Simon Halabi (as executor of the estate of X, deceased) v Mark Wilson (as trustee in bankruptcy of Simon Halabi) and HM Revenue and Customs

Jurisdiction:	Jersey
Judge:	James W. McNeill, George Bompas, Sir Wyn Williams Kt
Judgment Date:	02 July 2018
Neutral Citation:	[2018] JCA 114
Reported In:	[2018] JCA 114
Court:	Court of Appeal
Date:	02 July 2018

Text

[2018] JCA 114

COURT OF APPEAL

Before:

James W. McNeill, Q.C., President;

George Bompas, Q.C., and

Sir Wyn Williams Kt

Between
Simon Halabi (as executor of the estate of X, deceased)
Appellant
and
Mark Wilson (as trustee in bankruptcy of Simon Halabi)

First Respondent

and

Her Majesty's Revenue and Customs
Respondent

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

Advocate W. A. F. Redgrave **for the First Respondent**.

Advocate D. P. Le Maistre **for the Second Respondent**.

Authorities

Ariel -v- Halabi [2018] JRC 006A .

Finance Act 2008.

Bankruptcy (Désastre) (Jersey) Law 1990.

Trusts (Jersey) Law 1984.

Re M Trust [2012] (2) JLR 51 .

Re AG (Manchester) Limited (in liquidation) [2005] JRC 035D .

Attorney General v De Keyser's Royal Hotel Limited [1920] AC 508 .

Re X (A Child) [2016] 3 WLR 1718 .

R (Ingenious Media PLC) v Revenue and Customs Commissioners [2016] 1 WLR 4164 .

Mayo Associates and others v Cantrade and others [1998] JLR 173 .

Dicey, Morris and Collins, The Conflict of Laws (15th edition).

Government of India v Taylor [1955] AC 491 .

Re Tucker [1987] JLR 473 .

Bankruptcy Act 1914.

Re State of Norway's Application (Nos 1 and 2) [1990] 1 AC 723 .

R (on the application of Jimenez) v The First-tier Tribunal (Tax Chamber) [2017] EWHC 2585 (Admin).

R (Derrin Bros Properties Limited) v First-tier Tribunal (Tax Chamber) [2016] 1 WLR 2423 .

R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1 .

Evidence (Proceedings in Other Jurisdictions) Act 1975.

European Convention on Human Rights.

United Capital Corporation Limited v Bender and others [2006] JLR 269 .

The C Trust [2010] JRC 001 .

R v Grossman (1981) 73 Cr App R 302 .

Mackinnon v Donaldson Lufkin & Jenrette Securities Corp [1986] 2 WLR 453

Trust — appeal against a judgment of the Royal Court dated 10 January 2018

THE PRESIDENT:

1 This appeal is made in respect of a judgment of the Royal Court (Birt Kt, Commissioner, with Jurats Crill and Ramsden) dated 10 January 2018 (*Ariel -v- Halabi* [2018] JRC 006A) given in respect of an application by the trustee in bankruptcy of Simon Halabi (the "trustee"), the present appellant. Following Orders issued by the Royal Court in 2012 and 2013, the appointment of the trustee had been recognised in Jersey and the trustee had been able take possession of certain documents or other materials (the "Confidential Materials") recovered from various institutions in Jersey for the purpose of administering the bankruptcy. Having been issued with an information notice, issued pursuant to Schedule 36 of the United Kingdom Finance Act 2008 (the "Information Notice") by the Second Respondent ("HMRC") in England, requiring production of the Confidential Materials, the trustee applied to the Royal Court for directions as to whether compliance with that notice would amount to a breach of the Orders referred to above and, if so, as to whether leave and, separately, variation, should be granted to allow compliance with the notice.

2 As the learned Commissioner indicated at the commencement of the judgment below, the application raised difficult issues as to the approach of the Court when it had authorised material to be available for a specific purpose and where the recipient then became subject to measures in his home jurisdiction requiring supply of that material for a different purpose.

Background

3 At the outset it is appropriate to mention two particular points. The first is to note that the appellant ("Mr. Halabi") participates in these proceedings not in his personal capacity but as executor of the estate of the late X, his mother. The second is to note that the present trustee, Mr. Wilson, is the third to hold the position as trustee in bankruptcy of Mr. Halabi. Of the Orders already referred to, that obtained in October 2012 was obtained by his

predecessor, Mr. Carton-Kelly, and that of 2013 by Mr. Carton-Kelly's successor, Mr. John David Ariel. Mr. Ariel commenced the present proceedings as representor, but was replaced by Mr. Wilson on 24 November 2017 due to the impending retirement of Mr Ariel.

4 Turning to the background, in March 2010 Mr. Halabi was declared bankrupt by the High Court in London and a trustee in bankruptcy was appointed on 9 April. Mr. Halabi's automatic discharge occurred on 30 March 2011, with administration of the estate in bankruptcy continuing in the hands of the trustee.

5 As part of the trustee's administration he sought and obtained a Letter of Request from the High Court in London seeking the assistance of the Royal Court in Jersey (a) by exercising its jurisdiction pursuant to Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Bankruptcy Law") in order to have the trustee's appointment recognised within this jurisdiction and (b) to vest the trustee with appropriate powers to be exercised in Jersey. Article 49 is aimed at facilitating the management of cross-border insolvencies, in particular by allowing for recognition in Jersey of an insolvency representative appointed in a recognised overseas jurisdiction and by enabling the representative to be clothed with powers in Jersey to identify and gather in assets for administration in the insolvency. The Article is in the following terms:

> ***"49 Assistance for other courts in insolvency matters***
>
> ***(1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency prepared by the United Nations Commission on International Trade Law*** .
>
> ***(2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.***[114]
>
> ***(3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law*** .
>
> ***(4) In this Article "relevant country or territory" means a country or territory prescribed by the Minister."***

6 On 26 October 2012, upon an application to the Royal Court by the trustee to accede to the terms of the Letter of Request, the Royal Court, by Act of Court, issued an appropriate order (the "Recognition Order"). The Recognition Order recognised the appointment and gave the

trustee authority in Jersey to exercise all of the powers which he was entitled to exercise in England and Wales to the extent that they would not be contrary to Jersey Law. Further, it conferred specific authority to obtain material from a number of named parties in relation to certain trusts and other entities.

7 Paragraph 9 of the Recognition Order stated:

> *"Save with the leave of this Court, the Representor shall only use the information or documents so produced for the purposes of the administration of the estate in bankruptcy of Mr. Halabi, in whichever jurisdiction, under the direction of the High Court."*

8 The trustee duly took possession of the Confidential Materials from various institutions in Jersey under the authority of the Recognition Order.

9 Separately, in January 2013, Barclays Private Bank & Trust Limited, in its capacity as trustee of the A Trust, issued a representation seeking directions from the Royal Court pursuant to Article 51 of the Trusts (Jersey) Law 1984 (the "Barclays Proceedings"). The trustee sought to be joined, and was joined, to the Barclays Proceedings on the basis that the estate in bankruptcy was a substantial creditor of the A Trust, which was insolvent. On 22 November 2013 the Royal Court issued a consent order (the "Consent Order") in the Barclays proceedings.

10 Paragraph 1 of the Schedule to the Consent Order required that the trustee be provided with all pleadings, acts of court, affidavits, documentary evidence, skeleton arguments and bundles filed in connection with the Barclays Proceedings, subject to redaction of confidential information. The direction contained the following proviso:

> *"Provided always that such disclosure shall not be used for any purpose other than the Representation and shall not be disclosed to any third parties, other than to the parties [sic] legal advisers, and in particular shall not be disclosed to any of the Defendants in the Actions described in paragraph 4 below."*

11 At paragraph 9 of the Consent Order, a specific liberty to apply was conferred.

12 Pursuant to the Consent Order the trustee duly received some of the Confidential Materials.

13 In April 2014, at about the same time that the trustee notified HMRC that a creditors' meeting would take place on 28 April and would bring Mr. Halabi's bankruptcy proceedings to an end, HMRC indicated to the trustee that it intended to apply to the First-tier Tax Tribunal in England (the "FTT") for permission to issue an Information Notice pursuant to paragraph 2 of Schedule 36 of the Finance Act 2008 for the purpose of seeking access to records held by the trustee. The proposed Information Notice required the trustee to

produce to HMRC, amongst other matters, all documents and information received pursuant to the Recognition Order and the Consent Order.

14 As a result of various related proceedings and appeals between the trustee and HMRC, judgment from the FTT approving the terms of the Information Notice sought by HMRC was not given until 9 May 2017. A detailed narration of those proceedings does not appear necessary for present purposes; but it will be found at paragraphs 15 to 23 of the judgment below. Two matters, however, are of importance. The first is that, in granting approval, the judge made it quite clear that she was well aware of the predicament which faced the trustee: in that, approving a notice which included the Confidential Materials might place the trustee in the invidious position of being faced with penalties in the event of the Jersey courts not authorising release of the documents. On a fair reading of her reasoning the judge, to all intents and purposes, left it entirely open to the Jersey courts whether the materials might be released. In her judgment issued on 9 May 2017 — in a section expressed with such a degree of precision, clarity and understanding that it deserves to be quoted in full — she stated:

> ***"37. HMRC did not accept that complying with the Sch 36 notice (if it is approved) would necessarily be a breach of the Orders. However, it is clear to me that that is a matter of Jersey law and the only evidence I had on that question of fact was that of the Trustee's Jersey Advocate and his view was that compliance would be contempt of court. Therefore, I find, at the very least, that compliance with the Sch 36 order in respect of the Jersey Documents would carry a real risk to the Trustee that he would be found to be in contempt of the Jersey Court. It seems to me to be extremely onerous to require anyone, but particularly a professionally qualified person, to put themselves at risk of being in contempt of court by complying with an information notice."***
>
> ***38. On the other hand, it seemed wrong to deprive HMRC of documents to which they would otherwise be entitled and which the Trustee could legally deliver to them if either the Jersey Court were to rule that provision of them would not breach the Orders or if it were to agree to vary the Orders to provide an exception for compliance with the Sch 36 Order. (I have already dealt with the issue of the costs of making such an application at §§ 23–31 above)*** .
>
> ***39. It seemed to me that there were very few options available to me: either I could include the Jersey Documents in the Sch 36 Order or I could exclude them. I did not have any other practical option*** .
>
> ***40. In particular, I could no more order the Trustee to use his best endeavours to obtain the variation to the Orders referred to above than I could order HMRC to pay the Trustee's costs of compliance. There is simply no power to do so within Sch 36. The Tribunal has no inherent power at all; the only general power conferred on it is to***

make case management directions. Case management directions are those that relate to the conduct or disposal of proceedings (Rule 5): they do not permit the Tribunal to order anyone to do anything outside the proceedings. In particular, the Tribunal cannot resolve proceedings by ordering a party to do something .

41. Nor do I have the power to make a Sch 36 Order subject to a precondition that a variation is obtained: and even if I could do so, it would be pointless. Without any obligation to seek a variation to the Orders, the Trustee would clearly be right not to spend money to obtain one .

42. As I have said, my only options are to include or exclude the Jersey Documents from the order. If I exclude the documents from the Sch 36 Order, HMRC will be deprived of them in circumstances where it may in fact not be either particularly difficult or expensive to obtain a variation from the Jersey Court. But if I include the documents within the Sch 36 Order, it will put the Trustee to trouble and expense in seeking a variation, in circumstances where it is not certain he will obtain it, and therefore it necessarily carries the risk that the Trustee will face a choice of breaching the Sch 36 order or being in contempt of court .

43. Could it ever be proper for the Tribunal to impose such a choice on a person? At first glance it would seem not but there are two considerations. Firstly, HMRC put the case that there is a presumption of regularity and in particular that HMRC would not behave with disregard towards a person's obligations to the courts, even those of foreign jurisdictions. The Tribunal therefore ought to presume that HMRC would not in practice require compliance with an approved Sch 36 notice in these circumstances without first giving the third party sufficient opportunity to obtain a variation from the court, nor would HMRC require compliance at all where the third party, having used his best endeavours to obtain the variation to the Orders, was unable to do so. In particular, HMRC would not impose a penalty in such circumstances (see paragraph 45 of Sch 36). Secondly, if HMRC did impose a penalty for non-compliance with the Sch 36 order, the Tribunal has the power to allow an appeal where satisfied that the third party has a reasonable excuse for non-compliance (§45), and a failure to obtain a variation, having used best endeavours in the time allowed to obtain it, would be almost certain to amount to a reasonable excuse .

44. The Trustee's view is that it is wrong to issue a Sch 36 order in terms that may not be enforced nor to order him to produce the Jersey Documents without an undertaking in advance that penalties would not be imposed if a variation were not forthcoming .

45. In answer to the first point, it is inherent in the legislative scheme that some information notices will not be enforced: HMRC and the Tribunal have the power to discharge a penalty for non-compliance where satisfied the third party has a reasonable excuse: §45(1). Indeed, as the proceedings for the issue of the notice are ex parte, the only time that the Tribunal is in a position to properly address whether the Trustee's fears of liability for contempt of court and whether or not the Trustee has really pursued the possibility of variation to the court orders, will be in inter partes penalty proceedings. And that must have been intended by Parliament .

46. In answer to the second point, any advance waiver of liability would provide no incentive to use best endeavours to obtain the variation. In any event, as I have said, there is no power to make conditional approvals; nor is there power to give an advance waiver of liability. §45 only applies where there has been a breach of an information notice."

15 The second matter is waiver by HMRC of the trustee's potential liability, adverted to by Judge Mosedale. Immediately following the issuing of the judge's decision the Trustee's English solicitors wrote on 15 May 2017 to HMRC to seek confirmation that HMRC would not seek to impose a penalty for non-compliance in the event that variations of the Orders could not be obtained. Understandably perhaps, HMRC's response, in a letter dated 19 May 2017 from a solicitor member of its Enforcement and Insolvency Litigation Team, was to state that it could not give the confirmation sought but "Taking a pragmatic approach, HMRC would be unlikely to differ from the position set out by Judge Mosedale; that [the Trustee] would be "almost certain" to have a reasonable excuse if, despite using his best endeavours, he were unable to obtain a variation of the two Jersey Court Orders or a declaration from the Jersey Court that compliance with the schedule 36 notice would not amount to a breach of either of the two Orders." It appears that this remained the position before the Royal Court although, it seems to us perfectly obvious, whilst the writer felt unable to give formal assurance she was expressing matters as closely as she felt could be done short of assurance. Before us, Advocate Le Maistre very properly indicated to us that in the event of the trustee's present application resulting in a refusal to allow disclosure wider than the restrictions, there would be no question of HMRC suggesting that such circumstances warranted HMRC seeking to have applied any of the relevant statutory penalties.

16 On 21 June 2017 the trustee commenced the present representation proceedings seeking leave of the Royal Court under the Recognition Order to comply with the Information Notice and seeking a variation of the Consent Order against the event that the Royal Court considered that the trustee would otherwise be in breach of either Order.

17 The present representation was served on all those from whom materials had been obtained pursuant to the Recognition Order and upon all parties to the Consent Order.

None of the parties who provided materials pursuant to the Recognition Order participated in the hearing below and can be taken to be content to rest on the wisdom of the Court. As regards the Consent Order, the estate of the late X is the only party which played any part in the proceedings below.

18 The present representation was due to be heard on 4 August 2017, but at about that time HMRC applied for and was granted leave to intervene.

19 The hearing below took place on 14 November 2017 and the trustee, in essence, adopted a position of neutrality, as he does before us.

The determination below

20 The first issue considered by the Royal Court was whether compliance with the Information Notice would constitute a breach by the trustee of the Recognition Order or the Consent Order. Upon the basis of the reasoning set out at paragraphs 26 to 36, the Royal Court determined, contrary to the submissions on behalf of HMRC, that compliance with the Information Notice would constitute a breach of each of the Recognition Order and the Consent Order. HMRC does not appeal this part of the judgment by Respondent's Notice and the reasoning can be noted shortly.

21 As regards the Consent Order, the specific direction as to no disclosure to third parties would be breached whether it occurred as a voluntary act or in order to comply with some obligation. Apart from that specific wording, it is a contempt of court for a party to court proceedings held in private, such as an Article 51 application, to disclose any documents received without the leave of the court: see *Re M Trust* [2012] (2) JLR 51.

22 As regards the Recognition Order, there is no reference to “disclosure” but, rather, that the trustee is restricted to the “use” of the information or documents for the purposes of the bankruptcy. The word “use” is open to a very wide meaning, and an element of profit or benefit is not essential. Whilst the concept of “using” normally involves the concept of a voluntary act, the trustee, here, has a choice as to whether to comply with the Information Notice, albeit with the potential consequence of a penalty.

23 Further, the Royal Court emphasised that, in its judgment, the intention of the Court in making the Recognition Order with the inclusion of paragraph 9 was clearly to emphasise the limited purpose for which it was intended that the information should be obtained. The court was exercising a power under the Bankruptcy Law and would have wished to ensure that the material being obtained by means of compulsion was used only for the purpose for which the court had granted its order, namely, the administration of a bankruptcy and not, for example, for tax purposes: see paragraph 36(iv) of the judgment below.

24 The Royal Court then turned to deal with the three issues with which this appeal is concerned:

> (i) whether the Royal Court had jurisdiction to make any of the applications made having regard to (a) the purpose of Article 49 of the Bankruptcy Law and (b) the rule against enforcement of foreign taxes
>
> (ii) whether it had discretion to do so and
>
> (iii) whether, in the exercise of its discretion, the court should make any of the orders sought.

25 Article 49(1) of the Bankruptcy Law, quoted above in full, states:

> ***"49 Assistance for other courts in insolvency matters***
>
> ***(1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person …"***

26 The Royal Court accepted that, if the original application had been to request information for the purposes of giving it to HMRC for a tax investigation, the Court would have had no jurisdiction under Article 49 to make such an order because Article 49(1) is restricted to assistance in insolvency matters.

27 However, the Royal Court determined that the insertion of the qualifying words "save with the leave of this court" at the beginning of paragraph 9 of the Recognition Order clearly envisaged that, with leave, the materials obtained pursuant to the Order could be used for a purpose other than the administration of the bankruptcy. Such a purpose might become necessary; but granting leave to that end did not change the fact that the order was made for the purposes of assisting the bankruptcy. The court did not see the wording of Article 49 as being so restrictive as to preclude allowing material to be used for some other purpose if that became necessary. In the view of the court, it was ultimately a matter for the court as to the level of restriction which it placed upon the use of material obtained pursuant to an Article 49 order and it was inevitable that the court should have jurisdiction to vary the order in light of changed circumstances, even for another purpose.

28 The Royal Court relied on the decision in *Re AG (Manchester) Limited (in liquidation)* [2005] JRC 035D. That case had also dealt with an Order under what is now Article 49, albeit the restriction was given in an undertaking rather than being stipulated as part of the Order. An application to the Royal Court had been made by English joint liquidators and subsequently the Official Receiver in England and Wales requested that the information obtained from Jersey be passed to that Office for purpose of an investigation into the failure of the company. The court allowed the terms of the undertaking to be amended to allow the information to be passed on.

29 Turning to the present Consent Order, whilst not made under Article 49, it was a final order and the Royal Court expressed the view that, ultimately, the court was arbiter of whether material supplied in proceedings may be disclosed elsewhere: the court always had an ongoing ability to vary an order which it had made in respect of the confidentiality of material produced in proceedings before it, whether such proceedings had been held in public or in private.

30 In submissions before us, Advocate Le Maistre for HMRC supported the Royal Court's conclusion in respect of the scope of the power available to the Royal Court and made some ancillary observations.

31 For the appellant, Advocate Harvey-Hills submitted that the effect of the decision below was to say that the scope of the power of the Royal Court was wider on a variation than it would have been on the making of the original order. What could not be done expressly on the original application could not be done by the back door on a subsequent occasion. The application to the Royal Court was clearly made under Article 49 and, to purport to exercise the power for any purpose other than to assist in an insolvency, would have been a wrongful and invalid exercise. The wording of the restriction in paragraph 9 merely reflected the scope of the power and the basis on which it had been exercised. The court could not rely on the opening wording in the Restriction to give it a power which it did not have.

32 In Advocate Harvey-Hills' submission, the reliance on the decision in *AG Manchester* was misplaced. The undertaking there had restricted use of the material to the purposes of the Company's liquidation. Under UK insolvency legislation, the Official Receiver had a statutory duty to investigate the reasons for the failure of a company and, on any view, such a matter was one “relating to the insolvency of a person”. Accordingly, whilst the court in *AG Manchester* correctly identified that the later purpose was not part of the company's “liquidation”, it was still a matter relating to insolvency. In these circumstances the court in *AG Manchester* did not need to address the scope of the Article 49 power.

33 Further, the court could not rely upon an inherent jurisdiction. It is a well-established principle of law that where a statute governs the exercise of a power, the statute takes priority: see *Attorney General v De Keyser's Royal Hotel Limited* [1920] AC 508, 526 (Lord Dunedin) and *Re X (A Child)* [2016] 3 WLR 1718, 1733 (Munby J).

34 As far as the Consent Order issue was concerned, the trustee had obtained that material in his capacity as trustee in bankruptcy and, accordingly, those documents were subject to the Restriction in the Recognition Order in any event.

Discussion

35 In our judgment the Royal Court was correct to identify that it had jurisdiction to entertain

the applications made to it in this representation. It seems to us immaterial either by which process of law a recipient of confidential materials came to be in possession of them or whether a restriction on use arises by reason of an undertaking, a restrictive condition imposed by a court or of the principle of law of confidentiality. Those who, in the exercise of legal power of public duty, obtain personal or confidential information will in general owe a duty from the person from whom it was received or to whom it relates not to use it for other purposes: see *R (Ingenious Media PLC) v Revenue and Customs Commissioners* [2016] 1 WLR 4164 at paragraph 17 (Lord Toulson JSC). In any of these circumstances the restricted information has been obtained and, upon a possible separate purpose emerging, a new issue arises. That issue is as to whether in the circumstances which then obtain, the court which is approached by the holder of the information has the power to grant the request and, assuming it to be discretionary, is of the view that the discretion ought to be exercised in favour of the applicant. None of these questions depend upon the ambit of the initial power or authority being wide enough to encompass the subsequent request. It may well be that a request of the nature of the subsequent one could not properly have been entertained in exercise of the power used when the information was first obtained. That is neither here nor there so long as a power exists to grant the new request, that the ambit of the power covers the circumstances of the application and that all relevant parties participate in the court's determination.

36 It is correct here, however, to remember that the two fetters on the trustee's power to deal with the documents arise from two different juristic acts: an order of the court in which it deemed it apposite to insert a confirmation of the restriction (together with an indication of the possibility of leave being given to act contrary to the restriction) and, separately, a private agreement to which the court granted its approval. As to the second it might, in appropriate circumstances, be necessary to have regard to the interests of each of the parties to the agreement. Even so, as regards each the result is an order of the court with continuing effect restricting the power of the trustee. It seems to us that, there being an order of the court with ongoing effect, the court with jurisdiction to enforce the order must also have power to deal with the order by way of variation or by way of considering whether to grant leave to the person whose power is restricted to act in a specified way notwithstanding the restriction. This, we conceive, is a power separate from that exercised when the order was first made and is not, for example, an attempt to exercise a power to correct or alter the initial order; and it is part of the inherent jurisdiction of the court.

37 In *Mayo Associates and others v Cantrade and others* [1998] JLR 173 this court had occasion to consider the source and ambit of the inherent jurisdiction of a court: see the judgment of the court delivered by Smith JA at pages 188 to 191. The inherent jurisdiction is, put shortly, an authority in a court to do everything to uphold, protect and fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner, which must include all procedural power necessary to act as a court in a meaningful sense. Just as this will include the power to correct errors in its orders it must include all powers necessary to enable the court adequately to deal with an issue properly brought before it. Here, the trustee has been faced with a dilemma: he is aware of the enforceable restrictions on his use of the confidential materials and he is aware that a new circumstance has arisen which places a proper call on him. Against that background he has done what is correct: to

approach the court with power to enforce the restrictions, to express his neutrality, and to allow others to present competing arguments. In our judgment the court must have power to consider whether the new circumstance is so pressing that a limited release from the restrictions is warranted. Whilst the nature of a new circumstance might not be found sufficiently material to permit a review of the original order, to find that a court had no power to revisit a continuing order would be to deprive the court of the power to do justice as between parties.

Jurisdiction: Indirect enforcement of a foreign revenue law

38 Before the Royal Court, Advocate Harvey-Hills had submitted that the court had no jurisdiction to make the orders requested because to do so would amount to an indirect enforcement of a foreign revenue law. Reference had been made to Rule 3 as stated in Dicey, Morris and Collins, The Conflict of Laws (15th edition) at 5R-019. That rule states:

> ***"English courts have no jurisdiction to entertain an action … for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or founded upon an act of state."***

39 As the Royal Court indicated, that rule is based upon the decision of the House of Lords in *Government of India v Taylor* [1955] AC 491 and is taken accurately to reflect the position under Jersey law. The question for the Royal Court, as it saw it, was whether the orders requested by the trustee would amount to indirect enforcement of UK Revenue law.

40 The Royal Court referred to *Re Tucker* [1987] JLR 473 where a trustee in an English bankruptcy sought assistance from the Jersey courts under the Bankruptcy Act 1914 for the purpose of examining a Jersey resident about assets of the bankrupt held in various trusts. The sole remaining creditor of the bankruptcy was the Inland Revenue and the court held that the proposed examination, when the sole creditor was the Inland Revenue, amounted to an indirect attempt to enforce a foreign revenue law and refused to grant the requested order.

41 The Royal Court then noted that the decision in Re Tucker had been given before the decision of the House of Lords in *Re State of Norway's Application (Nos 1 and 2)* [1990] 1 AC 723. The House of Lords there held that granting assistance for the examination of witnesses in England in connection with assessments to tax in Norway of a Norwegian citizen did not amount to the indirect enforcement of the Revenue laws of the state of Norway: see the speech of Lord Goff of Chieveley at page 809.

42 Advocate Harvey-Hills had argued below that the position in the present matter was different from that in *Re State of Norway* in that Schedule 36 of the Finance Act 2008, under paragraph 2 of which HMRC was empowered to serve an information notice, had been held to be an enforcement provision: reference had been made to *R (on the application of*

Jimenez) v The First-tier Tribunal (Tax Chamber) [2017] EWHC 2585 (Admin). He had submitted, secondly, that the material in the possession of the trustee was subject to the Royal Court's jurisdiction as it was only in the possession of the trustee because of the granting of the two Orders.

43 The Royal Court did not accept either of those submissions. It noted that whilst the court in *Jimenez* had regarded Schedule 36 as an "enforcement jurisdiction" when considering the issue as to whether a notice could be directed towards a non-resident, it had elsewhere in the judgment referred to the schedule as conferring "investigatory powers".

44 The Royal Court also noted the observations of the Chancellor, Sir Terrence Etherton, in *R (Derrin Bros Properties Limited) v First-tier Tribunal (Tax Chamber)* [2016] 1 WLR 2423 at paragraphs 68 and 80, where the Chancellor emphasised that Schedule 36 related to the investigatory stage of checking possible tax avoidance or evasion.

45 In the view of the Royal Court, the whole purpose of Schedule 36 was to gather information in order to assess a person's tax position: not a measure for the enforcement or collection of tax liability.

46 Whilst the Royal Court agreed with Advocate Harvey-Hills that the trustee held the material as a result of the Jersey Orders, the material was situated in England and the trustee resident in England and subject to the jurisdiction of the English courts and English law. On the whole, the Royal Court did not see a proposed variation as amounting to indirect enforcement of a foreign tax law.

47 Before us, Advocate Harvey-Hills took issue with the idea that the trustee held the documents subject to English law and English courts. The trustee held the documents subject to the terms of the Jersey Orders and the documents were therefore properly to be regarded as being under the control of the Royal Court regardless of their physical location. The very fact that the courts of England and Wales had been prepared to approve an Information Notice indicated that it viewed the Jersey restrictions as operative.

48 Turning to the Royal Court's approach to the authorities, Advocate Harvey-Hills submitted that the Royal Court had misconstrued the decisions. The rule in Dicey Morris and Collins was not about enforcement or collection of tax liability, it was about enforcement well beyond the collection of tax. One state would not assist another in the exercise of an enforcement jurisdiction which, as a matter of international law, was exclusively territorial: reference should be made to *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1, (Lord Collins of Mapesbury JSC at paragraph 246). The Royal Court had not considered properly or at all the nature of direct and indirect enforcement.

49 Advocate Harvey-Hills submitted that the Royal Court was wrong to distinguish *Jimenez* on the ground that the classification of Schedule 36 as an enforcement jurisdiction was for

a very specific purpose. The court there had quashed a notice that had been approved by the FTT because Schedule 36 afforded HMRC no power to issue a notice extra-territorially. The basis for that conclusion had been that Schedule 36 was an enforcement jurisdiction. That finding had been central to the conclusion that Schedule 36 had territorial limits. The investigatory powers at issue here were being enforced through coercive means.

50 Further, in Advocate Harvey-Hills' submission, the Royal Court was wrong to analyse the decision in *Re State of Norway* as giving rise to some general principle that information gathering was excepted from the revenue rule. When particular regard was had to the speech of Lord Goff at 809D — H, it was clear that his Lordship had accepted that there would be indirect enforcement of the revenue rule either (1) where the foreign state (or its nominee) in form seeks a remedy which in substance is designed to give the foreign law extra-territorial effect, or (2) where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. Varying the Jersey Orders to vindicate the rights of the foreign state to require the production of documents was, clearly, indirect enforcement as identified by Lord Goff.

51 Before us, Advocate Le Maistre endorsed the reasoning of the Royal Court.

52 HMRC's checking of the taxpayer's tax position was for the purpose of identifying whether there was any tax to bring into charge, and only if so would there be a corelative enforcement action. Indeed, Mr. Halabi's position was that there would be no charge to tax.

53 Turning to the authorities, Advocate Le Maistre contended that the decision in *Jimenez* was irrelevant to the present case. It concerned the jurisdiction of the FTT to issue a notice under Schedule 36 in respect of an individual outside the jurisdiction, where noncompliance with the notice would lead to penalties arising overseas. The issue, therefore, was whether Schedule 36 operated extra-territorially, an issue which did not arise in the present case.

54 Further, the notice in *Jimenez* was addressed to the taxpayer and it was noteworthy that the view of the court was not that any notice whatsoever issued to a taxpayer under Schedule 36 would be an exercise of an enforcement jurisdiction generally but was concerned as to whether enforcement of the notice would in effect take place overseas. *Jimenez* was not authority for the proposition that Schedule 36 did not operate extraterritorially in any sense. The judgment of the English Court of Appeal in *Derrin* was an instance of Schedule 36 being used to enforce foreign tax powers.

55 Advocate Le Maistre informed us that the Court of Appeal in England had granted permission to appeal in *Jimenez* on 16 April 2018.

56 Turning to the decision of the House of Lords in *Re State of Norway*, that case concerned a request with no question of penalties being applied or criminalisation of conduct. This was

the equivalent to the variation sought in the present case, which was not coercive in any sense.

Discussion

57 As the learned authors of Dicey, Morris and Collins state at Section 5–021, Rule 3 is framed in terms of lack of jurisdiction of the domestic court. Whilst, in the 11th edition of their work, it had been suggested that it was the foreign state which had no international jurisdiction to enforce its law abroad, and therefore would be attempting to act in excess of jurisdiction (the view adopted in *Re State of Norway* at p. 808), the traditional and widely accepted terminology had been retained.

58 As the learned authors also state at Section 5–020, the theoretical basis for the Rule is a matter of some controversy but can be best explained through the notion that an assertion of sovereign authority by one state within the territory of another is contrary to all concepts of independent sovereignty: see *Government of India v Taylor* (at 511, Lord Keith of Avonholm) and *Re State of Norway* (at p. 808, Lord Goff).

59 The issue before this court is as to whether the powers given to HMRC under Schedule 36 constitute a revenue law which is to be used through an exercise of extraterritorial sovereignty.

60 An appropriate starting point would appear to be the decision of the House of Lords in *Re State of Norway* where it was held not to be an exercise of extra-territorial sovereignty for a foreign state to seek the assistance of the English court to obtain evidence for the enforcement of its revenue laws in its own country. The reasoning of the House of Lords is given in the speech of Lord Goff of Chieveley, with whom all other members of the Judicial Committee agreed.

61 The arguments before their Lordships were wide ranging, but at page 808 G-H Lord Goff turned to the question of whether the execution of letters of request in relation to foreign civil proceedings in a fiscal matter should, if the request is made on the application of a taxing authority, be refused; and immediately confessed to having given the most anxious consideration to the question.

62 After consideration of comparative materials, Lord Goff said (809D):

> ***"… It is of importance to observe that that rule is limited to cases of direct or indirect enforcement in this country of the revenue laws of a foreign state.*** It is plain that the present case is not concerned with the direct enforcement of the revenue laws of the State of Norway. Is it concerned with their indirect enforcement? I do not think so. It is stated in Dicey & Morris, at point 103, that indirect enforcement occurs (1) where the foreign state (or its

> nominee) in form seeks a remedy which in substance is designed to give the foreign law extraterritorial effect, or (2) where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. I have been unable to discover any case of indirect enforcement which goes beyond these two propositions. Even so, since there is no authority directly in point to guide me, I have to consider whether a case such as the present should nevertheless be held to fall foul of the rule. From my part, I cannot see that it should. I cannot see any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself."

63 It is important to recollect that in *Re State of Norway* a Norwegian court, seised with a revenue dispute between a taxpayer and the Norwegian Tax Committee, issued a letter of request addressed to the English High Court requesting the oral examination of two witnesses residing in England, upon the basis of which the Norwegian state applied under Section 1 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 for an order requiring the witnesses to give the evidence sought. For what it may be worth there was no suggestion of penalties being imposed in Norway or the conduct being criminalised there in the event of failure to comply with the proposed order. It can be seen therefore that, as Lord Goff indicated, the application in England was neither an attempt to enforce a revenue law extra-territorially nor was it a form of indirect enforcement.

64 The issue before this court, therefore, requires consideration of the terms of Schedule 36 in order to identify its true nature and, if it is found to be of a revenue nature, to identify whether or not the orders which might be given in this jurisdiction would amount to direct or indirect enforcement.

65 Schedule 36 to the Finance Act 2008 (c. 9) is part of what is, without doubt, a revenue statute, as the short title indicates. The title for Schedule 36, however, is "Information and inspection powers". Part 1 of the Schedule, as its heading and the headings of individual paragraphs indicate, provides for the power of an officer of HM Revenue and Customs to require a taxpayer to provide information or produce documents if the information or document is reasonably required by the officer for the purpose of checking the tax position of a taxpayer. By paragraph 7, where a person is required by an information notice to provide information or produce a document, the person must do so within such period and such time, by such means and in such form (if any) as is reasonably specified or described in the notice. Part 2 of the Schedule provides for powers to inspect business premises, Part 3 provides for ancillary powers and Part 4 provides for restrictions on powers. Part 5 provides for appeals against information notices. Part 7 provides for penalties where individuals fail to comply with the information notices or deliberately obstruct officers in the course of an inspection. Part 8, among other matters, provides that it is an offence to conceal, destroy or otherwise dispose of documents covered by an information notice. The Schedule concludes with ancillary and consequential provisions.

66 It therefore appears that, albeit part of a revenue statute, the provisions of Schedule 36 constitute a code for investigation into domestic tax affairs. They are, however, a very important part of the revenue laws of the United Kingdom authorising, as they do, active investigation by the tax authorities, coupled with penalties and criminalisation in the event of failure to respond or active obstruction. They are, for a well-regulated state intent on seeking to ensure the proper distribution for the provision of government revenues, an essential mechanism in the fight against tax avoidance and tax evasion.

67 Schedule 36 has been considered in two English authorities: most recently in *Jimenez* albeit now under appeal to the Court of Appeal. The consideration in that case, however, was as to the territorial ambit of Schedule 36, and in particular as to whether it provided a power to give tax payer notice in Dubai. The learned judge found that it did not. His reasoning included the finding that, whilst Schedule 36 provided investigatory powers, the inclusion of enforceable provisions for penalties and criminal sanctions indicated that the schedule was an enforcement jurisdiction: see paragraphs 51 to 55. His basis for reaching that decision included, among other matters, consideration of certain views of Lord Collins of Mapesbury JSC in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 where, dealing with enforcement jurisdiction at paragraphs 245 and 246, his Lordship said:–

> ***"… Thus a state cannot, without the consent of the territorial sovereign, perform official acts in a foreign state or carry out official investigations in the foreign state.*** The inability of a foreign state to claim, directly or indirectly, its taxes in England is sometimes put on the basis that it is an illegitimate extension of its territorial jurisdiction: see *Government of India v Taylor* [1955] AC 491."

68 The other decision is that of the English Court of Appeal in *Derrin*. In that case, claimants sought judicial review of the giving and approval of notices under Schedule 36 on the grounds that there had been a breach of the requirements of the Schedule and a violation of the right to a fair hearing guaranteed by Article 6 ECHR, when taken in conjunction with Article 8, upon the basis that the claimants had been precluded from challenging the third party notices, had not been given reasons and had no right to make representations or be present at the tribunal hearing. In such circumstances, no question arose as to whether the provisions of Schedule 36 were enforcement provisions. The claim was dismissed both at first instance and in the Court of Appeal but, among various observations made by the Chancellor, Sir Terrence Etherton, were some which emphasised that the provisions of Schedule 36 related to the investigatory stage of checking possible tax avoidance or evasion: see paragraphs 68 and 80.

69 Accordingly, neither of the decisions in *Jimenez* or *Derrin* give definitive guidance as to the issue facing this court. In this matter, we reach the view that it would not be a proper characterisation of the provisions of Schedule 36 to fail to recognise that they embrace both elements of investigation and elements of enforcement. The totality is to provide a regime which seeks to reduce instances of tax avoidance and tax evasion by enforcing the

implementation of the Tax Statutes. In that sense, as indicated by Lord Collins in *Smith*, the carrying out of official investigations is an element of enforcement and cannot be carried out in a foreign state without the consent of the territorial sovereign.

70 In the circumstances of the present case, however, the official investigations pursuant to the Schedule 36 powers are not proposed to be carried out in a foreign state. The trustee is resident in the United Kingdom and the relevant materials are under his physical control in that jurisdiction. Being within the jurisdiction he is subject to properly issued notices. The only issue is as to whether, given the obligations imposed upon him by the Royal Court in this jurisdiction, he should be precluded from responding to the validly issued notices.

71 We therefore reach the view that the Royal Court had jurisdiction to entertain the applications without being in breach of the Revenue Rule.

Discretion

72 The Royal Court determined that, in the particular circumstances before it, the correct course was to grant consent under the Recognition Order and to vary the Consent Order so as to permit the trustee to comply with the information notice. As was to be expected before reaching that conclusion it first identified the factors which it considered most relevant to its decision. In summary, it reasoned as follows.

73 First, the States have provided a specific mechanism for enabling confidential information in Jersey to be obtained by investigating authorities in other jurisdictions for the purpose of preventing tax evasion. This mechanism, underpinned by statute, is to be found in the various Tax Information Exchange Agreements ("TIEAs") entered into with many countries including the United Kingdom. Second, Article 49 is the means by which confidential information held by institutions or persons in Jersey can be obtained by an overseas insolvency representative, as part of the conduct of cross-border insolvency. In the event that an order under the Article is made, the information which is the subject of the order will then come to be held by the representative in an overseas jurisdiction. Third, circumstances may arise in which an insolvency representative in receipt of material which in principle is to be used only for the purposes of the cross-border insolvency and which might (as in the present case) be subject to an express restriction as to its use, will find himself/herself the subject of obligatory measures in an overseas jurisdiction requiring its disclosure for different purposes.

74 The Royal Court was clear in its view that if the material in question can be obtained through the mechanism of a TIEA but the party seeking the information has not availed himself of that process the court should refuse a variation permitting an insolvency representative holding material obtained for the purpose of a cross-border insolvency to provide the information. That would be so, even if, as here, the insolvency practitioner is subject to an order in another jurisdiction such as an information notice approved by the

FTT.

75 In the instant case, the information notice approved by the FTT and put in evidence before the Royal Court sought information from the trustee relating to the time-period 6 April 1993 to 5 April 2013. However, under the terms of the TIEA with the UK no material relating to a period prior to 2010 could be obtained by HMRC using the processes laid down in the TIEA. The Royal Court concluded, quite correctly, that the only way in which HMRC would be able to obtain information relating to the period prior to 2010 was if it authorised the trustee to provide it.

76 It is clear to us that this factor weighed very heavily in the balancing exercise which led the Royal Court to conclude as it did. That said the court relied upon other factors, too, to support its conclusion. They were (a) that the trustee was subject to an order made by the FTT and a failure to comply might lead to penal sanctions against him (b) that the material was situated within the United Kingdom and (c) that HMRC was entitled to the information under English law in circumstances in which the FTT as an independent judicial monitor had found the request for information to be reasonable.

77 For the appellant, Advocate Harvey-Hills submitted that the Royal Court, having found that the two separate routes in respect of confidential information relating to insolvency and to taxation should be respected, did not have a discretion available to it to allow procedure other than through the TIEA. The States had legislated specifically with regard to the provision of tax information through the comprehensive TIEA regulation scheme. The TIEA regulations provided important safeguards in respect of the request of tax information: an especially important matter as an interference in a right protected by Article 8 of the European Convention on Human Rights was involved. These safeguards included:

(i) Upon an information request being made to the Comptroller of Taxes in Jersey, the final decision as to whether to give effect to any such request lay with the Comptroller and, where necessary, the court.

(ii) The information request had to relate to a tax covered by the TIEA.

(iii) Fishing expeditions were not permitted.

(iv) HMRC had to set out in the greatest detail why the documents were required.

(v) A request may be declined.

(vi) A challenge by means of judicial review was open to the taxpayer or a third party with sufficient interest.

(vii) The Comptroller and the court could set time limits on the use that could be made of such documents.

78 He stressed that the importance of adhering to the TIEA scheme could be seen through three particular matters. First, the TIEA did not permit the obtaining of material prior to 2010. Second, the TIEA scheme envisaged any decision being made by the Jersey government through the Comptroller upon the basis of the fullest information being provided as to the "foreseeable relevance" of the documents and other matters. Here, on the other hand, the Royal Court has been given no information at all as to why the documents were required. Third, the procedure before the FTT specifically excluded the involvement of the taxpayer and other parties whereas the recipient of a TIEA notice has the right to challenge by means of judicial review.

79 It followed, submitted Advocate Harvey-Hills, that the Royal Court was wrong to find that the existence of the TIEA scheme was simply a factor to be considered in the exercise of a discretion. Application of the *De Keyser* principle meant that there was no discretion and the only course open to HMRC was to proceed under the Jersey/UK TIEA.

80 On this point Advocate Le Maistre for HMRC adopted the reasoning of the Royal Court. He reminded us, too, of the restrictions on the power of an appellate court to interfere with a discretionary decision taken below: reference was made to the decision of this court in *United Capital Corporation Limited v Bender and others* [2006] JLR 269.

81 If contrary, to his principal submission, the existence of the TIEA was but one factor to be taken into account in the exercise of a discretion, Advocate Harvey-Hills contended that the Royal Court had misdirected itself, had failed to take into account a number of relevant factors and had reached a decision which was plainly wrong.

82 As to its misdirection, he had placed before the Royal Court the case of *The C Trust* [2010] JRC 001, a case concerning a letter of request from the English High Court in the context of matrimonial proceedings, but emphasising the importance of adhering to specified procedures. The Royal Court had misdirected itself in failing to refer to this authority in the context of exercising a discretion in relation to the consent order.

83 For HMRC, Advocate Le Maistre submitted that there was no indication that such significance as the authority might have had been misapprehended by the Royal Court.

84 In respect of failure to consider relevant matters, Advocate Harvey-Hills submitted that the Royal Court's decision threw into doubt the future of mutual assistance in insolvency. Comity required not merely reciprocation but also respect for the orders that another court had made. Trustees and other parties were likely to be very concerned about making widespread documentation available to an overseas insolvency practitioner if there was a real risk that the documents could be made available to other parties, including governmental bodies, for unrelated matters and with potentially prejudicial consequences.

85 Secondly, the Royal Court had failed to consider the nature of the TIEA legislation, its

limits and safeguards. It was irrelevant to give weight to the fact that the Schedule 36 notice had been approved by the FTT. The Royal Court could not delegate its discretion to the FTT any more than the Jersey comptroller could delegate its discretion under the TIEA regulations to HMRC.

86 Thirdly, the Royal Court had failed to give weight to the distinction between a Schedule 36 notice and a letter of request. A letter of request allowed the Royal Court to exercise discretion in full knowledge of relevant facts and matters. Here, the Royal Court sought to rely upon the FTT as “independent judicial monitor” in relation to a statutory procedure which was not part of Jersey law.

87 Fourthly, as the documents, albeit held in England, are subject to the Jersey restrictions, the attempt by HMRC to seek disclosure of the documents should be treated as an attempt to have documents disclosed although held in another country. Reference was made to *R v Grossman* (1981) 73 Cr App R 302 and *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] 2 WLR 453.

88 Fifthly, the Royal Court failed to consider the prejudice and unfairness caused by failing to follow the process in the TIEA legislation.

89 Finally, Advocate Harvey-Hills submitted that the decision was plainly wrong. Whereas the Royal Court had expressed concern that, if it did not allow the variations, the trustee would be penalised, there was no risk of the trustee being penalised as was made clear from the FTT judgment at paragraph 43.

90 It was irrelevant for the Royal Court to lay emphasis on the fact that, if it did not allow the variations, HMRC would not be able to obtain the documents. The fact that the documents could not be obtained arose as a result of the specific statutory scheme designed for the purpose, that is the TIEA and TIEA Regulations. That should have been an end of the matter.

91 For HMRC, Advocate Le Maistre reminded the court that an appellate court should be slow to intervene on an exercise of discretion by a lower court absent a material error of law or fact. The appellant's contentions had not demonstrated any such material error.

92 As to comity issues, there was no basis for such fears as were expressed by the appellant. Any such concerns could readily be dealt with in future orders by incorporating preventative terms.

93 As regards the alleged failure to take into account comparisons with the TIEA regulations, Advocate Le Maistre submitted that the TIEA schemes did not preclude recourse to a Schedule 36 Notice in appropriate circumstances. The two schemes were different, but

each had checks and safeguards.

94 The analogy with the courts of one country declining to attempt to force a person who is subject to its jurisdiction to disclose documents held in another country was misplaced as the documents were, indeed, in England.

Discussion

95 The Royal Court recognised that the existence of separate legislative schemes enabling confidential information in Jersey to be obtained for the purpose of assisting in overseas insolvencies and, separately, for the purpose of preventing tax evasion in other jurisdictions constitute two quite distinct regimes. As the Royal Court indicated with some clarity, Jersey has entered into TIEAs with many countries and those make specific provision for the overseas tax authority to make a request to obtain confidential material. Any request for information must be formulated with considerable detail and specifying a number of prescribed matters. Thereafter, the requested authority, the Comptroller, considers the information provided and decides whether it falls within the terms of the TIEA. He can request further information if he thinks fit.

96 The Royal Court also expressed concern that if it were to become common for material supplied for insolvency purposes to then be disclosed to taxation authorities for tax purposes, this would circumvent the separate routes established by the legislature and allow revenue authorities to obtain information via the back door.

97 The Royal Court concluded it should ordinarily refuse to permit a trustee to comply with an information notice in circumstances where HMRC was able to obtain all the information specified in the notice using the agreed procedure of a TIEA. Unhesitatingly we agree with that approach.

98 However, we are not persuaded that the existence of a TIEA between the UK and Jersey, which permits the disclosure of information to HMRC if the criteria within the TIEA are met, necessarily means that the court should refuse to permit disclosure of information held by the trustee to HMRC in all circumstances In particular we are certainly not persuaded that this is the consequence of the existence of the TIEA when much of the information sought by HMRC could not be provided under the terms of the TIEA because it relates to a period prior to 2010. In our judgment the existence of the TIEA is always a factor which should be considered by a court when it is asked to authorise the provision of information by a trustee to HMRC; in many cases the existence of the TIEA may be a decisive factor as the Royal Court has indicated. Nonetheless the weight to be attached to this factor will, ultimately, be dependent upon all the circumstances prevailing in a particular case. We are satisfied that there is nothing in the TIEA itself nor in the legislation which underpins it which requires a different conclusion. In our judgment the Royal Court was correct in its appraisal of the significance of the TIEA in general terms; however, it was also correct to conclude that it

was but one of a number of factors to be taken into consideration in this case.

99 Before turning to review the decision of the Royal Court it is as well to refer to certain parts of the evidence put in on behalf of HMCR which was and remains unchallenged. In her affidavit dated 2 August 2017 Ms Ball, a solicitor employed by HMCR, described how on 30 June 2014 HMRC made a written request to Mr Halabi to provide the information which subsequently formed the basis of the information notice served upon the trustee; he was asked, in the alternative, to consent to the trustee releasing the information. Mr Halabi refused to provide the information and he refused his consent to the trustee providing the same. The information notice was filed at the FTT in August 2014. It sought information which related both to the period prior to 2010 and subsequent to that time. It also sought information which was not captured by the Recognition Order made by the Royal Court in 2012 and the Consent Order made in 2013. On 8 October 2014 an Information notice pursuant to Schedule 36 of the Finance Act 2008 (paragraph 1) was served upon Mr Halabi. As we understand it this notice sought information from Mr Halabi of a similar if not identical type as was sought from the trustee. No suggestion was made to the Royal Court that Mr Halabi was not obliged to comply with this notice; yet no information of any kind has ever been provided in response to the notice. Not surprisingly, in her affidavit, Ms Ball attested to the fact that the details of the investigation into Mr Halabi's tax affairs was confidential. She did, however, confirm that the information sought from the trustee related to a period from about 2003 to the date of the notice and was relevant to Mr Halabi's tax affairs both before his bankruptcy and to the present day. The information was, she said, "*vital to determining the correct tax position of Mr Halabi"* both in the past and presently. She was also able to say that the information which has been provided to HMRC by the trustee (because it was not subject to the recognition Order and the Consent Order) has reinforced the view of HMCR that the information held by the trustee which is subject to the orders was critical to establishing the correct view of Mr Halabi's tax affairs.

100 Against this background can it be said that the decision of the Royal Court to permit disclosure was wrong? Did the court fail to take account of a material consideration or considerations such that its decision should now be categorised as wrong? Was the decision made by the Royal Court one which it was entitled to reach or was it beyond the scope of reasonable decisions given the facts and circumstances presented to the court?

101 Notwithstanding the issues raised by Advocate Harvey-Hills, and summarised at paragraphs 84 to 90 above, we are satisfied that the Royal Court did not fail to take account of any relevant matters. In our judgment it is quite simply wrong to say that the Royal Court failed to take account of the matters raised in those paragraphs. It may be true that each of the points made by Advocate Harvey-Hills was not referred to expressly in the judgment of the Royal Court. However, it is clear from the judgment read as a whole that all of those issues were necessarily considered. We accept the submissions of Advocate Le Maistre to that effect.

102 We are satisfied, too, that the court did not fall in any kind of error and/or misdirect itself in relation to the decision of the Royal Court in *The C Trust*. We have read that decision with

some care. It is concerned with a letter of request issued by the Family Division of the High Court of England Wales for assistance from the Royal Court by the making of an order by the Royal Court for the release of information held in Jersey by the trustee of a particular trust fund. In a very limited way, therefore, it is concerned with an analogous situation. However, it provides no guiding principles which might be relevant as to how the court should proceed in a case such as the present one. It is true that in its judgment in this case the Royal Court did not mention *The C Trust*. We do not regard that as a failure or a misdirection. In our judgment the case was of no more than peripheral significance at best.

103 We come next to a point which has caused us some concern. There can be no doubt that the Royal Court attached some significance to the possibility that if it refused to authorise the disclosure of the material the trustee was at risk that HMRC might impose sanctions upon him. The Court's view was expressed thus:–

> ***"84. In these circumstances, we have to determine whether to consent to the Trustee complying with the information notice in circumstances where, if we were to refuse and the Trustee were subsequently to refuse to comply, either he would be penalised, (possibly on a daily basis) or HMRC would be denied access to material situated within the United Kingdom to which they are entitled under English law, where an independent judicial monitor has found their request for the information to be reasonable and where there is no alternative route available under the TIEA*** .
>
> ***85. In these particular circumstances, bearing in mind the considerations mentioned by Millett J in the Bank of Crete case, we conclude that the right course is to grant our consent under the Recognition Order and to vary the Consent Order so as to permit the Trustee to comply with the information notice."***

104 In our judgment even as at the date of the hearing before the Royal Court the risk that sanctions would be imposed upon the trustee in the event he was not authorised to release the information was remote. We have set out above at paragraph 14 the views expressed by Judge Mosedale of the FTT upon the possibility of the trustee being exposed to sanctions having regard to the salient contents of the letter from HMRC to the trustee's solicitor dated 19 May 2017. In our judgment there was no basis to conclude, as the Royal Court appears to have done, that the trustee "would be penalised" in the event of non-compliance with the information notice.

105 Further, before us, as we have recorded at paragraph 15 above Advocate Le Maistre conceded that HMRC would not impose any sanction upon the trustee in the event that the Appellant's appeal were to be allowed by us.

106 In our judgment the Royal Court's approach to the issue of whether in the circumstances of this case the trustee would be exposed to sanctions in the event that it refused to

authorise the disclosure of the material was erroneous. Further and in any event, it is now clear that the trustee will not be so exposed if we allow this appeal.

107 In these circumstances it falls to us to consider for ourselves whether, as a matter of discretion, the order made below should stand.

108 In our judgment it should. We have concluded that there are a number of powerful factors which point towards upholding the decision of the Royal Court. They are:

(i) That no other means exist to secure the disclosure to HMRC of much of the information which is the subject of the Recognition order and the Consent order.

(ii) That such information is, at the very least, important for HMRC to further its investigation of Mr Halabi's tax affairs.

(iii) That the scope of that investigation and the need for the information has been explained to the FTT in the UK which court thought it appropriate to approve the Information Notice.

(iv) That the trustee is subject to that notice and, although he may not be at risk of sanction for non-compliance it still amounts to direction to him by a court within the jurisdiction in which he practises to disclose information and, but for the orders in Jersey, with which he would comply and

(v) That Mr Halabi, as an individual, has refused to provide the information voluntarily and has failed to comply with an Information Notice served upon him seeking the same or substantially the same information.

109 As regards the first of those factors, we would add that the fact that the States were entitled to place a temporal restriction on TIEA documents does not mean that such a restriction either is of general application or should be read over to a different scheme which is differently policed. The Schedule 36 scheme undoubtedly is policed. It may not incorporate all the elements of the TIA scheme and cannot be seen as a mechanism in effect monitoring that scheme; but the scheme is one of a similar nature to that for the TIEA and is subject to the rule of law.

110 In our judgment the public interest would be served by upholding the order of the Royal Court. The point which weighs most strongly with us is that the Trustee has come under a legal obligation to produce material. This is not a case in which an office holder simply proposes voluntarily to use materials for some purpose outside the insolvency. If the court refuses to lift the restriction, this prevents the Trustee complying with the law of the state in which he resides and practises, that state being one which is recognised by this jurisdiction as an appropriate recipient of the mutual recognition provided for by Article 49.

111 This approach answers the comity arguments. As regards consideration of the loss of potential floodgates, because, in the present case, post 2010 material may be obtained through the TIEA, the concern is as to allowing access to earlier material, not permitted through the TIEA. It is only natural that, through the effluxion of time, there will be fewer instances when access to such material is thought helpful to investigations.

112 Accordingly, this appeal is dismissed.