Imperium Trustees (Jersey) Ltd v Jersey Competent Authority

Jurisdiction:	Jersey
Judge:	Wolffe, J.A.
Judgment Date:	01 June 2023
Neutral Citation:	[2023] JCA 57
Reported In:	2023 (1) JLR 229
Court:	Court of Appeal

vLex Document Id: VLEX-1038323538

Link: https://justis.vlex.com/vid/imperium-trustees-jersey-ltd-1038323538

Text

Imperium Trustees (Jersey) Limited
and
Jersey Competent Authority

[2023]JCA057

(William Bailhache, Wolffe and Matthews, JJ.A.):

COURT OF APPEAL

Taxation — exchange of tax information — judicial review — leave granted to seek judicial review of Comptroller's decision to issue notice under Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 and Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014

Held, granting leave to appeal, allowing the appeal and granting leave to apply for judicial review:

(1) Under the Regulations the respondent only had power to require the provision of “tax information” as defined. In a case where the matter was properly put in issue, the court required to determine for itself whether the information which a notice required an appellant to produce was “tax information”— *i.e.* whether the statutory test set out in art. 1A of the 2008 Regulations (as adjusted, where appropriate, for the purposes of the application of the 2014 Regulations) was met. An applicant for leave to bring a judicial review on the basis that the information sought was not “tax information” would require to satisfy the court that there was a realistic prospect of persuading the court, if leave was granted, that the information sought was not “tax information” as defined. The court would, in considering any judicial review, apply the threshold test of foreseeable relevance which was not unduly exacting. The court would be entitled to rely on any statement or explanation of foreign tax law provided by the requesting authority and put into evidence by the respondent. The court would not, as a general rule, require to adjudicate on a dispute as to the content or application of foreign tax law, which would ultimately fall to be determined, once any investigations had concluded, by the relevant authorities, including the courts, of the requesting jurisdiction. Both at the leave stage and if leave was granted, the respondent would require to place before the court sufficient information about the foreign tax regime and the tax purpose which had motivated the request to enable the court to adjudicate on the question. In assessing whether to accept any evidence produced by the respondent explaining why it had concluded that the link between the information sought and the tax purpose satisfied the statutory test, the court would be entitled to take into account the respondent's expertise in matters of tax administration and enforcement. Since the respondent must itself be satisfied that the information was “tax information” and would, in any event, need to explain to the court the basis of its conclusion in compliance with the duty of candour, the requirement to provide sufficient information to satisfy the court that it should agree with that conclusion should not impose any material additional burden on the respondent (paras. 36–41).

(2) The definition of “tax information” in reg. 1A of the 2008 Regulations had three elements, all of which must be satisfied: (i) the information must be “foreseeably relevant to the administration and enforcement … of the domestic laws of the third country whose competent authority was making the request”; (ii) the domestic laws in question must concern a tax which was listed in the third column of the Schedule to the 2008 Regulations against the entry for that third country; and (iii) the administration and enforcement of those laws must be “in the case of the person who is the subject of the request.” When a request was made under the OECD Mutual Assistance Convention and the respondent issued a notice under reference to the 2014 Regulations, the third element of the definition might require to be modified as the provisions of the 2008 Regulations fell to be applied, where applicable, as if references to a “taxpayer” were references to a “transaction.” The test of foreseeable relevance did not require the respondent to address whether the information requested was, in fact, relevant, or would actually be relevant, to the administration or enforcement of the tax laws of the requesting territory in respect of the taxpayer or transaction in question. It sufficed that the information was “foreseeably relevant” to one of those activities. Because the respondent had no power to require the production of information which was not “tax information” as defined, the respondent must positively conclude that the information which it required to be produced satisfied the statutory test. A

requested state was not obliged to provide information in response to a request that was a fishing expedition, *i.e.* a speculative request with no apparent nexus to an open inquiry or investigation. The threshold of foreseeable relevance, properly applied, should allow the pursuit of legitimate lines of inquiry, directed to the administration and enforcement of the tax laws of the requesting state. In order to apply the test, it was necessary, as envisaged in art. 5(5) of the Belgian TIEA, to identify the tax purpose which was said to justify the requirement to produce information. The question whether the statutory test was satisfied fell to be judged by reference to that tax purpose. The respondent could rely on the information about the foreign tax regime provided by the requesting competent authority. If the recipient of the notice contended that the rules of the foreign tax regime, or their implications, had not been accurately stated by the requesting competent authority, unless the inaccuracy was plain and self-evident, or following any inquiry which the respondent might make with the requesting authority was accepted by the respondent, this did not mean that the information sought was not "tax information." All that the threshold test required was foreseeable relevance. It would, ultimately, be for the relevant authorities, including the courts, of the requesting jurisdiction to determine any dispute between the taxpayer and the tax authorities of that jurisdiction about the application of the laws of that jurisdiction. The test of foreseeable relevance was also used in EU legislation, namely in Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation. The Directive was not part of Jersey law and the approach identified in the decisions of the ECJ interpreting that Directive was not consistent with Jersey law. Those decisions reflected the constitutional and juridical structures of the EU and did not apply in Jersey (paras. 42–61).

(3) Rule 12(1) of the Court of Appeal (Civil) Rules 1964 gave the court "full discretionary power" to receive further evidence on questions of fact. The court would exercise its discretion to admit the BTA assessment. The BTA assessment was credible, relevant and not available at the time of the hearing below. It was an official document from the foreign competent authority about this case. Generally speaking, a judicial review was concerned with a challenge to the validity of a decision by reference to the material which was before the decision-maker. Circumstances which occurred since the decision under review were usually irrelevant. However, there were two reasons for considering the BTA assessment to be relevant in the present case. First, the appellant did not rely on the BTA assessment as a supervening circumstance as such but in order to support its challenge to an aspect of the justification advanced in support of the decision and placed before the Royal Court. Secondly, the court had to address the "tax information" question for itself. The Deputy Bailiff approached the question of leave to apply for judicial review on the wrong basis. In addressing the question of leave to apply for judicial review as at today's date, it would be highly artificial for this court to exclude from consideration, so far as relevant, the developed statement of the BTA's position which was now available in the BTA assessment (para. 99).

(4) The appellant would be granted leave to appeal. The essential reason was that the BTA assessment, although not before the Royal Court, cast doubt on the reason given by the respondent for seeking at least some of the information referred to in the notice and the doubt was sufficient to justify the issue being ventilated in a judicial review. Furthermore, the court would require in a judicial review itself to address the question of whether the

information sought was “tax information” as defined in the 2008 and 2014 Regulations, if that was properly put in issue by way of an application for judicial review, and not merely whether the respondent acted unreasonably (in the *Wednesbury* sense) in concluding that it was. On that basis, it would follow that when the Deputy Bailiff was considering whether to grant leave to apply for judicial review, he should have asked whether the appellant's argument that the information requested in the notice was not, in fact, “tax information” had a realistic prospect of success. The Deputy Bailiff did not address that question. Instead, his essential reason for refusing leave to apply for judicial review was his conclusion that the appellant could not show that there was a realistic prospect that the respondent could not reasonably have concluded that the information requested in the notice was foreseeably relevant. In approaching the matter in that way, the Deputy Bailiff fell into an error of law (paras. 100–102).

(5) As the Deputy Bailiff addressed the wrong question in respect of the test for leave to apply for judicial review, leave to appeal should be granted on all three proposed grounds of appeal. The question whether the information requested was “tax information” was the central issue raised by the appellant. A correct approach to that issue was accordingly fundamental to the decision on leave to apply for judicial review. As the Deputy Bailiff erred in his approach to that question, it followed that he erred in his application of the test for leave (ground of appeal 1) as well as in respect of the issues specifically concerned with the statutory test of foreseeable relevance raised in ground of appeal 2. The error was also capable of affecting the court's assessment of proportionality (ground of appeal 3). Although it was open to the court to allow the appeal and quash the Deputy Bailiff's decision, with the consequence that the appellant's application for leave to apply for judicial review would require to be considered anew at first instance, the court would itself determine whether leave should be granted to apply for judicial review. There was no dispute as to the test for leave to apply for judicial review. The appellant must satisfy the court that it had an arguable ground of judicial review, with realistic prospects of success, which merited investigation at a full hearing (paras. 103–105).

(6) The present case was concerned with withholding tax, which was deducted from a payment which would or might fall to be treated as taxable income in the hands of the recipient of the payment and was remitted to the tax authority by the entity making that payment. The operation of a withholding tax therefore concerned two taxpayers: the taxpayer obliged to make that deduction and remit it to the tax authority, and the taxpayer in whose hands the payment would or might fall to be treated as taxable income. Where a request was made for information in relation to withholding tax, it was necessary, when assessing the lawfulness of any notice served under the 2008 and 2014 Regulations, to be clear as to (i) the taxpayer or taxpayers (or in the case of the 2014 Regulations, the transaction or transactions) which were the subject of the request; and (ii) the tax purpose, relating to the identified taxpayer(s) or transaction(s), which was said to justify the request and the notice. Clarity on these points would be the essential basis for any consideration as to whether the information sought was “tax information” as defined in the 2008 and 2014 Regulations (paras. 106–112).

(7) The starting point for analysing how these considerations applied in the present case was to identify the taxpayer which was the subject of the request and the tax purpose which was said to justify the request and the notice. The BTA assessment provided a much more

developed explanation of the investigation which the BTA had been undertaking than was available before the Royal Court. An investigation of the sort described in that document, examining, in the context of the anti-abuse provisions of the Parent–Subsidiary Directive and the abuse of rights doctrine (discussed in the *Denmark* case), the motivation for establishing a particular corporate structure, including whether the structure was put in place for valid commercial reasons which reflected economic reality, would, on the face of it, justify a wide-ranging factual investigation directed to obtaining information and evidence foreseeably relevant to these questions. Even if the identification of the beneficial owner of a dividend was not necessary in order to conclude that the exemption from withholding tax had been wrongfully applied, it did not follow that the identification of the beneficial owner was, at least in all cases, irrelevant to an investigation into issues arising under the Parent–Subsidiary Directive, or the abuse of rights doctrine described in the *Denmark* case. If the economic owner of a dividend could actually be identified as someone other than the nominal shareholder, that might well, on the face of it, be highly relevant to such an investigation. However in the present case, that was not the basis upon which the requirement to produce information tending to disclose the “economic owner” of the dividends was justified to the Royal Court. The person who was the subject of the request for the purposes of reg. 3 of the 2008 Regulations was Belgco. Belgco was identified in the affidavit before the Royal Court as “the taxpayer” and the case had been argued on the basis that the court was concerned with an investigation into Belgco's treatment of withholding tax. The tax purpose was stated in the affidavit as being to establish whether the exemption from the obligation to withhold had been correctly applied by the taxpayer and, among other things, to help the BTA to check the identity of the beneficiary of the dividends. The affidavit also referred to BTA's investigation into establishing whether the economic owner or beneficiary of the dividends was a person in respect of whom the correct Belgian withholding tax treatment was applied by the taxpayer. It was at least arguable that what was presented to the court was a case that at least some of the information was being sought with a view to identifying the economic owner of the dividends, and that this information was required specifically because it would affect the way in which withholding tax fell to be applied by Belgco (whether as income tax or corporate tax) and not, for example, because identifying the economic owner of the dividends could be relevant to the application of the anti-abuse provisions in the Parent–Subsidiary Directive. However, the affidavit did not provide any further explanation of how this would affect Belgco, the taxpayer which was the subject of the request. It was arguable that the BTA assessment raised a serious doubt as to whether there was, in fact, such an effect. It appeared that the BTA had been able to issue the assessment and to identify an amount of withholding tax which the BTA considered should have been deducted and paid by Belgco in the tax year in question, without identifying the “economic owner” of the dividends in question and, indeed, without requiring to characterize the withholding tax in question as income tax or corporate tax. There was no indication in the BTA assessment that identifying the “economic owner” would affect Belgco's tax position other than (and it was clearly an important qualification) insofar as identifying the “economic owner” could be relevant to the application of the anti-abuse provisions. It was arguable that the BTA assessment cast doubt on the accuracy, or at least the completeness, and meaning of the justification which was placed before the Royal Court as the basis for holding that all of the information sought was “tax information” as defined in the Regulations. The argument appeared to have sufficient merit to justify allowing it to be ventilated in a judicial review.

The court considered that the question of whether the information sought satisfied the definition of “tax information” was one which the court should itself address, and it seemed open to argument that the court should not, on the basis of the material before it, at least if that included the BTA assessment, conclude that at least some of the information sought satisfied the statutory definition of “tax information.” For these reasons, the appellant should be given leave to apply for judicial review on the first proposed ground of review, namely the challenge to the conclusion that the information sought was “tax information” for the purposes of the 2008 and 2014 Regulations. The BTA assessment cast sufficient doubt on the explanation provided to the Royal Court as the basis for seeking some of the information sought, and as to whether the information sought was indeed “tax information,” to justify allowing the appellant to ventilate these issues in a judicial review. The court would grant leave to appeal, allow the appeal and grant leave to apply for judicial review (paras. 113–129).

(8) It was doubtful whether, in the circumstances of this case, any separate question would arise in relation to ECHR art. 8. There was no dispute that art. 8 was engaged. The court must itself, when considering whether the interference with art. 8 rights would be in accordance with the law, determine whether the notice complied with the statutory requirements of Jersey law. If the notice was lawful, it was doubtful if it could be said to be disproportionate. A lawful notice under the Regulations would serve an important public policy purpose, namely Jersey's compliance with its obligations under the treaties to which the court had referred and the substantive policy objectives to which those treaties were directed. In the present case, the information sought would, *ex hypothesi*, if the notice was lawful, be foreseeably relevant to the administration of the tax regime in a jurisdiction with which Jersey had reciprocal treaty relations. It was apparent from the BTA assessment that the sums potentially at stake were significant. The disclosure would not be to the world at large but for a specific and limited purpose, namely for the purposes of a tax investigation being undertaken by the authorities of a friendly jurisdiction. The disclosure to the requesting competent authority was subject to the specific treaty obligations of confidentiality and Belgium was itself a party to the ECHR. Whilst the information sought in this case was confidential, it was not of such a nature that compulsory disclosure of it would call for the most careful scrutiny. The role of the court was a significant safeguard for any ECHR art. 8 rights which might be engaged. However, if the notice was found, following judicial review, to be unlawful, it would follow that it would also be incompatible with art. 8 since it would not be in accordance with the law. Having concluded that it was arguable that the notice was unlawful, the court also granted leave for the second proposed ground of review (para. 130).

Cases cited:

(1) *APEF Mgmt.* Co. 5 Ltd. v. Comptroller of Taxes, 2014 (1) JLR 100, considered.

(2) *Benest v. Le Maistre*, 1998 JLR 213, referred to.

(3) *Berlioz Inv. Fund S.A. v. Directeur de l'administration des Contributions directes, Case C-682/15*, CJEU, January 10th, 2017, distinguished.

(4) *Bernh Larsen Holding A.S. v. Norway, App.* No. 24117/08; [2014] ECHR 220; (2014), 58 E.H.R.R. 8; 35 BHRC 224, referred to.

(5) *Haskell v. Comptroller of Taxes*, 2017 (1) JLR 230, referred to.

(6) *Larsen v. Comptroller of Taxes*, 2015 (1) JLR 430; further proceedings, 2015 (2) JLR 209, considered.

(7) *Luxembourg v. B*; *Luxembourg v. B, C, D, and F.C., Joined Cases C-245/19 and C-246/19*, CJEU, November 30th, 2020, referred to.

(8) *Luxembourg v. L, Case C-437/19*, CJEU, November 25th, 2021, referred to.

(9) *Prahl v. Comptroller of Revenue*, [2022]JRC061; Royal Ct., March 8th, 2022, unreported, referred to.

(10) *Skatteministeriet Danmark v. T Danmark*; *Skatteministeriet Danmark v. Danmark Aps, Joined Cases C-116/16 and C-117/16*, CJEU, February 26th, 2019, considered.

(11) *X v. Comptroller of Revenue*, [2022]JRC290; Royal Ct., December 21st, 2022, unreported, referred to.

(12) *Z v. Finland, App.* No. 22009/93; [1997] ECHR 10; (1998), E.H.R.R. 371, referred to.

The appellant sought to challenge a notice issued by the respondent.

The respondent issued a notice under the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 and the Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014, requiring the appellant to disclose specified information concerning a trust. The respondent issued the notice following a request from the Belgian tax authorities ("the BTA") under the OECD Convention on Mutual Administrative Assistance in Tax Matters ("the OECD Mutual Assistance Convention") and the tax information exchange agreement between Jersey and Belgium. The appellant was the trustee of the trust. The appellant stated that the trust's sole ascertained beneficiary was a Belgian national resident in the United Kingdom (Mr. Ferdinand Huts) and that the trust's principal asset was a 100% shareholding in a Luxembourg company ("Luxco 1"). Luxco 1 held a 100% shareholding in another Luxembourg company ("Luxco 2"). Luxco 2 wholly owned a Belgian company ("Belgco").

According to an affidavit filed by the respondent, the BTA's request stated that it related to an inquiry being undertaken by the BTA into the correct application of Belgian legislation concerning Belgian income tax, corporate tax and withholding tax. The request stated that the BTA had identified that Belgco had not withheld Belgian taxes on the payment of distributions to Luxco 2, that the BTA required the information sought in order to establish whether the exemption from withholding tax had been correctly applied by Belgco, and that amongst other things the information requested was intended to help the BTA to check the identity of the beneficiary of the dividends.

The information which the notice required the appellant to provide encompassed

information relating to dividends paid by Luxco 1 to the trust; information about the trust itself; and information about the assets of and payments by the trust. Certain categories of information were sought on the basis that they would help to identify the “economic owner” of the dividends. The BTA needed to identify the economic owner of the dividends because withholding taxes were administered and paid by the Belgian company paying a dividend, but were assessed in the name of the economic owner or beneficiary of the dividend. Withholding taxes could be raised as income tax if the economic owner or beneficiary of the dividend was an individual, or as corporate tax if the economic owner was a company.

The legal context for the BTA inquiry into the application of withholding tax by Belgco was Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States of the European Union (“the Parent–Subsidiary Directive”). The purpose of the Directive was, according to its preamble, “to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the holding company.”

Belgco appeared to have relied on the exemption from withholding tax provided for in the Parent–Subsidiary Directive when making distributions to Luxco 2. It was not in dispute that if Belgco were owned by the trust and made distributions directly to the trust, it would not be entitled to rely on that exemption and would accordingly have needed to account to the BTA for Belgian withholding tax. The BTA had been investigating whether the distributions by Belgco to Luxco 2 did in fact qualify for the exemption from withholding tax.

The appellant applied for leave to apply for judicial review of the decision to issue the notice. The three proposed grounds of judicial review were: (i) the respondent could not reasonably have concluded that the information requested was foreseeably relevant to Belgco's tax affairs; (ii) the notice was a disproportionate breach of the rights of the beneficiaries of the trust under ECHR art. 8; and (iii) the notice was *ultra vires* as it was issued in response to a request which did not comply with the terms of the Mutual Assistance Convention or, alternatively, because the respondent did not take into account, properly or at all, relevant and material considerations which, if it had taken them properly into account, should have led it to refuse the request and to decline to issue the notice.

The Deputy Bailiff refused leave. His conclusions in relation to the three grounds of review were: (i) the respondent had reasonable grounds for forming the opinions which it did on the information before it. The appellant could not show that there was a realistic prospect of successfully persuading the court on an application for judicial review that the respondent could not reasonably have concluded that the information requested by the notice was foreseeably relevant; (ii) on the question of proportionality, tax information was likely to be private information. There appeared to be a clear nexus between the information sought in Jersey and the dividend paid by Belgco to Luxco 2. The appellant did not have a realistic prospect of successfully persuading the court that the objective of the notice was insufficiently important to justify the limitation of a fundamental right; the request for information was not rationally connected to that objective; there were less intrusive measures that could have been used to obtain less extensive information of more obvious relevance; and a fair balance had not been struck between the rights of the individual and the interests of the community; and (iii) the appellant had failed to establish that it had a

realistic prospect of successfully persuading a court that the respondent had failed to adhere to the terms of the OECD Mutual Assistance Convention. It was reasonable for the respondent to rely on the information provided by the BTA.

The Deputy Bailiff refused leave to appeal to the Court of Appeal. He considered that, by virtue of reg. 14A of the 2008 Regulations, any appeal from his decision lay to the Judicial Committee of the Privy Council, not to the Court of Appeal.

Regulation 3 of the 2008 Regulations provided:

" 3 Provision by other persons of tax information about taxpayer

(1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require a third party, being a person other than the taxpayer, to provide to the competent authority for Jersey all such tax information that the competent authority for Jersey requires for that purpose.

(2) A requirement under paragraph (1) shall be made by notice in writing …"

"Tax information" was defined in reg. 1A:

"(1) For the purposes of these Regulations 'tax information' means information that is foreseeably relevant to the administration and enforcement, in the case of the person who is the subject of a request, of the domestic laws of the third country whose competent authority is making the request concerning any tax listed in the third column in the Schedule opposite the entry for that third country, including information that is foreseeably relevant to—

(a) the determination, assessment and collection of such taxes;

(b) the recovery and enforcement of such taxes;

(c) the recovery and enforcement of tax claims; or

(d) the investigation or prosecution of tax matters."

Belgium was listed in the Schedule to the 2008 Regulations and the third column specified for Belgium: "taxes of every kind and description imposed on behalf of the Kingdom of Belgium or of its political subdivisions or local authorities."

The 2014 Regulations applied the 2008 Regulations, with appropriate modifications, to requests to the Jersey competent authority made under the OECD Mutual Assistance Convention. Regulation 2 provided:

" 2 Exchange of information on request

Where the Jersey competent authority has received a request from a requesting party, Regulations 2 to 16 and Regulation 16B of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 shall, to the extent

applicable and with any necessary modifications, apply in respect of the request as if references to—

(a) 'request' were to a request by a requesting Party;

(b) 'tax', were to a tax described in Article 2(1) (a) of the Convention and listed in Annex A of the Convention in respect of the requesting Party and 'tax information' were construed accordingly;

(c) 'taxpayer', where applicable, were to a transaction;

(d) 'tax information exchange agreement' were to the Convention;

(e) 'third country' were to a requesting Party."

The appellant sought leave to appeal. It drew attention to a significant development since the permission hearing in the Royal Court, namely that the BTA had issued an assessment ("the BTA assessment"), relating to the 2020 tax year, setting out BTA's reasons for concluding that Belgco was liable to pay more than €66m. by way of withholding tax for that year alone. The appellant invited the court to admit the BTA assessment into evidence.

The BTA assessment disclosed that in the 2020 tax year, Belgco distributed to Luxco 2 dividends of €155,768,833.91, which were declared as completely exempt from Belgian withholding tax pursuant to the Parent–Subsidiary Directive. It explained that BTA was of the opinion that the withholding tax returns for the 2020 tax year should be amended and that the total sum of withholding tax due was €66,758,071.67. The BTA assessment set out the corporate structure which it stated was used to upstream profits made by the Belgian companies tax-free to Luxembourg (under the Directive) and subsequently to Jersey by way of a series of dividends. The structure was said to allow the ultimate beneficial owner, Mr. Huts, to receive the profits of the Belgian entities tax free. The BTA assessment noted that Mr. Huts was the ultimate beneficial owner of Belgco and inferred that he must be the beneficial owner of the trust. The BTA assessment noted that the Parent–Subsidiary Directive did not specifically use the term "beneficial owner" but referred to a Danish case (*Skatteministeriet Danmark v. T Danmark*; *Skatteministeriet Danmark v. Y Danmark Aps*) from which it concluded that the term "beneficial owner" must be taken into account for the application of the Directive and was relevant to determining whether the exemption under the Directive applied. A withholding tax exemption would be refused if the recipient of income was not the beneficial owner of the dividends. Luxco 1 and Luxco 2 were not considered to be the beneficial owner of dividends paid by Belgian subsidiaries. They acted as conduits in respect of a structure which transferred profits from Belgium to the Jersey trust. As conduits, they could not claim the benefits under the Directive.

The appellant proposed three grounds of appeal: (1) The Royal Court applied the wrong test. The appellant accepted that the Royal Court identified the correct legal test for leave to apply for judicial review but argued that it did not in fact apply that test when it made its decision. (2) The Royal Court's approach to the foreseeable relevance of the information demanded was wrong in the following respects: (a) the court treated the views of the BTA as determinative; (b) the court erred in accepting that the BTA's explanation that the information requested was relevant was the end of the matter; the respondent had to

consider whether the BTA's assertion was credible in light of the likelihood of what was being asserted and the available evidence in support of the assertion; (c) the court was wrong to assume that there was a reasonable possibility that Luxco 2 was not the true economic owner of the dividends, given that the obvious starting point was that Luxco 2 was the true economic owner; and (d) the court did not address the point that identification of the true economic owner of the dividends appeared not to be relevant to the Belgian tax issue. (3) The Royal Court erred in its consideration of the requirement that information demanded by the notice should be proportionate. The court's approach rendered the proportionality requirement meaningless.

The respondent submitted that leave to appeal should be refused. The Royal Court's reasoning could not be faulted on the basis of the material which was before it. The information referred to in the notice was “tax information” as defined. Although the BTA assessment might render certain of the appellant's contentions more arguable than the Royal Court understood them to be, that did not amount to the appellant having a reasonable prospect of success in such arguments.

Legislation construed:

Court of Appeal (Civil) Rules 1964 (Official Consolidated Version, ch.07.245.10), r.12(1):

> “The Court shall have full discretionary power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before the Viscount or on commission:
>
> Provided that in the case of an appeal from a judgement after hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (as enacted), reg. 1: The relevant terms of this regulation are set out at para. 31.

reg. 3: The relevant terms of this regulation are set out at para. 31.

Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (Official Consolidated Version, ch.17.850.30), reg. 1: The relevant terms of this regulation are set out at para. 25.

reg.1A: The relevant terms of this regulation are set out at para. 24.

reg. 3: The relevant terms of this regulation are set out at para. 22.

Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2012, reg. 3(1): The relevant terms of this regulation are set out at para. 32.

Taxation (Exchange of Information with Third Countries) (Amendment No. 11) (Jersey) Regulations 2014, schedule: The relevant terms of this schedule are set out at para. 26.

Taxation (Exchange of Information with Third Countries) (Date in Force (Belgium)) (Jersey) Order 2017, schedule: The relevant terms of this schedule are set out at para. 26.

Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014 (Official Consolidated Version, ch.17.850.13), reg. 1: The relevant terms of this regulation are set out at para. 28.

reg. 2: The relevant terms of this regulation are set out at para. 27.

Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, art. 1: The relevant terms of this article are set out at para. 54.

art. 5: The relevant terms of this article are set out at para. 54.

Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States of the European Union, preamble: The relevant terms of the preamble are set out at para. 70.

art. 1: The relevant terms of this article are set out at para. 71.

art. 5: The relevant terms of this article are set out at para. 70.

Texts cited:

OECD, *Convention on Mutual Administrative Assistance in Tax Matters* (1988).

OECD, *Model Tax Convention on Income & on Capital (2012)*.

OECD, Update to Article 26 of the OECD Model Tax Convention and its Commentary (2012).

J. Harvey-Hills for the appellant;

G.G.P. White for the respondent.

Wolffe, J.A.
Introduction

This is the judgment of the court.

2 The common law principle that the courts do not enforce the revenue laws of other countries has been modified significantly in practice by legislation giving effect to international agreements which provide for co-operation between the tax authorities of different jurisdictions. 146 countries or jurisdictions participate in the OECD Convention on Mutual Administrative Assistance in Tax Matters done in Strasbourg on January 25th, 1988 and amended by a Protocol done in Paris on May 27th, 2010 (“the OECD Mutual Assistance Convention”). With the agreement of the States Assembly, the OECD Mutual

Assistance Convention was extended to Jersey by the United Kingdom on June 1st, 2014. Jersey has also entered into bilateral tax information exchange agreements with 38 other jurisdictions.

3 Jersey's obligations under these international treaties have been given effect in domestic law by the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 (as amended) ("the 2008 Regulations") and the Taxation (Implementation) (Convention on Mutual Administrative Assistance in Tax Matters) (Jersey) Regulations 2014 ("the 2014 Regulations"). The 2008 and 2014 Regulations were made by the States of Jersey under art. 2 of the Taxation (Implementation) (Jersey) Law 2004. The 2008 Regulations establish the legal machinery for fulfilling Jersey's obligations under bilateral tax information exchange agreements, ratified by the States in accordance with the internal domestic practice of the Island. The 2014 Regulations apply the 2008 Regulations, with appropriate modifications, in order to give effect to Jersey's obligations under the OECD Mutual Assistance Convention.

4 Belgium is one of the countries with which Jersey has a bilateral tax information exchange agreement. The Agreement between Jersey and the Kingdom of Belgium for the Exchange of Information Relating to Tax Matters ("the Belgian TIEA") was signed on behalf of Jersey and Belgium on March 13th, 2014 and was ratified by the States of Jersey on June 4th, 2014. Belgium is also a party to the OECD Mutual Assistance Convention, which it ratified on December 8th, 2014.

5 This appeal concerns a notice ("the notice") issued by the respondent on February 22nd, 2022, under reg. 2 of the 2008 Regulations and reg. 3 of the 2014 Regulations, requiring the appellant to disclose specified information concerning the Amiral Trust ("the trust"). The respondent issued the notice following a request made to it by the Belgian tax authorities ("the BTA") under the OECD Mutual Assistance Convention and the Belgian TIEA.

6 The appellant is the trustee of the trust. According to the appellant, the trust's sole ascertained beneficiary is Ferdinand Ernest Maximiliaan Isidoor Huts ("Mr. Huts"), a Belgian national resident in the UK, and its principal asset is a 100% shareholding in Katoen Natie Group SA ("Luxco 1"), a Luxembourg company. Luxco 1 holds a 100% shareholding in Katoen Natie International SA ("Luxco 2"), which is also a Luxembourg company. Among other interests, Luxco 2 wholly owns Katoen Natie NV ("Belgco"), a Belgian company.

7 According to an affidavit filed by the respondent in these proceedings, the BTA's request stated that it related to an inquiry being undertaken by the BTA into the correct application of Belgian legislation concerning Belgian income tax, corporate tax and withholding tax. The request further stated that the BTA's investigation had identified that Belgco had not withheld Belgian taxes on the payment of distributions to Luxco 2, that the BTA required the information sought in order to establish whether the exemption from withholding tax had been correctly applied by Belgco, and that amongst other things the information requested

was intended to help the BTA to check the identity of the beneficiary of the dividends.

8 On March 8th, 2022, the appellant applied to the court for leave to apply for judicial review of the notice. The Bailiff directed an oral hearing which proceeded before MacRae, Deputy Bailiff on April 20th, 2022. On May 24th, 2022 the Deputy Bailiff refused leave. His reasons are set out in a judgment dated May 20th, 2022 ([2022]JRC300).

9 On May 27th, 2022, the Deputy Bailiff refused leave to appeal to this court. In a judgment dated August 10th, 2022 ([2022]JRC165), he explained that this was because he considered that, by virtue of reg. 14A of the 2008 Regulations, any appeal from his decision lay to the Judicial Committee of the Privy Council ("the JCPC") and not to this court. The Deputy Bailiff also granted a stay of his decision pending the appellant's application to the JCPC for leave to appeal and directed that the respondent should not meantime provide the Belgian tax authorities with the information which the appellant had provided to it pursuant to the notice.

10 The appellant renewed its application for leave to appeal before this court. Following a hearing on September 22nd, 2022, the court determined that, contrary to the Deputy Bailiff's view, this court does have jurisdiction to hear an appeal against refusal of leave to apply for judicial review of a notice issued under the 2008 Regulations. The court directed that the application for leave to appeal and, if leave is granted, the appeal in relation to whether leave to bring judicial review proceedings should itself be granted, take place in a single rolled-up hearing.

11 We now require to decide: (i) whether to grant leave to appeal the Deputy Bailiff's decision of May 24th, 2022; and (ii) if leave is granted, to determine the appeal. For the reasons which we set out below: (i) we grant leave to appeal the Deputy Bailiff's decision; and (ii) we allow the appeal. We have ourselves considered whether leave to apply for judicial review should be granted and have concluded that it should.

12 We propose, first, to set out the relevant law, before turning to the circumstances of this case. Although the treaties to which we have referred do not form part of the domestic law of Jersey, they are the context for the request. Further, treaties and international conventions binding on Jersey which have not been incorporated into domestic law may not only be relevant to the development of the common law (as this court held in *Benest v. Le Maistre* (2)), but may, at least in a case such as the present which is concerned with domestic legislation implementing Jersey's international obligations, be relevant to the interpretation of the Island's legislation and in determining the principles on which the courts should exercise any discretion which that legislation gives to them. We accordingly set out the salient provisions of those treaties before turning to the 2008 and 2014 Regulations.

The Belgian TIEA

13 The Belgian TIEA provides, in art. 1:

> "The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information."

Article 3 states that the Agreement applies to taxes of every kind and description imposed by the Contracting Parties or of political subdivisions and local authorities in the case of Belgium.

14 Article 5 of the Belgian TIEA states: "1. The competent authority of the requested Party shall provide upon request information for the purposes referred to in Article 1 …" The article requires each Contracting Party to ensure that its competent authorities have the authority to obtain and provide on request various categories of information, including information held by any person acting in a fiduciary capacity and information regarding the legal and beneficial ownership of trusts. Article 10 obliges the Contracting Parties to enact any legislation necessary to give effect to the terms of the Agreement.

15 Paragraph 5 of art. 5 specifies information which the requesting competent authority is to provide in the request "to demonstrate the foreseeable relevance of the information to the request." The information which is to be provided includes: (a) the identity of the person under examination or investigation; (b) the information sought; and (c) the tax purpose for which the information is sought. The request must also confirm that the requesting authority has pursued all means available in its own territory to obtain the information except those which would give rise to disproportionate difficulties.

16 Article 8 of the TIEA provides for confidentiality in the following terms:

> "1. All information provided and received by the Contracting Parties shall be kept confidential.
>
> 2. Information provided to the competent authority of the requesting Party may not be used for any purpose other than the purposes stated in Article 1 without the prior expressed written consent of the requested Party.
>
> 3. Information provided shall be disclosed only to persons or authorities

(including judicial and administrative authorities) concerned with the purposes specified in Article 1 and used by such persons and authorities only for such purposes including the determination of any appeal. For these purposes, information may be disclosed in public court proceedings or in judicial decisions.

4. The information provided to the requesting Party under this Agreement may not be disclosed to any other jurisdiction."

The OECD Mutual Assistance Convention

17 The preamble to the OECD Mutual Assistance Convention sets out the objectives of, and background to, the multilateral regime which that Convention establishes in the following terms:

"Considering that the development of international movement of persons, capital, goods and services—although highly beneficial in itself—has increased the possibilities of tax avoidance and evasion and therefore requires increasing co-operation among tax authorities;

Welcoming the various efforts made in recent years to combat tax avoidance and tax evasion on an international level, whether bilaterally or multilaterally;

Considering that a co-ordinated effort between States is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst at the same time ensuring adequate protection of the rights of taxpayers;

Recognising that international co-operation can play an important part in facilitating the proper determination of tax liabilities and in helping the taxpayer to secure his rights;

Considering that fundamental principles entitling every person to have his rights and obligations determined in accordance with a proper legal procedure should be recognised as applying to tax matters in all States and that States should endeavour to protect the legitimate interests of taxpayers, including appropriate protection against discrimination and double taxation;

Convinced therefore that States should carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data;

Considering that a new co-operative environment has emerged and that it is desirable that a multilateral instrument is made available to allow the widest number of States to obtain the benefits of the new co-operative environment and at the same time implement the highest international standards of co-operation

in the tax field …”

By its adherence to the Convention, Jersey has committed itself to the important public policy objectives described in this preamble.

18 Article 1 provides:

> “1. The Parties shall, subject to the provisions of Chapter IV, provide administrative assistance to each other in tax matters. Such assistance may involve, where appropriate, measures taken by judicial bodies.
>
> 2. Such administrative assistance shall comprise:
>
> a. exchange of information …”

19 Article 2 identifies the taxes covered by the Convention. These include taxes on income or profits. The existing taxes to which the Convention applies are listed in Annex A. The entry for Belgium in Annex A lists, among other taxes, personal tax, corporation tax and “Withholding tax on income from moveable assets (tax on capital incomes), income tax reduced at source.”

20 Section I of Chapter III is concerned with exchange of information, and includes the following provisions:

> “ **Article 4—General provision**
>
> 1. The Parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this Convention …”
>
> “ **Article 5—Exchange of information on request**
>
> 1. At the request of the applicant State, the requested State shall provide the applicant State with any information referred to in Article 4 which concerns particular persons or transactions.
>
> 2. If the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information, that State shall take all relevant measures to provide the applicant State with the information requested.”

Article 18 contains generic provisions in relation to the content of a request for assistance under the Convention. Among other things it requires the requesting competent authority to “indicate where appropriate” the name, address or particulars assisting in the identification of the person in respect of whom the request is made.

21 Article 22 provides as follows:

> "1. Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.
>
> 2. Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes."

The 2008 Regulations

22 Against that background, we turn to the relevant Jersey legislation. Regulation 3 of the 2008 Regulations, in its current form, provides as follows:

> " **3 Provision by other persons of tax information about taxpayer**
>
> (1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require a third party, being a person other than the taxpayer, to provide to the competent authority for Jersey all such tax information that the competent authority for Jersey requires for that purpose.
>
> (2) A requirement under paragraph (1) shall be made by notice in writing …"

23 Under reg. 15, a person who knowingly and without reasonable excuse fails to comply with such a requirement is guilty of an offence. Regulation 15 also criminalizes the deliberate or reckless provision of false, misleading or deceptive information or the withholding of information the omission of which makes the information provided misleading or deceptive in a material particular.

24 Regulation 1A defines "tax information" for these purposes:

> "(1) For the purposes of these Regulations 'tax information' means information that is foreseeably relevant to the administration and enforcement, in the case of the person who is the subject of a request, of the domestic laws of the third country whose competent authority is making the request concerning any tax listed in the third column in the Schedule opposite the entry for that third country, including information that is foreseeably relevant to—

(a) the determination, assessment and collection of such taxes;

(b) the recovery and enforcement of such taxes;

(c) the recovery and enforcement of tax claims; or

(d) the investigation or prosecution of tax matters."

The Schedule lists the countries with which Jersey has tax information exchange agreements. When Jersey enters into a tax information exchange agreement with a third country, the Schedule requires to be, and is, amended so as to apply the 2008 Regulations to that agreement.

25 Other terms are defined in reg. 1 as follows:

"In these Regulations, unless the context otherwise requires—

'request' means a request that is made by the competent authority for a third country under a tax information exchange agreement for tax information regarding a person and that complies with the requirements of that agreement;

'tax', in relation to a request, means any tax listed in the third column in the Schedule opposite the entry for the third country making the request;

'tax information' has the meaning given in Regulation 1A;

'tax information exchange agreement' means an agreement between Jersey and a third country for the exchange of tax information;

'taxpayer' means the person who is the subject of a request;

'third country' means a country or territory that is listed in the first column of the Schedule, subject to the description, if any, opposite in the second column;

'third party notice' shall be construed in accordance with Regulation 3(1) and (2)."

26 Belgium is one of the countries and territories listed in the Schedule to the 2008 Regulations. It was added to the Schedule by the Taxation (Exchange of Information with Third Countries) (Amendment No. 11) (Jersey) Regulations 2014. The third column to the Schedule specifies, for Belgium, "taxes of every kind and description imposed on behalf of the Kingdom of Belgium or of its political subdivisions or local authorities." The Taxation (Exchange of Information with Third Countries) (Date in Force (Belgium)) (Jersey) Order 2017 inserted the date "26th July 2017" into the fourth column in the Schedule, which specifies the date when the agreement came into force.

The 2014 Regulations

27 The 2014 Regulations apply the 2008 Regulations, with appropriate modifications, to requests to the Jersey competent authority made under the OECD Mutual Assistance Convention. Regulation 2 provides:

> " **2 Exchange of information on request**
>
> Where the Jersey competent authority has received a request from a requesting party, Regulations 2 to 16 and Regulation 16B of the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 shall, to the extent applicable and with any necessary modifications, apply in respect of the request as if references to—
>
> (a) 'request' were to a request by a requesting Party;
>
> (b) 'tax', were to a tax described in Article 2(1) (a) of the Convention and listed in Annex A of the Convention in respect of the requesting Party and 'tax information' were construed accordingly;
>
> (c) 'taxpayer', where applicable, were to a transaction;
>
> (d) 'tax information exchange agreement' were to the Convention;
>
> (e) 'third country' were to a requesting Party."

28 Terms used in the Regulations are defined in reg. 1:

> " **1 Interpretation**
>
> (1) In this Law, unless the context otherwise requires—
>
> 'Convention' means the Convention on Mutual Administrative Assistance in Tax Matters done in Strasbourg on 25th January 1988 as amended by the Protocol done in Paris on 27th May 2010, signed on behalf of the United Kingdom and as extended to Jersey;
>
> 'Jersey competent authority' means the Minister for Treasury and Resources or his or her authorized representative;
>
> 'requesting Party' means a Party to the Convention who requests the Jersey competent authority for tax information concerning particular persons or transactions and 'request' shall be construed accordingly;
>
> 'tax information' means information that is foreseeably relevant to the administration or enforcement of the domestic laws of the requesting Party concerning any tax described in Article 2(1)(a) of the Convention and listed in Annex A to the Convention as being a tax

of the requesting Party, including information that is foreseeably relevant to—

(a) the determination, assessment and collection of such a tax;

(b) the recovery and enforcement of such a tax;

(c) the recovery and enforcement of tax claims; or

(d) the investigation or prosecution of tax matters.

(2) Tax information may be—

(a) information within an individual's knowledge or belief; or

(b) information recorded in a document or any other record in any format, that a person has in his or her possession, custody or control."

29 The Schedule to the 2014 Regulations identifies Belgium as a party to the Convention and April 1st, 2015 as the date of entry into force of the Convention in respect of Belgium.

Legislative history of reg. 3 of the 2008 Regulations

30 The 2008 Regulations, in their current form, are the product of successive amendments made since those Regulations were first enacted. Significant amendments were made by the Taxation (Miscellaneous Provisions) (Jersey) Regulations 2012 ("the 2012 Regulations") and the Taxation (Exchange of Information with Third Parties) (Amendment No. 7) (Jersey) Regulations 2013 ("the 2013 Regulations"). The legislative history of reg. 3 is of some relevance to the interpretation of the regulation in its current form.

31 As originally enacted, reg. 3(1)–(4) provided as follows:

"(1) This Regulation applies if the Comptroller has reasonable grounds for believing—

(a) that a taxpayer may have failed to comply, or may fail to comply, with a domestic law of a third country concerning tax; and

(b) that any such failure has led, is likely to have led or is likely to lead to serious prejudice to the proper assessment or collection of tax.

(2) If this Regulation applies, the Comptroller may require any person other than the taxpayer to provide to the Comptroller a document or record in the person's possession that contains or in the reasonable opinion of the Comptroller may

contain tax information that is relevant to—

(a) a liability to tax to which the taxpayer is subject or may be subject;

(b) the amount of any such liability; or

(c) the taxpayer's residential status for the purposes of these Regulations.

(3) A requirement under paragraph (2) shall be made by notice in writing.

(4) Before giving a notice under this Regulation, the Comptroller shall allow the person of whom the requirement is to be made a reasonable opportunity to provide to the Comptroller the document or record concerned."

Regulation 1 defined "tax information" as:

"information that is foreseeably relevant to the administration and enforcement of the domestic laws of a third country, including information that is foreseeably relevant to—

(a) the determination, assessment, enforcement or collection of tax with respect to a person who is subject to that tax; or

(b) the investigation or prosecution of a criminal matter in relation to that person …"

Regulation 14 provided a right of appeal to the Royal Court.

32 Among other amendments, the 2012 Regulations inserted reg. 1A (defining "tax information"), which we have quoted above, and substituted the following for reg. 3(1):

"(1) Where the Comptroller decides that it is reasonable to respond to a request concerning a taxpayer, the Comptroller may require a third party, being a person other than the taxpayer, to provide tax information that the Comptroller reasonably requires for that purpose."

The 2012 Regulations also removed the provision, originally contained in reg. 3(4), which required the Comptroller to allow the person of whom the requirement was to be made an opportunity to provide the document or record before serving a notice under the Regulations.

33 According to the report accompanying the draft of the 2012 Regulations, the changes which those Regulations made to the 2008 Regulations responded to recommendations for improvements in the legal regime which had been made by the peer review report on Jersey published in 2011 by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes.

34 The 2013 Regulations substituted a new reg. 3, in its current terms. The 2013 Regulations

also, amongst other changes, removed the right of appeal to the Royal Court which had previously been provided for in reg. 14 and substituted provisions applicable to a judicial review of a notice issued under the Regulations, including specifying that an appeal against a decision of the Royal Court on a judicial review lies not to this court but to the Judicial Committee of the Privy Council.

35 The report accompanying the draft of the 2013 Regulations explained that experience had shown that the 2008 Regulations had shortcomings which had caused delays in responding to requests for information, in particular from the French tax authorities. The changes made by those Regulations were intended to address that issue, notably by limiting the scope for appeal.

36 Regulation 3, in its current form, is significantly different from the original version. The 2012 Regulations removed the preconditions on the exercise of the power which were previously set out in reg. 3(1) and (4). The 2013 Regulations further amended the provision so that the issue of a notice is no longer expressly contingent on a decision by the respondent that it is "reasonable" to respond to the request from the foreign competent authority. All that is now required is a "decision" by the respondent to respond to the request.

37 At the same time the substantive content of the power has changed. As originally enacted, the regulation empowered the respondent to require a person to provide a document or record which "contains or in the reasonable opinion of the Comptroller may contain tax information." The 2012 Regulations changed this to a power to require the provision of "tax information" as such, albeit only such tax information as the respondent "reasonably requires." The 2013 Regulations removed the word "reasonably," and, under the current version of reg. 3(1), if the respondent decides to respond to a request, the respondent is obliged to require the provision of "all such tax information that the [respondent] requires for that purpose." Significantly, under the present formulation, the respondent only has power to require the provision of "tax information" as defined. If information is not "tax information," the respondent does not have power, under the present version of the Regulation, to require its production.

38 Although there is no longer a statutory right of appeal against a notice under reg. 3(1), the respondent's decision to issue such a notice is (subject to the provisions of reg. 14) susceptible to judicial review on conventional grounds, including *Wednesbury* unreasonableness. For this reason, as the Commissioner (Michael Beloff, Q.C.) observed in *Larsen v. Comptroller of Taxes* (6) (2015 (2) JLR 209, at para. 49(v)), "even though the epithet reasonable has disappeared from the vocabulary of the 2008 Regulations as amended, it remains implicit in them."

39 A notice under reg. 3(1) may also be susceptible to challenge under reference to the Human Rights (Jersey) Law 2000. The respondent has not disputed, in this case, that art. 8 is engaged. As the observations of the European Court of Human Rights in *Bernh Larsen Holding A.S. v. Norway* (4) ([2013] ECHR 220, at paras. 104–107) illustrate, art. 8 may in

certain respects and in certain contexts be relied upon by non-natural persons. We proceed on the basis that art. 8 would be engaged by the compulsory disclosure of confidential information, at least where such information is personal information about natural persons, and by the onward transmission of that information to a foreign tax authority. It follows that the court must be satisfied, in the event of a judicial review relying on art. 8 which satisfies the threshold for leave, that a notice issued under reg. 3, is "in accordance with law."

40 Since the respondent has no power, under the current version of the Regulations, to require the provision of information which is not "tax information," as defined, we take the view that this means, in a case where the matter is properly put in issue, the court requires to determine for itself whether the information which the notice requires the appellant to produce is "tax information"— *i.e.* whether the statutory test set out in art. 1A of the 2008 Regulations (as adjusted, where appropriate, for the purposes of the application of the 2014 Regulations) is met. If the information is not, in fact, "tax information," the respondent has no power to require it to be produced, and the notice would not satisfy the legal requirements of the Jersey statutory regime.

41 Such an approach should not create undue difficulties for the administration of the statutory regime. An applicant for leave to bring a judicial review on the basis that the information sought is not "tax information" would require to satisfy the court that there is a realistic prospect of persuading the court, if leave is granted, that the information sought is not "tax information" as defined. The court would, in considering any judicial review, apply the threshold test of foreseeable relevance which, as we will explain, is not unduly exacting. The court would be entitled to rely on any statement or explanation of foreign tax law provided by the requesting authority and put into evidence by the respondent. By reason of the nature of the statutory test, the court would not, as a general rule, require to adjudicate on a dispute as to the content or application of foreign tax law, which would, ultimately, fall to be determined, once any investigations have concluded, by the relevant authorities—including the courts—of the requesting jurisdiction. Both at the leave stage and if leave is granted, the respondent would require to place before the court sufficient information about the foreign tax regime and the tax purpose which has motivated the request to enable the court to adjudicate on the question. In assessing whether to accept any evidence produced by the respondent explaining why it has concluded that the link between the information sought and the tax purpose satisfies the statutory test, the court would be entitled to take into account the respondent's expertise in matters of tax administration and enforcement. Since the respondent must itself be satisfied that the information is "tax information" and would, in any event, need to explain to the court the basis of its conclusion in compliance with the duty of candour which was discussed in *Larsen* (6) (2015 (1) JLR 430, at paras. 17–18), and in *Haskell v. Comptroller of Taxes* (5), the requirement to provide sufficient information to satisfy the court that it should agree with that conclusion should not impose any material additional burden on the respondent.

Tax information

42 The definition of “tax information” in reg. 1A of the 2008 Regulations, which we have quoted at para. 24 above, has three elements, all of which must be satisfied.

> (i) The information must be “foreseeably relevant to the administration and enforcement … of the domestic laws of the third country whose competent authority is making the request.”
>
> (ii) The domestic laws in question must concern a tax which is listed in the third column of the Schedule to the 2008 Regulations against the entry for that third country.
>
> (iii) The administration and enforcement of those laws must be “in the case of the person who is the subject of the request.”

43 When the request is made under the OECD Mutual Assistance Convention and the respondent issues a notice under reference to the 2014 Regulations, the third element of this definition may require to be modified. The definition of “request” in the 2014 Regulations makes clear that such a request may, as envisaged in art. 5 of the OECD Mutual Assistance Convention, concern “particular persons or *transactions*.” [Emphasis added.] Consistent with the reference to “transactions” as well as to “persons,” the definition of “tax information” in the 2014 Regulations omits the phrase “in the case of the person who is the subject of the request,” and, in terms of reg. 2(c) of the 2014 Regulations, the provisions of the 2008 Regulations fall to be applied, where applicable, as if references to a “taxpayer” were references to a transaction.

44 The test of foreseeable relevance does not require the respondent to address whether the information requested is, in fact, relevant, or will actually be relevant, to the administration or enforcement of the tax laws of the requesting territory in respect of the taxpayer or transaction in question. It suffices that the information is “foreseeably relevant” to one of those activities. Because the respondent has no power to require the production of information which is not “tax information” as defined, the respondent must positively conclude that the information which it requires to be produced satisfies the statutory test.

45 The test of foreseeable relevance is derived from the international treaties to which the Regulations give effect in domestic law. The same test is used in art. 26 (exchange of information) of the Model Tax Convention on Income and on Capital published by the OECD. A commentary on art. 26 of that Model Convention, approved in its current version by the OECD Council on July 17th, 2012, states as follows (at 3–4):

> “The standard of ‘foreseeable relevance’ is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer. In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once

> provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are 'fishing expeditions,' i.e. speculative requests that have no apparent nexus to an open inquiry or investigation."

46 We were not referred to the Commentary on Article 1 of the OECD Model Agreement on Exchange of Information in Tax Matters, upon which the Belgian TIEA appears to have been based, or the Commentary on Article 4 of the OECD Mutual Assistance Convention. These also contain explanations of the concept of "foreseeable relevance" which, though briefer, are generally consistent with this Commentary on Article 26 of the Model Tax Convention which we have quoted above. Thus, the Commentary on Article 4 of the OECD Mutual Assistance Convention states (at para. 50):

> "The scope of this article is wide … The standard of 'foreseeable relevance' is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that the Parties are not at liberty to engage in 'fishing expeditions' or to request information that is unlikely to be relevant to the tax affairs of a given person or ascertainable group or category of persons…"

47 In *APEF Mgmt. Co. 5 Ltd. v. Comptroller of Taxes* (1), Clyde-Smith, Commr. quoted the passage from the Commentary on Article 26 of the Model Tax Convention which we have set out above, and stated (2014 (1) JLR 100, at para. 18):

> "18 Both counsel submitted that you cannot improve on the definition of 'foreseeably relevant' contained in this commentary, namely that 'there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial.' It also provides a useful definition of what is meant by 'fishing expeditions,' namely 'speculative requests that have no apparent nexus to an open inquiry or investigation.'"

The Commissioner did not demur from the common position of counsel which he described

in this passage. In *Prahl v. Comptroller of Revenue* (9), Birt, Commr. agreed ([2022]JRC061, at para. 8) with those observations. In *X v. Comptroller of Revenue* (11), the Bailiff noted that in *APEF Mgmt.* Co. 5 Ltd.the court had cited with approval the passage from the OECD Commentary which we have quoted above.

48 OECD Model Conventions are not legally binding instruments. *A fortiori*, Commentaries on Model Conventions are not legally binding on the courts of Jersey. Nevertheless, inasmuch as the documents to which we have referred provide a useful explanation of the test of "foreseeable relevance"—which is a key concept used in international treaties to which the 2008 and 2014 Regulations are intended to give effect—we agree that they are interpretive aids which the courts of Jersey may take into account when considering the meaning and application of the 2008 and 2014 Regulations.

49 We further agree that the specific passages in the OECD Commentary on Article 26 of the Model Tax Convention to which the Commissioner in *APEF Mgmt.* Co. 5 Ltd. referred in the observations which we have quoted at para. 47 above are consistent with the legal test and are helpful in understanding the general approach which should be taken to the test of "foreseeable relevance," provided that they are not taken to supplant or replace the statutory test. Foreseeability in the context of the 2008 and 2014 Regulations does not require probability. It requires only a possible connection which is more than just theoretical. On the other hand, if the claim of foreseeable relevance is intrinsically unlikely or is inconsistent with known facts (in the sense of facts which are agreed or are uncontroversial) or is a speculative request which has no apparent nexus to an open inquiry or investigation, the statutory test would not be satisfied.

50 The threshold of foreseeable relevance, as so explained, is appropriate in the context of powers to obtain information which may be used in the context of an investigation. Properly applied, that test should allow the pursuit of legitimate lines of inquiry, directed to the administration and enforcement of the tax laws of the requesting state. In order to apply the test, it is necessary—as envisaged in art. 5(5) of the Belgian TIEA—to identify the tax purpose which is said to justify the requirement to produce information. The question of whether the statutory test is satisfied falls to be judged by reference to that tax purpose.

51 The respondent may rely on the information about the foreign tax regime provided by the requesting competent authority. What if the recipient of the notice contends that the rules of the foreign tax regime, or their implications, have not been accurately stated by the requesting competent authority? Unless the inaccuracy is plain and self-evident or, following any inquiry which the respondent may make with the requesting authority, is accepted by the respondent, this does not mean that the information sought is not "tax information" as defined. That is because all that the threshold test requires is *foreseeable* relevance. It will, ultimately, be for the relevant authorities, including the courts, of the requesting jurisdiction to determine any dispute between the taxpayer and the tax authorities of that jurisdiction about the application of the laws of that jurisdiction. If the requesting competent authority's position as regards the requirements of the foreign tax law is one which, though disputed, may, when tested in the courts of the requesting jurisdiction,

be proved correct, the foreseeable relevance of the information sought may, as a general rule, properly be assessed by reference to that statement of the legal position even though it is a legal position which is disputed by the taxpayer.

52 The passage from the Commentary on Article 26 of the OECD Model Tax Convention which we have quoted at para. 45 above is not confined to explaining the concept of "foreseeable relevance." It also contains guidance on the interaction between requested and requesting authorities. Whilst much of that guidance is no doubt practical and sensible, uncritical reliance should not, in the context of the domestic legal regime in Jersey, be placed on the following passage:

> "… once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination."

As we have explained, under the 2008 and 2014 Regulations, the respondent may only lawfully require the production of "tax information." When considering whether the information sought meets the statutory test, the respondent is of course entitled to rely on information and explanations provided to it by the requesting competent authority. And the threshold is not, as we have explained, an exacting one. But if, on the information available to it, and notwithstanding the information and explanations provided by the requesting authority, the respondent "believes that the information *lacks relevance* to the underlying investigation or examination" [emphasis added], that would appear to negate the statutory test and hence preclude a lawful notice under the 2008 or 2014 Regulations.

53 The test of "foreseeable relevance" is also used in European Union legislation, namely Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation. We invited submissions as to whether two decisions of the Court of Justice of the European Union interpreting that Directive, though not binding on this court, might provide assistance as regards the approach which the respondent and the court should take when assessing a request from a foreign tax authority. We have concluded that the approach identified in those decisions is not consistent with the law in Jersey, and we should explain why.

54 The Directive establishes, for the European Union, a regime for mutual administrative assistance between the tax authorities of Member States. Article 1(1) of Directive 2011/16 states:

> "This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2."

Article 5 provides:

> "At the request of the requesting authority, the requested authority shall communicate to the requesting authority any information referred to in Article 1(1) that it has in its possession or that it obtains as a result of administrative enquiries."

55 In *Berlioz Inv.* Fund S.A. v. Directeur de l'administration des Contributions directes (3), the CJEU (sitting as a Grand Chamber) ruled, at ruling 3, that (Case C-682/15, at para. 74):

> ". . . Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that the 'foreseeable relevance' of the information requested by one Member State from another Member State is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with that request, and thus a condition of the legality of the information order addressed by that Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order."

56 The CJEU (*ibid.*, at para. 67) accepted that the concept of foreseeable relevance in the Directive reflected that used in the Commentary on Article 26 of the OECD Model Tax Convention. The CJEU specifically endorsed the relevance of the passage from that Commentary which we have quoted.

57 The CJEU went on to state, at ruling 4 (*ibid.*, at para. 89):

> "… Article 1(1) and Article 5 of Directive 2011/16 must be interpreted as meaning that verification by the requested authority to which a request for information has been submitted by the requesting authority pursuant to that directive is not limited to the procedural regularity of that request but must enable the requested authority to satisfy itself that the information sought is *not devoid of any foreseeable relevance* having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned. Those provisions of Directive 2011/16 and Article 47 of the Charter must be interpreted as meaning that, in the context of an action brought by a relevant person against a penalty imposed on that person by the requested authority for non-compliance with an information order issued by that authority in response to a request for information sent by the requesting authority pursuant to Directive 2011/16, the national court not only has jurisdiction to vary the penalty imposed but also has jurisdiction to review the legality of that information order. *As regards the condition of legality of that information order, which relates to the foreseeable relevance of the requested information, the courts' review is limited to verification that the requested information manifestly has no such relevance*." [Emphasis added.]

58 In *Luxembourg v. B*; *Luxembourg v. B, C, D and F.C.* (7) (Joined Cases C-245/19 and C-

246/19), the CJEU, sitting as a Grand Chamber, applied the law declared in *Berlioz*.

59 The Directive is not part of Jersey law and decisions of the CJEU interpreting the Directive are, accordingly, not directly relevant. However, the legal test in the Directive is, as in the 2008 and Regulations, "foreseeable relevance," and that test is, likewise, based on the OECD Model Law. Decisions of the CJEU discussing that test might accordingly be thought, potentially, to provide some assistance—as, indeed, might the decisions of courts of other jurisdictions considering a legal test which is derived from the same international law source as the 2008 and 2014 Regulations. But, as we shall now explain, the CJEU's specific observations about the approach which should be taken to assessing a request under the Directive by the authorities of the requested state reflect the constitutional and juridical structures of the EU and do not apply in Jersey.

60 The Directive establishes a common legal regime internal to the European Union, imposing obligations on both requesting and requested states. It falls to be applied in the context of the obligations of the European Union and its Member States which are articulated in art. 4(3) of the Treaty on European Union. The application of the test may be the subject of authoritative adjudication by the CJEU in cases deriving from both requesting and requested states. The approach taken to the application of the Directive in both states is, accordingly, subject ultimately to the authoritative jurisdiction of the CJEU. By contrast, our task is to interpret the 2008 and 2014 Regulations. The bilateral and multilateral international law obligations to which those Regulations are intended to give effect do not constitute for the states party to the treaties an overarching, domestically enforceable, juridical structure applicable equally to requesting and requested states equivalent to that established by European Union law for Member States of that Union. Although we undertake the task of interpretation of the Regulations alive to Jersey's international law obligations, we have concluded that the approach set out in ruling 4 of the CJEU in *Berlioz Inv.* Fund S.A. (3), which we have quoted at para. 53 above, is not consistent with the approach which the respondent (or the Royal Court, if seised of the issue in a judicial review) is required, by the 2008 and 2014 Regulations, to take.

61 The CJEU decisions confirm that under the Directive, as under the 2008 and 2014 Regulations, it is a precondition of the lawfulness of a request that the information requested is "tax information"— *i.e.* information which is foreseeably relevant to the tax purpose being advanced by the requesting authority. As we have explained, as a matter of Jersey law that means that the respondent must positively conclude that the information is foreseeably relevant to that purpose. By contrast with the position under the Directive as explained by the CJEU, it would not be sufficient in Jersey law for the respondent to find only that the request is "not devoid of any foreseeable relevance." Nor would it be consistent with the court's responsibilities in a judicial review, the purpose of which is to adjudicate on the legality of administrative action, for the court to confine itself to verifying only whether the requested information "manifestly has no relevance." Rather, the court must apply the appropriate domestic standard of review.

62 With that analysis of the law in mind, we turn to the circumstances of this case.

Background to the notice

63 The respondent received the request from the BTA to which we referred at para. 5 above on December 24th, 2021. On February 3rd, 2022, the respondent issued a notice to the appellant's parent company, requiring it to provide specified information in respect of the trust. Following intimation that the appellant, and not its parent company, is trustee of the trust, the respondent withdrew that notice and, on February 22nd, 2022 issued the notice to the appellant.

The notice

64 The notice is signed by the Deputy Director of Revenue—International, who is an authorized competent authority for Jersey. The notice states that he had examined the request from the BTA and "being satisfied that it has been validly constituted in conformity with the Convention on Mutual Administrative Assistance in Tax Matters as it applies with respect to Belgium and Jersey" had decided to respond to the request.

65 The notice states:

> "I require you to provide, within 21 days, the following tax information that I require for this purpose in respect of The Amiral Trust ('the trust'):
>
> a. Regarding dividends paid by Katoen Natie Group S.A. to the trust, for the period of 1 January 2019 to 31 December 2021 inclusive (the 'Period'), for each dividend:
>
> i. Name and address of the contact persons for the debtor Katoen Natie Group S.A.;
>
> ii. Listing of the dates of distribution decisions and payment dates;
>
> iii. Following information regarding the received dividends:
>
> 1. Gross amount of each dividend;
>
> 2. Amount of withholding tax applied to each dividend;
>
> 3. If there was a reduction or exemption of withholding tax for any payment, an explanation of the legal reason for the reduction or exemption;
>
> 4. Copies of all tax rulings regarding these dividends;
>
> 5. Copies of all instructions given regarding the management of the dividends;

iv. Listing of bank account numbers to include financial institution and country on which the dividends were received in name of the Trust;

v. Name and address of the owners of these bank accounts listed in item ‘iv’;

vi. Bank statements for accounts listed in item ‘iv’ for the Period;

vii. Copies of internal communications regarding the dividends;

b. Name and address of the Trust's settlor(s);

c. Copies of the Trust's settlement and declarations;

d. Copies of all amendments to the Trust's settlement and declaration;

e. Copies of the Trust's letter of wishes;

f. Name and address of the Trust's beneficiaries;

g. Name and address of the Trust's contact person;

h. Listing of any payment made by the Trust during the period, to include date, amount and the name and address of the recipient;

i. Name, address and account number of the bank account used to make the payments listed in item ‘h’;

j. Bank statements for the accounts listed in item ‘i’ for the Period;

k. Name, address and account number of the bank account used by the recipient of the payments listed in item ‘h’;

l. Percentage of shares held in Katoen Natie Group S.A. held by the Trust;

m. Listing of assets held by the Trust.”

66 The information which the notice requires the appellant to provide accordingly encompasses:

(i) information relating to dividends paid by Luxco 1 to the trust (para. a);

(ii) information about the trust itself (paras. b–g); and

(iii) information about the assets of and payments by the trust (paras. h–m), including information about the bank accounts used by the recipients of payments.

Ms. Moylan's affidavit

67 An affidavit sworn in these proceedings by Niamh Moylan, Assistant Comptroller of Revenue, with responsibility for oversight of Jersey's international tax commitments, provides the following explanation:

> "7. The Request [from the BTA] stated that it related to an inquiry being undertaken by the BTA into the correct application of Belgian legislation concerning Belgian Income Tax, Corporate Tax and Withholding Tax. I understand that withholding taxes are applied under Belgian law as either income tax or corporate tax, both of which are taxes covered by the Convention and the TIEA.
>
> 8. The request went on to explain that a Belgian company, Katoen Natie NV ('the Taxpayer') had distributed dividends to a Luxembourg company, Katoen Natie International S.A. … which were then used to pay dividends to another Luxembourg company, Katoen Natie Group S.A. … and then used to pay dividends to its shareholder, The Amiral Trust … whose trustee was named in the request as Imperium Trustees Limited, formerly STM Fiduciaire Trustees Limited.
>
> 9. The request stated that the BTA's investigation had identified that the Taxpayer [*i.e.* Belgco] had not withheld Belgian taxes on the payment of distributions to [Luxco 2]; that the obligation to withhold tax was waived subject to certain conditions; that the BTA required the information sought in the Request in order to establish whether the exemption from the obligation to withhold had been correctly applied by the Taxpayer; and that amongst other things the information requested was intended to help the BTA to check the identity of the beneficiary of the dividends.
>
> 10. I have been advised by the BTA that withholding taxes are administered and paid by the Belgian company paying a dividend, but are assessed in the name of the economic owner, or beneficiary, of the dividend. As such, withholding taxes may be raised as income tax if the economic owner or beneficiary of the dividend is an individual, or as corporate tax if the economic owner is a company."

68 She explained, in the following paragraphs, why she had concluded that the information requested was foreseeably relevant:

> "24. The Notice requires production of information relating to dividends paid by [Luxco 1] to the Trust. The BTA explains that it needs this information in order to trace the flow of funds from the payment of dividends by the Taxpayer, through the two Luxembourg companies, to the Jersey trust, as part of its investigation into establishing whether the economic owner or beneficiary of the dividends is a person in respect of whom the correct Belgian withholding tax treatment was applied by the Taxpayer.

25. … Information regarding the settlor(s) and beneficiaries of the Trust appear foreseeably relevant to the BTA's enquiry insofar as it could assist it in establishing the economic owner of the dividends. The Trust's settlement, declaration and any letter of wishes could assist the BTA to understand whether any specific views were expressed by the settlor in relation to the dividends, such as a desire that the dividends received be paid to a particular beneficiary or class of beneficiaries, which might assist the BTA to identify the economic owner.

…

28. Item h requires a list of any payments made by the Trust during the period 1 January 2019 to 31 December 2021, to include the date, amount and the name and address of the recipient. I consider that this is foreseeably relevant to the BTA's inquiry, in that understanding who has received payments from the Trust may help the BTA to understand who the economic owner of the Trust's assets may be.

29. Item i requires production of the name, address and number of the bank account used to make the payments referred to in item h. Item j requires the production of bank statements for the accounts used to make these payments and item k requires the name, address and account number to which the payments identified in item h were paid. I consider that this is information which is foreseeably relevant to BTA's inquiry, in that it may assist the BTA to understand how the funds under review flowed through the Trust and onwards.

30. Item l requires the disclosure of the percentage of shares held by the Trust in [Luxco 1]. I consider this to be foreseeably relevant to the BTA inquiry in that it is common for tax regimes providing for exemptions from withholding taxes to apply a different treatment depending on whether the holding is merely de minimis or reaches a particular threshold.

31. Item m requires production of a list of assets held by the Trust. I consider this to be foreseeably relevant to the Belgian inquiry for a number of reasons. Understanding whether the shares in [Luxco 1] represent the sole asset of the Trust or are merely one of a wider portfolio of investments, could assist the BTA to understand whether the Trust has been inserted into the structure in order to circumvent Belgian withholding tax rules in relation to the dividends paid by the Taxpayer, such that anti-abuse provisions could apply. Details of the Trust's assets could also assist the BTA to establish whether the Trust holds an interest in the Taxpayer other than through the two Luxembourg companies known to it."

69 It is apparent that certain categories of information are sought on the basis that they will help to identify the "economic owner" of the dividends. According to para. 10 of the affidavit, the BTA had explained that it required to identify the "economic owner" of the dividends because:

> "withholding taxes are administered and paid by the Belgian company paying a dividend, but are assessed in the name of the economic owner, or beneficiary, of the dividend. As such, withholding taxes may be raised as income tax if the economic owner or beneficiary of the dividend is an individual, or as corporate tax if the economic owner is a company."

The Parent–Subsidiary Directive

70 The legal context for the BTA inquiry into the application of withholding tax by Belgco is Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States of the European Union ("the Parent–Subsidiary Directive"). The purpose of the Parent–Subsidiary Directive is, according to its preamble:

> "to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the holding company."

Article 5 of the Directive provides: "Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax."

71 As amended, art. 1 of the Parent–Subsidiary Directive provides:

> "1. Each Member State shall apply this Directive:
>
> (a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;
>
> (b) to distributions of profits by companies of that Member State to companies of other Member States of which they are subsidiaries;
>
> (c) to distributions of profits received by permanent establishments situated in that Member State of companies of other Member States which come from their subsidiaries of a Member State other than that where the permanent establishment is situated;
>
> (d) to distributions of profits by companies of that Member State to permanent establishments situated in another Member State of companies of the same Member State of which they are subsidiaries.
>
> 2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.
>
> An arrangement may comprise more than one step or part.

> 3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
>
> 4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse."

72 Belgco has, it would appear, relied on the exemption from withholding tax provided for in the Parent–Subsidiary Directive when making distributions to Luxco 2. It was not a matter of dispute before us that if Belgco had been owned by the trust and made distributions directly to the trust, it would not be entitled to rely on that exemption and would accordingly have required to account to the BTA for Belgian withholding tax. As will become apparent, the BTA has been investigating whether the distributions by Belgco to Luxco 2 do, in fact, qualify for the exemption from withholding tax having regard to paras. 2 and 3 of art. 1 of the Parent–Subsidiary Directive or otherwise.

73 In *Skatteministeriet Danmark v. T Danmark*; *Skatteministeriet Danmark v. Y Danmark Aps* (10) ("the *Denmark* case") the CJEU (Grand Chamber) confirmed in the context of the predecessor legislation (Council Directive 90/435/EEC) that, even if there are no domestic or agreement-based provisions for the prevention of tax evasion, tax fraud or abuse, Member State authorities must refuse the exemption by reference to the EU doctrine of abuse of rights where there is a fraudulent or abusive practice. The Grand Chamber ruled (Joined Cases C-116/16 and C-117/16, rulings 3 and 4):

> "3. Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.
>
> 4. In order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends."

As we will explain below, the appellant has, in these proceedings, placed significant reliance on ruling 4 and we therefore set out the CJEU's explanation for these rulings.

74 In its judgment the CJEU further explained ruling 3 in the following terms (*ibid.*, at paras. 98–113):

"98 Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage …

99 … when giving a preliminary ruling, the Court may … specify indicia in order to guide the national court in the assessment of the cases that it has to decide …

100 A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity interposed in the structure of the group between the company that pays dividends and the company in the group which is their beneficial owner, payment of tax on the dividends is avoided.

101 Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption … that all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions for the application of [the Directive] …

102 The conditions for the application of Directive 90/435 are not met by entities resident for tax purposes outside the European Union …

103 Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the dividends paid by the debtor company must itself pass those dividends on to a third company which does not fulfil the conditions for the application of Directive 90/435, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.

104 The fact that a company acts as a conduit company may be established where its sole activity is the receipt of dividends and their transmission to the beneficial owner or to other conduit companies. The absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has.

105 Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial

transactions at issue, giving rise to intragroup flows of funds, by the way in which the transactions are financed, by the valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends received. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the parent company receiving the dividends to pass them on to a third party but also by the fact that, 'in substance' … that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those dividends.

…

111 Furthermore, where the beneficial owner of dividends paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 5 of Directive 90/435 is not in any way subject to fraud or an abuse of rights being found.

…

113 The mechanisms of Directive 90/435, in particular Article 5 … are not … intended to apply when the beneficial owner of the dividends is a company resident for tax purposes outside the European Union since, in such a case, exemption of those dividends from withholding tax in the Member State from which they are paid could well result in them not actually being taxed in the European Union."

75 The CJEU provided the following further explanation of ruling 4:

"118. [A tax] authority has the task not of identifying the beneficial owners of those dividends but of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed. Indeed, identification of that kind may prove impossible, in particular because the potential beneficial owners are unknown. Given the complexity of certain financial arrangements and the possibility that the intermediary companies involved in the arrangements are established outside the European Union, the national tax authority does not necessarily have information enabling it to identify those owners. That authority cannot be required to furnish evidence that would be impossible for it to provide.

119. Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners …"

The proceedings in the Royal Court

76 The appellant brought an application for leave to apply for judicial review of the

respondent's decision to issue the notice. In its application and before the Deputy Bailiff, the appellant advanced three proposed grounds of judicial review, namely:

> (i) The respondent could not reasonably have concluded that the information requested is foreseeably relevant to Belgco's tax affairs.
>
> (ii) The notice is a disproportionate breach of the rights of the beneficiaries of the trust under art. 8 of the European Convention on Human Rights.
>
> (iii) The notice is *ultra vires* as it was issued in response to a request which did not comply with the terms of the Mutual Assistance Convention or, alternatively, because the respondent did not take into account, properly or at all, relevant and material considerations which, if it had taken them properly into account, should have led it to refuse the request and to decline to issue the notice.

Before the Deputy Bailiff, the appellant did not insist in a fourth proposed ground of judicial review alleging a failure to follow a fair procedure.

77 By the time the appellant's application for judicial review came before the Deputy Bailiff on the question of leave, it was supported by three affidavits from Simon Christopher Young, a director of the appellant company. In his third affidavit, Mr. Young commented on para. 10 of Ms. Moylan's affidavit (which we have quoted at para. 63 above) as follows:

> “I understand and am advised that paragraph 10 … is not correct, and that if withholding tax is held to be payable in this instance (1) that tax liability would accrue to Belgco; (2) no tax liability would accrue to the Applicant (in its capacity as trustee of the Amiral Trust); and (3) the identity of the Applicant would be irrelevant for the purposes of assessing and collecting tax from Belgco.”

78 Mr. Young's affidavit set out the basis for this comment in the following terms:

> “It has not been possible to obtain expert evidence from Belgian counsel in the limited time available … However I understand from the initial advice that the Applicant has been able to obtain … that paragraph 10 is misleading for the following reasons:—
>
> > (a) A Belgian company which pays a dividend is liable for withholding tax unless there is an operative available waiver of that tax, as for example in the case of a parent–subsidiary situation that falls within the terms of the EU parent–subsidiary directive (the PSD …). I understand the PSD aims to eliminate tax obstacles to the distribution of profits within groups of companies in the EU by abolishing withholding taxes on dividend payments between associated companies of different Member States and by preventing double taxation of parent companies on the profits of their subsidiaries. In this case the dividends in question were paid by a Belgian company (Belgco) to a Luxembourg company (Luxco 2).

(b) No provision of Belgian tax law defines the application of such a waiver of withholding tax by reference to the 'economic owner' or 'beneficiary' of the dividend. I understand that such concepts are not recognised as a matter of Belgian law.

(c) This analysis is consistent with the decision in *Skatteministeriet Danmark v. T Danmark and Y Danmark Aps* (2019) (cases C-116/16 and C-117/16) (the *Denmark* case). In the *Denmark* case the ECJ stated, at para. 20 (emphasis added):

> '… in order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, *a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends*.'"

79 The Deputy Bailiff refused leave. In summary, his conclusions in relation to the three grounds of judicial review argued before him were as follows:

(i) He concluded (at para. 44) that "the respondent had reasonable grounds for forming the opinions which it did on the information which it had." On the information available, he did not consider that the appellant could (at para. 45) —

> "show that there is a realistic prospect of successfully persuading the court on an application for judicial review that the respondent cannot reasonably have concluded that the information requested by the Notice was foreseeably relevant."

(ii) On the question of proportionality, the Deputy Bailiff recognized that tax information by its nature is likely to be private information. He concluded (at para. 48) that "there appears to be a clear nexus between the information sought in Jersey and the dividend paid by Belgco to [Luxco 2]." He did not consider that the appellant had a realistic prospect of successfully persuading the court that: (i) the objective of the notice is insufficiently important to justify the limitation of a fundamental right; (ii) the request for information is not rationally connected to that objective; (iii) there are less intrusive measures that could have been used to obtain less extensive information of more obvious relevance; and (iv) a fair balance has not been struck between the rights of the individual and the interests of the community.

(iii) The Deputy Bailiff concluded that the appellant had failed to establish that it had a realistic prospect of success of persuading a court that the respondent had failed to adhere to the terms of the OECD Mutual Assistance Convention. He held that it was reasonable for the respondent to rely on the information provided by the BTA. It was not necessary for the BTA to pursue the Belgian taxpayer in Belgium first. On the material shown to the Deputy Bailiff, he was

satisfied that the BTA could have obtained such information from a third party under Belgian law.

Application for leave to appeal

80 In its written contentions in support of its application for leave to appeal, the appellant draws attention to a significant development since the permission hearing in the Royal Court—namely that the BTA has issued to Belgco an "amendment notice" dated August 25th, 2022 ("the BTA assessment"). This assessment relates only to tax year 2020 and sets out BTA's reasons for concluding that Belgco is liable to pay more than €66m. by way of withholding tax for that year alone. We describe the BTA assessment further below. The appellant invites us to admit the BTA assessment into evidence.

81 The appellant's written contentions articulate three proposed grounds of appeal which the appellant proposes to argue if leave to appeal is granted.

(i) *Ground of appeal 1: the Royal Court applied the wrong test*. The appellant accepts that the Royal Court identified the correct legal test for leave to apply for judicial review but argues that it did not in fact apply that test when it made its decision.

(ii) *Ground of appeal 2: the Royal Court's approach to the foreseeable relevance of the information demanded was wrong*. The appellant alleges that the Royal Court went wrong in the following respects:

(a) The Royal Court treated the views of the BTA as set out in Ms. Moylan's affidavit as being determinative.

(b) The Royal Court erred in accepting that the BTA's explanation that the information requested was relevant was the end of the matter; the respondent had to consider whether the BTA's assertion was credible in light of the likelihood of what was being asserted and the available evidence in support of the assertion.

(c) The Royal Court was wrong to assume that there was a reasonable possibility that Luxco 2 was not the "true economic owner" of the dividends, given that the obvious starting point is that Luxco 2 is the true economic owner of those dividends.

(d) The Royal Court did not address the point that identification of the "true economic owner" of the dividends appeared not to be relevant to the Belgian tax issue.

(iii) *Ground of appeal 3: the Royal Court erred in its consideration of the requirement that information demanded by the notice should be proportionate*. The appellant contends that the Royal Court adopted an approach which

> renders the proportionality requirement “meaningless.” It argues that the court's conclusions on proportionality required the “unjustified assumption that: (i) there was a clear basis for treating someone other than Luxco2 as the economic owner (as the BTA uses that term) of dividends which were lawfully paid to it; and (ii) it was necessary to identify the real beneficial owner.” The appellant contends that there was no evidence before the Royal Court on which it could properly base the first assumption, and there is, it says (relying on the BTA assessment), “now clear evidence” that the second assumption is wrong.

82 The appellant does not, in its proposed grounds of appeal, contend that the Deputy Bailiff erred in his approach to the third of the appellant's proposed grounds of judicial review (which we described at para. 76 above).

83 Consistent with the court's directions of September 22nd, 2021, the appellant has set out substantive arguments in support of its proposed grounds of appeal. It does not address the question of leave to appeal separately on the basis that if the court were to determine that the appeal should be allowed it would follow that the appeal has a real prospect of success and would satisfy one of the threshold tests which this court applies when considering whether to grant leave to appeal an interlocutory decision. In its contentions, the appellant relies on the BTA assessment *inter alia* in support of the proposition that, having received that document, the respondent cannot maintain the position that the information sought is “foreseeably relevant,” at least without reverting to the Belgian competent authority for further explanation.

The respondent's position

84 The respondent invites us to refuse leave to appeal. It submits that the Royal Court's reasoning cannot be faulted on the basis of the material which was before it. It adheres to the position that the information referred to in the notice is “tax information” as defined. Although the respondent invites us to determine the appeal on the basis of the information which was before the Royal Court, it “accepts that the [BTA assessment] likely meets the relevant tests to be admitted in evidence such that the court will admit such evidence.” It recognizes that the BTA assessment “may render certain contentions of the appellant more ‘arguable’ than the Royal Court understood them to be” but submits that this does not amount to the appellant having a reasonable prospect of success in such arguments. It states that:

> “if the decision of the Royal Court were reversed then the respondent would have a greater timescale in which to consider, secure and then file evidence to explain further why the new evidence is not determinative of the issue of foreseeable relevance of the information by reference to the tax laws of Belgium.”

The BTA assessment

85 The BTA assessment and a sworn translation are annexed to a fifth affidavit of Mr. Young, which states that the BTA had issued to Belgco an "amendment notice" (the BTA assessment) dated August 25th, 2022. The BTA assessment is a lengthy document, and we refer here only to certain salient features.

86 The BTA assessment is introduced by the following statement:

> "In accordance with the provisions of the Article 346 of the Belgian Income Tax Code 1992 … I hereby inform you that on the grounds set out below, the tax office is of the opinion that amendments are required to the information provided in your withholding tax return for the year 2020 or acknowledged in writing. The proposed amendments are indicated below.
>
> This results in a change to the tax base we use to calculate the taxes you owe.
>
> We reserve the right to conduct further investigations into your file, including with regard to the period in question. This notice provides a summary of the infringement(s) we have identified to date.
>
> You are requested to submit a written response to this amendment proposal by 30 September 2022 at the latest."

87 The document discloses that in the 2020 tax year, Belgco distributed to Luxco 2 dividends of €155,768,833.91, which were declared as completely exempt from Belgian withholding tax pursuant to the Parent–Subsidiary Directive. It explains that BTA is of the opinion that the withholding tax returns for the 2020 tax year should be amended and that the total sum of withholding tax due is €66,758,071.67.

88 The BTA assessment sets out the corporate structure and states:

> "The Katoen Natie group uses this structure to upstream profits made by the Belgian companies in the group tax-free to Luxembourg (under the Parent–Subsidiary Directive) and subsequently to Jersey by way of a series of consecutive dividends.
>
> In this way the Katoen Natie group ensures that these profits leave the European Union without being subject to Belgian withholding tax and that this profit distribution escapes taxation. This structure allows Mr. Ferdinand Huts (as ultimate beneficial owner) to receive the profits of the Belgian entities of the group tax-free.
>
> Mr. Ferdinand Huts is responsible for managing the Katoen Natie group. Mr. Ferdinand Huts is the Managing Director of the aforementioned Luxembourg companies Katoen Natie International SA and Katoen Natie Group SA. He is also the ultimate beneficial owner of Katoen Natie NV via the Luxembourg

> holding companies and a trust in Jersey … He is in a position to control dividend policy."

89 The BTA assessment narrates the dividend amounts distributed by Belgian companies in the group to Luxco 2, by Luxco 2 to Luxco 1, and by Luxco 1 to the trust in the 2019 and 2020 periods. Under reference to the dates when the Belgian companies distributed dividends, it states:

> "This demonstrates that the companies within the Katoen Natie group are controlled centrally. The companies in the group all have to distribute their profits to Katoen Natie International at the same time."

90 The BTA assessment notes that the Belgian UBO Register indicates that Mr. Huts is the ultimate beneficial owner of Belgco. The BTA infers that he must be the beneficial owner of the trust. The BTA assessment states:

> "the tax office notes that Mr. Ferdinand Huts is responsible for managing the Katoen Natie group. Mr. Ferdinand Huts is Managing Director of the Luxembourg companies [Luxco 2] and [Luxco 1]. He is also the ultimate beneficial owner of [Belgco] via the Luxembourg holding companies and a trust in Jersey. He is in a position to control dividend policy."

91 The BTA assessment then sets out an analysis of the law. It notes that the Parent–Subsidiary Directive had been amended in 2014 and 2015 to introduce a common anti-abuse rule and to eliminate double non-taxation. The assessment states:

> "The tax office has established that the profits accrued by Belgian companies are being moved (in the form of dividends and via 'conduits') without Belgian withholding tax being paid on them to a third country (Jersey) that does not meet the criteria for application of the parent–subsidiary directive. This is not in line with the objective of the Directive. Its intention is not to allow a third country to indirectly enjoy the benefits of this European directive (through holding of a 'conduit company' and upstreaming of dividends) when this would not be the case if it received the revenue directly. By way of its structure, Katoen Natie ensures that these profits leave the European Union without having been subject to Belgian withholding tax and without any tax being paid on this distribution of profits."

92 The BTA assessment notes that the term "beneficial owner" was introduced in the 1977 OECD Model Tax Convention to prevent benefits under the Convention being enjoyed under certain circumstances not envisaged by the Convention. It states that "this international tax law term was created to ensure that interposed intermediaries cannot lay claim to benefits under the convention." It notes that the OECD Commentary states that:

> "the term 'beneficial owner' should not be used in a narrow technical sense, but

> that it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. The Commentary also clarifies that when a recipient of income simply acts as a conduit company for another person who in fact receives the benefit of the income, the conduit cannot be regarded as the beneficial owner. This suggests that the term should be given a broad and economic interpretation focusing on the commercial reality of a business."

93 The BTA assessment observes that the term "beneficial owner" was introduced into EU tax law in 2003 via the Interest Royalty Directive. It refers to case-law of the CJEU, from which it concludes that the term "should be interpreted economically and not formally" such that it "does not refer to a formally specified beneficiary, but to the entity that benefits economically from the payments." The BTA assessment notes that the Parent–Subsidiary Directive does not specifically use the term "beneficial owner," but refers to the *Denmark* case (10), from which it concludes that "the term 'beneficial owner' must nevertheless be taken into account for the application of the Parent–Subsidiary Directive" and "is relevant to determining whether the exemption under the Parent–Subsidiary Directive applies." It concludes:

> "Given that the term 'beneficial owner' is relevant to determining whether the exemption applies, a tax office or national court must refuse to grant a withholding tax exemption if the recipient of the income is not the beneficial owner of the dividends. The ECJ acknowledges that a national authority is not required to identify the entity it regards as being the beneficial owner of the dividends in order to refuse to recognise a company as beneficial owner of those dividends."

94 The BTA assessment goes on to address whether Luxco 2 was the beneficiary of dividends paid by its Belgian subsidiaries including Belgco. It states:

> "The administration establishes that the recipient of the dividends, [Luxco 2] is not the beneficial owner and that as a result, the exemption under the Parent–Subsidiary Directive does not apply. Nor is [Luxco 1] the beneficial owner of the dividends. This is clear from the above findings. Nearly all the dividends received by [Luxco 2] are transferred very quickly (via Luxco 1) outside of the European Union, ending up in the hands of an entity in Jersey which does not meet the criteria for application of the Parent–Subsidiary Directive. This group strategy can be executed rapidly thanks to the relationships between the companies in the international group Katoen Natie.
>
> The facts demonstrate that the group's strategy involved its Belgian companies paying their dividends to [Luxco 2] on 26/11/ 2020 or 27/11/2020. Based on the findings presented, it is evident that nearly all of these dividends were immediately transferred to Jersey. A week later, almost all of the dividends were already in Jersey…
>
> [Luxco 2] essentially uses none of the profits from the dividends received to

carry out reinvestments or to meet obligations *vis-à-vis* non-affiliated third parties. The findings from 2018, 2019 and 2020 show that [Luxco 2] has an annual strategy whereby it immediately transfers almost all dividends so that they end up (via the conduit [Luxco 1]) in the hands of a trust in Jersey. *De facto* [Luxco 2] does not have an unrestricted right to use and benefit from the income that it transfers, and as such forms part of the group strategy to move Belgian profits outside of the European Union. [Luxco 2] is therefore not the beneficial owner of the income in economic terms.

With respect to the dividends, the Luxembourg companies [Luxco 2] and [Luxco 1] function as 'conduits' in a structure that transfers profits from Belgium to a trust on the Island of Jersey. The Luxembourg 'conduits' cannot be regarded as the beneficial owner of the dividends, and as such cannot claim the benefits under the Parent–Subsidiary Directive.

The Belgian companies (including [Belgco]) would have had to pay Belgian withholding tax of 30% if the dividends had been directly transferred to Jersey (there is no double taxation agreement between Belgium and Jersey).

The structure ensures that the entity in Jersey is able to indirectly benefit from the Parent–Subsidiary Directive although this would not be the case had it received the income directly. The structure also means that profits earned by Belgian companies in the Katoen Natie group leave the European Union in the form of dividends without being subject to Belgian withholding tax and without any tax being levied on this distribution of profits."

95 The BTA assessment sets out the provisions of Belgian tax law upon which the BTA relies. It states that Belgco:

"wrongfully applied the withholding tax exemption set out in [the relevant article]. The tax office is required to refuse the withholding tax exemptions claimed … since the recipient of the dividends [Luxco 2] is not the beneficial owner thereof. As far as possible national law must be interpreted in such a way as to realise the objective of the Parent–Subsidiary Directive …"

It concludes:

"For the sake of completeness, it is noted that even if [Belgco] had not committed an infringement of the law … Belgian withholding tax would still have been due on the aforementioned dividends. This is because abuse of the Parent–Subsidiary Directive is being committed with respect to the dividends, namely via a chain of conduit companies. In this case, the Parent–Subsidiary Directive is being used to enable profits to be transferred to a third company (a trust in Jersey with a natural person as UBO) that does not meet the criteria for application of the Parent–Subsidiary Directive. It is evident from the foregoing that the movement of dividends is taking place for tax reasons, is not in line with the purpose of the Directive and is not genuine."

96 An annex to the BTA assessment sets out the relevant provisions of the Parent–Subsidiary Directive and Belgian law. These include the following:

> "Article 267 WIB92
>
> Withholding tax shall fall due upon distribution or declaration of income, whether in cash or in kind.
>
> Article 268 WIB92
>
> Any withholding tax payable by the taxable entity rather than the recipient of the income shall be added to the amount of that income for the purposes of calculating withholding tax.
>
> Article 269 WIB92
>
> The rate of withholding tax is set at:
>
> > i. 30% for income on moveable assets and capital except those referred to in indents 2 to 4 and 8 as well as for the miscellaneous income referred to in Article 90, para. 1, fifth to seventh indents;
> >
> > …
>
> Article 6 WIB92
>
> Taxable income is formed of the total net income minus deductible expenses.
>
> The total net income is the sum of the income from the following categories:
>
> > ii. income from immoveable property;
> >
> > ii. income from moveable assets and capital;
> >
> > …
>
> Article 17 WIB92
>
> 1. Income from moveable assets and capital shall comprise all revenue of any kind from moveable assets, namely:
>
> > i. Dividends;
> >
> > ii. Interest;
> >
> > …"

97 In his fifth affidavit, Mr. Young states that he understands that Belgco disputes the BTA's analysis and will be making submissions about it to the BTA. He notes that the BTA have

issued the BTA assessment without requiring access to any of the Jersey material sought in the notice. He states: “The contents of the BTA assessment appear to confirm that the Jersey material is unnecessary for, and irrelevant to, the determination of whether Belgco is entitled to the exemption.” He suggests that this supports the view that the information requested is not “foreseeably relevant” to the imposition of withholding tax. He further contends that the request and the notice cannot be proportionate “as it is apparent that much of the information requested has no relevance to the issues in point.”

98 He also suggests that there is an inconsistency between paras. 9 and 10 of Ms. Moylan's affidavit and the BTA assessment. He notes that the BTA assessment relies on the *Denmark* case (10) for the proposition that “a national authority is not required to identify the entity it regards as being the beneficial owner of the dividends in order to refuse to recognize a company as beneficial owner of those dividends.” He notes that nowhere in the BTA assessment do the BTA say who they assert to be the economic owner of the dividends, but this has not prevented the BTA from issuing the BTA assessment. He suggests that this apparent inconsistency at least calls for an explanation “and demonstrates that the irrelevance of the material requested is very far from being unarguable.”

Decision on whether to admit the BTA assessment

99 Rule 12(1) of the Court of Appeal (Civil) Rules 1964 gives us “full discretionary power” to receive further evidence on questions of fact and we consider that we should exercise our discretion to admit the BTA assessment. On the application of the usual test for the admission of new evidence, the BTA assessment is evidence which is credible, relevant, and was not available at the time of the hearing in the court below. The document plainly could not have been produced before August 25th, 2022, when it was issued by the BTA. It is an official document from the foreign competent authority about this very case. Generally speaking, of course, a judicial review is concerned with a challenge to the validity of a decision by reference to the material which was before the decision-maker. Circumstances which have occurred since the decision under review will usually be irrelevant. However, there are two reasons for considering the BTA assessment to be relevant in the present case. First of all, the appellant does not rely on the BTA assessment as a supervening circumstance as such but in order to support its challenge to an aspect of the justification advanced in support of the decision and placed before the Royal Court. As we will explain below, it seems to us that the BTA assessment does raise a question about the justification relied on by the respondent and placed before the Royal Court which we consider justifies granting leave to bring a judicial review. Secondly, for the reasons we have set out at paras. 37 to 40 above, the court requires to address the “tax information” question for itself. As we explain below, it follows that the Deputy Bailiff approached the question of leave to apply for judicial review on the wrong basis. In ourselves addressing the question of leave to apply for judicial review, as at today's date, it would be highly artificial for us to exclude from consideration, so far as relevant, the developed statement of the BTA's position which is now available in the BTA assessment.

Decision on leave to appeal

100 The appellant approached the question of whether we should grant leave to appeal by arguing that the test for leave to apply for judicial review was met, and, on the basis that it is, it would follow that we should grant leave to appeal. For the reasons which we explain below, we have concluded that leave should be granted to apply for judicial review; and we agree that it follows that we should grant leave to appeal. The essential reason, as we explain more fully below, is that the BTA assessment, although it was not before the court below, casts doubt on the reason given by the respondent for seeking at least some of the information referred to in the notice and the doubt is sufficient to justify the issue being ventilated in a judicial review.

101 There is, though, a further reason for granting leave to appeal in this case. For the reasons we have explained at paras. 37–40 of this judgment, we consider that the court would require, in a judicial review, itself to address the question of whether the information sought is “tax information” as defined in the 2008 and 2014 Regulations, if that is properly put in issue by way of an application for judicial review (leave having been granted), and not merely whether the respondent acted unreasonably (in the *Wednesbury* sense) in concluding that it was. On that basis, it would follow that when the Deputy Bailiff was considering whether to grant leave to apply for judicial review, he should have asked whether the appellant's argument that the information requested in the notice is not, in fact, “tax information” has a realistic prospect of success.

102 The Deputy Bailiff did not address that question. Instead, his essential reason for refusing leave to apply for judicial review (albeit in the context of the first ground) was his conclusion that the appellant could not “show that there is a realistic prospect of successfully persuading the court on an application for judicial review *that the respondent cannot reasonably have concluded* that the information requested by the Notice was foreseeably relevant.” For the reasons we have explained, it seems to us that in approaching the question in that way, he fell into an error of law—albeit that the error is one which reflects the way that, as we understand it, the appellant itself put its case before the Deputy Bailiff.

The test for leave to apply for judicial review

103 Because, on this critical issue, the Deputy Bailiff addressed the wrong question, we have concluded that we should grant leave to appeal on all three proposed grounds of appeal. The question of whether the information requested is or is not “tax information” is the central issue raised by the appellant. A correct approach to that issue was accordingly fundamental to the decision on leave to apply for judicial review. Since the Deputy Bailiff erred in the approach which he took to that question, it follows that he erred in his application of the test for leave (ground of appeal 1) as well as in respect of the issues specifically concerned with the statutory test of foreseeable relevance raised in ground of appeal 2. The error was also, it seems to us, capable of affecting the court's assessment of proportionality, and we accordingly also grant leave in respect of proposed ground of

appeal 3.

104 Since the Deputy Bailiff erred in the approach which he took to the questions before him, it would be open to us to allow the appeal and quash his decision, with the consequence that the appellant's application for leave to apply for judicial review would require to be considered anew at first instance. We have concluded that we should not take that course. We have had the benefit of submissions as to whether the Deputy Bailiff was or was not correct to refuse leave to apply for judicial review. In these circumstances, we consider that we should ourselves determine whether leave should be granted to apply for judicial review.

105 There has been no dispute before us as to the test for leave to apply for judicial review. The appellant must satisfy the court that it has an arguable ground of judicial review, with realistic prospects of success, which merits investigation at a full hearing. Whether the ground of review is a good one would, of course, be the issue in the judicial review and a decision to grant leave to apply for judicial review does not prejudge that issue.

Discussion

106 This case is concerned with withholding tax. A withholding tax, as we understand it, is deducted from a payment which would or might fall to be treated as taxable income in the hands of the recipient of the payment and is remitted to the tax authority by the entity making that payment. The operation of a withholding tax therefore concerns two taxpayers: the taxpayer obliged to make that deduction and remit it to the tax authority, and the taxpayer in whose hands the payment would or might fall to be treated as taxable income. Although the taxpayer making the payment effects the deduction and remits the relevant amount to the tax authority as withholding tax, that payment represents tax for which the recipient taxpayer would otherwise (or may in any event) require to account.

107 The Belgian tax legislation referred to in the BTA assessment includes the following provision, which appears to us to be consistent with this general understanding:

> “Article 268 WIB92
>
> Any withholding tax payable by the taxable entity rather than the recipient of the income shall be added to the amount of that income for the purposes of calculating withholding tax.”
>
> It also appears to us to be consistent with the statement in para. 10 of Ms. Moylan's affidavit that—
>
> “… withholding taxes are administered and paid by the Belgian company paying a dividend, but are assessed in the name of the economic owner, or beneficiary, of the dividend. As such, withholding taxes may be raised as income tax if the economic owner or beneficiary of the dividend is an individual,

or as corporate tax if the economic owner is a company."

108 Against that background, it appears to us that, in the context of a case involving withholding taxes such as the present one, there are different tax purposes for which a tax authority might seek to obtain information directed to identifying the true "economic owner" or "beneficial owner" of a dividend. Such information might, for example, be sought on the basis that it is foreseeably relevant to an investigation into whether the paying entity properly applied the rules about withholding tax—specifically, in the context of the Parent–Subsidiary Directive, whether the exemption from withholding tax for which that Directive provided, was properly applied. Alternatively, or in addition, such information might be sought on the basis that it is foreseeably relevant for the purposes of identifying the person who would fall to be assessed to tax in respect of the payment from which the withholding tax was deducted, with a view to levying tax on that person (assuming, of course, that they are liable to tax in the requesting territory).

109 It seems to us to be at least arguable, in the context of the domestic law of Jersey, that the two potential purposes for identifying the "beneficial owner" or "economic owner" of a dividend which we have identified at para. 108 above would raise different legal issues. That is because, as we have explained at para. 39 of this judgment, reg. 3 of the 2008 Regulations confines "tax information" to information which is "foreseeably relevant to the administration and enforcement, *in the case of the person who is the subject of a request*, of the domestic laws of the third country whose competent authority is making the request concerning any tax …"

110 If the person who is the subject of the request is the taxpayer responsible for deducting and paying withholding tax, reg. 3 of the 2008 Regulations would permit the recovery of information foreseeably relevant to the administration and enforcement of tax laws *in the case of that person*. That would encompass, for example, any information foreseeably relevant to an investigation into whether the anti-abuse provisions of the Parent–Subsidiary Directive fall to be applied. But, if that taxpayer is the person who is the subject of the request, reg. 3 of the 2008 Regulations could not, it seems to us, be relied upon to seek information which is not foreseeably relevant to any question affecting that taxpayer but which is directed to the tax affairs of a different person, namely the recipient of the payment. That is because, under the 2008 Regulations, "tax information" is information which is foreseeably relevant to the administration and enforcement of tax laws *in the case of the person who is the subject* of the request.

111 We should not be taken to be suggesting that the person potentially liable for tax on the amounts deducted could not also be a person who is the subject of the request. Nor should we be taken to be suggesting, far less holding, that reg. 3 of the 2008 Regulations could not be applied in a case factually similar to that which came before the CJEU in *Luxembourg v. L* (8), where the very purpose of the request was to ascertain the identity of persons liable to tax. We have heard no argument on the point, and it would require to be determined in a case where the parties join issue on it. Further, as we have explained at paras. 40 and 41 of this judgment, the position may be different where the request is made under the 2014

Regulations, at least if the request is formulated by reference to a “transaction” rather than to a “person.” These issues, if they arise at all in the present case, have not been focused so far between the parties.

112 The point which we draw from these general considerations is that, where a request is made for information in relation to withholding tax, it is necessary, when assessing the lawfulness of any notice served under the 2008 and 2014 Regulations, to be clear as to: (i) the taxpayer or taxpayers (or, in the case of the 2014 Regulations, the transaction or transactions) which are the subject of the request; and (ii) the tax purpose, relating to the identified taxpayer(s) or transaction(s), which is said to justify the request and the notice. Clarity on these points will be the essential basis for any consideration as to whether the information sought is “tax information” as defined in the 2008 and 2014 Regulations.

113 The starting point for analysing how these considerations apply in the present case is, accordingly, to identify the taxpayer which is the subject of the request and the tax purpose which is said to justify the request and the notice.

114 We now have before us, in the BTA assessment, a much more developed explanation of the investigation which the BTA has been undertaking than was given in Ms. Moylan's affidavit. An investigation of the sort described in that document, examining, in the context of the anti-abuse provisions of the Parent–Subsidiary Directive and the abuse of rights doctrine discussed in the *Denmark* case, the motivation for establishing a particular corporate structure, including whether the structure was put in place for “valid commercial reasons which reflect economic reality,” would, on the face of it, justify a wide-ranging factual investigation directed to obtaining information and evidence foreseeably relevant to these questions.

115 Even if identification of the beneficial owner of a dividend is, as stated in ruling 4 of the *Denmark* case, not *necessary* in order to conclude that the exemption from withholding tax has been wrongfully applied, it does not follow that the identification of the beneficial owner is, at least in all cases, *irrelevant* to an investigation into the issues arising under paras. 2 and 3 of art. 1 of the Parent–Subsidiary Directive, or the abuse of rights doctrine described in the *Denmark* case. If the economic owner of the dividend can actually be identified as someone other than the nominal shareholder, that might well, on the face of it, be highly relevant to such an investigation. For this reason, the reliance placed by the appellant throughout these proceedings on ruling 4 of the *Denmark* case, as if that ruling excluded any investigation into the identity of the true economic owner of the dividends, appears to us to have been misconceived.

116 But in the present case, apart from the reference to the anti-abuse provisions in para. 31 of Ms. Moylan's affidavit (which is concerned only with the information referred to in para. m of the notice), that is not the basis upon which the requirement to produce information tending to disclose the “economic owner” of the dividends was justified to the court in Ms. Moylan's affidavit (or, presumably, by the BTA in its request which prompted service of the

notice).

117 We were open to considering whether the respondent could, if we admitted the BTA assessment into evidence, rely on the analysis set out in that document with a view to justifying the terms of the notice. However, Advocate White made clear that he was not in a position to go beyond or behind the terms of Ms. Moylan's affidavit. He did not invite us to assess the foreseeable relevance of the information sought by reference to the BTA assessment or the analysis set out in that assessment. As we have noted, his written contentions candidly acknowledged that the BTA assessment rendered certain contentions of the appellant more arguable than the Royal Court had understood them to be. He also stated that if the Royal Court's decision were reversed, the respondent would "have a greater timescale in which to consider, secure and then file evidence to explain further why the new evidence is not determinative of the foreseeable relevance of the information by reference to the tax laws of Belgium."

118 It is for the requesting competent authority to identify the tax purpose for which it seeks assistance from the respondent, or otherwise to provide a proper basis upon which the respondent can conclude that the information sought satisfies the relevant legal test. In turn, if the matter requires to be determined by the court, it is for the respondent to place material before the court upon which the court may determine the lawfulness of the respondent's actions. The court must bear in mind that the respondent has, or should have, access to the requesting competent authority with a view to clarifying or explaining matters should that be required, and if the respondent chooses to proceed on a specific or limited basis that may be for good reason. If the respondent advances the justification for the notice on the basis that it is concerned with a particular taxpayer, and by reference to a particular and limited tax purpose, that is the basis upon which the court must generally proceed.

119 In the present case, it seems clear that the "person who is the subject of the request," for the purposes of reg. 3 of the 2008 Regulations, is Belgco. It is Belgco which is identified in Ms. Moylan's affidavit as "the Taxpayer"; and the case has been argued on the basis that we are concerned with an investigation into Belgco's treatment of withholding tax. The tax purpose is stated by Ms. Moylan (in para. 9 of her affidavit) as being: "to establish whether the exemption from the obligation to withhold had been correctly applied by the Taxpayer; and … amongst other things … to help the BTA to check the identity of the beneficiary of the dividends." Paragraph 24 also refers to BTA's "investigation into establishing whether the economic owner or beneficiary of the dividends is a person in respect of whom the correct Belgian withholding tax treatment was applied *by the Taxpayer*."

120 This begs the question of the tax purpose which would be advanced by "checking" the identity of the economic owner or beneficiary of the dividends, in the context of a request the subject of which is Belgco. The explanation which is given in Ms. Moylan's affidavit is the statement at para. 10 that "withholding taxes may be raised as income tax if the economic owner or beneficiary of the dividend is an individual, or as corporate tax if the economic owner is a company."

121 It is at least arguable that what was being presented to the court through Ms. Moylan's affidavit was a case that at least some of the information was being sought with a view to identifying the economic owner of the dividends, and that this information was required specifically because this would affect the way in which withholding tax fell to be applied by Belgco and not, for example, because identifying the economic owner of the dividends could be relevant to the application of the anti-abuse provisions in the Parent–Subsidiary Directive.

122 Having regard to the general nature of a withholding tax, it is intelligible that, when the payment is taxed in the hands of the recipient, it will be taxed as income tax or corporate tax, depending on the character of the recipient as an individual or a corporation. However, the affidavit does not provide any further explanation of how this distinction would affect Belgco, the taxpayer which is the subject of the request.

123 In our view, it is arguable that the BTA assessment raises a serious doubt as to whether there is, in fact, such an effect. The BTA has, it would appear, been able to issue the assessment, and to identify an amount of withholding tax which the BTA considers should have been deducted and paid by *Belgco* in the tax year in question, without identifying the “economic owner” of the dividends in question, and, indeed, without requiring to characterize the withholding tax in question as income tax or corporate tax. There is, so far as we have been able to discern, no indication in the BTA assessment that identifying the “economic owner” would affect Belgco's tax position other than (and it is clearly an important qualification) insofar as identifying the “economic owner” could be relevant to the application of the anti-abuse provisions.

124 The BTA assessment accordingly, arguably, raises a significant question as to what the statement in para. 10 of Ms. Moylan's affidavit means in practice for the tax affairs of *Belgco*, the taxpayer which would be the subject of the request. It is arguable that it casts doubt on the accuracy, or at least the completeness, and meaning of the justification which was placed before the Royal Court in para. 10 of the affidavit as the basis for holding that all of the information sought is “tax information” as defined in the Regulations. Indeed, as we have noted above, Advocate White expressly anticipated that, if the appeal were to be successful, the respondent would revert to the BTA with a view to considering, securing and providing further evidence on the point. It is perhaps unfortunate that this exercise had not been undertaken before the hearing of the appeal.

125 So far as we can judge, the argument has sufficient merit to justify allowing it to be ventilated in a judicial review. Whether it is right or not would of course be the issue in the judicial review. It may be that the doubt created by the BTA assessment will be capable of being dispelled, as Advocate White envisaged, by some further explanation as to how the characterization of the tax as income tax or corporate tax would affect the position of Belgco. We were not furnished with any such explanation. Or it may be that, on further inquiry, the respondent places reliance on the explanation of the BTA position set out in the BTA assessment—which on the face of it, may perhaps provide an alternative rationale

under reference to the anti-abuse provisions of the Parent–Subsidiary Directive, for seeking information about the “economic owner” of the dividends.

126 Further, as we have explained, we consider that the question of whether the information sought satisfies the definition of “tax information” is one which the court should itself address, and it seems to us to be open to argument that the court should not, on the basis of the material before it, at least if that includes the BTA assessment, conclude that at least some of the information sought satisfies the statutory definition of “tax information.”

127 For these reasons, we have concluded that the appellant should be given leave to apply for judicial review on the first proposed ground of review set out at para. 76 above—namely, the challenge to the conclusion that the information sought was “tax information” for the purposes of the 2008 and 2014 Regulations.

128 We emphasize the following points. First, the material upon which the respondent has relied to justify seeking at least some of the information sought—specifically, information directed to identifying the economic owner of the dividends—at least arguably relies on a specific tax purpose—namely that set out in para. 10 of Ms. Moylan's affidavit—as the basis for seeking information about the “economic owner” of the dividend. The affidavit provided no further explanation of the brief statement that “withholding taxes may be raised as income tax if the economic owner or beneficiary of the dividend is an individual, or as corporate tax if the economic owner is a company.” Secondly, this is not a case where the appellant simply disagrees with the requesting competent authority's position as regards the tax laws of that authority's jurisdiction. Were that the position, the court would generally leave the resolution of any such dispute to the relevant authorities of the requesting authority, and determine foreseeable relevance on the basis of the requesting competent authority's statement of the legal position. In this case, by contrast, an official document issued by the BTA itself arguably creates sufficient doubt about the accuracy or meaning of the critical statement in Ms. Moylan's affidavit to justify allowing the appellant to ventilate the issue in a judicial review. Thirdly, the respondent has not, or at least has not yet, provided information which explains the position sufficiently to dispel that doubt. Fourthly, even though the BTA assessment (which on the face of it may provide a different basis—by reference to the anti-abuse provisions of the Parent–Subsidiary Directive—upon which information about the economic owner of the dividends might potentially be sought) was before us, the respondent was not, at the hearing before us, in a position to go beyond the very brief explanation given in Ms. Moylan's affidavit.

129 As we have explained above, in the context of a judicial review, events arising after the decision under review has been made would not ordinarily affect its validity. Neither the respondent nor the Royal Court could have had the BTA assessment before them. However, the BTA assessment casts sufficient doubt on the explanation provided to the Royal Court as the basis for seeking some of the information sought, and as to whether the information sought is indeed “tax information,” to justify allowing the appellant to ventilate these issues in a judicial review. The respondent itself has told us that it would wish, if leave were to be granted, to investigate the position further. In these circumstances, we

grant leave to appeal, allow the appeal and grant leave to apply for judicial review.

130 We doubt whether, in the circumstances of this particular case, any separate question will arise in relation to art. 8 of the European Convention on Human Rights. As we have observed there was no dispute before us that art. 8 was engaged. As we have observed above, we consider that the court must itself, when considering whether the interference in art. 8 would be "in accordance with law," determine whether the notice complies with the statutory requirements of Jersey law. If the notice in the present case is lawful, we doubt if it could be said to be disproportionate. A lawful notice under the Regulations would serve an important public policy purpose—namely, Jersey's compliance with its obligations under the treaties to which we have referred and the substantive policy objectives to which those treaties are directed. In the present case, the information sought would, *ex hypothesi*, if the notice is lawful, be foreseeably relevant to the administration of the tax regime of a jurisdiction with which Jersey has reciprocal treaty relations. It is apparent from the BTA assessment that the sums potentially at stake are significant. The disclosure would not be to the world at large, but for a specific and limited purpose—namely, for the purposes of a tax investigation being undertaken by the authorities of a friendly jurisdiction. The disclosure to the requesting competent authority is subject to the specific treaty obligations of confidentiality which we have quoted at paras. 16 and 21 above and Belgium is itself a party to the European Convention on Human Rights. Whilst the information sought in this case is confidential, it does not appear to be of such a nature as the sensitive personal medical information at issue in *Z v. Finland* (12), compulsory disclosure of which would call for the most careful scrutiny (see 25 E.H.R.R. 371, at para. 96). The role of the court is a significant safeguard for any art. 8 rights which may be engaged. On the other hand, if the notice is found, following a judicial review, to be unlawful it would follow that it would also be incompatible with art. 8 since it would not, in that circumstance, be "in accordance with law." Having concluded that it is arguable that the notice is unlawful, we also grant leave, for that reason, in relation to the art. 8 ground— *i.e.* the second proposed ground of review set out at para. 76 above.

Concluding observations

131 We should, finally, comment on the appellant's argument that the ability of the BTA to issue the BTA assessment shows that the information sought in the notice is unnecessary and irrelevant. Whilst this argument may require to be considered further if the appellant applies for judicial review, we make the following observations. First of all, as Advocate White submitted, the BTA assessment is concerned with only one tax year. Secondly, the BTA assessment is clearly not the last word. It reserves the right to conduct further investigations and invites a response. We were told that Belgco disputes the assessment. It follows that a request for additional information which could foreseeably corroborate (or, for that matter, contradict) the analysis set out in the BTA assessment may not be otiose, and that a request for information in Jersey, if it satisfies the statutory test, would not necessarily be excluded simply because the BTA has been able, on the basis of information which it has obtained elsewhere, to draw conclusions for the purposes of the BTA assessment.

Conclusions

132 For these reasons:

(i) we grant leave to appeal the Royal Court's decision not to grant leave to apply for judicial review;

(ii) we allow the appeal; and

(iii) we grant leave to apply for judicial review relying on proposed grounds of review (i) and (ii) identified at para. 76 above.

Order accordingly.