Volaw Trust & Corporate Services Ltd; Mr Berge Gerdt Larsen v The Office of the Comptroller of Taxes

Jurisdiction:	Jersey
Judge:	Michael J. Beloff, Sir John Nutting, Bt., Sir Hugh Bennett
Judgment Date:	28 November 2013
Neutral Citation:	[2013] JCA 239
Reported In:	[2013] JCA 239
Court:	Court of Appeal
Date:	28 November 2013

Text

[2013] JCA 239

COURT OF APPEAL

Before:

The Hon Michael J. Beloff, **Q.C.; President**; Sir John Nutting, Bt., **Q.C., and**; Sir Hugh Bennett.

Between
Volaw Trust & Corporate Services Limited
First Appellant
Mr Berge Gerdt Larsen
Second Appellant
and
The Office of the Comptroller of Taxes
Respondent

Advocate A. D. Hoy **for the First Appellant**.

Advocate J. Harvey-Hills **for the Second Appellant**.

Advocate J. D. Kelleher **for the Respondent**.

Authorities

Volaw Trust and Corporate Services Limited and Mr B Larsen -v- Income Tax [2013] JRC 095 .

Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008.

ABN Amro v FSA 2010 EWCA Civ 323 .

Taxation (Implementation)(Jersey) Law 2004.

Registrar of Restrictive Trading Agreements v Smith (WH) 1969 1 WLR 1460 .

A and Others v Secretary for State for the Home Department 2005 1 WLR 414 .

Secretary of State for the Home Department v AY 2012 EWHC 2054 (Admin) .

Acturus Properties and 47 Others -v- Attorney General [2001] JLR 43 .

Investigation of Fraud (Jersey) Law 1991.

Proceeds of Crime (Jersey) Law 1999.

European Convention on Human Rights.

R v Birmingham CC ex p Ferrero Ltd [1993] 1 All ER 530 .

Bank Mellat No. 2 v HM Treasury 2013 UKSC para 36 .

Sharma v Browne-Antoine [2007] 1 WLR 780 .

Fordham: Judicial Review 6 th ed.

AG v Ryan 1980 AC 718 .

Fernando v H&SS Minister [2012] (2) JLR 21 .

Court of Appeal (Jersey) Law 1961.

Datec Electronic Holdings Ltd v UPS Ltd [2007] 1 WLR 1325 .

Quilter v Mapleson 1882 9 QBD 672 .

Lloyd v McMahon 1987 AC 125 .

R (on the application of Hope and Glory Public House) v City of Westminster Magistrates Court 2011 EWCA Civ 31 .

Licensing Act 2003.

Royal Court Rules 2004.

R v Westminster City Council ex p Ermakov 1996 2 All ER 302 .

Civil Procedure 2013 Vol 1.

Practice Direction RC 05/25 (Administrative Appeals).

Wade and Forsyth Administrative Law 10th ed.

Human Rights (Jersey Law) 2000.

Lester, Pannick and Herberg: Human Rights Law and Practice.

B. Larsen Holdings v Norway [2013] ECHR 24117/08 .

Investigation of Fraud (Jersey) Law 1991.

Wilson v First County Trust Ltd 2003 UKHL 40 .

HMRC -v- Ben Nevis (Holdings) Limited [2012] EWHC 1807 (Ch) .

Phillips -v- Eyre (1870) LR 6 QB 1 .

The Boucraa 1994 1 AC 486 .

IRC -v- Commerzbank Attorney General [1990] STC 285 .

Fothergill -v- Monarch Airlines Ltd [1981] AC 351 .

Vienna Convention on the Law of Treaties.

Comptroller of Income Tax -v- AZP [2012] 22 taxmann.com 36 .

Browne v Dunn [1894] 6. LR 67. HL.

Phipson on Evidence 17th ed.

Al Sweady -v- Secretary of State [2009] EWCA 2387 (Admin) .

Prest v Petrodel Resources Ltd & Others [2013] UKSC 34 .

R -v- IRC ex p Rossminster 1980 AC 952 .

Greta Somme -v- Drammen Municipality .

The State -v- Henning Astrup .

Knoop Utv 2012,139.

Taxation — appeal against Royal Court decisions dated 15 and 16 May 2013.

Appeal by the First Appellant against the decision of the Royal Court of 15th May 2013 whereby the Royal Court dismissed an appeal brought in accordance with the provisions of Article 14(1)(c) of the Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008; and

Appeal by the Second Appellant from the judgment handed down by the Royal Court on 16 May 2013 whereby the Royal Court specified that a notice dated 28th May 2012 under the Regulations specified above not be set aside or varied.

THE PRESIDENT:

This is the judgment of the Court.

Introduction

1 This is an appeal from the judgment of the Royal Court (Page QC Commissioner and Jurats Fisher and Liston of 16 May 2013 ([2013] JRC 095) ("the Judgment") by which the Royal Court upheld the decision of the Jersey Deputy Comptroller of Taxes ("the Comptroller") to serve a notice dated 28th May, 2012, ("the May 2012 Notice") on Volaw Trust & Corporate Services Limited ("Volaw") pursuant to regulation 3(2) of the Taxation (Exchange of Information with Third Countries)(Jersey) Regulations 2008 ("the 2008 Regulations"). The May 2012 Notice requires the production by Volaw of certain categories of documents and a small number of individually specified items said to be relevant to the tax affairs, in Norway, of a Norwegian national and resident, Mr Berge Larsen, and was served in response to a request made by the Norwegian Tax Authority ("NTA") on 26th February, 2010, ("the Request") pursuant to an agreement made between Jersey and the Kingdom of Norway for the exchange of information relating to tax matters ("the JN TIEA"). The appellants are Volaw and, as the 2008 Regulations permit, Mr. Larsen himself.

2 The resolution of the appeal turns primarily on construction of the 2008 Regulations (which have not previously fallen for consideration by this Court) and their application to the particular facts of the present case. The former element raises issues of general importance: the latter element of importance to the parties themselves. Underlying the dispute is the tension between the private interest in commercial confidentiality and the public interest in international co-operation in the investigation of potential tax evasion. In *ABN Amro v FSA* 2010 EWCA Civ 323 Stanley Burnton LJ said of the latter÷ at paragraph 38:–

"Financial enterprises and financial transactions are increasingly international … It is therefore of the greatest importance that national financial regulations co-operate particularly where there are suspicions or allegations of fraud or other misconduct."

The J/N TIEA

3 Jersey's power, to conclude bilateral agreements such as the J/N TIEA, notwithstanding the United Kingdom's responsibility in international law for its international relations, derives from delegation contained in a Letter of Entrustment [and see generally C. Powell Recent International Tax Initiatives: JGLR October 2013 p. 285 esp para 11].

4 The J/N TIEA was executed in Helsinki on 28 th October, 2008, and came into force on 7 th October, 2009. Its key Articles are as follows:–

Article 1 (***"Scope of the Agreement"***) provides:–

"The Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, recovery and enforcement or collection of tax with respect to such persons subject to such taxes, or to the investigation of tax matters or the criminal prosecution of tax matters in relation to such persons. ……"

"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 2, (***"Taxes Covered"***) provides:–

"1. This Agreement shall apply to the following taxes imposed by the Parties:

(a) in the case of Jersey:

(i) the income tax;

(ii) the goods and services tax;

(b) in the case of Norway:

(i) the tax on general income ("skatt på alminnelig inntek");

(ii) the tax on personal income ("skatt på personinntekt");

(iii) the special tax on petroleum income ("særlig skatt på petroleumsinntekt");

(iv) the resource rent tax on income from production of hydroelectric power ("grunnrenteskatt på inntekt fra produksjon av vannkraft");

(v) the withholding tax on dividends ("kildeskatt på utbytter");

(vi) the tax on Remuneration to non-resident artistes (skatt på honorar til utenlandske artister m.v."), etc.; and

(vii) the value added tax ("merverdiavgift")."

Article 3 (***"Definitions"***) paragraph 1 defines:–

"(d) the competent authority as … in the case of Norway the Minister of Finance or the Ministers' authorised representative"

"(f) "criminal tax matters" as:–

"……tax matters involving intentional conduct <u>whether before or after the entry into force of this Agreement</u> which is liable to prosecution under the criminal law of the requesting Party." (our emphasis)

and information (h) "as any fact statement or record in whatever form".

Article 4 (***"Exchange of Information upon Request"***) provides:–

"(3) If specifically requested by the competent authority of the requesting party the competent authority of the requested Party [Jersey in the present case] shall provide upon request by the requesting Party [Norway] information under the Article to the extent allowable under its domestic law for the purposes referred to in Article 1."

Article 4.5 provides:–

"Any request for information shall be formulated with the greatest detail possible and shall specify in writing:

(a) the identity of the person under examination or investigation;

(b) the period for which the information is requested;

(c) the nature of the information requested and the form in which the requesting Party would prefer to receive it;

(d) the tax purpose for which the information is sought;

(e) the reasons for believing that the information requested is foreseeably relevant to tax administration and enforcement of the requesting Party, with respect to the person identified in subparagraph (a) of this paragraph;

(f) grounds for believing that the information requested is present in the requested Party or is in the possession of, or obtainable by, a person within the jurisdiction of the requested Party;

(g) to the extent known, the name and address of any person believed to be in possession of or able to obtain the information requested;

(h) a statement that the request is in conformity with the laws and administrative practices of the requesting Party, that if the requested information was within the jurisdiction of the requesting Party then the competent authority of the requesting Party would be able to obtain the information under the laws of the requesting Party or in the normal course of administrative practice and that it is in conformity with this Agreement;

(i) a statement that the requesting Party has pursued all means available in its own territory to obtain the information, except where that would give rise to disproportionate difficulty."

Article 4.6 provides:–

"The competent authority of the requested Party shall acknowledge receipt of the request to the competent authority of the requesting Party and shall use its best endeavours to forward the requested information to the requesting Party as soon as possible."

Article 6 (***"Possibility of declining a request"***) provides:–

"(5) The requested Party may decline a request for information if the information is requested by the requesting Party to administer or enforce a provision of the tax law of the requesting Party, or any requirement connected therewith, which discriminates against a national or citizen of the requested Party as compared with a national or citizen of the requesting Party in the same circumstances."

Article 7 (***"Confidentiality")*** provides:–

"(1) All information provided and received by the competent authorities of the Parties shall be kept confidential.

(2) Such information shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the purposes

specified in Article 1, and used by such persons or 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.

(3) Such information may not be used for any purpose other than for the purposes stated in Article 1 without express written consent of the competent authority of the requested Party."

Article 10 ("entry into force"):–

"This Agreement shall enter into force on the thirtieth day after the latter of the dates

on which each of the partie has notified the other in writing that the procedures required by its law have been complied with. The Agreement shall have effect:

(a) for all criminal tax matters on that date; and

(b) for all other matters covered in Article 1 on that date, but only in respect of any tax

Hear beginning on or after the first day of January of the year next following that in

which this Agreement enters into force, or where there is to tax year, all charges to tax arising on or after that date".

The 2008 Regulations

5 The primary legislation, pursuant to which the 2008 Regulations were made is the Taxation (Implementation)(Jersey) Law 2004 ("the 2004 Law"), the preamble to which reads:–

"A LAW enabling the States to make Regulations implementing agreements with, and obligations owed to, the governments of other countries and territories regarding or relating to taxation, and for connected purposes."

6 The 2008 Regulations do not accordingly purport to give direct effect to the J/N (or any other) TIEA but as their clear purpose, so sourced in the 2004 law, is to provide, in Jersey domestic law, a procedure for, *inter alia*, obtaining information of the kind described, if a request from the competent Norwegian authority falling within the parameters of the J/N TIEA is received, with a view to that information being passed on to that authority.

7 The 2008 Regulations empower the Comptroller to require a taxpayer (under Regulation 2)

or a third party (under Regulation 3) to produce ***"tax information"*** provided that certain preconditions in relation to that information are satisfied.

8 The term ***"tax information"*** is defined in Regulation 1(1A) to mean:–

> ***"information that is foreseeably relevant to the administration and enforcement in the case of a person who is the subject of a request of the domestic laws of a third country, whose competent authority is making the request concerning any tax listed in the schedule opposite the entry for that third country, including information that is foreseeably relevant to –***
>
> > ***(a) the determination, assessment, enforcement, or collection of taxes 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 16A, (entitled ***"Application"***) states:–

> ***"(1) These 2008 Regulations apply to tax information foreseeably relevant to the administration and enforcement of the domestic laws of a third country specified in the Schedule, in respect of a tax specified in the Schedule from the date on which a tax information exchange agreement between Jersey and that third country came into force".***

9 The Schedule lists, among others, the J/N TIEA; identifying the date when the agreement came into force i.e. 7 th October 2009; and specifying that it applies to seven different taxes, including tax on personal income (***"income tax"***) which is the one relevant for present purposes.

10 Regulation 3 (provision by other persons of tax information about taxpayers) provides by way of a threshold condition):–

> ***"1. if the Comptroller has reasonable grounds for believing [our emphasis]:***
>
> > ***(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, or is likely to lead to serious prejudice to the proper assessment or collection of tax."***

11 Regulation 3.2 defines the nature of the information that can be required, if that threshold is passed, as follows:–

> ***"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 <u>in the reasonable opinion of the Comptroller</u> [our emphasis] 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 2008 Regulations."***

(As the Royal Court noted at paragraph 16 of the Judgment the definition of information in Regulation 1(1) and the description of such information in Regulation 3.2 do not sit entirely happily together, but nothing appears to turn on this.)

12 Regulation 3(3) provides that a ***"requirement"*** under paragraph (2) must be made by notice in writing (paragraph (3)).

13 Regulation 3(4) provides:–

> ***"Before giving a notice under this Regulation, the Comptroller shall allow the person of when the requirement is made, a reasonable opportunity to provide to the Comptroller the document or record concerned."***

14 Regulation 3(5) provides that the Comptroller must give the taxpayer in question (a) ***"a copy of the third party notice"*** and (b) ***"a written summary of the Comptroller's reasons for the giving of the notice"***.

15 Regulation 3(6) qualifies Regulation 3(5) by stating:–

> ***"Paragraph 3(5) does not require the disclosure of information***
>
> ***(a) if its disclosure would identify or might identify a person who has provided information that the Comptroller takes into account in deciding whether to give the notice.***
>
> ***(b) if the Comptroller is satisfied that there are reasonable grounds for suspecting that the taxpayer has committed a relevant criminal offence; or***
>
> ***(c) if the Comptroller is satisfied that disclosure of information of that description would prejudice the assessment or collection of tax."***

16 As can be seen Regulations 3.1 and 3.2 deploy different vocabulary to describe the basis upon which the Comptroller may act, ***"reasonable grounds for believing"*** in the former,

having a ***"reasonable opinion"*** in the latter. We share the Royal Court's view that the difference in wording does not convey a difference in meaning; in Regulation 3.2 the draftsman could have substituted the words ***"that the Controller has reasonable grounds for believing may contain"***, for the phrase actually used and achieved the same effect in law. As the Royal Court put it ***"the essence is the same"*** [Judgment para 15]. Each provision requires the Comptroller, to make a rational assessment on the material before him.

17 Reasonable grounds for a belief involves having a state of mind below certainty but above suspicion; and is an objective, and not just a subjective test. [*Registrar of Restrictive Trading Agreements v Smith (WH)* 1969 1 WLR 1460 at p. 1468] Because of that objective element, the appellate process exposes the Comptroller's decision to judicial scrutiny, and the Court's task is facilitated by the requirement for a written summary of his reasons [Regulations 3(4)]. It should, however, be emphasised that the belief or opinion required by the 2008 Regulations relates for the most, if not entire, part to possibilities, past, present or future as indicated by the use of the word ***"may"*** at relevant junctures.

18 In *A and Others v Secretary of State for Home Department (No. 2)* 2005 1 WLR 414 Neuberger LJ (as he then was) at paras 370 (cited recently by Silber J in *Secretary of State for the Home Department v AY* (2012 EWHC 2054 (Admin) at para 22) gave valuable insight into application of a test of the character set out in Regulation 3. He said, [omitting immaterial words]:–

> ***"In deciding whether there are as a matter of fact reasonable grounds for a belief (the decision-maker) is not necessarily concerned with primary facts and, to that extent, there is no need to establish a primary fact on the balance of probabilities" (he then instanced the ability to take account of a newspaper report subject to consideration of reliability) (ii) "in such a case it would not be necessary (for the decision-maker) to be satisfied on the balance of probabilities that the reported facts are true: it would merely need to be satisfied, on the balance of probabilities as to the existence of the newspaper report."*** (iii) "When considering whether there are reasonable grounds for the ***relevant belief or suspicion (the decision-maker) needs not … be concerned about satisfying itself that, on the balance of probabilities, the belief or suspicion is justified or that it shares the belief or suspicion.*** It is merely concerned with whether there are reasonable grounds for such belief or suspicion." (iv) "the question of whether there are reasonable grounds for suspecting (something) is matter of assessment" (he distinguished this from a matter of fact).

Mutatis mutandis, all these observations can be applied in our respectful view to the exercise on which the Comptroller embarks under Regulation 3.

The Duty of the Comptroller

19 There is a preliminary issue [itself germane to the extent of any appeal] as to how far beyond assessment of the material contained in the Request itself the Comptroller should go. Strict application of the decision of the Royal Court in *Acturus Properties Limited and 47 Others -v- Attorney General* [2001] JLR 43 (" *Acturus*") would suggest very little, if at all.

20 In *Acturus* the Attorney General had issued notices under the Investigation of Fraud (Jersey) Law 1991 in response to a letter of request from an agency of the Government of South Africa seeking assistance with a criminal investigation into a fraud there taking place.

21 Entities named in the letter of request, contended, on an application for judicial review of the Attorney General's decision, that the Law Officer could not simply accept what was asserted in the letter of request: on the contrary he was bound to make further enquiries, to check the facts alleged in the request and even to ask for affidavit evidence in support of allegations so as to satisfy himself that there were genuine grounds for believing that a fraud had been committed.

22 The Court (Birt, Deputy Bailiff, and Jurats) rejected this submission and said this [applying, significantly, the approach of the Privy Council in an earlier case in a cognate area]:–

> ***"We do not accept that the Attorney General is under any such duty.*** The whole point of the 1991 Law is that it is usually dealing with a criminal investigation rather than a prosecution. It is not necessarily known at that stage whether a crime has been committed and, if so, what crime and by whom. There is only a reasonable suspicion of a serious or complex fraud and evidence to justify or nullify that suspicion is sought. In *Bertoli -v- Malone* [1992–93 CILR N-1], ***the Judicial Committee of the Privy Council approved thejudgment of Georges, J.A. in the Court of Appeal of the Cayman Islands.*** That case concerned a request for assistance made by criminal investigative authorities of the United States to the Cayman Mutual Legal Assistance Authority. In considering the duty of the Cayman Authority in relation to such a request for assistance from a foreign jurisdiction, the Court of Appeal said this (1990–91 CILR at 71):–
>
> > ***"The Authority, with the assistance of the Attorney General if needed, can no doubt decide whether the request is in conformity with the provisions of the Treaty or whether it is for a political offence or a purely military offence.*** In deciding whether there are reasonable grounds for believing that an offence has been committed and that the information sought relates to the offence, the Authority must assume the correctness of the information laid before him in the request. Clearly he cannot receive evidence to raise doubt as to this. Again these are matters of analysis and inference on which the Authority can competently and accurately arrive at a decision on the documents placed before him."
>
> ***In our judgment, the position of the Attorney General is the same.*** He is

> entitled to assume the correctness of the information set out in the letter of request. It would not normally be appropriate for him to go back and query information given to him by a prosecuting authority of a friendly jurisdiction. That is not to say that the Attorney General, in order to ensure that orders made under the 1991 Law are not in terms which are wider than is required for the purposes of the investigation, cannot seek clarification or elaboration. For example, it may be that the alleged connection with a particular company in Jersey is not sufficiently spelt out in the letter of request. But that is a matter of judgment for him when holding the balance between the need to investigate serious or complex fraud, wherever committed, and the need to limit forced disclosure of confidential information to what is necessary for the purposes of the investigation. He is entitled, as a matter of law, to assume the correctness of what he is told and is under no duty to request sight of the evidence upon which the information in the letter of request is based. Reverting therefore to the presumption of regularity, no evidence has been produced by the representors which cannot be reconciled with a reasonable decision on the Attorney General's part that there was a suspected offence involving serious or complex fraud." paras 51–52 (Our emphasis)

23 The considerations applied in the case of requests for assistance under the 1991 Law are not identical to those applicable in cases such as the present under the 2008 Regulations but they are of the same genus. The statutory provisions in each case decree that the threshold for intervention includes the belief on the part of the relevant officer that a certain state of affairs exists and entrusts the decision whether to exercise the powers in question to him alone; a rational basis for that belief and decision is necessary; but the context in each case is one in which it is, in the nature of things, that the full facts are unlikely to be known at the time when the request for assistance is made. It is crucial, in our view, that the request made is in relation to investigation, not determination. *Acturus* suggests that the officer (here the Comptroller) is not required to do more than assess, albeit after seeking clarification or elaboration, the sufficiency of the request in the light of the statutory criteria.

24 The fact that *Acturus* was a judicial review, not an appeal, is not relevant to the matter under consideration: since the focus in the passage quoted is, on the exercise to be performed by the initial decision-maker, not on any subsequent judicial scrutiny of it.

25 In *Re Kaplan* [2009] JLR 88 (" *Kaplan*") the Royal Court was concerned with an application to discharge a saisie judiciaire that had been granted *ex parte* ("the order") over the representor's realisable property pursuant to article 16 of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law"). (By art. 15 of the 1999 Law a saisie judiciaire may be made where ***"(a) proceedings have been instituted against the defendant in a country or territory outside Jersey and — (i) …, and (ii) it appears to the Court that there are reasonable grounds for believing that such an order may be made in the proceedings.")***.

26 The order had been made on the application of the Attorney General at the request of the

United States on the basis of, *inter alia*, an affidavit of an Assistant US Attorney which included a statement of belief on his part that a forfeiture order was to be made in proceedings in Missouri.

27 Bailhache, Bailiff, rejected a submission of counsel for the Attorney General that a presumption of regularity was a principle of general application that could be read across to a *saisie judiciaire* obtained on behalf of foreign jurisdictions under the 1999 Law. He said:–

> ***"The mere fact that the US attorney has a reasonable belief that a forfeiture order will be made in the Missouri proceedings does not mean that this court can simply adopt that belief.*** It is necessary to delve a little deeper. The statute places an obligation on this court to satisfy itself that there are reasonable grounds for believing that an external confiscation order will be made." (at para 22, p. 100)

28 We do not construe *Kaplan* as significantly modifying the *Acturus* approach. Both cases emphasise that the decision-maker (in *Acturus* the Attorney-General, in *Kaplan* the Court) must consider whether there are reasonable grounds for the belief required. It is not, however, for a decision-maker to question the correctness of the material provided to it from outside the jurisdiction, as long as it is properly evaluated after, it may be, some probing for the purposes of clarification.

29 We have to consider whether the default position indicated in these two cases is to be modified by public law principles of the fairness or by the ECHR.

30 It is well established that fair procedures can (unusually) supplement any legislative scheme (primary or delegated) insofar as they do not frustrate the purpose of the scheme. *R v Birmingham CC ex p Ferrero Ltd* [1993] 1 All ER 530 at 541F–542G. *Bank Mellat No. 2 v HM Treasury* 2013 UKSC para 36. While the 2008 Regulations contain no express provision for representations to be made by the person of whom the requirement is made, as to why the request made does not justify a notice, Regulation 3(4), as noted, provides for a ***"reasonable opportunity"*** to that person to provide to the Comptroller the document or record concerned without the need for a notice. Reasonableness must, in our view, require not only making available sufficient time for such provision but also sufficient explanation as to why the information is required. There is nothing to prevent the person, given that opportunity, then to exploit it by making a case against such provision, which the Commissioner would be obliged to take into account before issuing a notice. Subject only to the circumstances set out in Regulation 3(6) which prevent the Comptroller from disclosing certain matters to the person from whom the information is sought [specifically post-notice, but which must sensibly apply pre-notice too], we were told by Advocate Kelleher for the Comptroller that there is no practical reason why the Comptroller should not inform the person of the substance of the Request.

31 Elementary fairness does seem to us, *prima facie*, to require the Comptroller to give the

person the chance to make representations so as to avoid, it may be, entering into the terrain of notices and the possibility of penal sanctions for non-compliance therewith Regulation 3. (As to which see Regulation 15(2).)

32 However, it does not seem to us possible to read into the Comptroller's decision making process a need to hold a mini-trial. The Comptroller has neither the power nor the facility to provide one. As long as he has reasonable grounds for his belief or opinion on the material, before him, he is empowered to act on that belief or opinion. Although the analogy is not exact, it seems to us that the situation confronting the Comptroller when faced with such representations is not un-akin to that which confronts a Court when it has to consider whether a putative Respondent's affidavit is sufficient to prevent what would otherwise be the grant of permission to apply for judicial review. In the familiar phase such affidavit would have to constitute a "knock-one blow" to have such effect. [Cf: *Sharma v Browne-Antoine* [2007] 1 WLR 780 at 14(6), p. 789] Fordham: Judicial Review 6 th ed (" *Fordham*") 21.1. 7(c), p. 230. So too the representations would have to undermine what would otherwise be the Comptroller's reasonable belief or opinion before he could be inhibited from further action.

The Appeal

33 Regulation 14 of the 2008 Regulations provides (so far as material):–

> ***"(1) The following persons have a right of appeal to the Royal Court under these Regulations …***
>
> > ***(a) A person against whom a requirement made of that person under Regulation 3(2).***
> >
> > ***(b) A taxpayer against a requirement made of another person under Regulation 3(2) in relation to that taxpayer…..***
>
> ***(4) On hearing the appeal, the Royal Court may confirm, vary or set aside the requirement to which the appeal relates."***

It was common ground between Counsel before the Royal Court that the appeal before it involved a ***"hearing de novo"***. The Royal Court declined to rule on the point, but proceeded on the assumption that the common ground was also the correct ground (Judgment para 4).

34 In our view Regulation 14 entitles the Royal Court to consider afresh whether the Notice was properly issued and not merely to review the decision of the Comptroller on well-known public law grounds, for the following reasons:–

> (i) The natural meaning of an appeal is a re-examination of the facts and conclusions of law of the person or body against whose decision the appeal is brought, and the

substitution of the appellate body's own findings of fact and conclusions of law for those of the decision maker, if it disagrees with the decision. cf *AG v Ryan* 1980 AC 718 at p. 729 per Lord Diplock.

(ii) Nothing in Regulation 14 identifies or, more importantly, restricts the grounds upon which such an appeal may be brought.

(iii) Absent provision for an appeal, the Comptroller's decision would, as an administrative decision made under statute have been amenable to judicial review. It would therefore have been otiose to provide for an appeal which was no more than judicial review by another name.

(iv) Given what was in issue in the making of such a notice i.e. an invasion of the individuals' commercial confidentiality, it is unsurprising that such an unfettered appeal was provided for.

35 Although Counsel for the Comptroller sought to suggest that a degree of deference should be paid by the Royal Court to his decision, in our view it has to stand or fall by its own merits. See analogically *Fernando v H&SS Minister* [2012] (2) JLR 21 at paragraph 4. It is in such an appeal for the Royal Court to reconsider the decision and in consequence to "confirm, vary or set aside the requirement to which the appeal relates" [Regulation 14 paragraph (4)]: [and for the Court of Appeal to exercise its ordinary jurisdiction vis à vis appeals pursuant to the Court of Appeal (Jersey) Law 1961 section 12(2) and (3) to reconsider the Royal Court's decision, bearing in mind only the conventional constraints on its exercise of that jurisdiction. *Datec Electronic Holdings Ltd v UPS Ltd* [2007] 1 WLR 1325 para [46]].

36 However the fact that the Royal Court exercises an appellate jurisdiction does not of itself identify what kind of appeal has been provided for and, accordingly, the extent of the material to which it can have regard. At the end of the spectrum are appeals *stricto sensu* in which the question for consideration is whether the decision subject to appeal was right on the material which the decision-making body had before it. In such an appeal fresh evidence cannot be called. At the other end are appeals *de novo* in which there is a fresh hearing with the parties being able to call fresh evidence. *Quilter v Mapleson* 1882 9 QBD 672 at p676.

37 We approach the issue of classification from this point of departure. The Comptroller will necessarily have before him a request from the Requesting state. He will need to consider whether it provides the reasonable grounds for a belief or opinion that the 2008 Regulation require. Whether or not he had reasonable grounds for such a belief could be construed to restrict an appeal to the Royal Court to an assessment of whether the material that he had before him provided, objectively, reasonable grounds for his belief. If for example he was unduly tolerant of an inadequately composed Request, on this footing, the Royal Court could set aside the notice.

38 An appeal on this limited basis supplemented by any further appeal to this Court, would involve a procedure without undue complexity.

39 There is nothing in the actual language of the 2008 Regulations inconsistent with such a construction: nor does the J/N TIEA insofar as relevant require its rejection since it does not oblige the Requested party to provide any safeguards: indeed the last sentence in Article 1 of the J/N TIEA suggests that the safeguards should not unduly hamper the exchange process.

40 *Lloyd v McMahon* 1987 AC 125 which was relied on by the Appellants as a basis for requiring the Royal Court to conduct a *de novo* hearing seems to us distinguishable. Not only was it founded on a different and distinctive statutory formula ***"the particular* [sic] *appeal mechanism"*** per Lord Keith at p. 697E. (See too per Lord Bridge at 703A-B ***"the starting point …is the Act of 1982"***) but it involved a significantly different issue: an adjudication by a District Auditor of Misconduct by Councillors who were, in consequence, liable to a significant surcharge whereas the effect of the Comptroller's decision was only to enable the Requesting State, Norway, to carry out an investigation.

41 Nor again is *R (on the application of Hope and Glory Public House) v City of Westminster Magistrate's Court* 2011 EWCA Civ 31, properly drawn to our attention by the Respondent as potentially suggesting the same conclusion, dispositive. Again it was founded on a different and distinctive statutory formula, under the Licensing Act 2003 Section 181 and Schedule 5 and involved a significantly different issue- the basis on which a Magistrates court hearing an appeal from a decision by a local authority refusing a licence should approach the decision. Licensing decisions are *sui-generis:* see analysis (para 42) and a refusal of a licence impinges directly on valuable property rights (para 37).

42 Our presumptive conclusion is fortified by an appreciation of the legal context in which the 2008 Regulations were composed. There are in this jurisdiction rules of court governing the proceedings of the Royal Court, Royal Court Rules 2004, which must be taken to have been known to the maker of the Regulations. Within the general corpus there is a discrete category of rules for administrative appeals, which, while the phrase is not defined, would appear apt to embrace an appeal against the decision of an administrative officer such as the Comptroller.

43 These rules provide materially:–

> ***"15(1) Application and interpretation***
>
> > ***(1) Except where provision is otherwise made, this Part applies to appeals to the Court from an administrative decision of a person, or body, in exercise of a right of appeal conferred by or under any enactment.***

(2) In this Part, unless the context otherwise requires –

"appeal" means an appeal to which this Part applies and "appellant" shall be construed accordingly;

15(2) Notice of Appeal and fixing day for trial

(1) An appeal to the Court shall be brought by serving on the respondent a notice of appeal –

(a) in the case of an appeal in the form set out in Schedule 4;

…

and every such notice must specify the grounds of the appeal with sufficient particularity to make clear the nature of the appellant's case.

(2) The appellant shall not, except with the leave of the Court, be entitled to rely on any ground of appeal unless it is specified in the notice of appeal.

(3) The appellant must –

(a) within 2 days after service of the notice of appeal furnish a copy of the notice to the Greffier together with a copy of the record of the Viscount certifying that the notice of appeal has been duly served;

(b) within 5 days after the service of the notice of appeal apply to the Bailiff's Secretary for a day to be fixed for the hearing of the appeal.

(4) If the appellant does not apply for a day to be fixed for the hearing of the appeal in accordance with paragraph (3)(b), the appeal shall be deemed to have been withdrawn.

(5) Except with the leave to the Bailiff, the day fixed for the hearing of the appeal shall be not more than 4 months from the date of service of the notice of appeal.

15/3 Documents for use of the Court

(1) Within 28 days after receiving notice of appeal, the respondent must lodge with the Greffier and serve on the appellant an affidavit setting out –

(a) a statement of the decision from which the appeal is brought; and

(b) the facts material to the decision and the reasons for it and exhibiting all documentary evidence relating thereto.

(2) Within 21 days after service of the affidavit on the appellant in accordance with paragraph (1), the appellant must lodge with the Greffier and service on the respondent an affidavit in response.

(3) The respondent may, within 14 days after service of the appellant's affidavit in accordance with paragraph (2), lodge with the Greffier and serve on the appellant an affidavit in reply thereto.

(4) Not less than 14 days before the date of the hearing of the appeal, the appellant and the respondent must each furnish to the Court (and serve upon one another) a written statement of the submissions that the appellant or the respondent, as the case may be, will make at the hearing concerning the issues in dispute between them."

We are informed from the Bar that, conventionally, the affidavit of the Administrative Officer is for the purpose of describing and justifying the decision under challenge on the evidence available at the time, and not to provide fresh evidence seeking to justify it with retrospective effect. Cf: again in judicial review *R v Westminster City Council ex p Ermakov* 1996 2 All ER 302, 312e *Fordham* 62.4.8, p. 674. In judicial review there are generally only limited circumstances in which a claimant can seek to impugn the decision-maker's decision with fresh evidence e.g. of bias or unfair procedure. Civil Procedure 2013 Vol 1 54.16.1 at p. 1880. *Fordham* 17.2.5, p. 181–182.

44 Practice Direction RC 05/25 (Administrative Appeals) ("the Practice Direction), complementing but neither purporting to override nor actually capable of overriding Rule 15 provides, *inter alia*, as follows:–

"1. In keeping with the time limits laid down under Part 15, the Royal Court will expect Administrative Appeals to be finally disposed of within four months of the issue of the Notice of Appeal.

2. Appeals will be dealt with primarily by means of affidavit evidence. If a party to an appeal wishes to cross-examine a deponent on the contents of his affidavit he must obtain the leave of the Bailiff or Deputy Bailiff who is to preside at the appeal. Such an application must be made (with notice being given to the other parties) at a pre-trial directions hearing which must take place at least seven days before the time fixed for the hearing of the appeal. Such leave will only be granted in exceptional circumstances.

3. The Royal Court will generally expect hearings of Administrative

Appeals to last no more than half a day. Only in exceptional circumstances and with the prior leave of the Bailiff or Deputy Bailiff with more than half a day be allocated for the hearing for such an appeal. Unless pre-trial directions are given by the Bailiff or Deputy Bailiff to the contrary a limit will be placed on the time allowed for oral submissions. Thus, the Advocate for the appellant will normally have one and a quarter hours in which to present the appeal. The Advocate for the respondent will then have one and a quarter hours in which to reply. Finally, the Advocate for the appellant will then have half an hour in which to readdress the Court."

45 The Practice Direction allows therefore for the possibility of cross-examination: but once again, we envisage, only on the exceptional grounds available in judicial review e.g. where the decision-maker's explanation is obviously at odds with a contemporary document. (*Fordham* 17.4.9, 17.4.10, p. 192.)

46 In summary while the grounds for a statutory administrative appeal may be wider than the grounds for a judicial review of an administrative decision, the adjectival machinery in this jurisdiction appears not dissimilar. Fairness, notoriously context-specific in its application does not always require the full panoply of natural justice such as oral testimony or cross-examination; an attempt to read across without modification classic dicta on the reach of natural justice from the paradigm case of a trial is inappropriate; see discussion in Wade and Forsyth Administrative Law 10 th ed (" *Wade*") pp. 432–434, *Fordham* 60.2, p. 625.

47 The Appellant's most substantial argument for applying Rules 14–15 to the 2008 Regulation so as to allow for a full re-hearing with fresh evidence was based on the ECHR incorporated into the Bailiwick since December 2006 via the Human Rights (Jersey Law) 2000.

48 Article 6 of the ECHR provides, so far as material:–

"In the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

49 Article 6 does not, however, inevitably require an unrestricted appeal from the decisions of an administrative body based on findings of fact and the exercise of judgment. Indeed judicial review can in appropriate circumstances suffice. [*Lester, Pannick and Herberg: Human Rights Law and Practice*: 4.6.24. [p299]] *Fordham* 59.5.7, p. 600.

50 Article 8.1. provides for the right to respect for, *inter alia*, private and family life subject to the well-known limitations in Article 8.2 (materially) "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of … the economic well-being of

the country, for the prevention of … crime …"

51 In *B. Larsen Holdings v Norway* [2013] ECHR 24117/08 a challenge to the acquisition by Norwegian tax authorities by seizure of a "back up" tape of information and documents pertaining to the tax payer was based on Article 8. The challenge failed. Materially for present purposes the ECtHR said the relevant provisions of domestic law were subject *to* ***"important limitations"*** and contained ***"adequate and effective safeguards"*** [paragraph 172].

52 In our view the 2008 Regulations do contain ***"important limitations"*** by defining, and so restricting, circumstances in which the Comptroller can respond to a request from a competent authority (requiring notably not merely suspicion but reasonable belief) accompanied by ***"adequate and effective safeguards"*** i.e. (quite apart from the obliged provision of fairness before the Comptroller) a two stage appeal to judicial bodies. Moreover if Article 6 does not directly require that an appeal should be by way of unrestricted oral hearing, Article 8 cannot be construed indirectly to do so.

53 We note too the distinction drawn by the ECtHR in *B.L. Holdings Ltd* between a ***"search and seizure"*** case and a demand by a public authority for information [paragraph 173], and its appreciation of ***"the public interest ensuring efficiency in the inspection of information provided by the Applicant company for tax assessment purposes"*** [paragraph 175].

54 We envisage, accordingly, that the following procedures will be consistent with the 2008 Regulations and legal principle. In the normal course of events, the Comptroller will have given the opportunity for the production of the documents and/or representations to have been made why the documents should not be produced, prior to the issue of the Notice. If the documents are not provided and the Comptroller is not persuaded by the representations the Comptroller will then issue his notice. At that point the putative Appellant/s will have to decide whether or not to appeal. If an appeal is instituted the next step will be for the Comptroller to swear an affidavit. The Royal Court should then conduct a case management hearing. We recommend that the court should, absent truly exceptional circumstances, discourage any attempt for the appeal to be turned into a trial, with full deployment of lay or expert witnesses, whether testifying orally or on affidavit. The court's function, when hearing the appeal, will be to concentrate on whether the material in front of the Comptroller at the time he issued the Notice provided him with reasonable grounds for his belief, and not to be drawn, as happened in the instant case, albeit given the novelty of the situation understandably, into permitting adduction of an extensive volume of such evidence. (See The Acts of Court of 8 th March 2012, 22 nd October 2012, 15 th November 2012, 16 May 2013). Any affidavit evidence from the Appellant should be concise and only entertained if it purports to contain is some truly dispositive point. Cross-examination should only be permitted if the appeal (recollecting the limited nature of the issue involved) truly turns on some point that can only be resolved by such method. It must be borne in mind by the court that the Comptroller has issued his Notice as part of an

investigation and that he himself is not obliged to conduct any sort of mini-trial. Neither, in our view, should a court be tempted down that slippery path.

Background to the Request and the May 2012 Notice

55 We now summarise the background to the decision gleaned in large part from the undisputed portions of the judgment of the Royal Court.

56 In Norway responsibility for tax matters is divided for the most part between, on the one hand, a department which is a subordinate agency of the Ministry of Finance, [described in translation as “the Tax Administration” or “the Tax Authority”] i.e. the NTA, one of whose five regional tax offices is known as Skatt Vest (Tax West) consisting of a central Tax Directorate and five regional offices and, on the other hand, the Police and Public Prosecutor.

57 The NTA is responsible for the administrative side of matters such as assessment and collection of tax, and the Police and Public Prosecutor are responsible for criminal investigations and prosecutions.

58 The NTA does, however, have power to conduct investigations of its own and, within certain limits, to impose penalties on defaulting tax-payers; it also has an important role in relation to prosecutions for criminal offences. This overlap is of significance to the issue raised by the Appellants as to whether the Request fell within or was for the purposes of, the J/N TIEA.

59 On 7 th and 13 th July, 2006 the Attorney General, William Bailhache QC, following an approach by the Norwegian Police Authority who were already at that stage investigating Mr Larsen's tax affairs, had served two notices on Volaw Jersey Service (“the 2006 Production Notices”) — requiring the production of documents under earlier legislation, the Investigation of Fraud (Jersey) Law 1991 (“the 1991 Law”).

60 The powers of the Attorney General to require the production of documents under the 1991 Law (which remains in force) are exercisable in a case where it appears to him that there is a ***“suspected offence involving serious or complex fraud”***, wherever committed, and there is good reason to exercise such powers for the purpose of investigating the affairs of any person (the 1991 Law Article 2(1)).

61 Volaw duly complied with these notices and the material in question was made available to the Norwegian police.

62 On 4 th August, 2006 shortly after the issue of the 2006 Production Notices Mr Larsen's

lawyers, Mourant du Feu & Jeune (later Mourant Ozannes, ('Mourant') wrote to the Attorney General expressing concern that although the request to which the 2006 Production Notices related purported to concern a criminal investigation, the material was in reality sought for the purposes of a civil tax investigation and so fell outside the scope of the 1991 Law.

63 By letter dated 22 nd August, 2006, the legal advisor to Attorney General, Howard Sharp provided the following assurance:–

> *"The Norwegian authorities have given the Attorney General an undertaking that the material transmitted will only be utilised for the purposes of criminal investigations and any subsequent criminal proceedings."*

64 Despite the undertaking referred to in Mr. Sharp's letter of 22 nd August, 2006, two attempts were made to secure the Attorney General's consent to the NTA being granted access to information concerning Mr Larsen and companies believed to be associated with him.

65 First in 2007 the Police requested their release from the original restriction on the use to which the material made available in July 2006. The Attorney General declined the request.

66 Secondly on 4 July, 2008 the NTA made a similar request to the Attorney General. The Attorney General again declined the request, explaining:–

> *"I recognise that the Norwegian Tax Authority may from time to time pass information to the Norwegian Police for the purposes of a criminal investigation.* However the focus of the work of the Norwegian Tax Authority appears to be administrative and not criminal. In those circumstances, I do not think I would be acting lawfully under our domestic law to give you assistance in this request and accordingly, with much regret, I respectfully decline to assist."

The February 2010 Request and the April 2010, November 2011 and January 2012 Notices

67 On 26 th February, 2010, following the coming into force of the J/N TIEA on 7 th October, 2009, the NTA being the competent authority made a further request under Article 4(3) of that agreement for assistance addressed to the Comptroller.

68 The Letter of Request, was accompanied by a memorandum headed *"Norwegian Tax Administration"* signed by a senior tax adviser on behalf of Skatt Vest and headed *"Request for assistance in tax investigation of Mr Berge Gerdt Larsen and his closely related companies"*. It was similar in form to the July 2008 request addressed to the Attorney General, and consisted of seven pages of text accompanied by one hundred and twenty-one pages of attachments.

69 The opening paragraphs of the memorandum summarised the circumstances that had led to the request for assistance being made, referring, *inter alia*, to the fact that the NTA had for several years been monitoring the income of Mr Larsen and companies wholly or partially owned by him registered in Norway: that a central aspect of this process had been to investigate transactions between the Norwegian companies and transactions between the Norwegian companies and a number of companies registered abroad; that NTA's monitoring so far had given grounds for suspecting incorrect pricing in connection with sales of shares and option agreements, as well as ascribing income to the wrong taxpayer and the antedating of financial contracts, and that those suspicions had also prompted the NTA to investigate whether Mr Larsen had submitted incorrect information concerning his direct or indirect ownership of foreign companies.

70 The same paragraphs referred to the fact that:–

> (i) in 2005 the NTA had filed a formal complaint with the Police alleging tax evasion on the part of Mr Larsen; and
>
> (ii) Pursuant to a Bill of Indictment dated 16 th June 2011 the Police had charged Mr Larsen with tax evasion and fraudulent breach of trust, as well as non-reporting of taxable property in foreign companies.

71 The NTA explained that it was aware that, on the authority of the Attorney General, documents had been obtained from Volaw and from the Jersey Financial Services Commission and made available to the Norwegian Police but that the Attorney General had declined to allow the Police to share those documents with the NTA and it was for these reasons that the present application for assistance was made.

72 The memorandum (importantly) asserted that the request *"concerns criminal tax matters."* The person under investigation was named as Mr Larsen and the period for which information was requested was that covered by the tax years from 1 st January, 1996, to 31 st December, 2008.

73 The principal request was two-fold.

The first, "A)", was in effect a request for access to the same body of information as that previously supplied to the Norwegian Police in 2006 concerning four particular companies for whom Volaw acted. The second, "B)", was that *"investigations be carried out"* in respect of another ten companies. In the event, request B has not been pursued.

74 In relation to certain companies (as to which there was an issue which we discuss later) the Comptroller was asked to "Obtain from Registered Agents all information, documents, correspondence, financial statements, accounts, entity records files held by them, and

details of where any other information concerned or connected to the companies can be obtained" and, in respect of Jersey registered companies, to "Obtain from the Jersey Financial Services Commission all information in respect of beneficial owners."

75 In addition to these specific requests the NTA wrote "we are also seeking to clarify who the real owners are of net company assets in the foreign companies. So far we have noted the following companies: …" and then listed a total of thirty-six companies, thirteen of which were those identified in requests A) and B). No specific request for information was made in relation to any company other than those previously named.

76 The purpose for which the information requested was said to be required was *"for stipulation of tax on general income".*

77 The Request continued "We also wish to use the information to stipulate net wealth tax and we request written permission to also use the information for this purpose". The reason for seeking such permission lay in Articles 1, 2 and 7 of the J/N TIEA, set out above, which precluded the use of information obtained in consequence of a request under that agreement for any purpose related to a tax other than income tax (or goods and services tax) without the express written consent of the requested party — that is, in the present case, Jersey. In the event, that consent was not given.

78 On 22 nd April, 2010, pursuant to the Request from the NTA, the Comptroller issued a formal notice to Volaw ("the 22 nd April Notice") requiring it, pursuant to Regulation 3 to furnish *"all information, documents, correspondence, financial statements, files and details of any other information concerned with or connected to the named subjects."* The subjects in question were named as Mr Larsen himself together with three of the companies listed in the Request and a fourth, the name of which was erroneously described but plainly should have been that of the fourth company named in the Request.

79 On 30 th June 2010 the validity of the 22 nd April 2010 notice was challenged by Mourant on behalf of Mr Larsen on a number of grounds including, in particular, that it was incorrect for the NTA to assert, as it did, that the request concerned *"criminal tax matters"*, given that the NTA was only responsible for administrative tax matters, not criminal investigations or prosecutions. Subsequent exchanges between Mourant and the Comptroller, led in due course to a protracted correspondence between on the one hand the Comptroller and on the other the NTA, Ministry of Finance and Public Prosecutor and eventually, in September 2011, to withdrawal of the 22 nd April, 2010, Notice.

80 On 7 th November, 2011, the Comptroller issued a new notice addressed once again to Volaw ("the November 2011 Notice").

81 The 7 th November 2011 Notice required the production by Volaw, for the period 1 st

January, 1996, to 31st December, 2008, of — broadly speaking — documents relating to the four companies listed in the Request (the name of the of the fourth company now being correctly given).

82 On 14 th November 2011 the validity of the 7 th November 2011 Notice was challenged, by Voisin on behalf of Volaw, on a number of grounds including in particular, that the demand was said to be at odds with the views previously expressed by the Attorney General, as to the inability of the NTA to use the material transmitted for purposes of civil tax collection.

83 On 14 th November 2011 Voisins requested a moratorium while the Attorney General was consulted, but the Comptroller on request declined on the basis that, following the entry into force of the J/N TIEA it was for him alone to decide whether to issue a notice in response to a request received under that agreement.

84 On 30 th November 2011 Voisin served a notice of appeal, on grounds that the notice was unlawful in that:–

(i) it sought information for a civil tax investigation rather than a criminal tax matter;

(ii) its demands were too wide and amounted to a fishing expedition;

(iii) it was not formulated with sufficient detail.

85 On 13 th January, 2012, a meeting took place attended by Voisins (for Volaw), Mourant (for Mr Larsen), (Jersey) Carey Olsen (for the Comptroller), the Comptroller himself and Mr Colin Powell of the Chief Minister's Department. Mourant and Voisins expressed concerns that:–

(i) the 7 th November 2011 notice was unclear,

(ii) the NTA appeared to be attempting to assess the tax liabilities of the companies rather than Mr Larsen's liability to income tax,

(iii) alternatively that, in reality, the NTA wanted the information for the inappropriate purpose of assessing Mr Larsen's liability to wealth tax.

86 On 20 th January, 2012, the Comptroller issued what he described as an *“amended notice”* in substantially the same form as the previous one but with the addition of a number of significant words designed to clarify the information that was required to be produced (“the January 2012 Notice”).

87 The Comptroller suggested that it would be unnecessary for Volaw to serve a fresh notice

of appeal but Voisins and Mourant taking a different view, each served new notices of appeal on behalf of their clients.

88 On 8 th March 2012 the Bailiff, *inter alia*, set a timetable with a view to the consolidated appeals being heard in late July that year — a timetable overtaken by the events now described.

The May 2012 Notice

89 On 28 th May, 2012, prompted by:–

the Deputy Comptroller, (Mr Campbell, the former Comptroller, having died earlier that month), issued a further notice under Regulation 3.

(i) concerns expressed by the NTA that the January 2012 "amended" notice had been too narrowly formulated,

(ii) a complaint by Volaw that the terms of the notice were still unclear,

(iii) his sight for the first time of the 2006 Production Notices (when they were exhibited to an affidavit sworn on 11 th May 2012 by Mr Larsen),

90 This notice ("the May 2012 Notice") described as *"supplemental to"* the January 2012 Notice was avowedly designed, in particular, to make clear that the documents that Volaw was required to produce included all those that had been disclosed in response to the 2006 Production Notices issued under the 1991 Law.

91 The May 2012 Notice was addressed to Volaw and related to information concerning Mr Larsen, who is named as the taxpayer under investigation, and four particular companies with which he is said to have been associated at the material time. Namely:–

With the exception of North East, which is a BVI company, all are Jersey companies.

(i) Larsen Oil & Gas Drilling Limited ("LOGD"),

(ii) Independent Oilfields Rentals IOR Ltd ("IOR"),

(iii) Mujova Investments Ltd ("Mujova Investments"),

(iv) North East Oil Ltd ("North East") formerly known as Norden Oil Ltd.

92 The May 2012 Notice required the production of documents and records held by Volaw falling within the period 1st January, 1997, and 7th July, 2006, as regards one category and

between 1st January, 1996, and 31st December, 2008, as regards the two other categories. They were listed as follows:–

"3.

(1) All documents and records that were previously provided by Volaw to the Norwegian police and/or public prosecutor pursuant to a Notice issued by the then Attorney General, William Bailhache QC, under Article 2 of the Investigation of Fraud (Jersey) Law 1991 on 7 July 2006, namely:

(i) documents relating to dealings with the named taxpayer; and

(ii) without prejudice to the generality of the forgoing:–

(a) documents (including, but not limited to, statutory records, minute books, details of references taken, file notes and correspondence) concerning the incorporation of Norden Oil Ltd (now known as North East Oil Limited) and Independent Oilfield Rentals Ltd;

(b) documents (including, but not limited to, statutory records, minute

(c) books, details of references taken, file notes and correspondence) concerning the administration and management of Norden Oil Ltd (now known as North East Oil Limited) and Independent Oilfield Rentals Ltd;

(d) documents relating to bank accounts held by Norden Oil Ltd (now known as North East Oil Limited) and Independent Oilfield Rentals Ltd (including, but not limited to, statements of account and any pay instructions); and

(e) documents relating to any trust in respect of which Norden Oil Ltd (now known as North East Oil Limited) and Independent Oilfield Rentals Ltd are underlying companies (including, but not limited to, trust deed, letter of wishes and details of beneficiaries).

The documents listed in paragraphs (ii)(a) and (d) above shall cover the period from incorporation of the companies or settlement of the trust(s) to 7 July 2006 and documents listed in paragraphs (i), (ii)(b) and (c) above shall cover the period from 1 January 1997 to 7 July

2006. (our emphasis)

(2) All documents and records that were previously provided by Volaw to the Norwegian police and/or public prosecutor pursuant to a Notice issued by the then Acting Attorney General, Stéphanie Nicolle QC, under Article 2 of the Investigation of Fraud (Jersey) Law 1991 on 13 July 2006, namely:

(i) a facsimile letter dated 12 June, 1998, from Judith Scott at Volaw Trust to the named taxpayer enclosing a 'Company incorporation enquiry form';

(ii) the completed 'Company incorporation enquiry form' sent to the named taxpayer with the facsimile letter mentioned at (i) above;

(iii) a facsimile letter dated the 15th June, 1998, from Judith Scott at Volaw Trust to the named taxpayer; and

(iv) documents relating to the beneficial ownership of Norden Oil Limited (now North East Oil Limited).

(4) Further, save in so far as produced under paragraph 3 above, I require Volaw to produce within 35 working days, the following:

(i) all documents and records that Volaw holds (including, but not limited to, financial statements, accounts, files and correspondence) which relate to dealings with the named taxpayer; and

(ii) all documents and records that Volaw holds (including, but not limited to, financial statements, bank accounts, statutory records, minute books, details of references taken, file notes, correspondence and trust documents) concerning the incorporation, administration, activities and operations, management, principals and directors, shareholders and shareholdings, and beneficial ownership of the following companies (including their subsidiaries):

(a) Larsen Oil & Gas Drilling Limited;

(b) Independent Oilfield Rentals IOR Limited;

(c) Mujova Investments Limited; and

(d) North East Oil Limited — formerly Norden Oil Limited

I request that Volaw provide me with the documents and records listed in this

paragraph for the period from 1 January 1996 to 31 December 2008."

It will be observed that the time-span of the documents required under paragraphs 4 (i) and (ii) is more extensive than that under paragraph 3.

93 Accompanying the May notice was a *"Summary of Reasons for Giving Notice"* of even date signed by the Deputy Comptroller, together with a copy of the corresponding summary delivered by the late Comptroller at the time of his withdrawal of his April 2010 Notice and issue of a new notice in November 2011.

94 On 23 October 2012 and 26 October 2012 respectively, fresh notices of appeal against this new notice were filed by both Mr Larsen and Mr Volaw.

95 At a pre-trial review on 22 nd October, 2012, the Bailiff ordered that the earlier appeals against the January 2012 Notice be stayed pending the outcome of the appeal against the May 2012 Notice. It was on that basis that the matter came before the Royal Court.

Evidence

96 Prior to the service of the May 2012 Notice, the Deputy Comptroller, had filed an affidavit on 30 th March, 2012, setting out his understanding of the late Comptroller's reasons for having issued the January 2012 notice and addressing the various challenges to that notice set out in Mr Larsen's and Volaw's notices of appeal.

97 On 11 th May 2012 Mr Larsen, as we had noted, and Mr Mark Healey (a director of Volaw) swore affidavits of fact.

98 On 21 st May 2012 Dr Hugo Matre, a Norwegian lawyer instructed jointly by Mr Larsen and Volaw swore an affidavit dealing with Norwegian tax law and criminal procedure.

99 Over the course of the six months following service of the May 2012 Notice further affidavit evidence was filed by the Deputy Comptroller, (31 July 2012) by Mr Larsen (30 May 2012, 8 October 2012 and 26 February 2013) and by Mr Healey (20 October 2012) and also by Mr Sven Anders Drangsholt, a Norwegian lawyer instructed on behalf of the Comptroller, (June 2012 and October 2012) and again by Dr Matre (9 October 2012, November 2012, 26 February 2013).

100 Pursuant to directions initially given by the Bailiff on 8 March 2012 the affidavit of Mr Healey and Mr Larsen stood as " *evidence*" and that of the experts as " *evidence in chief*". Consistently with what was apparently envisaged in those directions, cross-examination before the Royal Court was confined to the latter.

101 We have already questioned whether affidavits which contained material outwith that before the Comptroller should have been admitted at all: and whether it was any part of the proper function of a Comptroller or the Royal Court to make findings on controversial matters of foreign fiscal law (see para 54 above) but we emphasise at this juncture that the conclusion which we reached would not alter had we (somewhat artificially) restricted ourselves to consideration of the material before the Deputy Comptroller rather than to the more extensive material before the Royal Court).

Grounds of challenge to the May 2012 Notice

102 Although Volaw and Mr Larsen were separately represented, before the Royal Court [Volaw by Advocate Hoy and Mr Larsen by Advocate Harvey-Hills], and served separate notices of appeal in different terms, the grounds on which they challenged the May 2012 Notice were essentially the same. They also filed a single set of opening written submissions and relied on the evidence of Dr Matre on Norwegian Fiscal Law. A joint notice of appeal was filed before us, and Advocate Harvey-Hills had carriage of the advocacy, although Advocate Hoy was also present in a supporting role. The Deputy Comptroller, who from now on we shall for convenience call the Comptroller, has throughout been represented by Advocate Kelleher.

103 The principal complaints in the grounds of appeal before us were these:–

(i) whether the fact that the documents sought pre-date the entry into force of the J/N TIEA [as in fact they do], means that they fall outside the terms of the 2008 Regulations (“the retrospectivity issue”);

(ii) whether the Comptroller should have declined the Request on the basis that the Norwegian Notices discriminated against Jersey companies (“the discrimination issue”);

(iii) whether the threshold criteria specified by the 2008 Regulations for the lawful exercise of the Comptroller's powers to require the production of information by a person other than the named taxpayer are satisfied (“the reasonable grounds issue”);

(iv) whether the Appellants could foresee when they created the documents and records sought by the Notice that they would be vulnerable to requisition under a law which post-dated their creation, and, if not, whether this breached their rights under Article 8 of the European Convention on Human Rights (“ECHR”) (“the foreseeability issue”);

(v) whether the Notice is insufficiently detailed and constitutes no more than a fishing expedition (“the insufficient detail issue”);

(vi) whether the documents of which production is required go beyond those actually

requested by the Competent Authority (“the over breadth issue”);

(vii) whether, in any event, the documents are too widely delineated (“the proportionality issue”);

(viii) whether the true purpose of the Request was and is to enable the NTA to make a civil assessment of Mr Larsen's tax liability (“the improper purpose issue”).

(ix) whether where disclosure is sought in relation to a “ *criminal tax matter*” there is any power in the competent authority to use information for any purpose, other than for the purposes of a criminal investigation or prosecution (“the use issue”).

The Retrospectivity Issue

104 The Appellants contend that production of pre-7 th October 2009 information cannot be required under the 2008 Regulations. The Comptroller contends that, if the information relates to a criminal tax matter (but not otherwise) it can be so required.

105 In Article 10 of the J/N TIEA, which we have quoted above, a distinction is drawn between the date on which the Agreement *“enters into force”* and the periods of time in respect of which its provisions are to *“have effect”* and as regards exchange of the information thereunder between the criminal and civil spheres, giving, for perceptible policy reasons, a wider reach to the former.

106 It is, in our view, clear both from Article 10 itself and from the definition of “ *criminal tax matters”* in Article 3 [which refers to time zones both “ *before or after the entry into force of this Agreement*”] that information in relation to criminal tax matters predating the J/N TIEA can properly be sought thereunder. It was and is only in respect of matters other than ***“criminal tax matters”*** that there was, and is, any temporal limitation as to the tax year in respect of which information can be required to be produced.

107 It was nonetheless (albeit faintly) argued by the Appellants that the OECD model for inter-state arrangements in this area, and the commentary on the draft model articles, indicated a bias against retrospectivity. Even were this so, on which we need not express any view, such documents have no compulsive effect on the interpretation of the clearly drawn J/N TIEA.

108 The Appellants therefore are constrained to argue that the scope of Article 10 of the J/N TIEA is not reflected in the terms of 2008 Regulation; notwithstanding that the 2008 Regulations are made under the 2004 Law for the specific purpose of implementing agreements such as the J/N TIEA. Regulation 16A on which the submission focusses is said to be ambiguous and hence should be construed restrictively because of the presumption against retrospectivity.

109 We can detect no such ambiguity. It seems to us that Regulation 16A fairly read was simply designed to ensure that the 2008 Regulations were consistent with the J/N TIEA, including Article 10. It builds a bridge between the J/N TIEA and the 2008 Regulations which would otherwise be lacking. Even were that not so, we do not consider that the presumption relied upon is engaged, whichever concept of retrospectivity (on which the jurisprudence displays not always consistent views) is deployed.

110 In *Wilson v First County Trust Ltd* 2003 UKHL 40 (" *Wilson*") Lord Hope said at [98]:–

> ***"Then there is the general presumption that legislation is not intended to operate retrospectively.*** That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. But the mere fact that a statute depends for its application in the future events that have happened in the past does not offend against the presumption. For a recent example of this point reference may be made to *R v Field* [2003] 1 WLR 882 . ***In that case it was held that the making of a disqualification order under section 28 of the Criminal Justice and Court Services Act 2000 against a defendant from working with children in the future did not offend against the presumption where the offending behaviour had occurred before that Act came into force.*** It illustrates the point that there is an important distinction to be made between legislation which affects transactions that have created rights and obligations which the parties seek to enforce against each other and legislation which affects transactions that have resulted in the bringing of proceedings in the public interest by a public authority. The concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 should be altered retrospectively."

(i) Consistently with that approach in *HMRC -v- Ben Nevis (Holdings) Limited* [2012] EWHC 1807 (Ch), His Honour Judge Pelling QC, rejected an argument that an amendment to a statute making provision for a foreign revenue claim to be enforced in the UK, had to be construed as applying in the UK only in respect of tax debts arising **after** the date when the statutory instruments creating the amendment came into force. Adopting t *Bennion* on Statutory Interpretation (5th Ed. p. 137) the Judge said:–

> ***"It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law.*** However, the mere fact that a change is operative with regard to past events does not mean that it is objectively retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened and bases new legal consequences upon it." [paragraph 44]

He cited as the true principle as that enunciated by Willes J in *Phillips -v- Eyre* (1870) LR 6 QB 1 at 23: that legislation "ought not to change the character of past transactions carried on upon the faith of the then existing law….." (ditto) and concluded:–

> ***"The presumption against retrospectivity would preclude the rearrangement of tax liabilities for prior years of assessment…… but I see no reason for concluding that it precludes the collection in the future of debts that happen to have fallen due prior to the coming into effect of FA 06.*** Such a conclusion does not in any relevant sense involve changing "…the character of past transactions carried on upon the faith of the then existing law…" or the retrospective alteration of the legal effect of an act or omission by a later change in the law" (paragraph 45).

111 In the present case there is no question of the legal character of any past transaction, act or omission by the Appellants being changed as a result of the 2008 Regulations: the basis of liability for Norwegian tax or prosecution for a Norwegian criminal offence pertaining to tax remains exactly the same as before. The J/N TIEA and the 2008 Regulations do no more than make provision for the exchange of information that may have a bearing on such matters.

112 However in *Wilson* Lord Scott put the scope of the presumption against retrospectivity somewhat differently at paragraph 152:–

> ***"The Attorney General, Lord Goldsmith, appearing on behalf of the Secretary of State, based his submissions on this issue on a simple, and plainly correct, proposition, namely, that prior to 2 October 2000 FCT had had no Convention rights.*** The 1998 Act, under which Convention rights became rights enforceable under domestic law, was not yet in force. The loan transaction between FCT and Mrs Wilson had taken place in 1999. So, at the time the loan was made and at the time Mrs Wilson's claim for a declaration that the loan was unenforceable against her and for the return of her car (or repayment of the sum she had had to pay FCT to get it back) was tried in the county court, the 1998 Act and Convention rights were irrelevant. They could not affect the rights and liabilities of FCT and Mrs Wilson respectively under the loan agreement. There can be no dispute but that this was the position prior to 2 October 2000."

113 Even applying Lord Scott's approach the presumption against retrospectivity in legislation maybe displaced unless it would be unfair to do so. [See *Wilson* per Lord Nicholls at paragraph 19 and Lord Rodger at paragraph 196 *The Boucraa* 1994 1 AC 486 per Lord Mustill at pp 526–7.] In our view the provisions of Article 10 of J/N TIEA do not create any unfairness. The Appellants made an imprecise and elusive submission that, had at the time the documents and records, the subject of the Request, were created, it had been appreciated that they might at some future date been vulnerable to scrutiny by the NTA, they might have been drafted differently. We were quite unable to discern why this should

have been so unless (which was not submitted) Mr Larsen would have wished to conceal an actual tax liability.

114 It was further — and ambitiously — argued that the 2008 Regulations did no more-than confirm the 1991 Law as regards the exchange of information relating to criminal tax matters. Reliance was placed on the political commitment contained in Senator Pierre Horsfall's letter to the Secretary-General of the OECD of 22 nd February, 2002 which included the following passage:–

> *"Jersey considers that it already has existing legislation in line with the OECD's proposals for exchange of information on criminal tax matters to be implemented by 31 December, 2003."*

and under the heading *"An Effective Exchange of Information"*, gave an undertaking to:–

> *"Maintain in place legal mechanisms that allow information to be provided to tax authorities upon specific request for the investigation and prosecution of criminal tax matters, on a reciprocal basis and in accordance with the legal procedures for handling such requests.* Such procedures will be referred to in any tax information exchange, or mutual legal assistance, agreements to be negotiated."

115 We cannot see under what legal principle such an historic statement could be an admissible aid to construction of the later 2008 Regulations or how it could, even if admissible, override the clear language of the 2008 Regulations themselves.

116 Moreover it did seem to us quite unrealistic to support that, in relation to criminal tax matters, Jersey law was not intended to be altered by J/N TIEA and given effect through the 2008 Regulations, for the following main reasons which we gratefully derive from the judgment of the Royal Court:–

> (i) Whatever may have been contemplated by those responsible at the time of Senator Horsfall's letter in early 2002, it is inescapable that, by the time the J/N TIEA came to be concluded six and a half years later in October 2008, it had been decided to structure things differently.
>
> (ii) There is nothing that would justify the conclusion that any earlier intention continued to be the basis on which the final terms of the J/N TIEA were negotiated and agreed. On the contrary, given the clear purpose of the J/N TIEA, the Appellants' interpretation would produce an absurd result, namely that notwithstanding Jersey's inter-state commitment to Norway, Jersey's domestic legislation giving effect to that commitment had the effect, if anything, of reducing its ambit and effect.
>
> (iii) It is unlikely that the 2008 Regulations would not have contained some express reference to the 1991 Law were their intention that for which the Appellants contend.

(iv) In any event, the operative words delineating the circumstances in which the Attorney General's powers under the 1991 Law may be exercised are not ***"criminal tax matters"*** but where ***"there is a suspected offence involving serious or complex fraud"*** (Article 1 paragraph 2(1)(a));

(v) The Attorney General under the 1991 Law is under no obligation to do anything. The J/N TIEA creates a positive obligation on Jersey to respond to a request for information falling within its terms.

117 We are therefore in no doubt at all that the fact that the May 2012 Notice requires the production of documents pre-dating the coming into force of the J/N TIEA is, of itself, perfectly legitimate where ***"criminal tax matters"*** are concerned.

The Discrimination Issue

118 The Appellants argued that the Norwegian Controlled Foreign Corporation Rules ("the NOKUS Rules") which, according to Mr Drangsholt, provided one potential basis for Mr Larsen's liability to income tax discriminated against Jersey companies.

119 The NOKUS Rules, according to Mr Drangsholt, are to the effect that where a Norwegian resident shareholder directly or indirectly owns or controls 50% or more of a foreign company, the shareholder is taxed on the company's annual profits by reference to his percentage shareholding, irrespective of whether these profits are actually distributed to him by means of a dividend. It was argued by the Appellants that while a Norwegian taxpayer will incur a charge to tax on the profits of a foreign company that he controls (irrespective of whether those profits are ever actually paid to him), a similar charge will not arise if he has an identical holding in a company in Norway carrying on identical business; and that the result is to make it less attractive for a Norwegian resident individual to establish a company in Jersey than in Norway and, correspondingly, more difficult for Jersey companies to raise capital from Norway. Accordingly on this premise the Comptroller in the exercise of the discretion that he enjoys under Regulation 3 would be entitled to decline the Request pursuant to Article 6(5) of the J/N TIEA when the law of the requesting state, in respect of which the information requested, discriminates against the national citations or requested state compared with those of the requesting state.

120 The palpable flaw in this argument is that a Jersey company such is neither a *"national"* nor a *"citizen"* of Jersey.

121 In an attempt by the Appellants to dislodge this literal reading of Article 6(5), we were reminded of the well-known rules as to the interpretation of instruments of the character of the J/N TIEA based on the summary by Mummery J (as he then was) in *IRC -v- Commerzbank Attorney General* [1990] STC 285 of the approach of the House of Lords in *Fothergill -v- Monarch Airlines Ltd* [1981] AC 351 and of the

Vienna Convention on the Law of Treaties ("the Geneva Convention") which, in broad and unnuanced terms, requires a court to search first for what appears to be the clear meaning of the words used without being overly literal, secondly to bear in mind the purpose of the instrument, thirdly to bear in mind that its wording will have been the product of negotiation between states; fourthly if the result of the exercise so far leaves the meaning unclear or ambiguous or produces a manifestly absurd or unreasonable result, to have recourse to supplementary materials.

122 Albeit Jersey is not a party to the Vienna Convention, we proceed on the basis that the approach canvassed in the previous paragraph is appropriate to construction of the J/N TIEA. However, even a most benevolent application of that approach does not entitle us to interpret the words *"national"* or *"citizen"*, which have established meanings and are particular to natural, not legal persons, as if they mean *"having a place of business"* or *"domiciled in"*. [Mr Larsen himself is not a national or citizen of the Requested Party (Jersey) as distinct from the Requesting Party (Norway) so that Article 6(5) has no relevance to him.]

The Reasonable Grounds Issue

123 At the heart of the interest of NTA in Mr Larsen and the companies, the subject of the Request, is a series of transactions which took place between October 1997 and January 2000.

124 Before we describe these transactions it is important to appreciate that the first company in the chain of transactions, Larson Oil and Gas AS ("LOGAS"), a company incorporated in Jersey, was at all material times wholly owned by Mr Larsen. The last company in the chain, ANO AS ("ANO"), is a company in which, in 1995, Mr Larsen bought a 40% share. Between 1995 and 2000 he was its Chief Executive.

125 On 20th October 1997 LOGAS entered into an option agreement with Independent Oilfield Rentals Ltd ("IOR"), a company also incorporated in Jersey. Mr Larsen, as he informed NTA, directly owned 10% of the shares in this company through another company, Larsen Oil and Gas Drilling Ltd ("LOGD"), in which at all relevant times he also had a direct interest. The agreement specified that LOGAS would grant IOR an option for one year to purchase LOGAS' 34% interest in Independent Oil Tool AS ("IOT") for a consideration of NOK 8,500,000. The option price was NOK 1,000,000 to be paid on 15th January 1998. The Memorandum recites that the option agreement was apparently extended orally until 31st December 1999.

126 Norden Oil Ltd ("Norden"), which later changed its name to North East Oil Ltd ("North East"), is a company incorporated in the British Virgin Islands.

127 On 27th November 1999 an agreement was made between LOGAS, IOR, and Norden

whereby the option agreement, granted in 1997 to IOR, would be transferred to Norden and, upon transfer of the share purchase certificate to Norden (i.e. representing 34% of the shares in IOT), Norden would transfer NOK 8,500,000 to LOGAS' bank account. On 21st January 2000 Norden in a written agreement sold the 34% shareholding in IOT to ANO for a total consideration of NOK 36,002,944. It therefore follows that net proceeds of sale was some NOK 27,500,000.

128 The Memorandum asserts that the option price of NOK 1,000,000 was not paid on 15th January 1998, and indeed was not paid until 22nd October 1999. No interest was charged on the overdue payment. No option price was paid for the oral extension. No option price was paid when the option was transferred from IOR to Norden in late 1999.

129 The Memorandum draws together its conclusions as follows:–

> *"Based on the described facts, the Tax Administration is now investigating whether the option agreement was actually extended and whether BGL (we interpose, i.e. Mr Larsen) has a larger ownership in IOR Jersey than he has reported to the Norwegian Tax Administration, and whether he has ownership interests in Norden.* Based on circumstantial evidence uncovered by the Norwegian Tax Administration from Norwegian sources, LOG (we interpose, i.e. LOGAS) and BGL were in 2004 warned that there must be a communality of interest between IOR and *Norden and between IOR Jersey and LOG.* When concluding that there must be a communality of interest between IOR Jersey and Norden, it is decisive that the transport of the option to Norden was free of charge and that the same person signed the option agreement on behalf of both IOR Jersey and Norden. The Tax Administration also submits that BGL, directly or indirectly, is the real (beneficial) owner of both IOR Jersey and Norden. The evidence for this is the agreement, credit without maturity in the option agreement, and the missing provisions for interest charges. The option was extended orally. Moreover, in view of the dividend distributed by IOT, we submit that without a commonality of interest between IOR Jersey and Norden, IOR Jersey would have exercised the option. The Tax Administration further submits that the option — agreed orally — was not entered into until it was timely for DNO to purchase the shares in IOT. We also submit that the option agreement between LOG and IOR Jersey had expired, meaning that there was no option agreement between LOG and IOR Jersey in the autumn of 1999. The reasons for this conclusion are that there is no written agreement between the parties and that the shares were not priced in connection with the extension. In a letter dated 25th May 2004, the Tax Administration informed BGL about a change in his tax assessment for the fiscal year 2000. The Tax Administration concludes that BGL has transferred the shares in IOT from LOG for the Jersey company at below the market price, and that the transfer was made for BGL's private purposes. The transfer also means that LOG lost capital gains on the shares in the amount of NOK 27,502,944. The share transfer constitutes a cost-free transfer of values to the benefit of BGL, which the Tax Administration regards as taxable income to him."

130 Advocate Kelleher for the Respondent draws attention to another relevant paragraph in the Memorandum at page 64:–

> *"In addition, we also have a letter dated 25th November 2009 from Mr Harald Smedsvik (managing director of IOT) in which he confirms that he has received payment from Norden.* The payment was for the amount of approximate NOK 2.5m. In the letter, it is confirmed that it was BGL, who on behalf of LOG, wished to reward Smedsvik for his work in IOT. The payment was made from Norden, however, and we are not aware of any settlement between Norden and LOG in that connection."

131 All the above matters were known to Mr Larsen before he swore his affidavits. The Respondent submitted that it was of significance that at no time did he condescend to give any explanation at all of these transactions. Advocate Kelleher orally posed the rhetorical question — why was there no evidence from Mr Larsen of these transactions and the transfer of the shares in IOT to LOGAS through IOR and Norden to ANO? He submitted that the Comptroller was bound to take all these matters both what was and what was not said into consideration when coming to his conclusion whether, in accordance with Regulation 3.1 he had "reasonable grounds for believing…..that a*taxpayer (we interpose i.e. Mr Larsen) may have failed to comply…….*with a domestic law of a third country (we interpose i.e. Norway) concerning tax; and that any such failure has led……to serious prejudice to the proper assessment or collection of tax". If the Comptroller was satisfied that this test had been met, he was bound to issue a Notice.

132 The Royal Court's judgment on these matters is recorded at Judgment para 66. The Commissioner said:–

> ***"On any view the transactions in question, taken at face value, make little commercial sense and have a number of curious features, strongly suggesting that there was more to them than meets the eye.*** Even so neither Mr Larsen nor Mr Healey attempts to offer any explanation of — or indeed any comment at all — on the transactions recounted and observations made in the Request (other than indirectly in the form of a single, cursory passage in a letter dated 4th August 2006, from Mourant to the Attorney General saying 'the option was granted at a proper price and Mr Larsen did not benefit from the subsequent sales which simply reflected an increase in price due in part to the rising price of oil')."

133 However, the Memorandum and the annexes to it were not the only documentation available to the Comptroller concerning the option agreement described above. He was also sent a copy by the NTA of a *"Bill of Indictment" preferred against Mr Larsen on 16th June 2011 in the Bergen District Court by "The Public Prosecutors in Hordaland County"*. This document replaced an earlier Indictment preferred on 18th October 2010.

134 The Bill of Indictment is a detailed document more extensive than in similar circumstances would be its namesake in this jurisdiction. It contains a number of allegations against Mr Larsen and runs to nine pages. It is not necessary to include an analysis of the whole Indictment and what follows represents a selection of the most material parts.

135 The Bill of Indictment is in a form familiar to common lawyers. It consists of three Counts. The Statement of Offence (as we would describe it) in the first Count is pleaded contrary to "The Criminal Act (Norway), section 275.1 and 275.2, cf (sic) section 276" and alleges that Mr Larsen committed an offence of "intentionally obtaining unlawful gains for himself or others……." in relation to the option agreement. The details of the agreement are set out in what the document describes as "Grounds" but which we would recognise as the Particulars of Offence. The Grounds end with a paragraph to this affect "The transgression is seen as aggravated because it involves significant values, because it is effectuated through the***use of transactions between affiliated companies with community of interests and which are registered in countries with limited right to insight into real ownership and management, and, finally, because it was perpetrated in order to avoid taxation in Norway."*** As it seems to us, the ***"aggravated"*** features of the offence is relevant to the ***"serious prejudice"*** aspect of Regulation 3.

136 Count II of the Indictment is in four parts, (a), (b), (c), and (d). The parts are all pleaded contrary to "The Tax Assessment Act (Norway), section 12.1 no. 1a, cf section 12.2 nos. 1 and 2". The Grounds indict Mr Larsen "for having given the tax assessment authorities incorrect or incomplete information when he understood, or should have understood, that this could lead to tax advantages." The Count continues: "The transgression is seen as aggravated since it is particularly emphasised that it could have led to evasion of a very significant amount of tax and/or the transgression has been perpetuated in such a manner as to seriously complicate its discovery."

137 Two of the Grounds, (a) and (c), relate specifically to Mr Larsen's role as chairman of LOGAS. The first, (a), alleges that Mr Larsen, *"as chairman of the board of directors"* of LOGAS and in relation to the option agreement, inter alia, *"neglected to effectuate the reporting of taxable income arising from a withdrawal or gain"* to LOGAS *"of at least NOK 16,000,000."* The *"transgression"* is alleged to be aggravated in ways similar to those identified above. The second Ground of this pair, i.e. (c), alleges that Mr Larsen, in a similar capacity, *inter alia*, *"neglected to effectuate the reporting of NOK 6,500,000 in taxable income resulting from withdrawal or net proceeds for LO&G."* (LOGAS).

138 The two remaining parts of Count II, (b) and (d), relate specifically to Mr Larsen's personal tax affairs. The Grounds of (b) allege that "In his personal tax return for the fiscal year 1999 and/or for 2000, submitted to the Bergen Tax Assessment Office, he neglected to inform about dispositions and circumstances" relating to the option agreement "and that he thereby received proceeds from the company" (LOGAS) *"of at least NOK 20,500,000."* The second part, (d), alleges a similar failure by Mr Larsen in relation his tax return for the year 2000 which, it is alleged, resulted in the receipt by him from LOGAS of undeclared *"net proceeds*

(dividends) of NOK 6,500,000." Both transactions, (b) and (d), are said to be aggravated, the first in ways similar to those described above and the second, "especially since it involves significant amounts and the use of a falsified agreement and/or incorrect accounting documentation."

139 The third Count alleges offences pleaded as contravening the same section of the Tax Assessment Act. The Grounds assert that:–

> *"In his personal tax returns with attachments for the tax years 1997 — 2006 to the Bergen tax assessment office, and for 2007 to Skatt Nord, he (we interpose i.e. Mr Larsen) submitted incorrect and/or incomplete information regarding taxable wealth in foreign companies, despite that he understood, or should have understood, that this could lead to tax advantages.* Among other items, he under-reported his ownership of shares or assets in various companies, and/or too low taxable share values, and/or neglected entirely to submit information in respect of his ownership in capital assets placed in financial arrangements including trusts. Moreover, he neglected to inform of other circumstances significantly influencing his tax obligation, including that the taxable values of the shares were significantly higher than their nominal value, and that he had significant influence on the companies' ownership structure, operation and management."

140 A total of twelve instances are cited of Mr Larsen's alleged failures or omissions in this regard and these *"violations"* are said to be aggravated because:–

> *"they were perpetuated in a manner which severely complicated their discovery, by the use of companies registered in jurisdictions with limited rights to insight into ownership and asset values, and because significant asset values and any yield from these were concealed from taxation."*

141 The Appellants contended there is no basis whatever for the NTA's accusations. This part of their case rested, essentially, on two propositions.

142 First that the factual evidence before the Comptroller, and now before the Court, provides no or nugatory support to the NTA's suspicions about the extent of Mr Larsen's interests and the relationships between the several companies.

143 Secondly, in the absence of the receipt by Mr Larsen of any dividend payment related to the transactions in question — and, the Appellants say, there has been none — there is nothing that could give rise to any income tax liability on the part of Mr Larsen himself according to Norwegian law.

144 As to the first, the Appellants submitted that the only relevant evidence is that provided by the October 2012 affidavits of Mr Healey, a director of Volaw, and by Mr Larsen himself. We

deal with this submission separately below after considering both what the affidavits do, and what they do not say.

145 The scope of Mr Healey's affidavit is limited for the most part to summarising formal details of the date of incorporation of the four companies named in the May 2012 Notice, the extent, if any, to which Mr Larsen has ever had any shareholding in or been a director of them, the location of their board meetings and effective centres of management (Jersey, or, in the case of IOR, Sark until August 2008 and then Jersey).

146 In each case Mr Healey adds statements (1) to the effect that at no time has the company made dividend or other payments to Mr Larsen or to anyone else, that no other payments have been made to Mr Larsen, and that to the best of Mr Healey's knowledge and belief no member of Mr Larsen's family has ever received a dividend payment or other payment from the company; and (2) to the effect that Norwegian resident shareholders did not at any time own more than a 50% shareholding in the company.

147 In the case of Mujova Mr Healey adds that it is wholly owned by a purpose trust in which Mr Larsen has no interest ("the Jova Trust").

148 In the case of IOR Mr Healey says that while Mr Larsen originally had a 49% shareholding at the time of its incorporation in November 1996 this was subsequently reduced to 25% in 1997; that this was sold in January 1999; and that Mr Larsen no longer has any direct shareholding in IOR.

149 In the case of North East Mr Healey he says that it is owned by a Mr Ken Hodcroft, a UK resident.

150 Mr Larsen, for his part refers in his main affidavit to details of his CV and refers to the criminal charges currently faced by him and forcefully rejects the allegations made in the Bill of Indictment dated 16th June, 2011 which has now, however, resulted in a verdict of guilty a fact communicated to us only after the hearing. [At the same time we are informed that Mr Larsen intends to appeal.]

151 At paragraph 18 Mr Larsen says:–

> *"I understand that one of the bases upon which the Norwegian Tax Administration seeks these documents is that it alleges that I have undeclared interests in LOGD limited, IOR Jersey and North East.* This is completely untrue. I set out the position in relation to each company below."

There then follow details much to the same effect as summarised by Mr Healey in his affidavit.

152 In the case of North East, Mr Larsen adds in a later, supplementary affidavit dated 26th February, 2012:–

> *"I can confirm that I have never received a dividend form North East nor have I received any other kind of benefit from North East, either directly or indirectly."*

153 These affidavits and their exhibits (copy extracts from registers of shareholders and directors in the case of Mr Healey and copy correspondence in the case of Mr Larsen) are, the Appellants argue, the only evidence that the Court can take into consideration; everything else was and is mere speculation on the part of the NTA; the Comptroller had no business acting on it without probing it further; without more it reveals nothing untoward on the part Mr Larsen. The May 2012 Notice must accordingly be revoked.

154 In support of their overarching contention, the Appellants rely on the decision Chan Han Teck J. in the High Court of Singapore in May 2012 in *Comptroller of Income Tax -v- AZP* [2012] 22 taxmann.com 36, ("the *AZP* case") a case involving a request by the Republic of India for tax related information under an agreement between Singapore and India providing for the exchange of information for the purpose of enforcing tax laws of both states and, in particular, preventing tax evasion or fraud.

155 Having observed that the exchange of information could impinge on interests such as taxpayer privacy and confidentiality of banking information and that "it is important that the right balance is struck and that procedural safeguards are put in place to ensure that only specific and relevant requests are entertained" (paragraph 5), the Judge in that case turned to consider the requirement stipulated by the inter-state agreement there in play that the information must be ***"foreseeably relevant"*** to the administration and enforcement of requesting state's tax laws, commenting as follows:–

> ***"The first requirement of foreseeable relevance requires the Comptroller (on behalf of the requesting state) to show some clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws.*** Clear and specific evidence is necessary to prevent unwarranted disclosure of information that could not otherwise be sought from any party including the requested state" (paragraph 10).

156 In the *AZP* case the Indian authorities sought the production of records and information relating to two particular bank accounts held with the defendant bank in Singapore in the names of Company X and Company Y on the basis that they were believed to be relevant to undeclared incomes of an Indian national and persons associated with him, reliance being placed on two ***"transfer instructions"*** said to evidence transfers of money by the Indian national to the two companies.

157 The application was rejected by the Judge on the ground that neither document

amounted to sufficient evidence of a connection between the national in question and either company, and that, in the case of Company Y, there was, moreover, no evidence that the monies in question had in fact ever been transferred to or from the account in question.

158 In our view, the decision there plainly turned on the minimal extent of the material presented by the Indian authorities and its tenuous nature. One ***"transfer instruction"*** was described as unsigned and the Judge found that it was unclear whether it was ever executed; the other instruction was also unconvincing.

159 The present case was very different as regards the information on which the Comptroller was invited to act — which exemplifies the fact that attempts to read across from one set of facts to another is rarely a fruitful exercise in litigation or adjudication. As we have observed, the Comptroller had available to him the information contained in the Request and the accompanying Memorandum, as well as the Bill of Indictment. As to the first we are unable to accept the submission that the Memorandum, consisting of 8 closely reasoned pages of information and argument as well as 121 pages of supporting documentation, should be wholly disregarded by us, and should have been so disregarded by the Comptroller, in favour of the affidavit evidence of Mr Larsen and Mr Healey.

160 Nor have we been persuaded by the Appellants that the Bill of Indictment, consisting, it will be remembered, of 8 pages of detailed allegations should be discounted, and should have been thus discounted by the Comptroller, on the grounds, as was submitted to us, that the Bill has been translated from Norwegian into English; that it makes allegations, not confined to Mr Larsen personally, against him in a corporate capacity; and that since it contains mere allegations, nothing can safely be deduced from it. In the judgement of this Court, the Comptroller was entitled to conclude that the Norwegian prosecuting authority must have had material to support the allegations in the Indictment. Indeed the Comptroller was given information by the NTA that the charges were supported in some measure by the material provided earlier to the Norwegian prosecuting authority by the Attorney General of Jersey.

161 A subset of the challenge to the reasonable grounds issue was the assertion that since Mr Larsen and Mr Healey have given evidence on affidavit, which was not subject to cross-examination, it had to be accepted pursuant to the rule in *Browne v Dunn* [1894] 6.LR 67.HL.

162 It is, we readily accept, a rule of general (but not universal) application, rooted in fairness that if a witness in a trial is not challenged on evidence which it is sought to contradict, he cannot subsequently be impeached. See Phipson on Evidence 17 th ed 12–12 *Browne v Dunn* 1894 LR 67. HL per Lord Herschel at p. 70, Lord Halsbury, at p. 76 Lord Morris at p. 79.

163 We have already expressed our views as to the appropriate procedure before the

Comptroller and the Royal Court to the effect that cross-examination was not a technique to test evidence available to the Comptroller and that cross-examination on any appeal was not contemplated under Rule 15 before the Royal Court. Our subsequent comments are made without prejudice to this overriding point.

164 First the rule in *Browne v Dunn* applies only where there is a trial — as Lord Herschel put it ***"whilst he was in the box"***. [p. 70]

> (i) Secondly the Bailiff's direction, while it contemplated — in our respectful submissionover generously — that there should be cross-examination of the experts, by contrast did not allow for that process in respect of the lay witnesses.
>
> (ii) Thirdly there are many situations in which a Court may have to do the best it can in resolving conflicts of fact on the basis of conflicting statements or affidavits without cross-examination e.g. in interlocutory process. In judicial review, too, the default position is that the evidence of the public authority is accepted. *Al Sweady -v- Secretary of State* [2009] EWCA 2387 (Admin) at [19] *Fordham* 17.3. 7(c) p. 88.
>
> (iii) Fourthly there was in the circumstances no unfairness to the Appellants. Mr Larsen well knew of what the case against him consisted, from the memorandum alone: and knew too, incidentally, that his denials to the Norwegian authorities had not been accepted.
>
> (iv) Fifthly — and crucially — neither the Comptroller nor the Royal Court nor we had to determine whether or not the affidavit evidence of both Mr Larsen and Mr Healey was the truth, or, more importantly, the whole truth. It was the investigation, for which the documents and records were sought (and any consequent proceedings) which would resolve that issue one way or another. A reasonable belief as to a possibility is the test under the 2008 Regulations: it requires no such resolution of conflicting accounts.

165 There is in fact a further point arising out of those affidavits which is actually adverse to the Appellants.

166 The Memorandum itself, whether read with or without the preceding correspondence already apprised Mr Larsen of the basis for the NTA's suspicions arising out of the transactions which we have summarised above. Mr Larsen chose neither to answer them to provide any reason for omission to do so. In our view the Comptroller was entitled to take this omission into account when applying the reasonable grounds/reasonable opinion tests in Regulation 3: *a fortiori* the Royal Court was so entitled given, (with all the reservations we have expressed about the evidence adduced before it), that the Comptroller's reasons (as required by the 2008 Regulations) and his affidavit (as required by Rule 15) reinforced this aspect of the Memorandum.

167 In *Prest v Petrodel Resources Ltd & Others* [2013] UKSC 34, Lord Sumption described

the modern reach of the principle that someone confronted by a **“case against”** him but who declines to engage with it may be vulnerable to a conclusion that he had in fact no answer.to give He said at paragraph 44:–

> *“ In British Railways Board v Herrington* [1972] AC 877, 930–931 , ***Lord Diplock, dealing with the liability of a railway undertaking for injury suffered by trespassers on the line said:***
>
> ***The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it.*** This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold. A court may take judicial notice that railway lines are regularly patrolled by linesmen and Bangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of the persons who patrolled the line there is nothing to rebut the inference ***that they did not lack the common sense to realise the danger.*** A court is accordingly entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence.”
>
> ***The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact.*** There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification which I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of the committee in *R v Inland Revenue Comrs, Ex p Coombs (TC) & Co* [1991] 2 AC 283, 300 :
>
> ***“In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence.*** Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified.”

CF Wisniewski v Central Manchester Health Authority [1998] PIQR p. 324, p. 340 .

168 It is further argued by the Appellants that:–

(i) the Comptroller had failed to approach his task with the requisite degree of rigour;

(ii) he had in effect, abrogated his quasi-judicial, gate-keeper function in favour of adopting uncritically what the NTA asserted;

(iii) that in doing so he had failed to hold the proper balance between competing interests of which the court spoke in the *AZP* case;

(iv) he had failed to give sufficient weigh to the protection of Jersey nationals and taxpayers.

169 In our view this argument implicitly sets the bar too high and is unjustifiably critical of the Comptroller. Article 3 of the J/N TIEA obliges a requested party to provide the requisite information ***"to the extent allowable under its domestic laws"***. In the case of Jersey the ***"extent allowable"*** is that provided in the 2008 Regulations. The relevant safe-guards have, accordingly, been set by the Jersey legislature and, so far as relevant to present issues, are for the most part given expression in the terms of Regulation 3.

170 As is plain from the terms of that Regulation, it is recognised that for the JN/ TIEA process to work, some margin of appreciation has, inevitably, to be allowed to the Comptroller in deciding whether it is right to accede to a request for assistance: hence deployment of the words ***"belief"*** and ***"opinion"***. While it is certainly right that any request should be carefully considered by the Comptroller with the criteria of Regulation 3 in mind, it is not for him, or for this Court, to devise additional hurdles for a requesting party to jump before any request can be met. The presumption of regularity (*R -v- IRC ex p Rossminster* 1980 AC 952 per Lord Diplock at p. 100) at least applies to how he has discharged his duty, although it does not dilute the duty itself.

171 For present purposes it appears to us that the principles applicable to the question whether the Regulation 3 paragraph (1) threshold is satisfied, that is whether the Comptroller has reasonable grounds for believing the matters described in (a) and (b) of that paragraph, may be summarised as follows:–

(i) the Comptroller is entitled and bound to have regard to the totality of the information made available to him and its sources or lack of sources;

(ii) there is no requirement that such information must be verified by affidavit or otherwise take any particular form;

(iii) for the purposes of deciding whether to act on a request the Comptroller is at liberty to ask the requesting state authorities for clarification or further information but is under no obligation to do so; nor is he under any obligation to require the production of evidence in support of facts of which he is informed in order to verify them for himself;

(iv) where, as here, the Comptroller is faced with conflicting assertions as between the requesting authority (Norway) and those affected by the request (Mr Larsen) it is not for him to reach any final conclusion on where the truth lies: his role is not to act as final adjudicator on these issues which may or may not in the fullness of time fall for adjudication by Courts in Norway but simply to decide, having regard to the material before him, whether there are *"reasonable grounds for believing"* the two matters prescribed by the first paragraph of Regulation 3 and whether he can properly say that in his *"reasonable opinion"* the documents of which production is sought may contain information relevant to one or more of the matters listed in the second paragraph of that regulation.

172 In the present case the NTA has set out its case at considerable length in the Request. The sources of its account of events and suspicions are said to include monitoring exercises and investigations undertaken over a period of some years, documents evidencing the several elements of the transactions under scrutiny (attached to the Request), circumstantial evidence from Norwegian sources, material seized by the Police in Norway which includes "a significant number of documents regarding the Jersey-managed companies where the companies are more closely linked to Norway than just being ordinary business connections", and various correspondence and records relating to the incorporation of some of the companies concerned.

173 The NTA's concerns are evidently shared by the Norwegian Police and regarded as sufficient to have warranted the issue of a Bill of Indictment against Mr Larsen on 16th June, 2011 (with the outcome to which we have referred above at paragraph 150.

174 We have already observed that in the view of the Royal Court the transactions in question, taken at face value, made little commercial sense and had a number of curious features, strongly suggesting that there is more to them than meets the eye. We endorse that view.

175 Even so, neither Mr Larsen nor Mr Healey attempts to offer any explanation of — or indeed any comment at all — on the transactions recounted and observations made in the Request (other than indirectly in the form of a single, cursory passage in a letter dated 4th August, 2006, from Mourant to the Attorney General saying "the option was granted at a proper price and Mr Larsen did not benefit from the subsequent sales which simply reflected an increase in price due in part to the rising price of oil"). While Mr Larsen strenuously denies the suggestion that his interests in any of LOGD, IOR and North East is other than that deposed to by him, for the Appellants to suggest that, apart from the affidavits of Mr Larsen and Mr Healey, all is speculation and that the material before the

Comptroller, and now before us — as it was before this Royal Court, is scarcely better than that in the ATZ case is, in our view to trespass into the realm of unreality.

176 We are satisfied that there were available to the Comptroller at the very least reasonable grounds for believing that the NTA's suspicions could be well founded and that Mr Larsen's interests in some at least of the companies and the transactions in question were more extensive or different to what he would have others believe.

177 That, of course, is a necessary but not a sufficient basis for upholding the May 2012 Notice.

178 As to the second of the Appellants two main propositions, i.e. that there is no conceivable basis on which the transactions in question could give rise to any income tax liability on the part of Mr Larsen, the opinions of the two expert witnesses on Norwegian tax law, Dr Matre (for the appellants) and Mr Drangsholt (for the Comptroller), differed markedly: not so much because of disagreement about substantive law but because of divergent assumptions that they made about the facts to which the law is to be applied. We are grateful to the Royal Court for its analysis of this evidence upon which the succeeding paragraphs are all but entirely based.

179 Dr Matre's evidence proceeded in substantial part on the assumption that the events in question were no more than *bona fide* transactions between a number of unrelated companies, that the beneficial ownership and directorships of the entities covered by the affidavits of Mr Larsen and Mr Healey were exactly as stated in those affidavits, and that, in the absence of any dividend payment to Mr Larsen in connection with the transactions, there would be no income accruing to Mr Larsen to which any income tax liability could attach.

180 By contrast, Mr Drangsholt's evidence proceeded on the basis that the full facts were, as yet unknown, but it was evident to him that the NTA was, as he put it, “interested in investigating the circumstances and determining whether more atypical or indirect transfer of taxable dividends or taxable income to Mr Larsen or close relatives to him, has taken place”. He expressed his opinion that:–

> *“after reading the documents I have received is that Skatt Vest is not primarily interested in investigating whether the companies LOGD Limited, IOR Jersey, Mujova, North East or any other company have made cash distributions to Mr Larsen directly.* The question is whether the transactions that have taken place at company level, directly or indirectly, imply the transfer of value to or for the benefit of Mr Larsen or his relatives and thereby constitutes receipt of taxable dividends or other kind of taxable income” (paragraphs 26 and 27 of his affidavit).

181 Each expert was reluctant (as the record shows) to depart far from his basic thesis, even

under cross-examination, so like ships passing in the night, the two never engaged fully with one another.

182 Dr Matre was adamant that the only way in which any liability to income tax on the part of Mr Larsen could possibly arise was if there had been a distribution to him by way of dividend by one of the companies concerned; and there was, he contended, no evidence of any such distribution having occurred. Mr Larsen was not, he pointed out, a party to any of the transactions in question. All that had happened was that there had been a series of arm's length transactions between companies. LOGAS might possibly have been susceptible to some tax liability by the application of the Norwegian *"transfer pricing rules"* (applicable where companies are affiliated or associated) but those rules operate exclusively at the company level and the fact that Mr Larsen was the 100% shareholder in LOGAS would be of no relevance. In support of this he quoted from published works of two distinguished academic lawyers, Professor Frederick Zimmer and Professor Ole Gjems-Onstad. He also cited passages from two decisions of the Supreme Court of Norway, the first from *Greta Somme -v- Drammen Municipality* (otherwise referred to as *"Grecon"*) reading (in translation):–

> ***"When transfers are made to another limited liability company, it is the limited liability company as such which receives the values and not the shareholder or shareholders in this company".***

The second from *The State -v- Henning Astrup* (otherwise referred to as " *Ragelas*"), reading:–

> ***"I agree with the opposing parties in the appeal that a limited liability company is an independent tax subject separate form the shareholders.*** Moreover, the starting point must be that the form of the company must be respected [even] if the form is motivated on tax grounds."

183 Mr Drangsholt, for his part, suggested that there were at least three ways in which Mr Larsen might find himself liable to income tax were the facts to turn out to be not as clear as Dr Matre assumed them to be and that the transactions might indeed be regarded as giving rise to a taxable dividend in the hands of Mr Larsen:–

(i) within the terms of Section 10–11 of the Norwegian Tax Act;

(ii) under anti-avoidance principles developed by the courts; and

(iii) by reason of the NOKUS Rules.

184 As to the Sections 10–11 of the Norwegian Tax Act, Mr Drangsholt pointed out, and Dr Matre accepted, that the concept of a taxable dividend is wider than a simple cash payment, being defined by the relevant provision as "any distribution that involves a transfer of assets free of charge from the company to the shareholder". It thus includes any

economic benefit conferred on a shareholder (or someone identifiable with him under the relevant provisions of the Norwegian Act such as close relative).

185 Mr Drangsholt for his part accepted that the transfer pricing rules mentioned by Dr Matre primarily take place at company level, but insisted that:–

> *"transactions not carried out at arm's length can, according to Norwegian tax law, also be considered as a taxable distribution of income to the shareholders in these companies without de facto transfer of cash or similar to shareholders, if the transaction in question in some way has benefitted the shareholder or his relatives" (his affidavit paragraph 30).*

This, he suggested, was what Skatt Vest was referring to when it said:–

> *"The Tax Administration concludes that BGL has transferred the shares in IOT from LOG to the Jersey companies at below market price, and that the transfer was made for BGL's private purposes.* The transfer also means that LOG lost capital gains on the shares in the amount of NOK 27,502,944. The share transfer constitutes a cost-free transfer of value to the benefit of BGL, which the Tax Administration regards as taxable income to him."

Mr. Drangsholt continued:–

> *"My opinion is that Mr Larsen, depending on what facts the investigation may reveal, might be considered as having received taxable dividends according to section 10–11(2) or taxable income according to the basic principle settled in section 5–1 of the Norwegian Tax Act, if the entering into of the option agreement on 20 October, 1997, and the agreement that this option should be assigned by IOR Jersey to North East was not in the interest of LOG AS but in the interest (benefit) of Mr Larsen or his relatives.*
>
> *There are examples from Norwegian case law where similar circumstances occurred and where the shareholders were considered as having received taxable income, even though the relevant transactions took place at company level."* [Affidavit paragraphs 32–33].

186 By way of example Mr Drangsholt referred to a recent decision of the Norwegian Borgarting Appeal Court, *Knoop Utv* 2012, 139. Ostensibly valuable commercial rights under a contract with a third party had been transferred from one company to another, both being owned by Mr. Knoop. But the Court found that the reality was that Mr. Knoop had *"taken the contract out of the first company"* and placed it instead with the second one. This, it held, was for tax purposes to be regarded as a ***"withdrawal"*** from the first company for the benefit of the shareholder even though thereafter he transferred the contract to the second company; the withdrawal thus constituted a taxable dividend from the first company to Mr. Knoop.

187 Dr Matre was dismissive of this decision on a number of grounds that:–

(i) the decision was one of an inferior court

(ii) it failed to take account of the Supreme Court decisions in *Grecon* and *Ragelas*,

(iii) there was a degree of ambiguity in the terminology used by the Appeal Court,

(iv) in any event the facts of the case were different from those of the present one;

(v) all in all, the decision was thoroughly unsatisfactory and was wrongly decided.

188 But Mr. Drangsholt nonetheless adhered to its position which seemed to the Royal Court (as it does to us) both intelligible and logical. And, as regards Dr Matre's point that the case was distinguishable on its facts from the present one that of course did no more than beg the question of what the true facts in the present case are.

189 Mr. Drangsholt, too, cited Professor Gjems-Onstad, this time to the effect that where distributions are made by one company to another which is controlled by the shareholder of the company making the distribution, “the allocation of income may be altered provided there exists special circumstances” and that the controlling shareholder may, for example, be liable to income tax “if the real reason for the transaction is to benefit the shareholder” (affidavit paragraph 35).

190 As regards anti-avoidance concepts, Mr Drangsholt explained that in a corpus of over seventy judgments since the first half of the 20th century the Norwegian Supreme Court has developed a general anti-tax-avoidance doctrine which can, in appropriate cases result in transactions being reclassified for tax purposes. It is engaged, in effect, where the dominant purpose of a transaction is the avoidance of tax and the transaction involves violation of the purpose behind the provision of the Norwegian Tax Act and serves no other discernible purpose.

191 By way of example Mr Drangsholt cited two Norwegian Supreme Court cases: *Hovda*, in which the court reclassified the capital value of shares transferred from one company to another as a distribution of dividends to the underlying shareholders, and *Ragelas*, in which a company (*Ragelas*) was liquidated by another company (Pegasus) that had previously been the recipient of shares assigned to it by the joint shareholders of the two companies. There the Court, looking at the sequence of transactions as a whole, took the view that they constituted a predetermined scheme with the sole purpose of reducing the tax liabilities of the Astrup family and classified the proceeds of the liquidation received by Pegasus as distributions of dividends to the shareholders.

192 The result of such cases, said Mr Drangsholt, can be similar in effect to the direct application of Section 10–11 of the Norwegian Tax Act.

193 Dr Matre acknowledged the existence and scope of the anti-avoidance doctrine but contended that the two Supreme Court cases were distinguishable from the present case on their facts, which takes the Court unhelpfully down the blind alley of divergent assumptions as to what are the relevant facts in the present case.

194 As to the NOKUS rules, as we have observed above, the effect of these is that where a Norwegian resident shareholder directly or indirectly owns or controls 50% or more of a foreign company, the shareholder is taxed on the company's annual profits (by reference to his percentage holding) irrespective of whether those profits are actually distributed to him by means of a dividend.

195 Again the issue was not as to the meaning of the rules or of the policy behind them, but whether and if so, how they were engaged in the present matter.

196 Responding to Dr Matre's unqualified assertion in his first affidavit that, on the evidence presented, none of the circumstances that could trigger the NOKUS rules arises, Mr Drangsholt responded that he could not see how Dr Matre could so say at this stage:–

> *"It is my understanding that this is exactly what Skatt Vest wants to investigate and, even though Mr Larsen in his affidavit has claimed otherwise, the Bill of Indictment from the Norwegian Public Prosecutor implies that the information provided by Mr Larsen is misleading or even incorrect" Affidavit (paragraph 53).*

197 In our judgment, as we have already sufficiently explained, it cannot be a part of the Comptroller's function when deciding whether to issue a Regulation 3 notice in response to a request under the J/N TIEA, or this Court's function on any appeal from such a decision, to resolve contentious issues of Norwegian (or other foreign) tax law or to reach definitive conclusions about whether the person the subject of the request is or is not liable to Norwegian (or other foreign) tax.

198 Indeed, ordinarily it is unlikely that the Comptroller would have expert evidence of Norwegian (or other foreign) tax law in front of him at the time when he is called upon to make his decision (although in this instance he did because Dr. Matre's first affidavit was sworn on 11 th May, 2012). It would be in our view impractical that he should be required to obtain such evidence and undertake a process of detailed evaluation before coming to a conclusion about whether to accede to a request, and no discernible principle can compel him to do so.

199 Moreover, in the case of the present appeal it would have been wholly inappropriate for a Jersey court to presume to make findings on strongly disputed matters of substantive Norwegian tax law or the facts of the case under investigation, or to express definitive conclusions on questions of income tax liability, at the very time when these issues are the

subject of a criminal prosecution in Norway concerning Mr Larsen.

200 Nor do we accept the proposition advanced by the Appellants that the Court must be satisfied that it is more likely than not that Mr Larsen has failed to comply with Norwegian tax law. The Comptroller's task was, and ours now is, simply to ask whether the threshold criteria specified in paragraph (1) Regulation 3, carefully formulated as they have been, are satisfied.

201 The answer to that question is that having regard, first, to what we have already said (that we consider that there are very good grounds for believing that the NTA's suspicions are well founded and that Mr Larsen's interests in some at least of the companies involved in the transactions in question were more extensive or different from what he would have the outside world believe) and, secondly, to the evidence of Mr Drangsholt and Dr Matre, we are satisfied that there are indeed reasonable grounds for believing that Mr Larsen may have failed to comply with Norwegian domestic income tax law and that such failure has led, or is likely to lead, to serious prejudice to the proper assessment or collection of tax.

202 The very fact that charges of breaches of such law by Mr Larsen have not only been the subject of a Bill of Indictment but have been pursued to trial is, also, something that could not sensibly be ignored (even if we shut out from our minds the verdict).

203 It follows from this conclusion that the Appellants' repeated charge that the Request is nothing but an illegitimate *"fishing expedition"* is untenable.

204 It is moreover notable that on the issues of Norwegian law, in so far as the Royal Court had to consider the issues, they were obviously more impressed by Mr Drangsholt than by Dr Matre as a witness.

205 Mr Drangsholt candidly and very properly admitted that he did not know what the facts might, in due course, prove to be (causing him to cover the subject of robust forensic criticism in the Appellants' opening written submissions where he was charged with postulating "a series of hypothetical situations, none of which bears any relation to the actual facts", indulging in *"speculative straw grasping to justify a charge where none can reasonably exist based on the available information"* and *"unfounded speculation"*).

206 But Dr Matre was said by the Royal Court (paragraph 79) to be more assertive and judgmental than they would expect from an independent expert witness working — as such witnesses often must — on the basis of facts that ought to be acknowledged as no more than assumptions. Whether as the Royal Court surmised (ditto) Dr Matre was unconsciously handicapped by the fact, as he readily acknowledged, that he not only acts for Mr Larsen in civil cases in Norway from time to time but has been part of the team representing Mr Larsen in the current prosecution of him albeit only in relation to what he referred to as *"civil tax matters"* matters not. For our purposes it was how Dr Matre appeared

to the first instance court rather than why he did so which is significant.

207 The Royal Court concluded that Dr Matre's written testimony in particular too often read more like advocacy than independent expert evidence (ditto); a view we share even if as the Royal Court also observed, this tendency was less marked in his cross-examination by Mr Kelleher when he accepted that it would not take many facts to turn out to be different from those deposed to by Mr Larsen and Mr Healey for his views (on the potential for a tax liability on the part of Mr Larsen) to change.

208 But from our perspective, as an Appellate court, we must take account of the Royal Court's views. To the extent that there were differences of opinion between the two, the Royal Court preferred the evidence of Mr Drangsholt to that of Dr Matre. The advantage that the court of first instance has over an appellate court which has neither sight nor sound of witnesses, be they lay or expert, is notorious. See *Datec* (cit sup para [46]) *Pell Frischmann v Bow Valley Iran Ltd* [2008] JLR 311 [107–110] and *AI Airports International Ltd v Pirvitz* [2013] JCA 177 paragraph 57. We see no reason in the transcript or otherwise to depart from the Royal Court's expression of view as to which of the two witnesses was the more impressive.

The Foreseeability Issue

209 It is common ground that the phrase ***"according to law"*** in Article 8(2) requires at least a basis in domestic law for any interference with an Article 8(1) right. It is also common ground that this criterion is satisfied.

210 However, the phrase requires additionally certain features of the rule of law including ***"accessibility and foreseeability"***. (*Lester, Pannick, Herberg* op cit 3.14, p. 119–120). The Appellants argue that it was not foreseeable when they created the documents and records sought by the Notice that they would become vulnerable to requisition under a law which post-dated that creation.

211 Even accepting that as a proposition of fact, we consider that it is in context irrelevant. What is necessary under Article 8(2) is that the law in the 2008 Regulations should be accessible and foreseeable so as to enable person to have it as a guide to their conduct after it came into force. It has sensibly not been suggested that they fail that test. The 2008 Regulations are neither secret nor confused.

The Insufficient Detail Issue

212 The Appellants submit that there was no reason for the Comptroller to consider that the documents the subject of the May 2012 Notice may contain information relevant to a liability on the part of Mr Larsen to income tax (Regulation 3(2) and that the Notice lacks clarity

(Article 4(5)) J/N TIEA.

213 The Appellants' main themes appear to be that:–

(i) there is nothing in the Request to establish a connection between Mr Larsen and any potential liability to any tax falling within the scope of the J/N TIEA;

(ii) there is nothing to show any connection between the documents the subject of the May 2012 Notice and any such liability; and

(iii) the Request fails to comply with the stipulation of Article 4(5) of the J/N TIEA that a request *"must be formulated with the greatest detail possible."*

214 Underlying all three is the same, unrealistic insistence on the part of the Appellants that there is nothing about the circumstances of the transactions described in the Request that could possibly warrant suspicion that there is more to them than meets the eye, a contention that has already been examined and rejected above by us in the relation to Regulation 3(1). Our response to this head of challenge substantially reflects our response to reasonable grounds challenge.

215 Even in relation to Article 4(5) the main complaint is an assertion, once again, that the basis of the Request is "a series of bald assertions that are unsupported by any evidence" (paragraph 238 of the Appellants' opening written submissions), although, more specifically it is also alleged that the Request does not explain how the matters to which it refers are relevant to a liability on Mr Larsen's part to a tax covered by the J/N TIEA, why the documents requested are relevant to any such liability, on what basis the NOKUS rules are said to apply, and on what basis the Request can be said to concern criminal tax matters (paragraph 243).

216 In our view the requirements of Regulation 3(2) and of Article 4(5) J/N TIEA are more than adequately addressed in the Request (and its attachments) under the specific headings:–

"The tax purpose for which the information is sought"

and

"The grounds for believing that the information requested is relevant to the Norwegian Tax Administration and the factual basis for the investigation",

both in bold type and underlined. Moreover, by the time of the May 2012 Notice, the Comptroller had also had sight of the Bill of Indictment against Mr Larsen.

217 As regards the controversy over the expression *"criminal tax matters"* the Comptroller had by then also had the benefit of correspondence with the Norwegian authorities.

218 The extent of the detail that it is possible to give in any particular case will be conditioned by the circumstances; but it is in the nature of the facility afforded by any J/N TIEA that much will still be unknown and subject to investigation at the time that a request is made, and that, accordingly, there is a limit to how much specific detail a requesting party can realistically be expected to give.

The Over Breadth Issue

219 We do not consider there to be anything unreasonable about the nature and extent of the documents the subject of the May 2012 Notice.

220 Once the nature of the NTA's reasonable concerns about the transactions in question is recognised it is obvious why the Comptroller might have been of *"the reasonable opinion"*, as this Court is, that the documents production of which is required *"may contain tax information relevant to (a) a liability to tax to which [Mr. Larsen] …… may be subject; or (b) the amount of any such liability."*

221 It is submitted that the May 2012 Notice sought documents and records outside the scope of the Request. We do not agree. The salient parts of the Request have been set out at para 73 above.

222 It is notable that A) which was, in effect, a request for access to the same body of information as that previously supplied to the Norwegian police in 2006, actually describes, as a matter of history, what the police required, and B) (as stated in paragraph 73 above), has not been pursued.

223 This is clearly not so. The only Jersey companies over which the Jersey Financial Services Commission would have jurisdiction are in A. The only registered agents over which the Comptroller could exercise his powers would be Jersey registered agents.

224 The request to prioritise A) over B) tells us nothing about the content of A).

225 Because the May 2012 Notice required documents over a shorter time frame than did the Request far from being too broad, it was, if anything, too narrow.

226 The Appellants submitted that the scope of the May 2012 Notice is excessive, in that it extends to documents that are not covered by the Request and cannot therefore legitimately be demanded.

227 First, it was said, the Tax Authority never formally requested disclosure of "all documents

provided under the 2006 Notices to HM Attorney General" (paragraph 12 of Mr Larsen's notice of appeal).

228 The point is without merit. The way in which reference was made to these documents in the February 2010 Request may not have described them in precisely this way but on any fair reading it is obvious that that was what the Tax Authority was asking for under the request that they categorised as "A" and equally obvious from the course of events subsequent to the Request that it was this corpus of material that was and is at the heart of the dispute. Public law is concerned with substance, not form, (*R v Secretary of State for the Home Department ex p Pierson* 1998 AC 539 per Lord Steyn at (585D-E).

229 Secondly, it was said that the Request did not include documents relating to Volaw's dealings with Mr Larsen. But, with one exception the wording of paragraph 4(i) of the May 2012 Notice, "all documents and records that Volaw holds (including, but not limited to, financial statements, accounts, files and correspondence) which relate to dealings with the named taxpayer" is, in substance, the same as the request at paragraph 3(1) for Volaw to produce all documents previously provided pursuant to the first of the 2006 Production Notices, "namely: (i) documents relating to dealings with the named taxpayer; and …….". The only real difference being that whereas the latter was limited in time to the period 1st January, 1997, to 7 th July, 2006, the paragraph 4(i) request was for 1 st January, 1996, to 31st December, 2008. Recognising the overlap between the two requests, paragraph 4 opened with the words:–

> *"Further, save in so far as produced under paragraph 3 above ……".*

230 The belt-and-braces duplication of the request for this particular kind of document, if inelegant, is otherwise unobjectionable.

231 Moreover the widening of the span of time is in keeping with the terms of the Request itself:–

> *"The person under investigation is Mr Berge Gerdt Larsen, born 16 November, 1952, and the period for which the information is requested comprises the tax years from 1 Jan. 1996, until 31 Dec. 2008."*

232 Thirdly, it was said that paragraph 4(ii) of the May 2012 Notice requiring Volaw to produce documents concerning the four named companies for the period 1 st January, 1996, to 31 st December, 2008, goes beyond anything in the Request.

233 Here again there is an element of overlap with paragraph 3, albeit only in respect of two of the four companies. More importantly, on a fair reading of the section of the Request headed *"Assistance requested"* it is clear that the NTA was asking the Comptroller to *"1.* Obtain from the Registered Agents all information, documents, correspondence, financial

statements, accounts, entity records files held by them, and ……" in relation to *"the companies"*, that the companies so referred to include the four named under *"A)"*, and that in referring to *"Registered Agents"* the NTA had in mind Volaw in particular given that, *"As far as we know, Volaw is the only services provider used by these companies…..*". Here, too, the time-span is in line with that specified in the Request.

The Proportionality Issue

234 It was further submitted that the volume of document sought by the Request, and the subject of the May 2012 Notice was disproportionate and hence also inconsistent with Article 8.

235 In principle this head of challenge could involve two aspects. First that the Request and May 2012 Notice could ask for documents too remote from the purpose for which they were sought. Secondly, albeit they were not too remote, the amount of time and money to be incurred in their provision was out of scale to their potential utility.

236 In the present case, it is the first of those two aspects which is in play. Volaw does not complain that to satisfy the demand would be oppressive. They complain rather that there is no basis for a requirement for documents relating to other than the listed Companies in A.

237 The difficulty with that complaint is that *ex hypothesi* the NTA cannot know in advance whether documents from Company X, Y or Z will in fact illuminate the question as to whether, and if so, how Mr Larsen may have exercised control over the listed companies, or derived some benefit from them. Given the breadth of Norwegian fiscal legislation relating to income tax e.g. as to what amounts to a dividend, the net will inevitably be cast wide. We see nothing in context that makes the request disproportionate.

The Improper Purpose Issue

238 Before the Royal Court the Appellants advanced an argument that the NTA was acting in bad faith by concealing their true purpose of obtaining the information, the subject of the request, to carry out a civil assessment rather than for crime committed purposes. Before us the argument was initially discarded in opening and then resurrected in reply. We deprecate this somewhat casual treatment of a submission which involves accusations of bad faith against a public authority of a friendly foreign state. It is well-established that such a submission should never be advanced without careful consideration, and cogent evidence.

239 The Royal Court conscientiously analysed the material facts, embracing the entirety of dealing between the Jersey and Norwegian authorities in paragraphs 97 to 113 and after elaborate analysis which commands both our acceptance and our admiration they

concluded that the evidence “is nowhere near sufficient to justify a conclusion that there was bad faith on the part of the Norwegian authorities”.

The Use Issue

240 Before us the improper purpose argument was effectively moderated in favour of an argument that even if the NTA was candid as to their purposes of carrying out a civil assessment, but that use of the information for that purpose was prohibited.

241 It is Article 7 which alone is concerned with the use which the Requesting Party can make of the information provided. On its face it contemplates use for the purposes stated within Article 1, and indeed beyond them with the express written consent of the Requested Party see Article 7.3. The disclosure article i.e. Article. 7.2 reinforces the position that it is Article 1 which provides the initial controlling mechanism as to use within the jurisdiction of the Requesting Party.

This does not, contrary to the Appellants' argument, render the dichotomy in Article 10, meaningless. There is there a distinction between *“criminal tax matters”* and other tax matters: but as long as the Competent Authority can fit its request into the *“criminal tax matters”* box, its use of the information provided (which may relate to periods before the TIEA came into effect) is only restricted by Article 7(3). If it cannot fit its request into that box, that is an end of the matter. (And subject to their improper purpose argument, which we have rejected, the Appellants do not and cannot seek to contest the fact that the request in the present case falls within the definition of *“criminal tax matter”)*.

242 There is in short nothing in the J/N TIEA to the effect that, if information is obtained in relation to one or more of the purposes set out in Article 1, it cannot be used for any of the other purposes set out in Article 1.

243 The following submissions of Mr Kelleher recited in the judgment of the Royal Court (paragraph 97) and repeated in substance to us, correctly summarise the position:–

> ***“The key question in this Ground of Appeal must be whether the temporal distinction in Article 10, which enables the obtaining of information for “criminal tax matters” (as defined) from an earlier date than it does for civil tax matters, somehow serves to operate as a restriction on use by the recipient.*** In other words, if the Requesting party states that the request concerns their interest in a tax matter involving intentional conduct which is capable of leading to a prosecution, is the Requesting party restricted to using the information obtained for a criminal investigation and/or prosecution. The TIEA, as set out above, does not provide such a restriction.
>
> ***Further, the Comptroller has no power to reduce the purposes prescribed in the TIEA for which the information obtained may be used.*** As set out

above, the TIEA works in the opposite direction, a state of affairs amplified by the fact that the Comptroller has an express power under Article 7(3) of the TIEA to consent to the use of information provided for a purpose other than a purpose set out in Article 1. The Comptroller has no power to impose a restriction on use. Contrast the position under the Investigation of Fraud (Jersey) Law 1991 where the Attorney General has an express power, in agreeing to provide information to another designated party, to impose " an obligation not to disclose the information concerned otherwise than for a specified purpose" (Article 3(2))."

Conclusions

244 For these reasons we decline to set aside or vary the May 2012 Notice. The appeals will be dismissed and the requirements made of Volaw in that May 2012 Notice confirmed.

245 We emphasise that in reaching this conclusion we proceed on the basis that the information is made available solely in order to afford assistance in connection with the potential tax liability of Mr Larsen, not that of any of the companies named in the May 2012 Notice.