Acturus Properties Ltd and 47 Others v HM Attorney General

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	12 January 2001
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Text

[2001] JRC 010

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Esq., Deputy Bailiff & Jurats Rumfitt and Allo

In the matter of Notices issued to Sefta Financial Services Limited under the Investigation of Fraud (Jersey) Law, 1991

Between
Acturus Properties Ltd and 47 Others
Representors
and
H.M. Attorney General

Respondent

Advocate A. Clarke **for the Representors**

Crown Advocate J.A. Clyde-Smith **for the Respondent**

AUTHORITIES.

In re McMahon & Probets (1993) JJ 35 .

Investigation of Fraud (Jersey) Law 1991.

Royal Court Rules 1992: Rule 12A.

McMahon and Probets -v- Attorney General (1993) JLR 108 .

R -v- Director of Serious Fraud Office ex p Smith (19th December 1991) Unreported Judgment of the Divisional Court.

R. -v- Director of the SFO ex p Johnson (12th January 1992), Unreported Judgment of the Divisional Court.

Bassington -v- H.M. Procureur (2nd December 1998) Unreported Judgment of the Guernsey Court of Appeal.

R. -v- Central Criminal Court and the Home Secretary ex p Propend Finance Property Limited (1996) 2 Cr. App. R 26 .

R. -v- Home Secretary ex parte Fininvest S.p.A. (1996) 1 WLR 743 .

In re Sheikh Mahfouz (17th February 1994) Jersey Unreported .

Barclays Bank Plc -v- Taylor (1989) 3 All ER 563 .

De Smith's Judicial Review of Administrative Action (4th Ed'n): page 286.

Re: Attorney General of the Isle of Man (1997/98) 1 OFLR 419 .

Planning & Environment Committee -v- Lesquende Limited (1998) JLR 1 C of A .

Counsel of Civil Service Unions -v- Minister for the Civil Service (1984) 3 All ER 935 .

Associated Provincial Picture Houses Ltd v Wednesbury Corp. (1947) 2 All ER 680 , (1948) 1 KB 223.

Gouriet -v- Union of Post Office Workers (1978) AC 435 .

R -v- Attorney General ex p Ferrante (6th July 1994) Unreported Judgment of the High Court of England.

R -v- Solicitor General ex p Taylor (1995) 8 Admin Law Reports 206 .

A.G. -v- Hall (1995) JLR 102 .

Knight -v- Thackeray's Limited (1997) JLR 279 .

IRC v Rossminster Limited (1980) AC 952 .

R v Inland Revenue Commissioners Ex p TC Coombs & Co. (1991) 2 AC 283 .

R. v. Commissioners of Inland Revenue Ex p. Banque Internationale Luxembourg S.A. (23rd June 2000) Unreported Judgment of the High Court of England.

Ahluwalia v. Employment & Social Security Committee (27th July 2000) Jersey Unreported .

Conway -v- Rimmer (1968) AC 910 .

Bertoli v. Malone (1990–91) CILR 58

Bertoli v. Malone (22nd April, 1991) Unreported Judgment of the Judicial Committee of the Privy Council.

European Convention on Human Rights: Article 1 of Protocol 1; Article 6(1).

R v. Ministry of Defence ex p. Smith (1996) QB 517 .

Saunders -v- UK (1996) 23 EHRR 313 .

The decisions of the Attorney General taken pursuant to Article 2 or Article 3 of the 1991 Law are subject to judicial review on the traditional grounds of illegality, irrationality or procedural impropriety;

However, as the power is invoked in connection with a criminal investigation, the Attorney General is not required to give reasons for his determination that his power exists or for the manner in which he has chosen to exercise the power and public interest immunity provides justification for any refusal on his part to do so.

A presumption of regularity applies to the exercise of the Attorney General's powers under the law. The onus lies on an applicant to produce evidence of facts which cannot be reconciled with there having been reasonable grounds for the Attorney General's belief that he should exercise the relevant power under the 1991 Law or alternatively which cannot be reconciled with his having held such belief at all.

Whilst it is always open to Attorney General to consult with Home Office, Court holds that, under Jersey law, there is no duty on the Attorney General to consult with the Home Secretary before he exercises his powers under the 1991 Law to give assistance to a foreign jurisdiction.

The evidence produced in this case by the Representors comes nowhere near the level required to call the Attorney General's exercise of his powers into question

Attorney General 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.

Article 6(1) of European Convention on Human Rights of no application at this stage: proceedings are not at stage of a criminal prosecution. This is merely an investigation which may or may not lead to a prosecution in South Africa.

A notice under the 1991 Law does not, as a matter of law, have to say who is under investigation and, therefore, an incomplete description of the person who is under investigation cannot invalidate the notice but recommends that, save where there is good reason to do otherwise, the name of the person(s) under investigation should continue to be included but merely as a matter of good practice, not a requirement of law.

Bailiff

THE DEPUTY

1 In *In re McMahon & Probets* (1993) JJ 35, the Royal Court held that the exercise of the Attorney General's powers under the Investigation of Fraud (Jersey) Law 1991 ("the 1991 Law") was not subject to judicial review on the conventional grounds but only on certain narrower grounds spelt out in the judgment. Amongst other issues, this case raises the question of whether the Court should follow the decision in *McMahon*.

The 1991 Law

2 The relevant provisions of the 1991 Law are as follows:–

> "ARTICLE 2
>
> Attorney General's Powers of Investigation
>
> ***(1) The powers of the Attorney General under this Article shall be exercisable in any case in which it appears to him that –***
>
> ***(a) there is a suspected offence involving serious or complex fraud, wherever committed; and***
>
> ***(b) there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.***

(2) The Attorney General may by notice in writing require the person whose affairs are to be investigated ("the person under investigation") or any other person who he has reason to believe has relevant information to answer questions or otherwise furnish information with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith.

(3) The Attorney General may by notice in writing require the person under investigation or any other person to produce at such place as may be specified in the notice and either forthwith or at such time as may be so specified any specified documents which appear to the Attorney General to relate to any matter relevant to the investigation or any documents of a specified description which appear to him so to relate; and

(a) if any such documents are produced, the Attorney General may –

(i) take copies or extracts from them;

(ii) require the person producing them to provide an explanation of any of them;

(b) if any such documents are not produced, the Attorney General may require the person who is required to produce them to state, to the best of his knowledge and belief, where they are. …

ARTICLE 3

Disclosure of information

…

(3) Subject to paragraph (1) and to any provision of an agreement for the supply of information which restricts the disclosure of the information supplied, information obtained by the Attorney General or any person duly authorised under paragraph (10) of Article 2 may be disclosed –

(a) to any person or body for the purposes of any investigation of an offence or prosecution in the Bailiwick or elsewhere; and

(b) to any competent authority".

The Factual Background

3 The relevant facts are, for the most part, not in dispute. The Representors are companies

incorporated in the British Virgin Islands with the exception of the fourteenth and forty-fifth Representors, which are Jersey trusts, and the thirty-third and thirty-fourth Representors, which are companies incorporated in Jersey. Sefta Financial Services Limited ("Sefta") is a Jersey company carrying on business in Jersey as a trustee and company administrator. At the relevant time it was acting as administrator of the Representors.

4 On 18th April 2000 the Attorney General received a faxed copy of a letter of request from the Investigating Directorate: Serious Economic Offences, National Prosecuting Authority of South Africa ("IDSEO"). The letter sought the assistance of the Attorney General in connection with a criminal investigation which was in progress in South Africa. The Attorney General has not produced the letter of request on the grounds that it contains information which, if disclosed, could prejudice the investigation. He has however sworn an affidavit setting out certain of the information made available to him in the letter of request and what follows is taken substantially from his affidavit.

5 The letter of request disclosed that IDSEO was investigating allegations of fraud and theft allegedly committed by a group of companies known as the Wheels of Africa Group ("WOA"), the majority of which were incorporated in the Republic of South Africa, Botswana or the British Virgin Islands. The principal activity of WOA was the importing, assembling, distributing and selling of Hyundai and Volvo vehicles in South Africa. In December 1999/January 2000 the majority of WOA companies registered in South Africa and Botswana went into liquidation with considerable debts. The business activities of WOA were structured in a complicated manner but essentially the BVI companies placed orders with Korea and Sweden for vehicle units, which were sold on to Botswana, where there were assembly plants. They in turn sold on to the Republic of South Africa. Companies in all three jurisdictions raised loans and banking facilities.

6 In essence the frauds alleged were of two types. In the first place it was said that, by the fraudulent manipulation of invoices, duty payable to the South African Customs Union was evaded. IDSEO estimated that the customs unit had been defrauded of US$27 million for the Hyundai vehicles alone. Secondly it was suspected that false financial information had been given to a variety of local and international banks with the result that security had been given over assets already secured. Three named banks had lost a total of US$143 million. Two of the companies, namely Hyundai Motor Distributors Limited and Scandinavian Motor Corporation Limited (both BVI companies) had debts in excess of US$60 million and US$25 million respectively. There was evidence that Sefta administered the companies and provided signatories on the bank accounts of the companies. A search and seizure operation had been carried out in South Africa at the WOA premises in Johannesburg and a large volume of documents had been seized, including correspondence with Sefta. It was alleged that some documents which had been missed in the search were subsequently sent by WOA employees to Sefta in Jersey. The Representors were among the entities listed in the letter of request and were all identified from the documents seized from WOA in Johannesburg. They were all under investigation in South Africa and there was reason to believe that they were directly involved in the suspected fraudulent activities or used to siphon off the proceeds.

7 On 31st May 2000, having obtained an appropriate undertaking from IDSEO as to the use which it would make of any material provided, the Attorney General considered the matter and concluded that the requirements of Article 2(1) of the 1991 Law had been met, namely that there was a suspected offence involving serious or complex fraud and that there was good reason for him to exercise his powers for the purpose of investigating the affairs of, *inter alia*, the entities listed in Annexure A to the notices. Accordingly he authorised the issue of the notices. The first ("the First Notice") was addressed to Sefta and required the production of various categories of documents in relation to the companies listed in Annexure A. That Annexure contained the names of all the Representors together with three further entities. On the same day, the Attorney General authorised the issue of a notice ("the Third Notice") addressed to Cater Allen Bank (Jersey) Limited and a further notice ("the Fourth Notice") to Royal Bank of Scotland International Plc. requiring production of documents concerning the bank accounts of one of the Representors, namely Conrho Limited.

8 On 14th June, the Attorney General was informed that Sefta's response to the First Notice was causing some concern to his assistant and to IDSEO. Advocate Sinel had apparently been representing Sefta but he had switched to represent WOA and had asked for confirmation that the investigation be stayed pending an application for judicial review. In the light of the concerns of IDSEO and the fact that there had apparently been at least two occasions when Sefta had failed to comply with deadlines which had been agreed for the production of particular documents, the Attorney General authorised the issue of a further notice ("the Second Notice") addressed to Sefta. This notice required the production of the documents specified therein forthwith. The Second Notice superseded the First Notice and was served on 15th June. Sefta duly complied with it and all the documents were handed to the Attorney General's representative.

9 The terms of the Second Notice were as follows:–

> *"14th June 2000*
>
> *The Director or Other Responsible Officer*
>
> *Sefta Financial Services Limited*
>
> *The Courtyard*
>
> *12 Hill Street*
>
> *St. Helier*
>
> *JE2 4UB*
>
> INVESTIGATION OF FRAUD (JERSEY) LAW, 1991
>
> NOTICE

to furnish information, answer questions and produce documents

Persons and Entities under investigation:

Wheels of Africa Group

> *1. It appears to the Attorney General that there exists a suspected offence involving serious or complex fraud and that there is good reason for him to exercise the powers conferred upon him by the Investigation of Fraud (Jersey) Law, 1991, as amended.*
>
> *2. I am a Crown Advocate authorised by the Attorney General to exercise the powers of investigation conferred upon him by the said Law. A copy of the Attorney General's signed Authority is attached.*
>
> *3. I have reason to believe that you have relevant information about the affairs of the persons and companies under investigation and therefore require you to* ***answer questions*** *or otherwise* ***furnish information*** *relating to the investigation. The answers to such questions and the provision of information should be made to myself and/or any persons designated to assist in this investigation. The persons so designated are named in the attached Attorney General's Authority and any other supplementary Authority issued at a later dated [sic].*
>
> *4. I also require you to produce* ***immediately upon production hereof****, all documents and files which appear to relate to matters relevant to the investigation of the entities listed on "Annexure A" hereto or true copies of the same and to provide an explanation of any of these documents if so required."*

The Notice was signed by Crown Advocate Matthews and was endorsed by the Attorney General who authorised the making of the above requirements.

The legal proceedings

10 Having failed to secure an undertaking from the Attorney General that he would not transmit the documents obtained from Sefta to IDSEO pending the Representors' application for judicial review, Advocate Clarke attended before the Deputy Bailiff in chambers on 16th June seeking an order to that effect. The Attorney General was asked to attend and he duly gave an undertaking not to transmit the documents nor allow them to be inspected prior to any prompt application for leave to bring proceedings for judicial review.

11 On 17th July the Court sat to consider the Representors' application for leave to apply for judicial review pursuant to Rule 12A of the Royal Court Rules. This is the new rule which deals with proceedings for judicial review. The Court held that Rule 12A applied only to civil proceedings and that, as a result of the decision of the Court of Appeal in *McMahon*

and Probets -v- Attorney General (1993) JLR 108 the present proceedings had to be categorized as criminal proceedings. The Court therefore refused leave under Rule 12A on the grounds that there was no jurisdiction to do so, but gave the Representors leave to present and serve a representation under the inherent jurisdiction of the Court. It then gave consequential directions as to the procedure to be followed which sought to ensure that that procedure should be as close as possible to the procedure laid down in Rule 12A for judicial review in civil proceedings.

12 Unfortunately, despite the imposition of a tight timetable, it did not prove possible for the matter to come before the Court until 8th November. On 7th November, Philip Sinel & Co. wrote to say that they were no longer instructed by sixteen of the forty-eight Representors. The reason for this was never made clear. Accordingly Mr Clarke, of Philip Sinel & Co., appeared on 7th November on behalf of only thirty-two of the original Representors; the others did not appear and were not represented. It follows that reference hereafter to the Representors is technically a reference only to those thirty-two for whom Advocate Clarke appeared; but nothing turns on this.

13 Although the representation had originally concerned only the First Notice and the Second Notice, it was subsequently amended to challenge the Third and Fourth Notices. These have been put into effect but the materials supplied by the two banks have not yet been transmitted to South Africa. At the hearing it was agreed that the First Notice was no longer of any effect, having been superseded by the Second Notice. Accordingly the proceedings are challenges only to the Second, Third and Fourth Notices.

Locus Standi

14 Mr Clyde-Smith, on behalf of the Attorney General, submitted that, having regard to the merits of the application, the Representors did not have *locus standi* to challenge the notices. The only person entitled to challenge a notice was the person to whom that notice was addressed i.e. Sefta and the two banks. In support Mr Clyde-Smith relied on two English cases. The first was *R -v- Director of Serious Fraud Office ex p Smith* (19th December 1991 Unreported). The Divisional Court held that the applicant in that case (being a person owed a duty of confidentiality by Coopers & Lybrand who were the recipient of a notice from the Director of the SFO under equivalent powers to those conferred on the Attorney General by the 1991 Law) had no *locus standi* to apply for judicial review. In giving the decision of the court Leggatt L.J. said:–

> ***"It appears to me that if a person under investigation could prevent the production of documents by third parties on the grounds that they owed him a duty of confidentiality or on grounds of failure to comply with the procedure prescribed by the statute, then the progress of any investigation would be stultified."***

That approach was followed by the Divisional Court in *R. -v- Director of the SFO ex p Johnson* (12th January 1992, Unreported).

15 However there are cases which point in the opposite direction. In *Bassington -v- H.M. Procureur* (2nd December 1998 Unreported), the Guernsey Court of Appeal declined to *R. -v- Central Criminal Court and the Home Secretary ex p Propend Finance Property Limited* (1996) 2 Cr. App. R 26 follow the approach of the above two authorities. In, there was an investigation into criminal conduct in Australia. The Australian authorities sought the assistance of the United Kingdom authorities under the Criminal Justice (International Co-operation) Act 1990 in order to obtain documentary evidence situated in the United Kingdom. The Home Secretary, exercising the power conferred upon him as the central authority under the Act, agreed to act on the request and further authorised the police to apply for a warrant to search for and seize material. A judge at the Central Criminal Court granted a warrant to that effect. Propend was one of the parties under investigation in Australia and, together with others, sought to challenge the decision of the Home Secretary and the judge of the Central Criminal Court. The Divisional Court specifically stated that the applicants had locus standi to challenge the decisions as being the parties concerned in the Australian investigation. However it is right to say that the court does not appear to have been referred to *ex p Smith* or *ex p Johnson*.

16 Similarly in *R. -v- Home Secretary ex parte Fininvest S.p.A.* (1996) 1 WLR 743, the persons under investigation for criminal conduct in Italy sought to challenge the decision of the Home Secretary to give assistance pursuant to the Criminal Justice (International Co-operation) Act 1990 and the decision of the Director of the SFO to obtain a search warrant under the Criminal Justice Act 1987 pursuant to the authority granted by the Home Secretary. No one appears to have suggested that the applicants did not have *locus standi* to challenge the decisions of the Home Secretary and the Director of the SFO.

17 The point has not previously been specifically considered by the Courts in Jersey although in both *McMahon* (supra) and (*In re Sheikh Mahfouz* 17th February 1994, Jersey Unreported), the challenge to the decision of the Attorney General under the 1991 Law was brought by the person to whom the recipient of the notices owed a duty of confidentiality. In neither case was it suggested by any party or by the Court that the applicants did not have *locus standi* to challenge the notices.

18 We accept that some of the English decisions referred to above were dealing with different legislation, but that legislation concerned the giving of assistance in relation to criminal investigations being carried on in other countries. We think that no distinction is to be drawn in this respect. In our judgment it would be highly undesirable to hold that persons about whose affairs a notice under the 1991 Law seeks information have no standing to challenge such a notice. The case of *Barclays Bank Plc -v- Taylor* (1989) 3 All ER 563 held that there is no duty on a bank or other recipient of a notice requiring the disclosure of information about its customer's affairs, to challenge that notice. It would therefore be unlikely to do so. To prevent those most affected by a notice from challenging the notice on grounds of standing would mean that, in reality, there would be no one who would be in a position to challenge the lawfulness of the decision to issue the notice. In our judgment that would be a highly unsatisfactory state of affairs. A person whose confidential affairs are

forcibly disclosed to investigating authorities, perhaps to be sent to a foreign jurisdiction, should have the standing to challenge the legality of that decision. He is undoubtedly a person whose rights are affected by that decision. He would be prejudiced by an unlawful decision. We therefore decline to adopt the principles of *ex.* p. Smith as part of the law of Jersey.

19 On the facts of this case the information sought by the notices concerned the affairs of the Representors. The recipients of the notices, namely Sefta and the two banks, owed the Representors a duty of confidentiality. We hold that the Representors have the locus standi to seek to challenge the legality of the notices by way of judicial review.

The grounds for judicial review of the Attorney General's decision under the 1991 Law

20 In *McMahon* the Royal Court held as follows:–

> ***"Looking at the cases and the textbooks, the court has come to the following conclusions.***
>
> > ***1. It is not in the public interest that the decision of the Attorney General to issue a notice under the Law should be reviewable as to its merits.***
> >
> > ***2. Nevertheless, the court has the power and in appropriate cases should exercise it to enquire into the three matters concerning the exercise of the Attorney General's discretion mentioned by Mr. Clyde-Smith, that is to say, (a) whether the powers of the Attorney General exist to enable him to make a decision; (b) the extent of those powers; and (c) whether or not those powers have been exercise in an appropriate form".***

21 We have to say that we find some difficulty in ascertaining exactly what is meant by the statement that the Attorney General's decision should not be reviewable as to its merits. In one sense it is often said that judicial review is not concerned with the merits of a decision but rather with the decision making process. That is because judicial review is not an appeal. It is simply a check on the legality of a decision. A court is not entitled to substitute its own view for that of the decision maker to whom the decision has been entrusted by law. If that is all the Royal Court was saying, then there is no real distinction to be drawn with the general test for judicial review.

22 However, we think that, when read with the second paragraph of the decision, the Court in *McMahon* was seeking to impose a narrower test for judicial review. It would seem from Mr Clyde Smith's helpful submissions that the genesis for this narrower test came from a passage in De Smith's Judicial Review of Administrative Action (4th Ed) page 286:–

> ***"If it is claimed that the authority for the exercise of discretion derives from the royal prerogative, the courts have traditionally limited review to questions of vires in the narrowest sense of the term.*** They can determine whether the ***prerogative power exists, what is its extent, whether it has been exercised in the appropriate form and how far it has been superseded by statute; they have not normally been prepared to examine the appropriateness or adequacy of the grounds for exercising the power, or the fairness of the procedure followed before the power is exercised, and they will not allow bad faith to be attributed to the Crown."***

23 Mr Clarke invited us not to follow *McMahon*. He relied principally on the fact that similar legislation to the 1991 Law exists in Guernsey, the Isle of Man and the United Kingdom. In Guernsey and the Isle of Man the powers, as in Jersey, are conferred upon the Attorney General. In the United Kingdom, the power is conferred upon the Director of the Serious Fraud Office. In Guernsey, in the case of *Bassington* (supra), the Guernsey Court of Appeal had held that the decision of the Attorney General was judicially reviewable on normal Wednesbury grounds. In the Isle of Man, in the case of *Re: Attorney General of the Isle of Man* (1997/98) 1 OFLR 419, the Court of Appeal had held to similar effect. In the United Kingdom, the Director of the SFO had been challenged by way of judicial review in a number of cases. Although there had not been an analysis as to the exact grounds for any such challenge, no one had suggested that the grounds were anything other than the normal grounds for judicial review. It followed, said Mr Clarke, that Jersey was now out of step with the three other jurisdictions in relation to virtually identical legislation.

24 We agree that, in the light of developments since the decision in *McMahon*, we should revisit that decision in order to decide whether we are of the view that it is good law.

25 The law on judicial review in Jersey has developed considerably since 1993. The most significant case is that of *Planning & Environment Committee -v- Lesquende Limited* (1998) JLR 1 C of A. In that case the Court of Appeal reviewed the state of judicial review in Jersey in some detail and said as follows at page 6:–

> ***"For our part, we endorse the existence of a remedy by way of judicial review in Jersey.*** The inherent jurisdiction of the courts to control excess or abuse of power by executive bodies seems to us to be intrinsic to the very judicial process and vital to the rule of law. To confer upon an administrative authority limited powers only, but to provide no means for confining them within those limits would be paradoxical. There is nothing in the traditions of Norman French law as developed in Jersey, which appears incompatible and much appears consistent with our conclusion. It would in principle be regrettable to deny to a citizen of Jersey a form of relief available to citizens in other parts of Her Majesty's dominions. …".

On page 7 the Court said this:–

> ***"There is no reason to dispute that the grounds for judicial review are, in***

broad terms, those identified by the Royal Court, i.e. the GCHQ trilogy."

26 The GCHQ trilogy is to be found in the speech of Lord Diplock in the well known case of *Counsel of Civil Service Unions -v- Minister for the Civil Service* (1984) 3 All ER 935 at 950:–

> ***"My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review.*** Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> ***By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*** Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> ***By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (see*** *Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1947) 2 All ER 680 , (1948) 1 KB 223). ***It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.*** Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in*Edwards (Inspector of Taxes) v Bairstow* (1955) 3 All ER 48, (1956) AC 14***of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker.*** "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> ***I have described the third head as "procedure impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the***

decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedure rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

27 One therefore starts from the position that a decision made pursuant to a power conferred by statute is subject to control by judicial review on the three grounds referred to by Lord Diplock. However some decisions remain non-justiciable because they are ill suited for judicial review by the courts (e.g. allocation of economic resources or other matters of high policy); others have been held not to be subject to review because of the identity of the decision maker as well as the nature of the decision. The position of the Attorney General in England and Wales has been subject to consideration under this second category and it is undoubtedly the case that some of his decisions are not subject to review by the courts (e.g. *Gouriet -v- Union of Post Office Workers* (1978) AC 435 in relation to the decision of the Attorney General as to whether he should give consent to relator proceedings). The court's approach, when considering the position of the Attorney General, was summarised in the case of *R -v- Attorney General ex p Ferrante* (6th July 1994 Unreported) and this approach was subsequently approved in *R -v- Solicitor General ex p Taylor* (1995 8 Admin Law Reports 206). Popplewell J. summarised the position as follows at page 27 of his judgment in *Ferrante*:–

> *"**(1)** Gouriet **is a general application and is not limited to relator actions.***
>
> ***(2) The decision whether the power of the Attorney General is immune from review does not depend upon the source of those powers but on their character.*** Arguments relating to the prerogative and statutory duties are sterile.
>
> ***(3) …***
>
> ***(4) …***
>
> ***(5) …***
>
> ***(6) The question as to whether the decision is amenable to judicial process depends on the nature and subject matter.***
>
> ***(7) It is for the Courts to decide on a case by case basis whether the matter in question is reviewable or not".***

In *Ferrante* the Court held that there was no jurisdiction to judicially review the Attorney General's refusal to give authority under Section 13 of the Coroner's Act 1988.

28 Mr Clyde-Smith argued that, although it did not have the benefit of the decision in *Ferrante* at the time it gave its judgment, the Royal Court in *McMahon* undertook the very exercise recommended by *Ferrante*. It considered the nature of the decision to be taken by the

Attorney General under the 1991 Law and considered that, on grounds of public interest, that decision should only be subject to judicial review on a limited basis. The Royal Court did not base its decision on the grounds that the Attorney General was, simply because of his office, immune from judicial review. The whole debate in *McMahon* was as to whether that review should be on a narrower basis or on the normal grounds for review. The Court preferred the former on the grounds of public interest.

29 Mr Clyde-Smith was critical of the decision of the Guernsey Court of Appeal in *Bassington*, which in turn was critical of the decision in *McMahon*. First he argued that the Guernsey Court of Appeal had misunderstood the grounds for the decision in *McMahon*. It appeared to think that *McMahon* was based upon the status of the Attorney General and that he was therefore immune from review, whereas in fact the Royal Court had held that, the public interest required that the particular decision of the Attorney General (namely that under the 1991 Law) should only be subject to limited judicial review. Secondly, he said, having approved the *Ferrante* test, the Court of Appeal in Guernsey did not then go on to apply the test by considering whether the nature of the powers exercised by the Attorney General in Guernsey under the relevant legislation pointed to an immunity from review or not. Having held at page 17 of its judgment that the position of H.M. Procureur was not of itself a bar to the institution of proceedings, the Court of Appeal failed to go on to consider whether the particular powers in question were of a nature or character suitable for review as required by *Ferrante*. The only other reference to this aspect of the matter was on page 35 of the judgment where the Court of Appeal simply said:–

> ***"We have already held that HM Procureur is not above the law, and that his exercise of his powers under the Investigation Law of 1991 is subject to judicial control in accordance with the usual Wednesbury principles."***

In fact, said Mr Clyde-Smith, the Court had not so held at any earlier stage; it had merely held that the position of HM Procureur was not a complete bar to judicial review. For these reasons, said Mr Clyde-Smith, the Court should not place undue weight on the decision in *Bassington*.

30 Finally Mr Clyde-Smith said that, even if we were minded not to agree with *McMahon*, judicial comity required that we should not depart from it unless convinced it was wrong (see *A.G. -v- Hall* (1995) JLR 102). However he also very properly drew our attention to the decision of *Knight -v- Thackeray's Limited* (1997) JLR 279 where the Royal Court held that, in appropriate cases, a decision of the Court of Appeal of Guernsey, although not binding, was to be regarded as highly persuasive. We think that that must particularly be so where the Guernsey Court was construing legislation which is in very similar terms to the relevant legislation in Jersey.

31 Having particular regard to developments since 1993, we have come to the clear conclusion that *McMahon* should be departed from. In *Lesquende* the Court of Appeal stated authoritatively that judicial review was available under Jersey law to control the legality of decisions made in Jersey in the same way as it was available in the United Kingdom. We agree that, for historical and policy reasons, the Attorney General of Jersey is

in a special position in relation to many of his functions in the same way as his counterpart in the United Kingdom. Nothing we say in this judgment is intended to be wider than is necessary for this particular decision. For example, nothing we say is intended to cast any doubt on the observations of the Royal Court in *McMahon* concerning decisions of the Attorney General in relation to prosecutions. The correct approach, when considering the position of the Attorney General, is to adopt that laid down in *Ferrante*. We must therefore consider the nature of the subject matter of the decision in this case.

32 We note Mr Clyde-Smith's argument that the powers in the 1991 Law concern criminal investigations where speed is essential: confidentiality should be maintained so that suspects are not in a position to destroy or tamper with evidence; witnesses have to be protected; and there is always the possibility that an early warning to suspected persons may open the way for such persons to manipulate others. We accept that these are arguments against the desirability of permitting judicial review in its general form rather than in the narrower form approved in *McMahon*.

33 However these policy considerations are equally applicable in the United Kingdom, Guernsey and the Isle of Man. We note the criticisms of the decision in *Bassington*, although it must be borne in mind that that was merely an application for leave to appeal rather than the hearing of the substantive appeal itself. Nevertheless it is clear that the law of Guernsey now permits judicial review of the decision of HM Procureur under the equivalent of the 1991 Law on ordinary Wednesbury grounds. The position of the Attorney General in the Isle of Man under the equivalent legislation is the same. So also with the United Kingdom. We therefore arrive at the position where Guernsey, the Isle of Man and the United Kingdom all allow for a decision under the equivalent of the 1991 Law to be challenged on normal judicial review grounds. We see no reason of public policy why Jersey should be different. On the contrary, we think that a person whose privacy has been overridden pursuant to the 1991 Law should have the same ability to challenge the legality of that decision as his counterpart in other jurisdictions. Furthermore we think that it would be difficult in practice to draw a line between the test in *McMahon* and the normal tests for judicial review. *McMahon* permits a challenge to whether the power of the Attorney General exists at all in a particular case. However, once the power exists, it appears to offer no method for challenging the exercise of that power on grounds of rationality, no matter how unreasonable may be the exercise of the power. It seems illogical to allow a challenge to the decision of the Attorney General that he has reasonable grounds for exercising his power but not to allow a challenge that, in the particular case, the power is being exercised in an irrational manner in relation to the particular individual or company. Accordingly we decline to follow *McMahon* and we hold that decisions of the Attorney General pursuant to the relevant provisions of the 1991 Law are subject to judicial review on the normal grounds of illegality, irrationality and procedural impropriety. However we emphasise, as was emphasised by the Isle of Man Court of Appeal in *Re: Attorney General*, that judicial review is not an appeal. The Court is not sitting to reconsider the Attorney General's decision. The legislature has entrusted that decision to him and the Court is exercising only a supervisory jurisdiction as to the lawfulness of that decision.

The approach to judicial review in criminal investigations

34 However the fact that one is concerned with a criminal investigation is not to be ignored. The intensity of judicial review is often affected by the subject matter of the decision being reviewed. There is a clear public interest in ensuring that criminal investigations are not hindered by unmeritorious claims for judicial review which may be brought simply to achieve delay. This is particularly significant for an island such as Jersey which has a strong finance sector and where the island's reputation requires that enquiries undertaken in order to assist foreign criminal investigations should not become bogged down in the courts. The Court respectfully and wholeheartedly endorses the comments of the Court of Appeal in *Mafhouz* (supra) when it said at page 5 of the judgment:–

> ***"What they have asked us to do is to make an order that the execution of the Attorney General's Notice should be stayed pending the hearing of the Doléance.*** Such an order would amount to an injunction upon the Attorney General restraining him from carrying out, or enabling others to carry out, a criminal investigation. This is an order which the Royal Court was asked to make, and they refused. It is the order which we again have been asked to make. The application has been put before us without any evidence or even argument to show that the Attorney General is exceeding his powers or acting against the law in what he is doing and allowing others to do. In the absence of such evidence and such argument, it is quite impossible for the Court to restrain the Attorney General in the way which has been suggested. …
>
> ***It must be clearly understood that applications made when the powers of the Attorney General are being exercised under the Investigation of Fraud Law, are applications of the greatest urgency.*** They deal with matters which cannot be allowed to be delayed in the way in which civil litigation frequently is. Counsel must be prepared to make such applications at short notice, as, indeed, Mr Costa was. Counsel must also be prepared to argue in defence of them at equally short notice. The public interest is involved in investigations of this kind. The public interest cannot be served if delays of legal proceedings are to be allowed to hold up the investigations on any but the clearest grounds and those that suggest that investigations should be delayed must be prepared to demonstrate those clear grounds and to demonstrate them at short notice."

35 That approach has been reflected in a number of decisions in England. The leading authority is *IRC v Rossminster Limited* (1980) AC 952. That case involved the issue of a search warrant in connection with an investigation into tax fraud. Rossminster, whose premises had been searched pursuant to the warrant, brought proceedings for judicial review to quash the warrant. According to the head note, the House of Lords held:–

> ***"… that the warrants, which conferred the power to enter and search premises, regardless of their ownership, were strictly and exactly within the authority of Section 20C(1) and under them the occupants had no right to be told at that stage what offences were alleged to have been***

committed, who were alleged to have committed them or the "reasonable ground" which the judge was satisfied existed for suspecting that an offence involving fraud relating to tax had been committed".

36 Lord Diplock had important things to say concerning the approach to be adopted in criminal cases and we would cite the following extract at page 1013:–

> ***"In the same way, it would not in my view be open to a person claiming to have been injured by the purported but unlawful exercise by a public officer of statutory powers, to circumvent the public interest immunity against premature disclosure of the ground on which the officer's exercise of the power was based, by applying under R.S.C., Ord. 53 for judicial review instead of bringing a civil action.*** …
>
> ***Seizure of documents by an officer of the board under section 20C (3) involves a decision by the officer as to what documents he may seize.*** The subsection prescribes what the state of mind of the officer must be in order to make it lawful for him to decide to seize a document: he must believe that the document may be required as evidence in criminal proceedings for some form of tax fraud and that belief must be based on reasonable grounds. The decision-making power is conferred by the statute upon the officer of the board. He is not required to give any reasons for his decision and the public interest immunity provides justification for any refusal to do so. Since he does not disclose his reasons there can be no question of setting aside his decision for error of law on the face of the record and the only ground upon which it can be attacked upon judicial review is that it was ultra vires because a condition precedent to his forming the belief which the statute prescribes, viz. that it should be based upon reasonable grounds, was not satisfied. Where Parliament has designated a public officer as decision-maker for a particular class of decisions the High Court, acting as a reviewing court under Order 53, is not a court of appeal. It must proceed on the presumption omnia praesumuntur rite esse acta until that presumption can be displaced by the applicant for review — upon whom the onus lies of doing so. Since no reasons have been given by the decision-maker and no unfavourable inference can be drawn for this fact because there is obvious justification for his failure to do so, the presumption that he acted intra vires can only be displaced by evidence of facts which cannot be reconciled with there having been reasonable cause for his belief that the documents might be required as evidence or alternatively which cannot be reconciled with his having held such belief at all".

37 The dictum of Lord Diplock was applied by the House of Lords in *R v Inland Revenue Commissioners Ex p TC Coombs & Co.* (1991) 2 AC 283. That case involved the power of the Inland Revenue to issue a notice under Section 20(3) of the Taxes Management Act 1970 requiring the production of documents. In a challenge for judicial review, the House of Lords refused to quash the notices. Lord Lowry said as follows:–

> ***"To support their case the applicants, as a reductio ad absurdum, submitted that, if the revenue's arguments were sound, the quashing of a section 20(3) notice, though available in theory, could never be achieved in practice.*** My Lords, this prospect does not fill me with alarm when I reflect that Parliament has subjected an intrusive and potentially oppressive (but presumably necessary) power to what I suggest to be the effective supervision of section 20(7). Nor should the difficulty of achieving a remedy cause surprise when one considers the following points.
>
> ***(1) The applicant has to prove a negative.*** (2) What he has to prove is not a fact within his own knowledge but the absence of a reasonable opinion on the part of someone else, namely, the inspector. (3) The inspector's opinion has to have been reasonable but need not have been correct. (4) The resolution of the ***question will usually depend in large measure on evidence which is not before the court.*** (5) By reason of the principle of confidentiality (which the applicant concedes), the general rule for taking account of a party's silence does not fully apply and, for the same reason, the court cannot assess the extent to which in each case it does not apply. (6) Proceedings in which affidavit evidence is the general rule are not well suited to resolving factual questions. …
>
> ***… While I appreciate the distinctions between that case [i.e.*** *Rossminster*] ***and the present, I agree with Bingham LJ on the principle.*** Parliament designated the inspector as the decision-maker and also designated the commissioner as the monitor of the decision. A presumption of regularity applied to both. No unfavourable inference can be drawn from the silence of the revenue because there is (to put it no higher) an obvious explanation for their silence, and the presumption that the inspector acted intra vires when giving the notice can only be displaced by evidence which cannot be reconciled with the inspector's having had the required reasonable opinion."

38 Finally, in *R. v. Commissioners of Inland Revenue Ex p. Banque Internationale Luxembourg S.A.* (23rd June 2000, Unreported), Lightman J. summarised the position as follows on page 20 of the judgment:–

> ***"(2) In relation to Section 20(3) Notices, Lord Lowry in the House of Lords in*** *R v CIR ex p. TC Coombs & company* [1991] 2 AC 283 ***at 300 C-F and 302 E-F made clear that: (a) the commissioner is an independent person entrusted by Parliament with the duty of supervising the exercise of the Revenue's intrusive powers; (b) Parliament designated the inspector as the decision-maker and the commissioner as the monitor of the decision; (c) a presumption of regularity applies to both; (d) where the commissioner gives his consent, he must be taken to be satisfied that the inspector was justified in proceeding under Section 20 and hence that the inspector held, and reasonably held, the opinion required by Section 20 (3); (e) the presumption that the opinion was reasonable and that the commissioner was right to be satisfied can be displaced only by evidence showing that at the time of giving the notice the inspector could not reasonably have***

held that opinion. What must be proved are facts which are inconsistent or irreconcilable with the inspector having had a reasonable (not necessarily a correct) opinion. The answer to this question will usually depend in large measure on confidential evidence which is not put before the court; (f) the commissioner is in a much better position to make a just appraisal under Section 20(7) than the court conducting a judicial review. If this means that the quashing of a Section 20(3) notice, though available in theory, can never be achieved in practice, this is not alarming, for Parliament subjected this intrusive and potentially oppressive (but presumably necessary) power to the effective supervision of Section 20(7);

(3) …

(4) Section 767 does not contain the procedural safeguard of an independent person entrusted by Parliament with the duty of supervising the exercise of the intrusive power (which is conferred by Section 20(3)), but there is the requirement for a decision by the Board or an officer to whom the duty is delegated, and the principle applies (relied on by Lord Lowry at p.300) that in the absence of any proof to the contrary credit ought to be given to public officers who have acted prima facie within the limits of their authority for having done so with honesty and discretion. The presumption of regularity likewise applies to the Section 767 Notices, albeit not with quite the same force".

39 In our judgment, the presumption of regularity applies with full force to decisions of the Attorney General taken pursuant to the 1991 Law. Indeed the arguments in favour of the presumption could be said to apply more strongly to a criminal investigation than in connection with powers conferred for the purposes of collecting tax such as in *Coombs* and *Banque Internationale Luxembourg*. It would in our judgment be quite wrong to insist on the Attorney General (any more than the police in an ordinary criminal investigation or others exercising the powers in the cases referred to above) disclosing the exact state of his knowledge at the material time or the grounds for concluding that there were reasonable grounds for an investigation to be carried out. Such information would often be of very considerable assistance to those under investigation and could lead to the investigation being hampered or thwarted. It is true that, unlike in Section 20(3) of the Taxes Management Act (the subject of the decisions in *Coombs*), there is no commissioner to monitor the decision of the Attorney General. However the Attorney General is appointed by and answerable to the Crown and he is the senior law enforcement officer in the Bailiwick. The 1991 Law has entrusted the decision to exercise the powers to him. It is in general not appropriate for a court to get involved in a criminal investigation. In our judgment the principle laid down by Lord Diplock in the *Rossminster* case applies with full force to decisions of the Attorney General under the 1991 Law. This is a presumption of regularity. It follows that there is a clear onus on an applicant for judicial review. He must adduce evidence of facts which cannot be reconciled with there being reasonable grounds for the Attorney General's belief that he should exercise the relevant power under the 1991 Law or alternatively which cannot be reconciled with his having held such belief at all.

The evidence produced by the Representors in this case

40 In our judgment, the evidence produced by the Representors comes nowhere near satisfying the above test. They have relied upon three affidavits by Mr James Tidmarsh who is an attorney in New York employed by the firm of Winston & Strawn, which firm was instructed by all the Representors at the time of the original application. The first affidavit of Mr Tidmarsh was sworn on 31st May in support of the application for leave to apply for judicial review. Apart from recounting what happened following service of the First Notice, the affidavit produced no facts whatsoever. It merely stated that the Attorney General had failed to state in the notice or elsewhere what offence he suspected had been committed; what the nature of the alleged serious or complex fraud was; what good reason he had for exercising his powers under Article 2 of the 1991 Law; what reason he had to believe that Sefta held relevant information about the affairs of the companies under investigation; or the identity of the companies under investigation. It was said that, unless this information was provided by the Attorney General, neither Sefta nor the Representors were able to know whether the notice was properly issued under Article 2. Other points raised concerned the form of the notice. Mr Tidmough stated that he was advised by Philip Sinel & Co. that the requirements for the Attorney General to exercise his powers under Article 2 had not been fulfilled and that the Representors therefore had grounds for judicial review. In short, no facts were produced which could not be reconciled with the Attorney General having valid grounds for his decision. All that was said was that the Attorney General had not produced enough information for the Representors to know whether the Attorney General had valid grounds and that the Representors had been advised by Jersey lawyers that this gave them grounds for judicial review.

41 The second affidavit of Mr Tidmarsh was sworn on 14th July 2000. On this occasion he stated that he had been advised by the South African lawyer to Hyundai Motor Distributors Limited and Scandinavian Motor Corporation Limited that those two companies were the only entities amongst the Representors that were under investigation in South Africa. He went on to say at paragraph 6:–

> *"I am informed by the directors of the Applicants that a number of the Applicants are in no manner related either to Hyundai or to Scandinavian.* Several of the applicant companies are wholly unrelated to South Africa, with activities only in third countries. I am advised and verily believe the beneficial owners of a number of the Applicants are different from the beneficial owners of Hyundai and Scandinavian. Indeed I am advised and verily believe that several of the Applicants are wholly unrelated to any of the other Applicants, either in terms of beneficial owners or financial dealings. It is difficult for me to understand how such entities would be connected in any manner to the investigation in South Africa as described to me by Miss Fourie". (emphasis added)

42 Finally Mr Tidmarsh swore a third affidavit dated 15th August 2000 in response to that sworn by the Attorney General. Most of the affidavit was taken up with comments on the Attorney General's affidavit. The only specific assertions of fact were in the following two

passages:–

> *“Paragraph 2(b)*
>
> *I am unable to comment on WOA's principal activity without knowing what WOA is and the connection, if any, between WOA and the Applicants.* It is certainly the case that the majority of the Applicants have no connection whatsoever with the activities described in the Attorney General's affidavit. It is simply not the case that all of the Applicants have as their principal activity motor vehicle distribution, nor that each and every one of the Applicants received at any time any proceeds of such activity. (emphasis added)
>
> *Paragraph 2(i)*
>
> *The Attorney General has failed to state why there is any reason to believe the Applicants are companies directly involved in unparticularised fraudulent activities or ‘were used to siphon off the proceeds' of the same.* To the extent that one might assume that such fraud is related to the business of motor vehicle distribution, as expressed above, a number of the companies are wholly unrelated to such business and have never received assets from companies involved in such business. The Applicants are most concerned that the Attorney General is relying on such vague and general allegations to include completely unrelated parties without producing even the rudiments of a prima facie case of fraud.” (emphasis added)

43 In relation to the comment under paragraph 2(b), namely that Mr Tidmarsh did not know what WOA was, Mr Clyde-Smith pointed out that, as long ago as 14th June, Philip Sinel & Co. had written to the Attorney General to say:–

> *“We are writing to inform you that this firm no longer acts for Sefta, but we are retained on behalf of the Wheels of Africa Group.”*

It seemed strange, said Mr Clyde-Smith, that Philip Sinel & Co. were able to identify the Wheels of Africa Group but that Mr Tidmarsh, whose affidavit was submitted by Philip Sinel & Co. in support of their clients' case, was able to assert that he did not know who the Wheels of Africa Group were.

44 In our judgment the evidence produced by the Representors is wholly unsatisfactory. In the first place, the affidavits are sworn by a solicitor upon instructions. That is inappropriate. In such cases an affidavit must be sworn by someone who has direct knowledge of the relevant matters. It should normally be the beneficial owner or a director of the applicant companies. An assertion by a solicitor that he is advised that, for example, a particular company has no connection with the entity under investigation, is of no assistance to the Court. Such an assertion must be made by someone who has direct knowledge and must be developed and explained in detail. Furthermore the affidavit gives every appearance of having been designed to mislead. Thus there are reference to “a number” of the companies having different beneficial owners or “several” being wholly unrelated to any of the other

applicants. What does this mean? How many is “a number” or “several”? Which companies were they? The affidavits raise more questions than they answer.

45 We repeat that applicants need to produce evidence of facts which cannot be reconciled with the requisite reasonable belief on the part of the Attorney General. The evidence in this case comes nowhere near that standard. Indeed the first affidavit, which produces no facts but merely says that the Attorney General has provided insufficient information, would have been wholly insufficient to justify the granting of leave to bring a representation for judicial review had it not been for the fact that the Court, in view of the reference to *Bassington*, felt that it would be appropriate to revisit *McMahon* in the light of subsequent developments.

46 This is sufficient to deal with much of the Representors' case but, in deference to the arguments raised, we will deal with certain aspects specifically.

(a) Insufficient information or reasons supplied by the Attorney General.

47 A constant theme of Mr Clarke's submissions was that the Attorney General had failed to give sufficient information to enable his clients to decide whether the Attorney General had been acting lawfully or not. He referred the Court to (*Ahluwalia v. Employment & Social Security Committee* 27th July 2000, Jersey Unreported) where the Court, at page 7 of its judgment, had summarised the law of Jersey in relation to the giving of reasons by decision-makers. That case, said Mr Clarke, suggested that the Attorney General should either have given reasons or that, in the absence of such reasons, it should be presumed that he did not have good reasons.

48 In our judgment the principles laid down in *Ahluwalia* are of no application in the case of a criminal investigation. The approach in such cases is clearly summarised in the cases to which we have referred earlier, namely *Rossminster*, *Coombs* and *Banque Internationale Luxembourg*. There is a public interest immunity attaching to information in the hands of a criminal investigating authority and the courts do not expect such information to be supplied at an early stage in the investigation, to the possible prejudice of that investigation. The position was well summarised by Lord Reid in *Conway -v- Rimmer* (1968) AC 910 at 953 in observations which were relied upon by the House of Lords in *Rossminster*:–

> ***“The police are carrying on an unending war with criminals many of whom are today highly intelligent.*** So it is essential that there should be no disclosure of anything which might give any useful information to those who organize criminal activities and it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution ….”

49 In our judgment, the notice must correctly state the statutory power under which it is issued and must further state that the Attorney General has satisfied himself of the requirements of

the preconditions for the exercise of that power set out in Article 2(1) of the 1991 Law. This, the notices in the present case do. In the light of the cases, we do not think that the Attorney General needs to go any further in explaining the grounds for his decision. The fact that the notices contained no more information is not a ground for judicial review, any more than was the case in *Rossminster* in connection with a search warrant.

(b) There was no evidence before the Attorney General of serious or complex fraud.

50 Mr Clarke submitted that the only evidence before the Court which supported the suggestion that there was a serious or complex fraud in South Africa, was that contained in paragraph 2 of the Attorney General's affidavit, which is reflected in the summary of facts which we have given earlier in this judgment. Mr Clarke argued that the Attorney General must not just accept what is asserted in a letter of request. It was incumbent upon him to seek to make further enquiries by checking the facts alleged and asking for the evidence in support of the allegations so as to satisfy himself that there were genuinely grounds for believing that a serious or complex fraud had been committed. He should have sought an affidavit from IDSEO in support of the letter of request.

51 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* (22nd April, 1991, Unreported) the Judicial Committee of the Privy Council approved the judgment of Georges J.A. in the Court of Appeal of the Cayman Islands (1990–91 CILR 58). 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 at page 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."

52 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.

(c) There was no good reason to exercise the power in relation to the Representors.

53 Mr Clarke submits that there was no evidence produced to the Court that justified the Attorney General in concluding that there was good reason to make the particular enquiries of the particular entities which he had authorised in this case. The affidavit of the Attorney General did not disclose any evidence which directly implicated the Representors; it merely contained an assertion that there was reason to believe them to be involved in one way or another.

54 Our answer to this point is the same as in relation to the previous point. In the first place the Attorney General was entitled to rely upon the accuracy of the letter of request concerning the involvement of the Representors. In the second place, no evidence has been placed before the Court which cannot be reconciled with a reasonable and genuine belief on the part of the Attorney General that there was good reason to carry out the particular enquiries and seek the particular documents. We have already highlighted the serious deficiencies in this respect of the affidavit of Mr Tidmarsh.

(d) A breach of human rights

55 The Representors further contended that the Attorney General had failed to have regard or sufficient regard to the human rights protected by Article 1 of Protocol 1 and Article 6(1) of the European Convention on Human Rights. Those two articles are as follows:–

> ***" Article 1 Protocol 1***
>
> ***Every natural or legal person is entitled to the peaceful enjoyment of his possessions.*** No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> ***The preceding provisions shall not, however, in any way impair the right of***

a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

" Article 6(1)

In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …."

56 Mr Clarke referred to *R v. Ministry of Defence ex p. Smith* (1996) QB 517 where the court said at 554:–

> ***"The court may not interfere with the exercise of an administrative decision on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker.*** In judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

57 He argued that the Attorney General had to carry out a proportionate balance of the relevant considerations. He had to balance the desirability of providing assistance to the South African authorities in connection with a criminal investigation against the legal right of the Representors to maintain confidentiality in their business affairs and not to have their own documents used to incriminate them; the legal right of Sefta not to be subject to unnecessary seizure of documentation; and the fact that, if the allegations of a serious or complex fraud were true, there was a risk that Sefta would be required to incriminate itself.

58 As to Article 1 of Protocol 1, we are by no means certain that the requirements of the notice had the effect of depriving the Representors of their possession of the documents. Copies have been taken and the originals returned. Even if, technically, there has been an interference with the right protected by Article 1, such interference can be justified in the public interest. We are in no doubt that an investigation into serious or complex fraud is in the public interest. We accept that the Attorney General must act proportionately and must take into account the fact that the documents sought are subject to confidentiality. However the Representors have failed to produce any evidence which suggests that the Attorney General did not take this into account or that his decision is disproportionate in its effect.

59 As to Article 6(1), we accept the authority of the European Court of Human Rights that a privilege against self-incrimination is inherent in the concept of a fair trial. However we are not at the stage of a criminal prosecution. This is merely an investigation which may or may not lead to a prosecution in South Africa. In our judgment Article 6(1) is of no application at this stage. (See *Saunders -v- UK* (1996) 23 EHRR 313). So far as Sefta is concerned, there

is no suggestion that Sefta is under investigation for any offence. Furthermore Sefta itself is not before the Court and has not taken any point in relation to the notices. We do not think it is open to the Representors to act as agents for Sefta in this respect.

60 For these reasons we do not think that reliance upon human rights is of any assistance to the Representors in this case.

(e) The Attorney General should have sought the guidance of the Home Secretary

61 Mr Clarke referred the Court to the dicta of the Guernsey Court of Appeal in *Bassington* when it said as follows at page 36:–

> ***"In exercising his powers HM Procureur holds a position similar in many respects to that of the Director of the Serious Fraud Office.*** Foreign relations, insofar as they concern Guernsey, are a matter for the United Kingdom Government acting on behalf of Guernsey, and not for HM Procureur. This means that, like the Director, HM Procureur is dependent on guidance from the Secretary of State for Home Affairs, as the United Kingdom minister responsible, as to the states and governments which may be assisted under the Investigation Law of 1991, and as to the requests from such states and governments to which a response by way of assistance under the Law may be made. For example, for the purposes of Article 2 of the 1959 Convention, it is the Secretary of State, not HM Procureur, who has to decide whether there is a political element in the alleged offence or whether the national interest of the United Kingdom requires that no assistance be given in answer to the request from the foreign state to HM Procureur".

62 He said that there was no evidence in the Attorney General's affidavit that he had consulted the Home Secretary prior to his decision to issue the notices. On the basis of *Bassington* the Attorney General should have consulted the Home Secretary as to whether South Africa was a country which should be assisted under the 1991 Law and should also have consulted him on the specific request for assistance in this case. In the absence of evidence that the Attorney General had done so, the notices should be quashed.

63 The short answer to Mr Clarke's submission is that, assuming such consultation to be necessary, we do not know whether the Attorney General consulted with the Home Secretary. The Attorney General has refused to say one way or the other. The evidence on behalf of the Representors is equally silent on the matter with the consequence that the Representors have failed to overturn the presumption of regularity by producing evidence which is inconsistent with a lawful exercise of the Attorney General's power.

64 However the point is one of some importance and has not been the subject of judicial consideration in Jersey. We have heard full argument on the point and we therefore

express our view as to the law.

65 Mr Clyde-Smith argued that the Guernsey Court of Appeal fell into error. He relied upon a number of matters. In the first place it appeared that the matter had not been the subject of full argument and was only the expression of a preliminary view. He referred to the fact that the views expressed were stated to be "subject to further argument" (page 37) and to his understanding that it was the court itself which had raised the question of the 1959 European Convention on Mutual Assistance in Criminal Matters ("the 1959 Convention"). Furthermore the hearing was only an application for leave to appeal, not the appeal itself. Secondly the Court of Appeal had placed considerable weight on the provisions of the 1959 Convention and appeared to have assumed that Guernsey was, through the United Kingdom, party to the Convention. That was, in fact, not so. The 1959 Convention did not extend to Guernsey or Jersey. Thirdly, reliance on the 1959 Convention was in any event illogical. The 1991 Law (and the Guernsey equivalent) was of general application and would cover numerous countries not party to the 1959 Convention. Fourthly, the relevant legislation in the United Kingdom was the Criminal Justice (International Co-operation) Act 1990. This specifically provided a role for the Home Secretary, who was to act as the central authority for all requests for assistance and was charged with the duty of deciding whether, in principle, assistance should be given. He would therefore determine the suitability of the country seeking assistance and review the character of the specific request (e.g. was it for a political offence?). The duty of the Director of the Serious Fraud Office was merely to put the request into effect if the Home Secretary had agreed to accede to the request. This was quite different to the 1991 Law which combined both these different roles in the Attorney General. Fifthly the observations were inconsistent with the constitutional relationship between Jersey and the United Kingdom as understood and applied in practice by both the Home Office and the Jersey authorities. On specific instructions from the Attorney General Mr Clyde-Smith informed the Court that the position was that there was consultation with the Home Office in relation to requests for assistance when the Attorney General thought fit to do so but that it was established with the Home Office that neither the Home Secretary nor the Home Office expected to be consulted in relation to notices issued under the 1991 Law.

66 With great respect to the Guernsey Court of Appeal, which may well not have had full argument on the subject, we do not think that the observations in *Bassington* on this topic are correct and we decline to adopt them as part of Jersey law. One must begin by referring to the 1991 Law itself. That states specifically that the decision as to whether to exercise the powers under Article 2 is one for the Attorney General. There is no reference to the Home Secretary, nor to any duty to consult the Home Secretary. In our judgment it goes well beyond the permissible bounds of interpretation to insert in the statute words along the following lines:–

> *"… after having consulted with the Home Secretary in the case of an investigation carried out to assist another jurisdiction …."*

In implying words to this effect, the Court of Appeal referred quite extensively to the provisions of the 1959 Convention. In our judgment the 1991 Law cannot be construed by

having regard to a Convention to which Jersey is not a party. Furthermore, as Mr Clyde-Smith argued, the 1991 Law is of general application and assistance may be given to jurisdictions anywhere in the world, many of which would not be party to the 1959 Convention. Indeed South Africa is an example. It would therefore be surprising to use as an aid to construction a Convention to which only some countries, which Jersey might assist, are party.

67 The Court of Appeal drew a comparison between the position of the Director of the Serious Fraud Office in England and HM Procureur. But the position in England is quite different. The Criminal Justice (International Co-operation) Act 1990 specifically confers on the Home Secretary the duty to assess the incoming request. Having done so he then delegates the carrying out of the request to the Director of the SFO or some other entity. The 1991 Law, by contrast, makes no mention of the Home Secretary. On the contrary the Law states specifically that the decision as to whether to exercise the power is for the Attorney General. The Law was sanctioned by Her Majesty in Council in this form and the Crown must therefore be taken to have been content with the Law in its present form. If it was felt that consultation with the Home Secretary was necessary, the Law could always have been enacted as to so provide; but it was not.

68 Furthermore, we agree that the suggestion that the Attorney General has to consult with the Home Secretary in matters relating to a criminal investigation in Jersey is contrary to the constitutional relationship between the United Kingdom and Jersey, as generally understood. Such matters have always been regarded as being within the domestic autonomy of Jersey. We are not surprised to hear the Attorney General state that the Home Office does not expect to be consulted on such matters. In our view both the Jersey authorities and the Home Office would be very surprised to learn that the Attorney General was required to consult with the Home Secretary before exercising his powers under the 1991 Law in support of a request from another country. It is, of course, always open to the Attorney General to consult with the Home Office should he think fit. We have no doubt that, in the hypothetical case, referred to by the Guernsey Court of Appeal, of a request for assistance from the Pol Pot regime in Cambodia concerning an offence alleged to have been committed by an opponent of that regime, the Attorney General would, if he had not turned down the request out of hand, consult the Home Secretary if he was minded to accede to it. But that would be a matter of choice for him. The Court of Appeal was clearly concerned at the prospect that, if the Attorney General were to give assistance to the Pol Pot regime without consultation, the person affected should have a remedy by way of judicial review. In our judgment he would; but the grounds for review would not be a failure of the Attorney General to consult with the Home Secretary; they would be that a decision to give assistance to the Pol Pot regime was a decision which no reasonable Attorney General could come to. The decision would therefore be quashed on grounds of irrationality rather than on the basis of any failure to consult.

69 Finally we would refer again to the decision of the Cayman Court of Appeal in *Bertoli -v- Malone* (supra) and to the judgment of Georges J.A. which, on this aspect, was specifically approved ‘in toto’ by the Judicial Committee of the Privy Council. The relevant passage is

set out paragraph 51 above and it is clear that the Court of Appeal was of the opinion that the Cayman Authority, with the assistance of the Attorney General of Cayman if needed, could decide whether a request for assistance was concerned with a political offence or a purely military offence. The Cayman Islands is also a dependency of the Crown and the United Kingdom is responsible for its international affairs. For these purposes therefore there would appear to be no distinction to be drawn between the position of the Channel Islands and the position of the Cayman Islands. On the reasoning of the Guernsey Court of Appeal, the Authority in the Cayman Islands should have sought guidance from the Foreign Secretary (being the Secretary of State responsible for the Cayman Islands) on such matters. However there is no suggestion that the Cayman Court of Appeal or the Judicial Committee of the Privy Council were of that view. On the contrary they clearly envisaged the decision being taken by the Authority with advice, if need be, from the Cayman Attorney General. We think that the case lends support to our view that the decision as to whether to grant assistance to an overseas authority in connection with a criminal investigation is entirely within the province of the person entrusted with that decision by the appropriate legislation.

70 For these reasons we hold that, under Jersey law, there is no duty on the Attorney General to consult with the Home Secretary before he exercises his powers under the 1991 Law to give assistance to a foreign jurisdiction.

(f) The width of the notice

71 Mr Clarke argued that the Second Notice was in terms which were far wider than was necessary. He pointed out that the notice required production of all documents and files of the Representors which were in the possession of Sefta. This submission fails to take into account that the 1991 law is used at the investigative stage rather than following the bringing of criminal charges. Inevitably, at the investigative stage in a case of serious or complex fraud involving more than one jurisdiction, it is impossible to know exactly what documents exist, let alone whether they will eventually turn out to be relevant. In these circumstances it is not unreasonable to require all files relating to a particular entity which is reasonably suspected of being involved in the fraud or of having information in its possession relevant to the fraud. In this respect we note that, in the case of *R -v- Home Secretary Ex.* p. Fininvest (supra) the request from the Italian authorities under the Criminal Justice (International Co-operation) Act 1990 of the United Kingdom was in the following terms:–

> *"… all documents of the description set out below, or files of documents containing documents of the description set out below, which are connected to, or relate in any way to, Fininvest or any companies in its group, or any other persons named in this letter of request including persons under investigation or any companies or entities set out in Schedule 1 hereto"* — a list of overseas companies — *"for the period 1 January 1989 to the present day."*

The applicants sought judicial review on the grounds that this wording was far too wide and

amounted to a mere fishing expedition. That argument was rejected by the Divisional Court and we agree with remarks of Simon Brown L.J. at pages 752 and 753 of the judgment. We reject the criticism of the Second Notice on this point.

(g) The defects in form

72 Mr Clarke raised a number of criticisms in relation to the form of the notices. The first related to the Second, Third and Fourth Notices where the person under investigation was described as "Wheels of Africa Group". Mr Clarke submitted that this was not a "person" being neither an individual nor a legal entity. It was an informal name for a number of companies, which were not specified in the notice as comprising the Wheels of Africa Group. The 1991 Law could only be exercised where there was good reason to investigate the affairs of "any person" and Wheels of Africa Group was not a person. In our judgment this was a point without merit. In the first place we think that the expression 'person' includes the plural and can therefore include a group of persons. More importantly, as was stated in the *Rossminster* case, the law does not require that the persons under investigation be named in documents such as a notice under the 1991 Law. That is for good reason. The persons under investigation may change as the investigation progresses and more information becomes available. Alternatively it may be prejudicial to the enquiry to disclose who is under investigation. In our judgment a notice under the 1991 Law does not, as a matter of law, have to say who is under investigation. It follows that any incomplete description of the person who is under investigation cannot invalidate the notice either. In saying this we would not wish to encourage the Attorney General to omit the name of the person(s) under investigation in all cases. It has been the practice hitherto to give some indication of the person under investigation and we think that it is helpful to the recipients of notices to have some idea of the general nature of the investigation being undertaken. We are not aware of any evidence that including the name has in practice caused difficulties. Accordingly we would recommend that, save where there is good reason to do otherwise, the name of the person(s) under investigation should continue to be included but merely as a matter of good practice, not a requirement of law.

73 Mr Clarke was also critical of paragraph 3 of each of the notices on the grounds that the recipient could not know what was expected of him as a result. In our view paragraph 3 has to be read with paragraph 4 of each of the notices. It is paragraph 4 which contains the substantive requirement to produce documents etc.; paragraph 3 merely requires further information to be given when required by the Attorney General. In our view there is nothing wrong with such a requirement and we see no objection to the paragraph in its present form.

74 Mr Clarke was also critical of the words "which appear to relate to matters relevant to the investigation" in paragraph 4 of the Second Notice (see paragraph 9 of this judgment for the text of the notice). He argued that the words appeared to place on Sefta the onus of deciding which of the documents or files in its possession were relevant to the investigation. We do not think that the words can sensibly be taken to carry that meaning.

Clearly the recipient of a notice will not know which documents are relevant to the investigation as he is not privy to the details of the investigation. Mr Clyde-Smith accepted that the words could have been better phrased but it was clearly intended that they should be read as if the words " *to the Attorney General*" appeared after the word " *appear*". He agreed that in future those words should either be inserted or the whole passage should be omitted. We think that the wording could be better expressed and agree that it would be helpful if the Attorney General were to revisit the words in order to make it clear or in one or other of the ways suggested by Mr Clyde-Smith. However we do not think that anyone could have been in any real doubt as to what was meant and we know that in fact Sefta found no difficulty in complying with the request. Accordingly we do not accept that the words should in any way invalidate the notice.

75 Mr Clarke had certain other minor criticisms of the form and content of one or more of the Second, Third and Fourth Notices but in our view nothing turns on these. We conclude that the notices were all in lawful form.

Conclusion

76 In summary we hold that:–

(i) The decisions of the Attorney General taken pursuant to Article 2 or Article 3 of the 1991 Law are subject to judicial review on the traditional grounds of illegality, irrationality or procedural impropriety;

(ii) However, as the power is invoked in connection with a criminal investigation, the Attorney General is not required to give reasons for his determination that his power exists or for the manner in which he has chosen to exercise the power and public interest immunity provides justification for any refusal on his part to do so.

(iii) A presumption of regularity applies to the exercise of the Attorney General's powers under the law. The onus lies on an applicant to produce evidence of facts which cannot be reconciled with there having been reasonable grounds for the Attorney General's belief that he should exercise the relevant power under the 1991 Law or alternatively which cannot be reconciled with his having held such belief at all.

(iv) There is no duty on the Attorney General to consult with the Home Secretary in cases where a request for assistance comes from a foreign jurisdiction.

(v) The evidence produced in this case by the Representors comes nowhere near the level required to call the Attorney General's exercise of his powers into question and it was for that reason that, when giving our decision orally, we described the application as having been hopeless.

77 We therefore dismissed this application.