Berge Gerdt Larsen v The Comptroller of Taxes; The States of Jersey; Volaw Trust & Corporate Services Ltd and its directors and other officers v North East Oil Ltd and its directors and other officers; Larsen Oil and Gas Drilling Ltd and its directors and other officers; Network Drilling Ltd and its directors and other officers; Independent Oilfield Rentals IOR Ltd and its directors and other officers; Petrolia Drilling Ltd and its directors and other officers; OPS Personnel Services Ltd and its directors and other officers; Fiduciana Trust Cyprus Ltd (as Trustee of the Merit Trust) v The Comptroller of Taxes; The States of Jersey

Jurisdiction:	Jersey
Judge:	Michael Jacob Beloff
Judgment Date:	27 November 2015
Neutral Citation:	[2015] JRC 244
Reported In:	[2015] JRC 244
Court:	Royal Court
Date:	27 November 2015

Text

[2015] JRC 244

ROYAL COURT

(Samedi)

Before:

Michael Jacob Beloff, **QC, Commissioner, sitting alone**.

Between
Berge Gerdt Larsen
Applicant
and
(1) The Comptroller of Taxes
(2) The States of Jersey
Respondents

Between
Volaw Trust & Corporate Services Limited and its directors and other officers
Applicants
and
North East Oil Limited and its directors and other officers
Larsen Oil and Gas Drilling Limited and its directors and other officers
Network Drilling Limited and its directors and other officers
Independent Oilfield Rentals IOR Limited and its directors and other officers
Petrolia Drilling Limited and its directors and other officers
OPS Personnel Services Limited and its directors and other officers
Applicants

Between
Fiduciana Trust Cyprus Limited (as Trustee of the Merit Trust)
Applicant
and
(1) The Comptroller of Taxes
(2) The States of Jersey
Respondents

Advocate Howard Sharp **QC for the Comptroller of Taxes and States of Jersey.**

Advocate J. Harvey-Hills **for Berge Gerdt Larsen.**

Advocate A. D. Hoy **for Volaw Trust & Corporate Service Limited; North East Oil Limited, Larsen Oil and Gas Drilling Limited, Network Drilling Limited, Independent Oilfields Rentals IOR Limited, Petrolia Drilling Limited and OPS Personnel Services Limited, and the directors and other officers of each.**

Advocate D. Evans **for Fiduciana Trust (Cyprus) Limited.**

Authorities

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Judicial review — dismissal of all applications for judicial review.

THE COMMISSIONER:

Introduction

1 The main cases, which I shall call respectively the Volaw and Larsen proceedings and the Fiduciana proceedings, all concern notices from the Comptroller of Taxes("the Comptroller") requiring the provision of certain documentation to foreign tax authorities pursuant to the provisions of the Taxation (Exchange of Information with Third Countries) Regulations 2008 as amended in 2013 ("the 2008 Regulations as amended") made under the Taxation (Implementation)(Jersey) Law 2004 ("the 2004 Law") Article 2. In all there has been a challenge made by way of judicial review not only to the notices, but to the validity of the 2013 amendments to the Regulations themselves. In all leave to apply for judicial

review has been granted.

2 The Volaw and Larsen proceedings are a sequel to *Volaw Trust and Corporate Services Limited and Larsen v Comptroller of Taxes*, a case ("Larsen No. 1") decided by the Court of Appeal under the 2008 Regulations in their then incarnation in which the Applicants made challenges to Notices served on Volaw on 28 th May, 2012, in response to a request made by the Norwegian Tax Authority ("NTA") pursuant to an agreement made between Jersey and the Kingdom of Norway for the exchange of information relating to tax matters which came into force on 7 th October, 2009, ("J/NTIEA"). These were dismissed by the Royal Court and Court of Appeal (*Volaw Trust and Corporate Services Limited and Larsen -v- Office of the Comptroller of Taxes* [2013] JCA 239 and *Volaw Trust and Corporate Services Limited -v- Comptroller of Taxes* [2013] 2 JLR 499), the Privy Council refusing leave to appeal further. As a result the information sought was provided to the NTA on 30 th July, 2014, on the basis that it would be used in respect of the affairs of Mr Larsen only.

General Observations

3 As the Court of Appeal said in Larsen 1 ***"Underlying the dispute is the tension between the private interest in commercial confidentiality and the public interest in international co-operation in the investigation of potential tax evasion"*** (para 2). In *R (on application of ABN International SA) v FSA* [2010] EWCA Civ 123 Stanley Burnton LJ said of the latter at para 38:–

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

The dispute also reflects a tension between the effective exercise of that co-operation and fairness to the individual taxpayer.

4 In relation to the several challenges made in the *Volaw and Larsen* proceedings it must also be borne in mind that the Notices are simply machinery to assist in a process of investigation by a foreign state, which, if Mr Larsen or anyone else investigated is guilty of neither non-payment of taxes properly due nor of evasion of such payment, will have no adverse consequences other than those intrinsic to the investigation process itself, the disruption and expense involved in compliance with the Notices, and, if the material provided is transmitted, the exposure to scrutiny of otherwise private documents for specific and limited purposes and subject itself to obligations of confidentiality (1998 Regulations as amended, Regulation 16B, and J/NTIEA Article 7). Norway is itself a friendly democratic sovereign state which has ratified the European Convention on Human Rights ("the ECHR") and which must be presumed, absent compelling contrary evidence, to act in accordance with its obligations under the J/NTIEA and the ECHR. This is not a case in which Mr Larsen, a fortiori Volaw and other recipients of the Notices are threatened with

loss of liberty or deprivation of property or the imposition of some sanction or burden. The sending of Notices is a stage in a process which may — but also may not — ultimately lead to such outcome; see the distinction drawn in analogous circumstances in *R -v- Inland Revenue ex p. Morgan Grenfell* [2003] 1 AC 563 at p577–578 (DC), para 48 p595 (CA).

Mr Larsen was, at the time coincident with Larsen No 1, being prosecuted in Norway for tax evasion. On 4 th October, 2013, the District Court in Bergen in an elaborate judgment of 281 pages found him guilty of criminal tax fraud, whose gravity, in its view, was indicated in his sentence of 5 years' imprisonment and a substantial fine ("the Bergen judgment"). Mr Larsen is appealing that judgment. Nonetheless and not wholly surprisingly the NTA has now by nine letters of request summarised in an Appendix to this judgment sought the assistance of the Comptroller for the purpose of a criminal investigation into whether Mr Larsen, Volaw or the other companies and their Directors have committed tax offences.

Chronology in the Main proceedings

5 In the *Volaw and Larsen* proceedings the salient dates are these:–

(i) On 27 th August, 2014, the Comptroller received the request from the NTA for information about the affairs of Volaw and eight other companies (for convenience to be referred to hereafter simply as 'Volaw' — Volaw itself being the Companies financial services provider in Jersey) pursuant, as before, to the J/NTIEA. (The Comptroller was at that date David Le Cuirot who had been appointed on 1 st August, 2013. His deputy, Andrew Cousins dealt with the matter on Mr Le Cuirot's behalf until his own departure from office on 13 th February, 2015). (Again for convenience I shall refer hereafter indifferently to the Comptroller unless I state otherwise).

(ii) On 21st October 2014 the Comptroller, after seeking and obtaining clarification and further information from the NTA, issued 9 Notices to Volaw requiring disclosure of documents and records relating to the affairs of Mr Larsen and what were said to be associated corporate entities.

(iii) On 7 th November, 2014, Volaw applied for leave to apply for judicial review supported by an affidavit of Mr Mark Healey, a Director of Volaw.

(iv) On 18 th November, 2014, Mr Larsen applied for judicial review supported by his own affidavit dated 17 th November, 2014.

(v) On 25 th November, 2014, Sir Michael Birt, the then Bailiff, granted Volaw and Mr Larsen leave to apply for judicial review against the Comptroller and the States.

(vi) On 9 th February, 2015, Mr Larsen and Volaw each issued a summons seeking the setting aside of the Notices on the grounds that neither the States or the Comptroller had responded to the application for judicial review, or alternatively that they each file affidavits responding to the grounds in full.

(vii) On 13 th February, 2015, Mr Michael de la Haye filed an affidavit on behalf of the States.

(viii) On 13 th February, 2015, Mr Andrew Cousins filed an affidavit on behalf of the Comptroller ("Mr Cousins' first affidavit").

(ix) On 9 th April, 2015, Mr David Le Cuirot filed an affidavit on his own behalf *"to provide the substance of the reasons for the decisions to serve the Notices"* (para 3).

(x) On 13 th April, 2015, the hearing of the summons of Mr Larsen and Volaw took place.

(xi) On 20 th April, 2015, Mr Cousins filed another affidavit ("Mr Cousins' second affidavit") exhibiting the Letters of Request without conceding any obligation to do so but in an effort to avoid delay to the substantive hearing.

(xii) On 14 th May, 2015, I dismissed an application made by Mr Larsen and Volaw, based on the duty of candour owed by the Respondents to an application for judicial review, for further elaboration of the cases of the Comptroller and States and disclosure of additional documents thereby ("the Disclosure ruling"). In that ruling I also determined that a Letter of Request is not ordinarily a disclosable document either before or after the making of an application for judicial review.

(xiii) On 26 th June, 2015, Dexter Flynn filed a first affidavit.

(xiv) On 14 th July, 2015, Dexter Flynn filed a second affidavit.

(xv) On 23 rd July, 2015, Dexter Flynn filed a third affidavit.

(xvi) On 28 th September, 2015, Kenneth Hodcroft, who had an interest in certain of the companies, filed an affidavit.

Grounds of Challenge

6 Mr Larsen and Volaw rely upon a variety of grounds in seeking to quash the Notices and to obtain a declaration that the Comptroller has no power to transfer to the NTA any documents received pursuant to the Notices. The main contentions are that:–

(i) The 2008 Regulations as amended are *ultra vires* the enabling legislation, i.e. the 2004 Law and/or infringe various human rights enforceable in Jersey under the Human Rights (Jersey) Law 2000 ("the Human Rights Law") and/or the rule of law itself (there is a pithy summary of this contention in Sir Michael Birt's judgment of 25 th November, 2014, para 9) ("the Larsen/Volaw Regulations issue").

(ii) The Notices themselves are ultra vires those Regulations as imposing, unjustified and disproportionate requirements on Volaw ("the Larsen/Volaw Notices issue").

(iii) Mr Larsen and/or Volaw should have been given, but were not, an opportunity in advance of the services of the Notices to make informed representations as to why the Notices should not be served ("the Larsen/Volaw Natural Justice issue").

7 Sir Michael Birt, in giving leave, did not elaborate on his conclusion that ***"there is sufficient in the grounds to justify the granting of leave to apply for judicial review on all the grounds set out in the application"*** (para 5 see also para 10) though I note that he was not prepared to describe the challenge to the Regulations as amounting to a ***"strong prima facie case"*** (para 15). I interpret his decision on sufficiency ***"in the grounds"*** to refer to the grounds themselves rather than to every point made in support of those grounds.

8 There are ancillary grounds, postdating the grant of leave, and which themselves accordingly require leave if they are to be advanced. Volaw took on itself by Advocate Hoy the main carriage of these ancillary grounds:–

(i) The requirements of the Notices breach the privilege against self-incrimination ("the PSI issue");

(ii) The requirements of the Notices breach the principles of the Data Protection (Jersey) Law 2005 ("the DPA issue").

The Legal Framework

The Tax Convention

9 The backcloth to the 2004 Law and Regulations made thereunder is to be found in The Convention on Mutual Administrative Assistance in Tax Matters ("the Tax Convention") which, in its form at the time material to these proceedings provided as follows:–

"Chapter 1 — Scope of the Convention

Article 1 — Object of the Convention and persons covered

The Parties shall, subject to the provisions of Chapter 1V, provide administrative assistance to each other in tax matters …

Such administrative assistance shall comprise:

exchange of information …

…

service of documents.

A Party shall provide administrative assistance whether the person

affected is a resident or national of a Party or of any other State.

Article 2 — Taxes covered

This Convention shall apply:

to the following taxes:

taxes on income or profits ,

…

taxes on wealth ,

imposed on behalf of a Party;

…

Chapter II — General definitions

Article 3 — Definitions

For the purposes of this Convention, unless the context otherwise requires:

the terms “applicant State” and “requested State” mean respectively any Party applying for administrative assistance in tax matters and any Party requested to provide such assistance;

the term “tax” means any tax … to which the Convention applies pursuant to Article 2;

…

the term “competent authority” means the persons and authorities listed in Annex B;

the term “nationals” in relation to a Party means:

all individuals possessing the nationality of the party; and

all legal persons, partnerships, associations and other entities deriving their status as such from the laws in force in that Party.

…

Chapter III — Forms of assistance

Section 1 — Exchange of Information

Article 4 — General provision

The Parties shall exchange any information, in particular as provided in this section, that is foreseeably relevant for the administration or enforcement of their domestic laws concerning the taxes covered by this Convention.

…

Article 5 — Exchange of information on request

At the request of the applicant State, the requested State shall provide the applicant State with any information referred to in Article 4 which concerns particular persons or transactions.

…

Article 6 — Automatic exchange of information

With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, two or more Parties shall automatically exchange the information referred to in Article 4.

Section II — Assistance in recovery

Article 14 — Time limits

Questions concerning any period beyond which a tax claim cannot be enforced shall be governed by the law of the applicant State. The request for assistance shall give particulars concerning that period.

…

Article 17 — Service of documents

At the request of the applicant State, the requested State shall serve upon the addressee documents, including those relating to judicial decisions, which emanate from the applicant State and which relate to a tax covered by this Convention.

The requested State shall effect service of documents:

by a method prescribed by its domestic laws for the service of documents of a substantially similar nature.

…

Chapter IV — Provisions relating to all forms of assistance

Article 18 — Information to be provided by the applicant State

A request for assistance shall indicate where appropriate:

the authority or agency which initiated the request made by the competent authority;

the name, address, or any other particulars assisting in the identification of the person in respect of whom the request is made;

in the case of a request for information, the form in which the applicant State wishes the information to be supplied in order to meet its needs;

…

in the case of a request for service of documents, the nature and the subject of the document to be served;

whether it is in conformity with the law and administrative practice of the applicant State and whether it is justified in the light of the requirements of Article 21.2.g.

As soon as any other information relevant to the request for assistance comes to its knowledge, the applicant State shall forward it to the requested State.

Article 20 — Response to the request for assistance

If the request for assistance is complied with, the requested State shall inform the applicant State of the action taken and of the result of the assistance as soon as possible.

…

Article 21 — Protection of persons and limits to the obligation to provide assistance

Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State.

Except in the case of Article 14, the provisions of this Convention shall not be construed so as to impose on the requested State the obligation:

to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant State;

to carry out measures which could be contrary to public policy (ordre public);

to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant State or its administrative practice;

to supply information which would disclose any trade, business,

industrial, commercial or professional secret, or trade process, or information the disclosure of which would be contrary to public policy (ordre public);

…

Article 22 — Secrecy

Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.

Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes."

The 2004 Law:

10 The 2004 Law in force from 5 th November, 2004, provides, so far as material, as follows:–

"TAXATION (IMPLEMENTATION) (JERSEY) LAW 2004

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

1. Interpretation

In this Law –

"approved agreement" means an agreement regarding or relating to taxation which the States have authorized to be signed on their behalf with the government of another country or territory;

"approved obligation" means an obligation regarding or relating to taxation which the States have authorized to be signed or assented to on their behalf;

"tax officer" means the Comptroller of Taxes or any other officer

appointed under Article 8 of the Income Tax (Jersey) Law 1961;

"taxation" means taxation in Jersey and –

in relation to an approved agreement, taxation in the country or territory with whose government the agreement is signed;

in relation to an approved obligation, taxation in a country or territory to which the obligation is owed.

2 (1). Power to implement

The States may by Regulations make such provision as appears to them to be necessary or expedient for the purposes of-

implementing an approved agreement or approved obligation; and

dealing with matters arising out of or related to such an agreement or obligation.

2(2) Regulations made under paragraph (1) may –

amend any other enactment; and

make any other provision, of any extent, as might be made by a Law passed by the States.

2(3) Without prejudice to the generality of paragraphs (1) and (2), Regulations made under paragraph (1) may contain such incidental, supplemental, transitional and saving provisions as the States may consider expedient.

…

4. Information

No specific or general restriction on the disclosure of information imposed by any enactment or contract or otherwise shall prevent the disclosure of information to the competent authority or another country or territory pursuant to an approved agreement or approved obligation, or Regulations made under Article 2.

The reference in paragraph (1) to the competent authority of another country or territory is a reference to the authority designated in or for the purposes of an approved agreement or approved obligation as the competent authority of that country or territory."

The 2004 Law did not incorporate the Convention or any TIEA into Jersey law but enabled regulations to be made to give effect to the latter.

The J/NTIEA

11 The J/NTIEA, one of the TIEAs to which the regulations would attach, in force from 7 th October, 2009, provides, so far as material, as follows:–

> ***"Whereas the Government of Jersey and the Government of the Kingdom of Norway ("the Parties") have long been active in international efforts in the fight against financial and other crimes…:***
>
> ***Whereas it is acknowledged that Jersey under the terms of its Entrustment from the UK has the right to negotiate, conclude, perform … a tax information exchange agreement with the Kingdom of Norway;***
>
> ***Whereas Jersey on 22 February 2002 entered into a political commitment to the OECD's principles of effective exchange of information;***
>
> ***Whereas the Parties wish to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes;***
>
> ***Now, therefore, the Parties have agreed to conclude the following Agreement which contains obligations on the part of Jersey and the Kingdom of Norway only;***
>
> ***Article 1***
>
> ***Scope of the Agreement***
>
> ***The Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, recovery and enforcement or collection of tax with respect to persons subject to taxes, or to the investigation of tax matters or the criminal prosecution of tax matters in relation to such persons. A requested Party is not obliged to provide information which is neither held by its authorities nor in the possession of not obtainable by persons who are within its territorial jurisdiction. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information.***
>
> ***Article 2***
>
> ***Taxes Covered***
>
> ***1. This Agreement shall apply to the following taxes imposed by the Parties:***

…

2. This Agreement shall apply also to any identical taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes. This Agreement shall apply also to any substantially similar taxes imposed after the date of signature of the Agreement in addition to or in place of the existing taxes, if the Parties so agree. The competent authority of each Party shall notify the other of substantial changes in laws which may affect the obligations of that Party pursuant to this Agreement.

Article 3

Definitions

In this Agreement

(a) "Jersey" means the Bailiwick of Jersey, …;

…

(c) "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;

(d) "competent authority" means, in the case of Jersey the Treasury and Resources Minister or his authorised representative; in the case of Norway, the Minister of Finance or the minister's authorised representative;

(e) "criminal laws" means all criminal laws designated as such under domestic law, irrespective of whether such are contained in the tax laws, the criminal code or other statutes;

(f) "criminal tax matters" means tax matters involving intentional conduct whether before or after the entry into force of this Agreement which is liable to prosecution under the criminal law of the requesting Party;

(g) "information gathering measures" means laws and administrative or judicial procedures enabling a requested Party to obtain and provide the information requested;

(h) "information" means any fact, statement, document or record in whatever form;

(i) "person" means a natural person, a company or any other body or group of persons;

…

(n) "requested Party" means the Party to this Agreement which

is requested to provide or has provided information in response to a request;

(o) "requesting Party" means the Party to this Agreement submitting a request for or having received information from the requested Party;

(p) "tax" means any tax covered by this Agreement;

2. As regards the application of this Agreement at any time by a Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party.

Article 4

Exchange of Information upon Request

1. The competent authority of the requested Party shall provide upon request by the requesting Party information for the purposes referred to in Article 1. Such information shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes or the conduct being investigated would constitute a crime under the laws of the requested Party it if had occurred in the territory of the requested Party. The competent authority of the requesting Party shall only make a request for information pursuant to this Article when it is unable to obtain the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty.

…

3. If specifically requested by the competent authority of the requesting Party, the competent authority of the requested Party shall provide information under this Article, to the extent allowable under its domestic laws, in the form of depositions of witnesses and authenticated copies of original records.

4. Each Party shall ensure that it has the authority, subject to the terms of Article 1, to obtain and provide, through its competent authority and upon request:

(a) information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity;

(b)

(i) information regarding the legal and beneficial

ownership of companies, partnerships and other persons, …

(ii) in the case of trusts, information on settlors, trustees, protectors and beneficiaries; and in the case of foundations, information on founders, members of the foundation council and beneficiaries.

…

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

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

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

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

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

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

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

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

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

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

5. The competent authority of the requested Party shall acknowledge

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

Article 6

Possibility of Declining a Request

1. The competent authority of the requested Party may decline to assist:

> ***(a) where the request is not made in conformity with this Agreement;***
>
> ***(b) where the requesting Party has not pursued all means available in its own territory to obtain the information, except where recourse to such means would give rise to disproportionate difficulty; or***
>
> ***(c) where the disclosure of the information requested would be contrary to public policy ("ordre public")***

2. This Agreement shall not impose upon a requested Party any obligation to provide items subject to privilege, or any trade, business, industrial, commercial or professional secret or trade process, provided that information described in Article 4 (4) shall not by reason of that fact alone be treated as such a secret or trade process.

3. A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed;

4. The requested Party shall not be required to obtain and provide information which if the requested information was within the jurisdiction of the requesting Party the competent authority of the requesting Party would not be able to obtain under its laws or in the normal course of administrative practice.

…

Article 7

Confidentiality

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

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

judicial decisions.

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

…

Article 9

Mutual Agreement Procedures

…

3. Formal communications, including requests for information, made in connection with or pursuant to the provisions of the Agreements entered into will be in writing directly to the competent authority of the other Party at such address as may be notified by one Party to the other from time to time. Any subsequent communications regarding requests for information will either be in writing or verbally, whichever is most practical, between the earlier mentioned competent authorities or their authorised representatives.

Article 10

Entry into force

This Agreement shall enter into force on the thirtieth day after the latter of the dates on which each of the Parties has notified the other in writing that the procedures required by its law have been compiled with. The Agreement shall have effect:

(a) For criminal tax matters on that date; and

(b) For all other matters covered in Article 1 on that date, but only in respect of any tax year beginning on or after the first day of January of the year next following that in which this Agreement enters into force or, where there is no tax year, all charges to tax arising on or after that date.

Done at Helsinki this 28th day of October 2008, ….”

The 2008 Regulations as Amended

12 The 2008 Regulations as amended in force from 6th November 2013…. provide so far as material:–

“1. Interpretation

(1) In these Regulations, unless the context otherwise requires –

"competent authority" means, in relation to Jersey, the Minister for Treasury and Resources, or his or her authorized representative and, in relation to a third country, the person named as the competent authority for that country in the tax information exchange agreement between it and Jersey;

"relevant criminal offence" means an offence that is criminal by reason of the law of a third country that is designated as a criminal law, for which purpose it is immaterial whether it is contained in a tax law, in a criminal code or in any other law;

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

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

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

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

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

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

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

1A Tax information

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

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

(b) the recovery and enforcement of such taxes;

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

(d) the investigation or prosecution of tax matters.

(2) Tax information may be –

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

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

2 Provision of tax information by taxpayer

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

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

3 Provision by other persons of tax information about taxpayer

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

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

(3) Where a third party notice does not name the taxpayer to whom it relates, it must provide an account number or other identification for the tax information required.

(4) Subject to paragraph (5), the competent authority for Jersey shall send to the taxpayer to whom a third party notice relates a copy of the third party notice –

(a) In a case where, at the time the third party notice is given, the competent authority for Jersey does not know the taxpayer's name and address — within 7 days after the third party has provided to the competent authority for Jersey the tax information required by the third party notice; or

(b) In any other case — within 7 days after the third

party notice is given.

…

(7) The third party shall not disclose the third party notice nor any information relating to it to the taxpayer that is prohibited from so disclosing by virtue of any prohibition contained in the third party notice except –

(a) with the written consent of the competent authority for Jersey; or

(b) with the consent of the Royal Court.

4 Time for compliance with notices

(1) A notice under Regulation 2 or Regulation 3 shall specify a time within which the person to whom it is given must comply with it.

(2) The time specified shall not be less than 15 days, beginning on the date on which the notice is given to the person who is to comply with it.

…

10A Restrictions regarding requirement to provide information

(1) Nothing in these Regulations requires a person to provide to the competent authority for Jersey information that is subject to legal professional privilege.

(2) The answers given or a statement or deposition made by an individual in compliance with a notice given under Regulation 2 or 3 may not be used in evidence against the individual in any criminal proceedings, except proceedings under Regulation 15(2).

(3) Notwithstanding any other enactment (whenever passed or made) or the terms of any contract (whenever made), a person required to provide information by notice given under Regulation 3 shall not incur any civil or criminal liability by reason of disclosing the information in compliance with the requirement.

[10B Manner of provision of tax information]

…

[10C Keeping of records]

…

[11 Protection of evidence]

…

14 Judicial review: limitations

(1) Despite any Rule made to the contrary under the Royal Court (Jersey) Law 1948, an application for leave to apply for judicial review may not be made –

> ***(a) by a taxpayer, against a requirement made of that taxpayer under Regulation 2, later than 14 days after the requirement arose under Regulation 2;***
>
> ***(b) by a person, against a requirement made of that person in a third party notice, later than 14 days after the third party notice was given to that person under Regulation 3; or***
>
> ***(c) by a taxpayer, against a requirement made of a third party in respect of that taxpayer, later than 14 days after the copy of the third party notice was given to that taxpayer under Regulation 3.***

(2) An application for judicial review may not be made on any of the following grounds –

> ***(a) that the competent authority for Jersey has not provided the third party notice to a taxpayer within the time limits specified in Regulation 3(4);***
>
> ***(b) that the competent authority for Jersey has not provided the third party notice to the taxpayer on a ground mentioned in Regulation 3(5);***
>
> ***(c) that the competent authority for Jersey has prohibited a third party from disclosing the third party notice to the taxpayer, or any information relating to the notice to the taxpayer on a ground mentioned in Regulation 3(5); or***
>
> ***(d) that the competent authority for Jersey has required tax information to be authenticated in a manner that is not required for the purposes of Regulation 10B(3).***

(3) Despite any application for leave to apply for judicial review being made –

> ***(a) a taxpayer or a third party shall provide the competent authority for Jersey the information requested in the notice served under Regulation 2 or 3, as the case may be, within the time limits specified in the notice; but***
>
> ***(b) the competent authority for Jersey shall not provide to the***

competent authority for the third country the tax information obtained under these Regulations unless –

(i) the application for leave to apply for judicial review or any subsequent application for judicial review is dismissed;

(ii) the application for leave to apply for judicial review or any subsequent application for judicial review is withdrawn or discontinued; or

(iii) The competent authority for Jersey is permitted to do so by the Royal Court.

(4) In all other respects the Royal Court shall apply the principles applicable on an application for judicial review.

14A Further appeal to the Privy Council

(1) An appeal lies to the Privy Council from a decision of the Royal Court on a judicial review to which Regulation 14 applies.

(2) An appeal under this Regulation lies at the instance of –

(a) a taxpayer, against a requirement made of that taxpayer under Regulation 2;

(b) a person, against a requirement made of that person in a third party notice;

(c) a taxpayer, against a requirement made of a third party in respect of that taxpayer; or

(d) the competent authority for Jersey.

(3) An appeal under this Regulation lies only with the leave of the Privy Council.

(4) An application to the Privy Council for leave to appeal under this Regulation against a decision shall be made before the end of the period of 14 days commencing on the day on which the Royal Court makes its decision.

(5) If leave to appeal under this Regulation is granted, the appeal shall be brought before the end of the period of 14 days commencing on the day on which leave is granted.

(6) If paragraph (5) is not complied with –

(a) the appeal shall be taken to have been brought; and

(b) the appeal shall be taken to have been dismissed by the Privy Council immediately after the end of the period specified in that paragraph.

(7) For the purpose of paragraph (6)(b) –

(a) Any power of a court to extend the period permitted for giving notice of appeal; and

(b) Any power of a court to grant leave to take a step out of time ,

shall be disregarded.

(8) The Privy Council may allow or dismiss the appeal.

15 Offences

(1) …

(2) An individual who, being required by notice under Regulation 2 or 3 to provide information by answering questions or by making a statement or deposition –

(a) knowingly or recklessly gives an answer or makes a statement or deposition which is false, misleading or deceptive in a material particular; or

(b) knowingly or recklessly withholds any information the omission of which makes the information provided misleading or deceptive in a material particular ,

is guilty of an offence.

(3) A person who knowingly and without reasonable excuse –

(a) fails to comply with a requirement imposed under Regulation 2(1) or 3(1); or

(b) contravenes Regulation 3(7) or 12(9) ,

is guilty of an offence.

…

(5) A person guilty of an offence against this Article is liable to imprisonment for a term of 12 months and a fine.

16 Parties to offences

(1) A person who aids, abets, counsels or procures the commission of an offence under these Regulations is also guilty of the offence and liable in the same manner as a principal offender to the penalty provided for that offence.

(2) If an offence under these Regulations by a limited liability partnership, separate limited partnership or body corporate is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of –

> ***(a) A person who is a partner of the partnership or director, manager, secretary or other similar officer of the body corporate;***
>
> ***(b) A person purporting to act in any such capacity*** ,

the person is guilty of the offence and liable in the same manner as the partnership or body corporate to the penalty provided for that offence.

(3) If the affairs of a body corporate are managed by its members, paragraph (2) applies in relation to acts and defaults of a member in connection with the member's functions of management as if the member were a director of the body corporate.

16A Application

(1) These Regulations, apart from Regulation 16B, apply to tax information in respect of a tax that is specified in the Schedule from the date on which a tax information exchange agreement in respect of that tax comes into force.

(2) There shall be specified in the Schedule the date on which a tax information exchange agreement came into force.

(3) The Minister for External Relations shall by Order amend the Schedule so as to add, for a third country and any description of tax, the date the tax information exchange agreement relating to that third country and description of tax came into force.

16B Confidentiality of information received under tax information exchange agreement

(1) Information received by the competent authority for Jersey from the competent authority for a third country pursuant to a tax information exchange agreement shall be disclosed only to persons, and used only for the purposes, described in that agreement.

(2) A person who knowingly contravenes paragraph (1) commits an offence and is liable to a fine."

(3)

The Human Rights Law

13 The Human Rights (Jersey) Law 2000 (in force from 10th December 2006), which informs the construction of the 2004 Act and the 2008 Regulations as amended, and with which both must comply provides, so far as material, as follows:–

"1. Interpretation

(1) In this Law –

"amend" includes repeal and apply (with or without modifications);

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the Island;

"Convention rights" means the rights and fundamental freedoms set out in –

(a) Articles 2 to 12 and 14 of the Convention;

(b) Articles 1 to 3 of the First Protocol

…

as read with Articles 16 to 18 of the Convention;

"declaration of incompatibility" means a declaration of incompatibility made under Article 5;

"principal legislation" means any –

(a) Law;

…

and includes any Regulations, an Order or other instrument made under principal legislation (whether in Jersey or in the United Kingdom) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any principal legislation;

" subordinate legislation" means any

(a) Order in Council other than one which is principal legislation; and

> ***(b) Regulations, Order, Rules, scheme, warrant, Bye-laws or other instrument made under principal legislation (except to the extent to which it operates to bring one or more provision of that principal legislation into force or amends principal legislation).***

2 The Convention

(1) The Articles of the Convention which comprise the Convention rights (and which are set out in Schedule 1) shall have effect for the purposes of this Law subject to any designated derogation or reservation.

…

3 Interpretation of Convention rights

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any –

(a) Judgment, decision, declaration or advisory opinion of the European Court of Human Rights;

…

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

…

4 Legislation

(1) So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

(2) This Article –

> ***(a) Applies to principal and subordinate legislation whenever enacted;***
>
> ***(b) Does not affect the validity, continuing operation or enforcement of any incompatible principal legislation; and***
>
> ***(c) Does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) principal legislation prevents removal of the incompatibility.***

7 Public authorities and the States Assembly

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) In this Article "public authority" includes –

> ***(a) A court or tribunal; and***
>
> ***(b) Any person certain of whose functions are functions of a public nature, but does not include the States Assembly or a person exercising functions in connection with proceedings in the States Assembly.***

…

(4) Notwithstanding that the States Assembly is not a public authority for the purposes of this Law, it shall be unlawful for the States Assembly –

> ***(a) to make subordinate legislation which is incompatible with a Convention right;***

…

8 Proceedings

(1) A person who claims that –

> ***(i) a public authority has acted, or proposes to act, in a way which is made unlawful by Article 7(1); or***
>
> ***(ii) the States Assembly has acted in a way which is made unlawful by paragraph (4) of that Article*** ,

may

> ***(a) bring proceedings against the authority or, in the case of the Assembly, the States, under this Law in the Royal Court; or***
>
> ***(b) rely on the Convention right or rights concerned in any legal proceedings*** ,

but only if the person is (or, in the case of proposed action by a public authority, would be) a victim of the unlawful act.

(2) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have sufficient interest in relation to the unlawful act only if he or she is, or would be, a victim of that act.

(3) A person wishing to bring proceedings under paragraph (1)(a) must do so before the end of –

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court considers equitable having regard to all the circumstances ,

unless Rules of Court made by the Royal Court impose a stricter time limit in relation to the procedure in question.

…

(5) For the purposes of this Article, a person is a victim of an unlawful act only if he or she would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

…

9 Judicial remedies

(1) In relation to –

(a) Any act or proposed act of a public authority which the court finds is, or would be, unlawful; or

(b) Any act of the States Assembly which the court finds is unlawful ,

the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

…

SCHEDULE 1

(Article 2(1))

CONVENTION RIGHTS

PART 1

THE CONVENTION

Article 6

Right to a fair trial

1 In the determination of his civil rights and obligations or 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. …

Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private … life. …

2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

PART 2

THE FIRST PROTOCOL

Article 1

Protection of property

1 Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

2 The preceding provisions shall not, however, in any way impair the right of a States to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."

Additional proceedings

14 Three of the companies, Larsen Oil and Gas Drilling Ltd, Independent Oil Fields Ltd, North East Oil Fields Ltd ("the three companies") also originally challenged the provision of the documents to the NTA on the primary basis that there is no "positive power" to do so and sought an order compelling the Comptroller to take all reasonable steps to procure their return. (Their other arguments based on Human Rights Law and the DPA are considered in relation to the main proceedings and what I say in that context can be applied mutatis mutandis to this challenge).

Chronology in the Additional proceedings

15 On 1 st July, 2014, the then Bailiff dismissed an application for leave to apply for judicial review by the three companies which essentially mirrored the applications in Larsen 1.

16 On 24 th October, 2014, the present application for judicial review was made supported by an affidavit of Mr Healey of even date.

17 On 16 th January, 2015, the Bailiff gave leave on the basis of the similarity of the issues raised in the subsidiary proceedings (including Human Rights and data protection issues) with those in the main proceedings.

18 On 26 th March, 2015, Mr Le Cuirot filed an affidavit in response.

19 This ingenious submission, if well founded, would make the grounds of challenge in the main proceedings redundant. It was in the event withdrawn shortly before the hearing on the basis that the absence of such a power was an inadvertent omission curable by reference to the principles in *Inco Europe Ltd v First Choice Distribution Ltd* [2000] 1 WLR 586 ("Inco") which I discuss later. I therefore consider it only briefly as a prologue to the main production and in order to scotch any chance of its resurrection hereafter because in my view the withdrawal was correct if somewhat too narrowly based.

20 I would have had no hesitation in rejecting the submission for these reasons:–

In short the fact that the drafting of those regulations could have been improved does not entitle a Court to make a nonsense of them.

(i) Article 4 of the 2004 Law expressly envisages that Regulations will enable such provision to be made and Regulation 3(1) reflects this in terms.

(ii) The power of provision is in any event to be implied as necessarily ancillary to the power to obtain: see by analogy e.g. *Ward v MPC* [2005] 2 AC 114 para 23.

(iii) The power of provision is expressly restricted in the 2008 Regulations as amended in Regulation 14 (3)(b) on the necessary premise that such power otherwise existed.

(iv) It would destroy the very purpose of a TIEA.

(v) More generally the Comptroller only obtains information by means of a Notice in order to provide it to the appropriate authority of the requesting state. Article 1 of the N/TIEA. He has no other interest in them.

Reasons for the 2013 Amendments

21 In my view it is clear from the documents disclosed by the Respondents (Proposition P.132/2013 — a Report on the draft 2013 Amendments ("the Report") and the Hansard material) that the reason for the 2013 amendment to the 2008 regulations was to reduce the delay in responding to a request under a TIEA; and to achieve this by abbreviating time limits and so reducing the routes of challenge, exploited indeed by Mr Larsen in Larsen 1 and others ("the first reason"), as well as to bring Jersey legislation into broader alignment with that of other States involved in the same exercise ("the second reason"). Avoidance of delay in the effective exchange of information by use of rights and safeguards provided by the States which are parties to the J/NTIEA is one of the J/NTIEA's objectives (Article 1). There had already been in pursuit of the same objective an amendment to the 2008 Regulations in 2012 to respond to the Peer review report of the Global Forum on transparency of Information for Tax Purposes which recommended that "Jersey should amend its domestic legislation to remove the identified impediments to the effective access to relevant information".

22 The first reason is indeed apparent from a simple comparison of the amended Regulations with the Regulations in their form before those amendments (as well as from the Explanatory Note to the former); and is confirmed by the documents I have referred to, which also and expressly evidences the second reason). The French complaint may have been responsible for the reconsideration of the Regulations in their previous form and the speed with which the amendments were introduced (see the Report "this is why there is a need for an urgent response" and Hansard Speech of the Chief Minister) but the 2008 Regulations as amended stand or fall in point of law on their own merits (I so found in the Disclosure ruling para [38]).

Effect of the 2013 Amendments and the questions raised thereby

23 It is not therefore in issue that the 2008 Regulations as amended reduce the procedural rights accorded to taxpayers when compared with the 2008 Regulations in their original form in that:–

Neither is it in issue that in other jurisdictions e.g. the United Kingdom, greater rights are accorded where requests are made under a TIEA (see discussion in *R on the Application of Derrin Brother Properties v HMRC* [2014] EWHC 1152 (Admin); [2014] STC 2238 ("Derrins")), or that in principle greater rights could be so accorded ("shortfall").

(i) No reasons are required for the sending of Notices;

(ii) R14(1) introduces a 14 day time limit in which to bring proceedings;

(iii) R14(2) excludes certain grounds for judicial review;

(iv) R14(3) makes compliance with a Notice mandatory notwithstanding inception of judicial review proceedings;

(v) R14A purports to restrict further rights of appeal.

24 But that reduction or shortfall is not per se objectionable nor does it involve the necessary conclusion that those regulations are out with the enabling provisions of the 2004 Law or non-compliant with the Human Rights Law.

There is no mandatory standard template for procedures under a TIEA *"The question is whether a less intrusive measure could have been used without unacceptably compromising the objective".Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700" ("Bank Mellat") per Lord Sumption at paras 20 and 75). Margins of appreciation must be accorded to legislatures sensitive to and sensible of local circumstances. In my view the proper question is whether in their current form those Regulations are: first within the enabling power; second are compatible with the Human Rights Law and third are proportionate.

The Reach of the 2004 Law

25 As to the first the language of the 2004 Law enables the States to pass Regulations that appear to them to be "necessary or expedient" for the purposes of implementing a TIEA as well as "dealing with matters arising out of or related to such an agreement or obligation". The criteria of necessity or expediency are alternative; and the latter creates a lower hurdle than the former see e.g. *Ahmed v HM Treasury* [2010] 2 AC 534 ("Ahmed") at para 47. Unusually, but not uniquely, the 2004 Law enabled the States by such regulations to amend enactments (which, pursuant to the Interpretation (Jersey) Law 1954 — Article 1(1) included both primary and secondary legislation) or to make such provision in lieu thereof as would ordinarily be made by primary legislation. Nor in the Jersey context did this involve an abdication of powers which ought to remain vested in the legislation to the executive. The States would themselves have to vote on and hence vouch for any regulations made by reason of this unusual power-and in this instance did so.

26 It is, I accept, insufficient for the Respondents to rely on the literal interpretation of the 2004 Law to validate the 2008 Regulations as amended. The primary power relied on to make such regulations has to be tested against the principle of legality. In consequence of this legal principle, not only ambiguous words but general words are insufficient to override human rights. Lord Hoffmann in *R v Secretary of State ex p Simms* [2000] 2 AC 115 at p.131 explained:–

> ***"This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express words or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."***

27 In this context Mr Larsen and Volaw naturally placed emphasis on the decision of the

Supreme Court in *Ahmed* where the scope of powers under the United Nations Charter Act Section 1 empowered the making of Orders in Council are to make such provision as appeared "necessary and expedient" to enable measures required by decisions of the Security Council to be "effectively applied". Such words were held insufficient to enable the fundamental rights of the individual to be overridden in two orders, the Terrorism Order and the Al Quaeda Order.

28 I draw attention to the following features of that influential decision.

29 First, as Lord Hope observed, such Orders in Council:–

> ***"not instruments upon which proceedings may be taken in either house. They are laid before parliament for its information only, not for scrutiny of their merits or for debate. The effect of section 1 is that decisions as to the provisions that orders made under it may or should lie entirely with the executive." (para 14)***
>
> ***"The crucial question is whether the section confers power on the executive, without any parliamentary scrutiny, to give effect in this country to decisions of the Security Council which are targeted against individuals" (ditto para 44)***

There is therefore no read across to the present case where, as I have already noted, the Regulations themselves required a positive endorsement by the States before coming into effect. Although that is a vital point of distinction I note additionally that Lord Phillips P was not prepared to espouse the proposition:–

> ***"That the principle of legality raises a general presumption against parliament delegating to the executive the power to make regulations that call for legislative design" (para 122)***

30 Second, the two orders made were extremely oppressive. As Lord Hope observed:–

> ***"The Appellants have all been subjected to a regime which indefinitely freezes their assets under which they are not entitled to use, receive or gain access to any form of property, funds or economic resources unless licensed to do so by the executive"*** ditto (para 37) and;
>
> ***"The restrictions strike at the very heart of the individual's basic right to live his own life as he chooses. It is no exaggeration to say that designated persons are effectively prisoners of the state"*** (ditto para 60).

Again there is no read across to the present case where any infringement of human rights was of a significantly lesser scale.

31 Third those designated as the objects of the oppressive orders:–

> ***"were unable to make an effective challenge to the reasons for treating them in this way"*** (Lord Phillips P at para 147).

See too Lord Rodger at para 186 and Lord Mance at para 249.

Yet again there is no read across to the present case where the remedy of judicial review coupled with the possibility of an appeal is available.

32 The crucial question, as it seems to me, is whether the States were conscious or unconscious of what they were doing in enacting the 2004 Law.

33 As Lord Browne Wilkinson said in *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539, at p.575:–

> ***"A power conferred by parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of parliament."***

34 In application of that principle in *Ahmed* Lord Rodger said:–

> ***"I have come to the conclusion that, by enacting the general words of section 19(1) of the 1946 Act, Parliament could not have intended to authorise the making of AQO 2000 which so gravely and directly affected the legal right of individuals to use their property and which did so in a way which deprived them of any real possibility of challenging their listing in the Court"*** (para 185).

35 I respectfully accept that he posed himself the right question as to the scope of Parliamentary intention but note that to answer it he had to evaluate a number of factors as listed in his judgment, at paras 179–184. All were specific to the case before the Supreme Court. None is replicated even by analogy in the present case.

36 I see no reason on the facts specific to the present case to conclude that the States did not know exactly what they were doing in 2004 or that the 2008 Regulations as amended were not within the scope of those envisaged when the 2004 Law was enacted. The generality and flexibility of the provisions of the law were designed, in my view, to enable certain rights to be overborne in the interests of obtaining otherwise confidential information for use in an investigation by another state. In the context of the reach of enabling powers framed by concepts such as necessity or expediency, one is in the realm not of absolutes, but of questions of degree (see *Ahmed* Lord Hope para 76). The Report of the draft law lodged with the Greffe by the Policy and Resources Committee on 22 nd January, 2004, ("the Report") stated that its provisions were *"compatible with Convention rights".* The Report

further noted at para 4 the need for the States both to authorise any TIEA and to approve any Regulations required to implement it.

37 In my view, on the basis of the facts as I have already found them, the States clearly (and rationally) considered the 2008 Regulations as amended to be expedient for the purposes of dealing with matters relating to J/TIEAs. I note that the OECD's Supplemental Peer Review Report stated at paragraph 104:–

> ***"The notification and appeal process also proved to be burdensome and led to a high proportion of challenges of the notices on elements that should have been left to the appreciation of the competent authority. Appeals also appear to have been used in some cases to frustrate and delay the exchange without being based on solid grounds"*** .

Larsen, I may provide the paradigm example of such a case, and insofar as the restrictive amendments complained of are valid, Mr Larsen may be said to be the author of his own misfortune.

38 This agitates the question whether judicial review, coupled with the possibility of an appeal to the Privy Council, is a sufficient guarantor of the fairness to which Mr Larsen or Volaw are entitled either at common law or pursuant to the Human Rights Law or whether:–

are inconsistent with the principles which they embody.

(i) the absence of an opportunity to make representations as to why the Notices should not be sent — *aliter* the natural justice issue.

(ii) an absence of a right of appeal to the Court of Appeal

(iii) the abbreviated time limits

39 As to (1) the issue does not strictly go to the *vires* of the Regulations. If fairness requires such an opportunity, it can be implied into the regulatory scheme; if it does not, *cadit quaestio*. Nor does it go uniquely to compatibility with the Human Rights Law which is as much concerned with the means of challenge to a decision within the scope of Articles 6 or 8, as with the means of preventing an adverse decision in the first place. Nonetheless it is convenient to consider whether in law Mr Larsen and Volaw must have an opportunity to make such advance representations which in point of fact they did not.

Natural justice

40 The lynch pin of the Applicants' argument on the natural justice issue was the observations of the Court of Appeal in Larsen No. 1 where that Court said:–

"While the 2008 Regulations contain no express provision for representations to be made by the person of whom the requirement is made, as to why the request made does not justify a notice, Regulation 3(4), as noted, provides for a "reasonable opportunity" to that person to provide to the Comptroller the document or record concerned without the need for a notice. Reasonableness must, in our view, require not only making available sufficient time for such provision but also sufficient explanation as to why the information is required. There is nothing to prevent the person, given that opportunity, then to exploit it by making a case against such provision, which the Commissioner would be obliged to take into account before issuing a notice. Subject only to the circumstances set out in Regulation 3(6) which prevent the Comptroller from disclosing certain matters to the person from whom the information is sought [specifically post-notice, but which must sensibly apply pre-notice too], we were told by Advocate Kelleher for the Comptroller that there is no practical reason why the Comptroller should not inform the person of the substance of the Request. [para 30]

Elementary fairness does seem to us, prima facie, to require the Comptroller to give the person the chance to make representations so as to avoid, it may be, entering into the terrain of notices and the possibility of penal sanctions for non-compliance therewith Regulation 3. (As to which see Regulation 15(2).) [para 31]

However, it does not seem to us possible to read into the Comptroller's decision making process a need to hold a mini-trial. The Comptroller has neither the power nor the facility to provide one. As long as he has reasonable grounds for his belief or opinion on the material, before him, he is empowered to act on that belief or opinion. Although the analogy is not exact, it seems to us that the situation confronting the Comptroller when faced with such representations is not un-akin to that which confronts a Court when it has to consider whether a putative Respondent's affidavit is sufficient to prevent what would otherwise be the grant of permission to apply for judicial review. In the familiar phase such affidavit would have to constitute a "knock-one blow" to have such effect. [*Cf: Sharma v Browne-Antoine* [2007] 1 WLR 780***at 14(6), p.789] Fordham: Judicial Review 6th ed (" Fordham") 21.1. 7(c), p.230. So too the representations would have to undermine what would otherwise be the Comptroller's reasonable belief or opinion before he could be inhibited from further action. [para32]***

…"

41 It is axiomatic that the Royal Court is bound by decisions of the Court of Appeal.

42 It should, however, be noted:–

(i) The observations as to the existence of the right reflected a concession made by Counsel then appearing for the Comptroller (The observations and its extent-or limits-are in any event no less important);

(ii) The concession does not appear to reflect the Comptroller's thinking at the time material to these proceedings as appears from:–

> (a) The fact that though cognizant of the decision in Larsen 1, he did not on legal advice (Mr Cousins' first affidavit paras 16–17) accord to the Applicants any such opportunity; and
>
> (b) The statement made on his behalf by Counsel now representing him that *"it was frankly rather curious that the Comptroller was previously obliged to engage in informal discussions with a person suspected of complex tax fraud or their close associates before any documents could be formally secured for the purposes of a criminal investigation. This in circumstances when in most cases, there was little or no prospect of voluntary disclosure".* As the Bailiff pertinently (if provisionally) posed in a num question at the leave application *"Does this really mean that, if there is a criminal tax investigation, the Controller has got to give notice that he is investigating, perhaps to the criminal, in order to give the criminal an opportunity to make representations as to why the notice should not be issued, but also to give the criminal the opportunity of destroying the documents which might incriminate him?"* It is not without interest that the analogous regime in the Cayman Islands obliges notification of the subject of a request prior to service of a notice only where the matter is not criminal or allegedly criminal. *Cayman Island Tax Authority v MH Investments* C-A no.3.of 2013 ("MH") para 5.

(iii) The regulatory context in which such observation was made was different from the present context. In the 2008 Regulations a person served with a notice was entitled to a reasonable opportunity to provide the documents without notice, a factor which influenced the analysis of the Court of Appeal. That entitlement has disappeared. There is no longer any statutory stipulation that there be such opportunity prior to the issuing of a Notice; a possible two stages have been reduced to one. The removal of that stipulation aligns the Regulations more closely with other mutual legal assistance regimes including the Investigation of Fraud (Jersey) Law 1991. The 2008 Regulations as amended reflect the policy of the last sentence of Article 1 of the J/NTIEA. Protection of individual rights must not prevent or postpone unduly the transmission of tax information.

(iv) While it is trite law that *"although there are no positive words in a statute, requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature"Cooper v Wandsworth* 134 ER 414; (1863) 14 CB NS 180 per Byles J at p.194…..the implication is not automatic. As Lord Sumption said in *Bank Mellat* at para 36 in a passage following his exposition of the *Cooper v Wandsworth* line of authority'.

It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid 40 years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:–

> ***"Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation"*** .

(v) A factor determining whether the implication is triggered is the existence of a procedure which enables a challenge to be made after it is taken — in this instance judicial review with the possibility of an appeal to the Privy Council if judicial review is refused. True it is that, as Lord Neuberger P said in *Bank Mellat*, (para 187) that *"in some cases the right of subsequent challenge* can be enough to dispense with any prior obligation to consult, while adding and explaining that *"it is by no means a sufficient answer in many cases".* (ditto). That is, however, to my mind a proposition of fact as much as of law. Lord Neuberger cannot sensibly be taken to have considered it to be dispositive since, if it were, it would always be decisive in favour of the implication and at odds with Lord Reid's dictum in *Wiseman*.

(vi) The dicta in *Bank Mellat* were inevitably conditioned by what was at stake. In that case the Bank was prevented from carrying on its business at all. In the present case Volaw is merely being obliged to provide documents pursuant to a notice. There is a palpable difference of scale. Lord Sumption laid stress on ***"particular circumstances"*** when dealing with procedure (para 31) reflecting what he had already said dealing with substantive justification: ***"Every case turns on its own facts and analogies with other decided cases can be misleading"*** (para 26).

(vii) Once an application for judicial review is made, the Comptroller is prevented from transmitting material received in response to his Notice to the requesting state (R 14.3(b)). I accept that the need to aggregate the material and provide it to the Comptroller will be irksome, but it is not in itself calculated significantly to invade privacy. The Comptroller has no interest in examining the material other than to check, in so far as he can, that it is fully responsive to the Notice; the material is not required for the purposes of Jersey revenue law. Judicial review, as I find later, is in the circumstances an effective remedy to protect an Applicant's legitimate interests).

(viii) To add to the specified statutory procedure to challenge a decision already taken another — and prior — procedure would necessarily be to elongate the process and would frustrate the perceptible purpose of the Regulations rather to abbreviate it. see too the OECD commentary at para 6, which does not regard prior notification as

compulsory and advises exceptions where it is provided for in the interests of effective investigation.

43 I am alert to the fact that in one case where representations of the recipient of the Notice were taken into account its evidence ***"removed in its entirety the foundation upon which the French tax authorities had, on the face of their request based their suspicion and given as the reason for their request"***: *APEF Management v The Controller* [2014] (1) JLR 90 ("APEF") para 101. But that does not establish that a system which restricts the right to make representations to those made after rather than before the decision is *ipso facto* flawed: see. *R (Detention) Action v Secretary of State for the Home Department* [2015] EWCA civ 840("Detention Action"). ***"A successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in a particular case"*** (para 27). Knock out blows e.g. one which showed dispositive that the overseas authority were investigating the wrong taxpayer would always be exceptional. A tax convention compatible system should not encourage mere jabs subtly seeking to provoke the Comptroller to pursue a line of enquiry which he would not otherwise be obliged to pursue.

44 I therefore conclude that in the context of the current regulatory regime the dictum of the Court of Appeal can be modified as set out in the next sentence. The Comptroller can, if he reasonably thinks fit, offer an opportunity to a person to whom he plans to send a notice an opportunity to persuade him to abandon that plan but he is not obliged to do so.

45 However, even were that conclusion to be incorrect, in my view, judicial review should not go since the offer of such an opportunity could in this case have made no difference. I do not ignore the much quoted dictum of Megarry VC in *John v Rees* [1970] Ch. 435 at 402 ***"As everyone who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which in the event were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change"*** and see in Jersey. *JT Jersey Limited v Jersey CRA* [2014] 1 JLR 15 paras 131–133. But in this instance I am not required to speculate upon what might have happened but to analyse what did. The Applicants' case made before me cannot be less powerful and may well be more powerful than the case that they could hypothetically have advanced before the Comptroller as to why notices should not be issued. If, their case is inadequate now, it would necessarily have been inadequate then; and, putting myself in his shoes, as I must, I cannot conceive that the Comptroller would have rationally come to a different conclusion.

Judicial Review

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

"In the determination of his civil rights and obligations, everyone is

entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

47 Advocate Harvey-Hills submitted in his skeleton argument that judicial review is not sufficient, in order to *"verify and scrutinise the underlying grounds pursuant to which the Notice issued"* and conduct *"an examination of the underlying factual basis of the decision".* As the Court of Appeal held in an analogous context in Larsen 1 Article 6 does not, however, inevitably require an unrestricted appeal from the decisions of an administrative body based on findings of fact and the exercise of judgment. **"Judicial review can in certain circumstances suffice"** para 49) For Article 6 purposes ***"The condition to be satisfied is that judicial review provides full jurisdiction to deal with the case as the nature of the decision requires"***. (*R Alconbury Developments Ltd v Secretary of State for the Environment* [2001] UKHL 23 per Lord Hoffmann para 87 approved in *R (Runa Begum) v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430 per Lord Bingham para 5. ***"The principle that access to the judicial review court may cure a defect provided that the procedure as a whole complies with Article 6(1) is well recognised";*** see also Wade and Forsyth Administrative Law 11th ed ("Wade") p.381. ***"The more administrative and the less judicial the decision making process set up by parliament may be, the less intense will be the judicial scrutiny of the decision to secure compliance"*** (p379).

48 How then is the nature of the decision under challenge to be characterised? The decision required of a Comptroller is whether to respond to a request concerning a taxpayer, and in consequence to require the taxpayer or the third party to provide information to him. He can only refuse the request under Article 6 of the J/NTIEA on the three grounds there set out. As to this, there may be arguments as to whether, for example, the information requested is tax information at all but the thrust of most challenges by a person seeking to impugn a Notice would be to the judgment made by the Comptroller that the information is foreseeably relevant to the administration and enforcement of the domestic laws of the requesting state (ditto Article 4e). Is then judicial review sufficient for a challenge of that kind?

49 In answering this question I bear in mind the following matters:–

(i) as I have already determined, there is no obligation on the Comptroller to disclose the letter of request;

(ii) as has been frequently stated that it is not for the relevant Jersey authority to address issues of foreign law (Larsen 1 para 197);

(iii) it is not for a decision maker to question the correctness of the material provided to it from outside the jurisdiction as long as it is properly evaluated after, it may be, some probing for the purposes of clarification:–Larsen 1 paras 28 and-171 In short the Comptroller does not have to resolve disputed issues of fact. As was said by Clyde-Smith, Commissioner in *APEF* (para 66):–

"For the purposes of deciding whether to act on a request the

> ***Deputy Comptroller is at liberty to ask the requesting state authorities for clarification or for further information but he is under no obligation to do so; nor is he under any obligation to require the production of evidence in support of the facts of which he is informed in order to verify them for himself … where the Comptroller is faced with conflicting assertions as between the requesting authority and those affected by the request, it is not for him to reach any final conclusion on where the truth lies; his role is not to act as final adjudicator on these issues which may or may not in the fullness of time fall for adjudication by the Courts but simply to decide whether having regard to the material before him, whether it is reasonable to respond to the request".***

(See too *Taylor Fladgate v Comptroller of Taxes* [2014] 1 JLR 342 paras 44–46 *Temple v Comptroller of Taxes* [2014] 214 JLR 44 ("Temple") at para 37, the Royal Court consistently following the guidance of the Court of Appeal in Larsen No. 1 on this issue notwithstanding any intervening change to the 2008 Regulations).

This approach reflects that conventionally taken in the context of mutual assistance in criminal matters *Bertloli v Malone* [1991] UKPC 17, *Arturus Properties v Attorney-General* [2001] JLR 43, 51–52.

(iv) The Comptroller is engaged in an evidence gathering process as part of an investigation, not conducting a trial.

> ***"It is in the nature of the facility afforded by any NTIEA that much will be unknown and subject to investigation at the time a request can be made"***

(See Larsen No. 1 para 218). See to like effect Sir Michael Birt in *Larsen Oil and Gas Drilling Ltd v Comptroller of Taxes* [2014] JRC 143 para 44

(v) In those circumstances, which further define and circumscribe the decision to be made by the Comptroller, it seems to me that judicial review is an appropriate remedy compatible with Article 6. It is open to an applicant, if it can, to impugn the Comptroller's judgment as unreasonable in the public law sense (I accept that even though the epithet reasonable has disappeared from the vocabulary of the 2008 Regulations as amended it remains implicit in them). (See the Deputy Bailiff in *Temple* para 37.) If the Comptroller is not obliged to verify the facts underlying the Request the person on whom the Notice is served cannot complain, other than in exceptional circumstances, of his omission to do so. If he is not obliged to form a view on matters of foreign law, such person cannot compel him to do so by advancing an argument of foreign law itself said to undermine the validity of the Request.

50 The fact that the scope for challenge at the suit of an applicant may be limited cannot mean *per se* that he is entitled to a more intrusive or wide reaching legal remedy than judicial review; if anything the reverse must be the position. Judicial Review has in any event been held to be an appropriate mechanism to resolve issues relating to the production of

evidence obtained by a Notice issued pursuant to the Investigation of Fraud (Jersey) Law 1991: see *Durant v Attorney General* [2006] JLR 112 and in cases brought by reference to an NTIEA such as Larsen 1 and the later Jersey cases (see also *Derrins* at paras 77–78).

51 I do not accept that cases in the ECHR such as *Capital Bank AD v Bulgaria Application no. 49429/99 ("Capital Bank")* at para 109–115 disclose any contradictory principle given that the circumstances were entirely different from those of a TIEA. Capital Bank concerned removal of a Bank's licence on grounds of insolvency where the key and disputed issue — i.e. whether the bank was indeed insolvent — was not reviewed at all by the domestic courts. Those cited to me involved the placing of a Credit Union into receivership or the dismissal from office where the procedure was similarly defective. I note that the States were fully aware that the 2008 Regulations as amended would provide for a judicial review process when the amendments were debated on 5 th November, 2013; see the relevant part of Hansard pp98–100 and the explanatory note to Proposition 132/2103.

52 As Advocate Sharp observed — and not entirely frivolously — the volume of papers produced by the Applicants suggests that they have had ample opportunity in this judicial review to ventilate their concerns over the Notices. *Si monumentum requiris circumspice*. I add that there have been seven days of hearing (not taking into account the Disclosure hearing which provided a dress rehearsal for some of the main performance).

53 Article 8 as well as Article 6 is relevant, I accept, to this argument Article 8.1 provides for the right to respect for, inter alia, private life. The Notices indisputably interfere with privacy and confidentiality rights although unless the material is personal, privileged or commercially sensitive ***"at a relatively low level"*** (*Derrins* para 71). Whether the interference can be justified depends upon whether the triple test in Article 8(2) is satisfied: ***"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of … the economic well-being of the country, for the prevention of … crime …".*** The Notices indisputably have a foundation in transparent and accessible Jersey law and consequently with law in the enhanced Strasbourg sense as well as a legitimate aim, the protection of the taxation system and revenue (*Derrins* para 72). But necessity (embracing proportionality) does engage considerations of the quality of the process attendant upon the sending of the notices.

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

55 I note (as did the Court of Appeal in Larsen 1) the distinction drawn by the ECHR in *B.L. Holdings Ltd* between a ***"search and seizure"*** case and a demand by a public authority for

information [para 173], and its appreciation of ***"the public interest ensuring efficiency in the inspection of information provided by the Applicant company for tax assessment purposes"*** [para 175].

56 Moreover if Article 6 does not directly require that an appeal should be by way of unrestricted oral hearing, Article 8 cannot be construed indirectly to do so.

57 In summary the statutory provision of a right of judicial review cannot sensibly be described as unjustifiable restriction on the rights of access to the court or to a fair hearing. It is rather the grant of access and a guarantee of fairness. Judicial review is, I am aptly reminded, the ordinary mechanism by which a person can seek to challenge a decision taken by a public official. By that mechanism fundamental fair trial rights are respected, not removed.

Time limits

58 The time limits for instituting judicial review under the new regulatory regime are undoubtedly tight, especially so, as Advocate Evans noted, for Trustees who are interested parties but may not have been themselves the recipients of the Notices. However ordinarily judicial review applications must be made ***"promptly"*** and, as Lord Diplock said in *O'Reilly v Mackman* [1983] 2 AC … at p 284].

> ***"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of the decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision".***

59 The need for speed in engaging the court process is one of the major features of distinction between public and private law. Moreover I note that in ordinary judicial review a notice of appeal against a decision of the Royal Court must be served within 14 days (Court of Appeal (Civil) (Judicial Review) Rules 2000, Rule 6(3) itself capable of abridgment, Rule 7).

60 The question whether or not those time limits are excessively stringent must be assessed by reference to the scope for challenge as discussed above. In *Detention Action* the Fast Track Rules governing asylum appeals were held to be unlawful. It should, however be noted:–

In my view these applicants — and others in similar circumstances — ought to be able, if sound case for challenge they have, to institute proceedings within 14 days and the abbreviation of time limits is not out with the powers of the States under the 2004 Law as being an impermissible infringement of substantive or procedural human rights guaranteed under the Human Rights law or the Convention or by the Royal Court law 1948 or otherwise.

(i) that the system required asylum seekers to present their appeals within 2 days of the decisions under challenge with similar successive time limits (paras 7–11) far less than the time allowed for judicial review challenges under the 2008 Regulations as amended (R14(1)) or an application to appeal to the Privy Council (R14A(4)).

(ii) In issue was the right to claim asylum — a safeguard against proscribed persecution — not a less important — albeit not unimportant — right to protect the privacy of personal financial information.

(iii) The restrictions were on appeal, not judicial review applications and, as the Master of the Rolls said, ***"asylum appeals were often factually complex and difficult, sometimes raising difficult issues of law"*** (para 37) which is not the case here.

Appeal:–General

61 The common law does not require that the Applicants be given an appeal from the decision of an independent and impartial decision of the Royal Court. " ***This is the inevitable corollary of the fact that there is no right of appeal against a statutory authority unless statute so provides"*** (*Wade* op cit 446). Nor does Article 6 of the ECHR do so. It requires a single determination by an independent tribunal of civil rights, not more than one.

62 On its face R14A no longer provides for the right to appeal to the Court of Appeal which subsisted under the earlier regime but only to the Privy Council but this would not, as explained, offend against Article 6 which requires no provision for an appeal at all. Rather it is in excess of such requirement (I decline to construe R14A as rendering any appeal to the Privy Council nugatory by requiring an appeal thereto to be "brought" within 14 days to be concluded rather than commenced in such period. Such an impractical interpretation is required neither literally still less purposively).

63 It was suggested that in any event by an exercise of 'remedial construction' the appellate jurisdiction of the Court of Appeal could also be held to subsist since neither R 14A nor any other Regulation expressly removed it; rather it conferred appellate jurisdiction on the Privy Council. The elegance of the phrase is unable to disguise the extravagance of the submission. First it ignores the word ***"only".*** Second, Article 12(2) of the 1961 Law provides:–

> ***"Subject as otherwise provided in any other enactment, the Court of Appeal shall have jurisdiction to hear and determine appeals from any Judgment or order of the Royal Court when exercising jurisdiction in any civil cause or matter."***

64 The 2008 Regulations as amended are by reason of Article 2(2) of the 2004 Law 'such other enactment'. The principle *generalia specialibus non derogant* cannot sensibly apply

where the special law itself envisages its susceptibility to be overridden. Third, given the limits, as explained, of Article 6, such construction is not required to achieve compatibility therewith.

65 It is common ground that the 2008 Regulations as amended did not cater for the case of a person such as Fiduciana, which was neither the taxpayer nor the recipient of a notice ("the two categories") nor indeed of any person outside those two categories who had sufficient interest to apply for judicial review ("other persons with standing"). That being so, it was argued that such a person first retained the ability to apply for judicial review on any of the conventional grounds (i.e. the principles referred to in R 14(4)) irrespective of the exceptions set out in R14(2), second was not subject to the special restrictive time limits applicable to the taxpayer or recipient of a notice (R14(1)) and third, enjoyed the right of appeal to the Court of Appeal and Privy Council in accordance with the ordinary rules for judicial review by reason of R 14(4).

66 It was further argued that, based on the third point, even if no right of appeal to the Court of Appeal arose under Article 6 where procedural rights, including an appeal, are conferred on anyone they should be conferred on a non-discriminatory basis (*Podbielski v Poland* [2005] ECHR 543para 62) so that to deny such rights to the two categories while maintaining it for other persons with standing was itself offensive to the formers' Convention rights.

67 I do not for my part accept that the other persons with standing did enjoy all the advantages (other than the second) contended for over the two categories. As to the first the exceptions to the grounds for judicial review provided for in R 14(2) are applicable to anyone who made such an application, and not only to the two categories, the subject of R 14(1). As to the third the 'principles of judicial review' are a proxy for the substantive grounds upon which such an application can be made, and not for the forum where they may be relied upon.

68 In my view it is in any event clear that the omission to make specific reference to other persons of standing in the scheme of the 2008 Regulations as amended was an inadvertent oversight rather than a deliberate decision. There was no dissent from the Bar as to this analysis, discussed during the hearing, nor could anyone suggest any reason why the States should have chosen to confer procedural benefits not on persons in the two categories but rather on other persons with standing.

69 Article 4 of the Human Rights Law requires the Court to read legislation in a human rights compatible way where it is possible to do so. The limits of this power have been exhaustively and authoritatively discussed by reference to the analogous provision in the Human Rights Act 1998 (See e.g. *Ghaidan v Mendoza* [2004] 2 AC 557). Reading words in is one of the recognized routes to the desired destination. Inserting the phrase *"other persons with standing"* into R 14(1)(b), and 14A 2(b) would eliminate the alleged discrimination as to time limits, if nothing else, in favour of other persons with standing but I

would, absent compelling precedent or persuasive authority, be uneasy about using Article 4 to subtract rights from persons currently enjoying them rather than to confer rights upon persons who do not.

70 The same destination can, however, be reached by application of principles, free standing of the human rights context, as explained in Inco where it was held:–

> ***"The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words", albeit with "considerable caution" where it is abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed". (p592)***

(See also *Ghany v Attorney General of Trinidad and Tobago* [2015] UKPC 12 paras 14–15). This reasoning is applicable to secondary as well as primary legislation, see *Bojan Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2572 (QB), para 40.

71 In my view all three conditions are manifestly fulfilled. It was argued that there was no clear indication of parliamentary intent but it seems obvious to me that the States envisaged that in order to fulfil their perceptible purpose the time limits must be applied to whoever enjoyed standing.

Appeal:–Privy Council

72 Mr Larsen and Volaw submitted that it was not open to the States by regulation to limit the right of appeal to the Privy Council in the manner set out in R14A because of the provisions of The Judicial Committee Act 1833 ("JCA 1833").

73 Section 3 of the JCA 1833 provides as follows:–

> ***"All appeals from Sentence of any Judge, &c. to be referred by His Majesty to the Committee, to report thereon. All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his Privy Council, and such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His***

Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of his Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open court).”

74 If there were an absolute bar by reason of this provision on local attempts to curtail the amplitude of appeal rights to the Privy Council, it is notable that there have been as a matter of record at least two breaches of the bar. Article 14(2) of the 1961 Law precludes any appeal to the Privy Council where the Jersey Court of Appeal has refused leave in respect of a civil matter. (While I accept of course that the Privy Council can itself grant special leave, Article 14(2) is nonetheless a restriction). Article 52 of the Extradition (Jersey) Law also limits the circumstances in which an appeal can be made to the Privy Council in a context of collaboration with another friendly foreign state and in language which is echoed in the 2008 Regulations as amended. Advocate Harvey-Hills accepted that the logic of his argument (which I reject) was that this limit too was *ultra vires*. Those restrictions were both the creatures of primary legislation but that seems to me to be without significance given the width of section 2(2) of the 2004 Law to which I have already referred.

75 The JCA 1833 itself was an act of the Westminster Parliament as well as a local law ***“registered in Jersey by the consent of the Insular Authorities”*** (*Michel v Attorney-General* [2010] JCA 018 para 26, see too para 22). (The registration is the procedure vouched for in the Jersey Code of 1771). I cannot accept Advocates Sharp's submission that its reach therefore depends upon the continued consent of those authorities. However R 14A does not remove the right of appeal to the Privy Council; it confirms it and indeed allows the Privy Council itself, not the Jersey Courts, to determine what should be in its docket. There is nothing in this at odds with JCA 1833.or of the *Appels a sa Majeste en conseil Order* in Council 1893 or the Judicial Committee(Appellate Jurisdiction) Rules 2009 being essentially derivative from or at any rate not enlarging the scope of that initial legislation nor does the principle already alluded to *general ia specialibus non derogant* prevent the State from exercising its powers under the 2004 Law so to diminish the scope for delay antithetical in itself to the policy underpinning the J/NITEA.

Proportionality of the 2008 Regulations as amended

76 I rely *mutatis mutandis* on the analysis advanced above in relation, in particular, to the applicants' arguments based on Human Rights in dismissing this ground of challenge in so far as discrete. Applying the *Bank Mellat* principles I consider that the States reaction to the perceived problems of the *status quo ante* was proportionate and within the scope of their margin of appreciation of Jersey needs. The fact that the Jersey regime was different to, and more stringent than, analogous regimes in other jurisdictions does not make them disproportionate.

Relevant Considerations

77 It is part of the catechism of modern judicial review that a public authority must in exercise of its powers have regard to relevant considerations and only to those. So much stems from Wednesbury itself 1948 1 KB 322 (see Wade op.cit pp321–323). I do not detect that there was any consideration which the States were obligated expressly or impliedly to take into account that they failed to have regard to at all or that they took into account any consideration which they were not entitle so to do. In essence this submission was for the most part-as is often the case in judicial review applications, a reformulation of contentions advanced under other heads already discussed. In particular and without prejudice to that, I do not see that the States misunderstood in any material way the character of other TIEA regimes, which were themselves not standardized nor, as I have already found, wrongly succumbed to any French blacklisting.

Larsen/Volaw Proportionality

78 There is a presumption of regularity in respect of the Comptroller's decision (*Derrins* paras 1 and 57). For the reasons set out in the Disclosure Ruling the onus lay and lies upon Mr Larsen and Volaw to raise some legally material concerns about the Comptroller's decision.

79 Mr Larsen's first affidavit used in the application for leave confirms that he was convicted of tax related crimes in Norway (paragraph 7) He nonetheless goes on to say that *"It is not clear to me why these Notices [served on the Jersey companies] have been issued"*. The statement seems in the circumstances somewhat disingenuous.

80 There are, as was argued on behalf of the Comptroller, two themes in the *Bergen* judgment. First, that Mr Larsen was guilty of aggravated tax evasion and breach of trust. Secondly, that companies in the Larsen group in form managed and controlled in Jersey were in fact his creatures and that the Trusts he created were a mere *façade*. Hence the natural desire of the NTA to see whether those companies — the subject of the nine notices — were resident in Norway for tax purposes and so liable to declare their income — which they have not done — in breach of Norwegian fiscal and criminal law as well as whether Mr Larsen himself has provided full information to the NTA about any income he has personally received from those companies. Mr Larsen disputes the conclusions of the Bergen Court but he cannot be unaware of them. He no longer enjoys any presumption of innocence. On the contrary he is presently fixed with a finding of guilt. Even if, as Advocate Harvey-Hills argued, that of which he was found guilty and that which is the subject of the current investigation are not exactly in *pari materia*. The affinity between the two is sufficient.

81 It was not for the Comptroller to re-examine the conclusions of the Bergen Court as if he were the domestic appellate court: see OECD Guidance arts. 1, 3, 4 and 5. Unless there

were some manifest and critical error on its face, he had to treat the *Bergen* judgment as a given.

82 Advocate Harvey-Hills submitted that the *Bergen* judgment was unsound because its approach to the issues of corporate residence and sham trusts were both flawed on their face; and further that in relation to sham trusts the Respondent was prevented from any reliance on the *Bergen* Judgement because of Article 9 of the Jersey Trust Law 2006.

83 I do not accept this submission. It seems to me that the Bergen Court asked itself the right question about who was in truth the decision maker for the companies; and, to the extent that it is relevant, approached the issue in a manner consistent with the test laid down in *Wood v Holden* [2006] EWCA Civ 26; [2006] 1 WLR 1393, at paras 27 and 40–43 The Bergen Court pp61–62 was — correctly — looking at where 'the actual decision' was made; it did not confuse direction by an outsider with usurpation by the same. Advocate Sharp in his skeleton argument put it this way:–

> ***"The Judgment provides ample justification for the decision taken. By way of example only, page 87 records that two of the Jersey directors held 500 board positions and had 1,300 'customers' respectively. Given that a person might only work 230 days per year, these statistics appear to raise questions on their face about the true control of the companies that were engaged in significant commercial activities. Some of the company directors were resident in Sark and evidence was taken from one Sark director that suggests that she had little or no idea about the activities of the companies supposedly under her management. The Judgment refers to documents that again appear to show that the real decisions were being taken outside the Channel Islands by Larsen and others (see pages 92–95). The Comptroller is entitled to consider this information in the context of the fact that Mr Larsen has convictions for serious tax evasion. The Comptroller is not required to conduct his own investigation nor is it necessary to prove that there will be criminal charges and convictions in due course."***

This submission is vouched for by the material alluded to.

84 I do not accept the submission on the Trust point either. I do not see that the Bergen Court confused the questions of whether the trusts were shams or whether the evidence disclosed at most a breach of fiduciary duty a trustee neglectful, of his obligations in relation to genuine trusts (see the classic analysis of Birt DB in *Re Esteem Settlement* [2003] JLR 188 pp223ff). It was not, and could not, be submitted that Jersey law does not acknowledge the possibility of a sham trust; see Munby J in *A v A & St Georges Trustees Limited* [2007] EWHC 99 (Fam) noting that English and Jersey law appeared to approach the issue of *sham vel non* in the same way. The Bergen Court found that the Blading Trust has ***"never been a trust other than in name"*** p142 and that ***"it was never the intention that the (Jova) Trust should be real"*** (p.146).

85 Advocate Harvey-Hills submitted that nonetheless the Comptroller was bound by the provisions of Article 9 of the Trusts (Jersey) Law 1984 which in its modern incarnation provides at (4): ***"No foreign judgment in respect to a trust shall be enforceable or given effect to the extent that it is inconsistent with this Article irrespective of any applicable law relating to the conflict of laws".*** This is read together with Article 9(1) which provides that a number of matters relating to trusts had to be determined in accordance with the law of Jersey, including its validity and that no rule of foreign law should affect such a position. It was argued that as the Bergen Court was not applying Jersey law to the issue of the trusts' validity, the Comptroller could not give effect to its judgment without contravening Article 9(4) by which, given it was of general application he was bound. The flaw in that argument is that the Comptroller was not giving effect to the Bergen judgment at all, even construing, as I was invited to do, the word judgment as distinct from order, a construction which itself in this context does not attract me. He was giving effect to the Letter of Request which is a different exercise, even acknowledging, as I do, that the Letter of Request itself on its face accorded great weight to the judgment.

86 Mr Larsen's second affidavit dated 26 th June, 2015, exhibits a written opinion from Dr Matre, a Norwegian lawyer who acted for Mr Larsen in the Bergen Court and who features in Larsen 1 para 198, to the effect that there is a 10 year limitation period for the offences that the NTA seeks to investigate and that in so far as the Letters of Request seek information which precedes that period, it must be irrelevant and ought not to be the subject of the Notices.

87 I repeat that it is not for the Comptroller (or for the Court on a judicial review of his decision) to adjudicate upon issues of foreign law. But without prejudice to that and assuming as I shall, that Dr Matre is correct about the limitation period this proposition, it is a *non sequitur* that material which relates to periods before, even decades before, that date may not be "foreseeably relevant" to the putative offences by shedding light, *inter alia*, on the important issue of the control and management of the companies. I accept that the residence of a company for the purposes of Norwegian fiscal law may change from year to year so that its residence in, for example, 2005 may not be the same as in 2006, but if, as the Bergen Court concluded wherever the board of the companies in which Mr Larsen had an interest in form took their decisions, in fact those decisions were taken by Mr Larsen, it seems to me that it is relevant to investigate whether this was consistently the position.

88 Dr Matre further opined that fiscal law in Norway provides for offences where the *mens rea* is gross negligence, not intent and that the J/NTIA Article 3(f) defines ***"criminal tax matters"*** as tax matters ***"involving intentional conduct".*** Therefore it was submitted the Comptroller's Notices might require documentation capable of establishing gross negligence only and not intent against the taxpayer. I repeat my concern about this line of challenge. But in any event I see no reason to assume that the NTA was not cognizant to the terms of the J/NTIEA. It is not for the Comptroller to predict whether intention will be made out; see the OECD guidance para 35. The standard of foreseeable relevance ***"is intended to provide for the exchange of information in tax matters to the widest***

possible extent" subject to the *proviso* that member states are not at liberty ***"to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer"*** (a definition found in the OECD Commentary para 3 and in the Council Directive 2011/11/EC preamble (9)).

89 As long as:–

the Request will, in my view, be appropriate (and the Requests were so here).

> (i) First the ***"request is genuinely directed to the purpose for which the notice may be given, namely to secure the protection of documents reasonably required for carrying out an investigation or enquiry of any kind into another taxpayer's tax position".*** (*Derrins* para 20).
>
> (ii) Second there is some clear and specific evidence that there is a connection between the information requested and the requesting states tax laws (Larsen No1 para155).

90 Even a request for a conjectural document i.e. one which may not exist is not out with the ambit of the TIEA (*Derrins* para 20). In my view the pejorative phrase ***"fishing expedition"*** is applicable only to a speculative request that has no apparent nexus to an investigation. (See rejection of a similar argument in Larsen 1 para 203). The detailed requests though they enjoy a measure of commonality have sufficient differences to indicate that the NTA has not — to mix the metaphor — adopted a scattergun approach.

91 The problem which continually confronts Mr Larsen and Volaw is that Mr Larsen does not start with a clean slate. It may be one thing for a letter of request to seek documentation relating to a taxpayer against whom no adverse finding has ever been made; quite another where the taxpayer has already been found guilty of offences against fiscal law. Mr Larsen is not in the same position as *Derrins*. And I emphasise that it will be open to Mr Larsen if first the requested documents are provided to the NTA and secondly charges are brought to argue all the points he wishes about the residence of the companies, the reality of the trusts and his own state of mind. Indeed it may well be that he can effectively rehearse such arguments in the forthcoming appeal against the *Bergen* judgment (a similar point is made in *Derrins* para 71).

92 The reasons for the issue of the Notices, against and reflecting this background, are fully and fairly set out in Mr Le Cuirot's affidavit and the exhibits to it, including a detailed analysis of the *Bergen* judgment and its relevance to the Notices. I reject the ancillary submission that, notwithstanding that he was head of the Department, he was not competent to testify as to those reasons because Mr Cousins was more directly involved; in any event Mr Cousins' second affidavit scotches the point.

93 It was argued that nonetheless I should reject the summary of reasons given in Mr Le

Cuirot's affidavit because it should be stigmatized as *ex post facto* reasoning not reflective of the actual reasons pursuant to the tests expounded by Stanley Burnton J in *Nash v Chelsea College of Art* [2001] EWHC Admin 538. With reference to those tests:–

> (i) First the Comptroller was not under the regime of the 2008 Regulations as amended to give reasons at all. There is therefore *ex hypothesi* no discrepancy identifiable between contemporary and subsequent reasons;
>
> (ii) Second I see no "real risk that the later reasons have been composed subsequently in order to support the … decision", or are a confected retrospective justification of the original decision.

94 It was Mr Larsen who asked for disclosure by the Comptroller of the Letters of Request to which, according to my disclosure ruling he was not in law entitled. The Letters of Request attached the *Bergen* judgment which obviously inspired the Comptroller's decision to send the Notices. Mr Larsen is to that extent hoist by his own petard.

95 I draw attention to these facts which also seem to me to be germane to this line of argument:–

This was therefore on its very face and in reality no rubber stamping exercise.

> (i) Mr Cousins sought clarification of two points from the NTA and received it (First affidavit para 10);
>
> (ii) He took particular care with the request given Mr Larsen's history as a doughty litigant. (ditto para 13);
>
> (iii) He confirmed with the NTA that the notices accurately captured what it sought (paras 13–14);
>
> (iv) He appears to have been fully and accurately apprised of the legal framework which governed his decisions and actions (*ditto passim*).

96 The evidence adduced by Mr Larsen himself, Mr Healy and Mr Hodcraft raised issues as to whether, for example, Mr Larsen had any interest in particular companies to which the Requests related, but — and this is the critical point — they did not resolve them. They cannot therefore establish that the Comptroller acted other than reasonably. See too the reasoning in Larsen 1 para 159, 171(iv). There is simply no knockout blow.

97 Approaching the issue through the lens of Article 8 of the ECHR I accept that the Notice must be proportionate. In *Bank Mellat*, in a classic passage repeated in a series of subsequent Supreme Court cases, Lord Sumption JSC said:–

> ***"The requirements of rationality and proportionality, as applied to***

decisions engaging the human rights of applicants, inevitably overlap. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine

(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;

(ii) whether it is rationally connected to the objective;

(iii) whether a less intrusive measure could have been used; and

(iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community." (para 20)

For all the reasons already discussed I am satisfied that the Notices surmounted all four hurdles.

Privilege against self-incrimination ("PSI")

98 Volaw and its Directors contend in their amended grounds that the Notices breach Volaw's and its Directors' PSI at common law and under Article 6 of the ECHR as given effect by the Human Rights Law; or that, the 2008 Regulations as amended must be read and given effect so as to comply with the PSI.

99 They note that the Requests reveal that the NTA is investigating the possibility of criminal offences by Volaw and their Directors as well as by Mr Larsen. Each Request states that a company resident in Norway that fails to report taxable income may commit criminal offences, namely tax evasion or aggravated tax evasion. Accordingly, it is asserted, Volaw and its Directors are both being compelled, on pain of punishment, to provide documents that may incriminate them in relation to such offences.

100 I observe that there was between disclosure of the Letters of Request and the raising of this new point a temporal gap which has not been wholly satisfactorily explained, but, notwithstanding that, and bearing in mind that I have had the benefit of full argument on both sides on a point of considerable importance and interest I shall grant leave.

101 Volaw and the Directors rely upon a quintet of propositions in support of their overall contention, all of which must be satisfied to achieve their objective:–

(i) the privilege applies outside and before criminal proceedings.

(ii) there is a low threshold of the risk of prosecution for the provision to be engaged.

(iii) the privilege applies to pre-existing materials.

(iv) the privilege is engaged where there is a risk of prosecution in another jurisdiction.

(v) the privilege at common law is qualified not absolute.

102 I am prepared to assume the correctness of propositions (i), (ii) and (v) for the purposes of this application while noting that there is superficially an element of paradox in the reliance on PSI as being qualified, not absolute in nature, that is to say on a weaker rather than a stronger version of the privilege. I am also prepared to accept, contrary to Advocate Sharp's submissions, that companies as well as natural persons enjoy PSI (See Phipson on Evidence 18th ed para 24–45. *BL Holdings* para 104).

103 I also accept Jersey law follows English law in respect of the recognition of PSI:– see *Trant v Attorney General* [2007] JCA 073 in which the Jersey Court of Appeal endorsed the judgment at first instance given by the then Deputy Bailiff, Michael Birt: ***"There is no doubt that the law in Jersey recognises a privilege against self-incrimination in the same way as English law…."*.** It is not, however, bound to follow English law in its every application of that principle.

104 In a trilogy of cases the English Court of Appeal has rejected the argument, advanced by Volaw, that compulsory production of pre-existing document violated PSI either at common saw or under the ECHR.

105 First in *Attorney General's Reference (No 7 of 2000)* [2001] 1 WLR 1874 it held that there is a material distinction between being compelled to answer questions and being compelled to produce documents, given that the privilege has two justifications: (a) it discourages ill treatment of a suspect and (b) it discourages the production of dubious confessions, neither of which applies to the production of documents. It is accepted as ***"jurisprudentially sound"*** the distinction drawn in *Saunders v UK* [1997] 23 EHRR 313 para 69 (set out below)). It was not persuaded by the earlier Strasbourg case of *Funke v France* ("Funke") insofar as discrepant with *Saunders* see paras 57–61.

106 Second a majority of the Court of Appeal in *C plc v P* [2008] Ch 1 reiterated that the privilege does not apply to ***"documents which were independent evidence"***, at para [34] per Longmore LJ, Sir Martin Nourse agreeing at para 74 (although both *Funke* and *JB v Switzerland Application no. 31827/96 2001* ("JB"), the foundation of the Volaw argument, were cited to them).

107 Lawrence Collins LJ in the minority on this point considered himself bound by decisions of the House of Lords in *Rank Film Distributors Ltd v Video Information Centre* [1982] A.C. 380, ("Rank Films") where the privilege was successfully relied upon to justify non-compliance with orders for the disclosure of information and of pre-existing documents

and *AT&T Istel v Tully* [1993] A.C 45. However, he recognised the powerful policy reasons why privilege should not attach to the production of documents (paras 46–48 p19) being both its rationale and powerful overseas authority.

108 Third the Court of Appeal held that the privilege does not normally apply to 'things' which comprise evidence with an existence independent of a person's will *R v S(F)* [2009] 1 WLR 1489 (CA), at [18].

109 In *R v Allen* [2001] UKHL 46, ("Allen") the House of Lords considered the cognate power of the Inland Revenue to serve a Notice requiring the production of information and documents relevant to their tax affairs pursuant to Section 20 of the Taxes Management Act 1970 where it is a criminal offence not to comply with the Notice (Lord Hutton para 24, p144/145).

110 Lord Hutton, who gave the leading speech, referred to the cases of *Funke*, *Saunders* and *Brown v Stott* [2003] 1 AC 681 ("Brown") (paras 28–30) and concluded that Article 6 rights are not absolute and that, in the context of the assessment and collection of tax, the power to require a tax payer to provide information about their tax affairs did not constitute a violation of the right against self-incrimination: para 31, p 143.

111 Unfortunately there are cross currents in the English jurisprudence see e.g *R (Bright) v Central Criminal Court* [2001] 1 WLR 662 (DC) and *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403 ("Malik") at para 72b. As Phipson op cit says *Cplc v P* ***"may not be the last word on this topic"*** (para 24–39.). It reflects similar volatility in the jurisprudence of the European Court of Human Rights, to which I will return later. Since neither the Strand nor Strasbourg have spoken with the single voice, it is therefore appropriate to return to first principles.

112 Volaw accepts (necessarily) that statute can abrogate the privilege although only if it does so clearly. *R v SF0 ex.p. Smith* [1993] AC at p 40 ***"statutory interference with the right is almost as old as the right itself"*** a *fortiori* it is not an absolute right: see *Attorney General's reference (No 7 of 2000)* [2001] 1 WLR 1879 (at para 57). *R v Hertfordshire CC ex p Green* [2000] 2 AC 412 at p.419.

113 The starting point here must be consideration of the regime of the 2008 Regulations as amended which allow the Comptroller to serve a Notice requiring a taxpayer who is subject of a criminal investigation to provide tax information. To see whether any right to PSI has been abrogated, and, if so to what extent, it is necessary to consider Regulation 10A (which I set out again for convenience) and which provides as follows:–

> ***"Restrictions regarding requirement to provide information***
>
> ***(1) Nothing in these Regulations requires a person to provide to the competent authority for Jersey information that is subject to legal***

professional privilege.

(2) The answers given or a statement or deposition made by an individual in compliance with a notice given under Regulation 2 or 3 may not be used in evidence against the individual in any criminal proceedings, except proceedings under Regulation 15(2).

(3) Notwithstanding any other enactment (whenever passed or made) or the terms of any contract (whenever made), a person required to provide information by notice given under Regulation 3 shall not incur any civil or criminal liability by reason of disclosing the information in compliance with the requirement"

114 Legal professional privilege ("LPP") is expressly and comprehensively preserved. Significantly there is no equivalent preservation of PSI. I accept that in *Malik* Dyson LJ stated *obiter* that inclusion of one form of established privilege did not sufficiently imply the exclusion of the other (para 73) but in my respectful view, if not dispositive, it is at any rate indicative.

115 Furthermore and more significantly R 10A(2) expressly preserves PSI in a qualified and nuanced way only namely in respect of ***"any answer given"*** or ***"statement or deposition made by an individual"*** distinct from documents.

116 This distinction is again recognised in R 10B.

R 10B(1) provides:

"Where tax information is information within an individual's knowledge or belief, an individual required by notice under Regulation 2 or 3 to provide that information shall do so by answering questions, or by making a statement or deposition in a form that would be receivable in evidence according to the law of the third country making the request."

R 10B(3) provides:–

"Where tax information is information recorded in a document or any other record, the person required by notice under Regulation 2 or 3 to provide that information shall, as further required –

(a) provide a copy of the document, authenticated in such manner that the copy would be receivable in evidence according to the law of the third country making the request; or

(b) produce the original, for the purpose of the competent authority for Jersey making a copy authenticated as described in sub-paragraph (a)."

117 The distinct duties quoad statements and documents are distinguished. Here the principle *expressio unius exclusio alterius* has more purchase because the same kind of privilege (not a discrete one such as PSI) is being delineated.

118 Volaw argues that the use of the phrase ***"the answers given"*** at Regulation 10A(2) refers to the provision of documents but that is inconsistent with:–

(i) ordinary and natural reading of the words;

(ii) the perceptible purpose of the TIEAs; and

(iii) the fact that Regulation 10B clearly distinguishes between answers given to questions and documents provided in a manner coincident with the trilogy of English Court of Appeal cases referred to above.

119 Most significantly it is not surprising that the Regulations require the production of documents, even incriminating ones. It would defeat the entire purpose of the TIEAs agreements if it were otherwise. Advocate Sharp says with force that, if Volaw's argument is correct then a coach and horses would be driven through them (as well as through the analogous powers of the Attorney General pursuant to the Investigation of Fraud (Jersey) Law 1991 ("the 1991 Act") which, it if were correct, can never be used effectively to investigate serious fraud and money laundering. (Volaw, did indeed in a fresh case challenge the exercise of the Attorney General's powers under the 1991 Act on the same basis of infringement of PSI though I have not been called upon to adjudicate on the substantive merits of the point). In my view the present is a case where to paraphrase the words of Lord Walker in *Phillips v V News Group Newspapers Ltd* [2013] 1 AC 1 para 14 the States ***"have left no doubt that they intends the privilege to be withdrawn".***

120 The statutory abrogation is not, however, conclusive since it is necessary to take into account the jurisprudence if the European Court of Human Rights, which could be deployed to read in or out words inconsistent with its principles, or, if such interpretation would trespass into the area of legislation, be used to obtain a declaration of incompatibility. The jurisprudence has been euphemistically described in *Malik* as ***"somewhat problematic"*** and the Court of Appeal there ***"find it difficult to extract from them a clear statement of principle as to whether the privilege against self-incrimination applies to pre-existing documents*** (para 77) — although inclined to accept the submission that they did (ditto).

121 I am not minded to rush in where the English Court of Appeal so recently feared to tread, especially when, as will appear, I do not consider that my conclusion on this issue will affect my final order. Nonetheless in deference to the arguments of counsel I shall sketch out the battleground and explain why my own inclination is to contrary effect.

122 In *Funke*, the applicant's complaint was not as to the use of materials obtained from him in criminal proceedings. No such proceedings were brought against him. Rather, he successfully argued that the proceedings brought against him by the revenue authorities to obtain information were themselves a breach of Article 6:–

> ***"The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (see paragraphs 30–31 above) can… within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent n not justify such an infringement of the right of anyone 'charged with a criminal offen… within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself" (para 44)***

123 In *Saunders* the applicant had been subjected to criminal proceedings. He successfully argued that admitting the evidence of answers, compulsorily obtained from company Inspectors, in those proceedings was a breach of Article 6. The Court, however also said:–

> ***"The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the contracting parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing". [para 69]***

see to like effect *Shannon v United Kingdom* [2006] 42 EHRR 31 at para 36.

Funke which preceded it was clearly not thought to be an obstacle to that observation.

124 In *Weh v Austria Application no 38544/9* [2005] 40 EHRR 37 ("Weh") the ECHR sought to distinguish between two types of cases where the PSI issue could arise. In a manner maybe designed to reconcile these two lines of jurisprudence:–

Funke was given as an example of the first; *Saunders* an example of the second.

> (i) First, there are cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, or in other words in respect of an offence with which that person has been ***"charged"*** within the autonomous meaning) of Article 6 § 1). (para 42).

(ii) Second, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution. (para 43).

125 Much of the latest learning from Strasbourg is less hard edged see e.g. *Jalloh v Germany* [2007] 44 EHRR 32 ("Jalloh") at p.695 at para 117 ***"in order to determine whether the Applicants' right not to incriminate himself has been violated the Court will have regard in turn to the following factors; the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the office at issue; the existence of any relevant safeguards in the procedure; and the use to which any material is put;"*** see to like effect *Halloran v United Kingdom* [2008] 46 EHRR 21 ("Halloran") at p.414.

126 The explanation for this diversity may be found in the observations of Lord Bingham in *Brown* at p704 D-G:–

> ***"The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree. Ex facto oritur jus. The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention: see*** *Sporrong and Lönnroth -v- Sweden* (1982) 5 EHRR 35, 52 , para 69; *Sheffield and Horsham -v- United Kingdom* (1998) 27 EHRR 163, 191, ***para 52."***

127 Many of the cases to which I was taken e.g. *Jalloh and Halloran* involved specific scenarios far removed from the present case. The case closest in its context is *JB*, which concerned a penalty imposed upon the applicant for declining to give tax information to the state authorities where this might expose him to prosecution (para 66) and found, following *Funke* that this violated his PSI. I note, however, that the Court said this: ***"The Court recalls at the outset that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it. The Court is called upon to examine whether or not the imposition of a fine on the applicant for having failed to provide certain information complied with the***

requirements of the Convention. It follows that the Court is not deciding in the present case the issue whether a State can oblige a taxpayer to give information for the sole purpose of securing a correct tax assessment." [Para 63]

128 Both *Funke* and *JB* have been subjected to criticism on, *inter alia*, their lack of exposition as to why the compulsion to provide pre-existing documents violates PSI (see *Ward v Owen"The privilege against self-incrimination; in search of legal certainty"* EHLR 2003 pp 388–399 which I find cogent. As they aptly say ***"it is not clear that such material should engage the privilege at all. If it did it would come dangerously close to a right to withhold any potentially incriminating material".***

129 When *Allen* came before the ECtHR (2002 35 EHRR CD 289, it said, inter alia ***"(i) the right not to incriminate oneself does not per se prohibit the use of compulsory powers….to provide information about their financial affairs'; (ii) the obligation to make disclosure of income and capital for the purpose for the purpose of the calculation and assessment of tax as indeed a common feature of the taxation system of contracting states and it would be difficult to envisage them functioning effectively without it."*** These statements have the ring of common sense.

130 The latest tax case in the series is *Chambaz v Switzerland 1165/04* which again allowed a claim for breach of PSI when a fine was levied on the applicant for the refusal to produce tax documents in the context of tax evasion proceedings (paras 53/54). It distinguished *Allen* on the basis that in *Allen* the applicant had admitted to acting unlawfully whereas *Chambaz* had not (para 57). Mr Larsen has not made any such admission; but his denials have been rejected by the Bergen Court. It seems to me well arguable that the ECHR would equate Mr Larsen to *Allen* rather than *Chambaz*.

131 If the jurisprudence of the ECHR is not — as I find — compulsive in favour of Volaw's submission, I decline to rule that Volaw can rely upon PSI as a reason for not complying with the Comptroller's notices for three main reasons:–

(1) it seems to me that it is not possible as a matter of principle to equate the extraction of fresh evidence by way of compulsion and the requirement to disclose existing documents whose contents are unaffected by the compulsion (see in *C plc v P* Lawrence Collins LJ para 47). The surrender, even under compulsion, of such documents will not run the risk of a miscarriage of justice in the same way as a coerced oral statement; *au contraire* its non-surrender may lead to a wrong result;

(2) it seems to me clear as a matter of policy that Volaw's submissions must be rejected; otherwise the whole purpose of a TIEA would be frustrated;

(3) the preponderant and quintessentially pragmatic English case law digests, distinguishes and (ultimately) discards *Funke* in favour of *Saunders*.

132 As to (3) I am aware that the most recent case in which the Supreme Court had to consider the reach of PSI. In *Beghal v DPP* [2015] UKSC 49, Lord Hughes (for the majority) said ***"the privilege against self-incrimination is firmly established in judge made law. It entitles any person to refuse to answer questions or to yield up documents or objects if to do so would carry and appreciable risk of its use in the prosecution of that person"*** (paragraph 60). Naturally and properly Volaw has seized on this case as, if all else fails, coming to their rescue.

133 I make these observations about *Beghal*:–

(i) The dictum was *obiter*. Although the statutory provisions under consideration (Section 7 of the Terrorism Act 2000 ("TA 2000")) gives officers, police, customs, immigration the power, inter alia, to require the production of documents (paragraph 8(1)) the core power was to answer questions (para 3); and the Appellant was appealing against a conviction for a refusal to answer questions (para13).

(ii) It was noted that statute can exclude PSI ***"either expressly or by necessary implication"*** (para 61).

(iii) Ancillary provisions e.g. to exclude answers given from use at trial may indicate that PSI is otherwise excluded (para63).

(iv) Exclusion can be implied without such ancillary provisions (ditto).

(v) A key indicator is that the powers ***"would be rendered nugatory if the privilege applied"*** (para 64).

(vi) PSI is implicit not explicit in Article 6 of the ECHR (para 68).

(vii) The trigger for its application is a ***"charge"*** in the special Strasbourg sense (*Ambrose v Harris*) (para 68). The use thereafter in proceedings of such answers given under compulsion before charge will be an infringement of the right to a fair trial (citing *Saunders*) (ditto).

(viii) Charged in that context means ***"his position has been substantially affected by an allegation against him and he has become in effect a suspect"*** (ditto).

134 In *Ambrose v Harris* [2011] UKSC 43, where the context was of an interview in a police station Lord Hope said at para 63 ***"The moment at which article 6 is engaged when the individual is questioned by the police requires very sensitive handling if protection is to be given to the right not to incriminate oneself".*** This if course is not germane to the present application. However earlier he said para 62 that a person's position will have been ***"substantially affected as soon as the suspicion against him is being seriously investigated and the prosecution case compiled"***. I am prepared to accept that this criterion is satisfied as far as Volaw is concerned; but, as already indicated, decline to agree that it entitles Volaw not to make disclosure of pre-existing documents as distinct from answering questions. *Beghal* is not in my view, compelling authority to the contrary.

135 There is in any event, a further hurdle for Volaw to surmount if it is to succeed on these issues. It faces a risk of prosecution which arises in Norway and not in Jersey.

136 The Civil Evidence Act 1968 of England and Wales, in s.14(1)(a), explicitly confines the privilege to cases where the risk relates to prosecution in England or Wales. In *Brannigan v Davison* [1997] AC 238 the Privy Council (hearing an appeal from New Zealand) reached the same conclusion. It expressed concern that because of its 'rigid and absolute' nature the privilege could not be recognized where the risk of prosecution would arise under the law of another jurisdiction:–

> ***"In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings. …. Their Lordships' conclusion is that the common law privilege does not run where the criminal or penal sanctions arise under a foreign law." at 249–250*** .

137 Volaw nonetheless submits that, in the circumstances of this case, where disclosure is ordered in Jersey solely for the purpose of transmitting the documents to the authorities of another jurisdiction, Norway, there can be no principled reason for excluding the common law privilege against self-incrimination, at least as a relevant factor in the exercise of the Comptroller's discretion in issuing a Notice since the rationale for the Privy Council's approach has disappeared. It being no longer the case that the privilege against self-incrimination, once engaged, operates as an absolute or unqualified right at common law that permits of no exceptions but rather at common law to be a qualified right, as under Article 6, to be taken into account and given due weight in the balancing exercise. See the Divisional Court judgments in *Malik* (at [78]) and *Bright* (693A-B, 697A-B72).

138 However, in *Warren v Attorney General* [2014] JCA 080, where the applicant complained that he felt unable to give evidence freely in confiscation proceedings that took place in Jersey because he feared that what he might say would be used to form the evidential basis of a prosecution in England, the Jersey Court of Appeal declined to grant leave and noted that Warren's remedy was to argue in England that the material should be excluded (para 31).

139 The Jersey Court of Appeal's view in *Warren* is consistent with the English Court of Appeal reasoning in *Rottmann v Brittain* [2009] EWCA Civ. 12 ("Rottmann") where the appellant sought absolution from answering questions before the English bankruptcy court because it might incriminate him in Germany. Ward LJ said: ***"It is in my judgment for the English court to control proceedings before the English court. It is for the judge dealing with the bankruptcy matter to exercise his discretion in allowing or not allowing incriminating questions to be put to and to be answered by Mr Rottmann. But such use as may be made of those answers in Germany is a matter for the***

German court to control. Germany is a signatory to the Human Rights Convention. The German court will, we must assume, consider any objection to the use of the transcript which may be made by Mr Rottmann should he ever stand his trial in Germany. It is for the German court to control its proceedings and not for this court to be further concerned about the hypothetical use that may be made in that jurisdiction." (Para 12).

140 *Rottman* was dealing with statements being made, not pre-existing documents being produced. I can see no basis upon which the Comptroller, in relation to those documents, could sensibly do other than allow the Norwegian Courts if, (which is still to be decided), Volaw is made subject to criminal charges to decide whether any reliance that the prosecution seek to place on them was or was not consistent with the ECHR or its own domestic law. The Comptroller should render unto the Norwegian Courts the things that are Norway's (see to similar effect *Trant* para 51).

141 It is also asserted that if any of the Companies refused to assist Volaw in providing materials they may become parties to offences under the 2008 Regulations as amended, either in their own right or as accessories. R 15 establishes an offence of failing to comply with a requirement made under a notice issued under those Regulations, and R 16(1) establishes the criminal liability of others who aid, abet, counsel or procure the commission of offences. The Companies, their Directors and other Officers are therefore compelled to disclose the documents the subject of the Notices on pain of prosecution. In my view this argument conflates and confuses the issue of compulsion with the issue of self-incrimination. The latter is, in my view, concerned with the criminal offences which the documents might disclose, not with the criminal offences for failing to disclose them.

142 Finally in my view the directors' own PSI is not relevant here. Volaw, a separate legal entity, and the companies not the directors have been served with Notices and required to produce documents. The documents are not the personal property of the directors. Volaw and the companies would still be obliged to produce the records even if all the directors resigned *en masse*. There is no scope for a parasitic claim.

143 A further point was addressed on the last day of the hearing by reference to the decision of the Norwegian Supreme Court in *Petrolia AS v Public prosecutor RT* [2011] s 800 ("Petrolia") which also related to Mr Larsen's affairs and the legality of orders made by the Norwegian Court of Appeal, that 15 companies, in which he was said to have commercial interests, hand over ledger balances and similar documents in relation to investigation of an on-going tax related criminal case against Mr Larsen pursuant to Section 210 of the Criminal Procedure Act (Norway) which provides: ***"A Court may order the possessor to surrender objects that are deemed to be significant as evidence if he is bound to testify in the case".*** It was said to show, according to Ms Gaeta, advocate in the firm Steenstrup Storrange DA that Volaw being someone deemed to be a person charged or at risk of being charged in the Norwegian investigation can rely in Norway on PSI to resist the provision of the documents, the subject of the Notices (Gaeta opinions of 16 th and 23 rd

July, 2015). It was also asserted that by virtue of Article 6(4) of the J/N TIEA the Comptroller was entitled to refuse to provide the documents since Norway would not have been able to obtain them under its own laws.

144 I naturally approach this analysis with a measure of diffidence given that I am not qualified to pronounce on Norwegian law and the Comptroller has not provided any expert evidence on the point — although I repeat it is not his duty to do so. With that reservation it is clear that in *Petrolia* the principal question was whether under the ECHR PSI applied to legal as well as natural persons (para 1). The Supreme Court held that it did, and for that reason, annulled the Court of Appeal order (para 54). The case was remitted to the Court of Appeal to determine whether the fundamental condition in Article 6, i.e. that there was a criminal charge, was satisfied (para 63). Whether the fact that the companies not charged might risk accomplice liability (para 64) would satisfy that condition was not determined. The Supreme Court drew attention somewhat delphically to the decision in *Weh* as a possible source of guidance for the Court of Appeal (para 65).

145 It is therefore in my view far from clear that Volaw and the companies could rely on Article 6 and PSI as analysed in *Petrolia* in Norway.

146 According to Ms Gaeta Section 210 can only be deployed against witnesses, not persons charged. This seems on its language (assuming, as I shall, the accuracy of the translation) to be correct. But this does not answer the question whether Volaw would be treated as a witness or a person charged. Furthermore, according to Ms Gaeta, even if Volaw fell into the latter category the Norwegian police could apply for what is termed ***"a seize warrant"*** under Section 192 of the Criminal Procedure Act. Therefore it is not again at all clear that Norway would not be able to obtain the documents "under its laws". This reinforces my view that it is more appropriate for the Norwegian Courts to determine such ' *quasi-constitutional'* issue. As a link in the chain of what remains no more than an investigation, albeit criminal primarily, into Mr Larsen's affairs, in my view Volaw's new argument on PSI are insufficient to justify quashing the Notices.

Data Protection (Jersey) Law 2005 ("DPA")

147 This was not a point which sprang from disclosure of the letters of request. It was a point which could have been taken in Larsen 1 (but was not until the unsuccessful application for leave was made to the Privy Council) and could in theory be taken in any TIEA case.

148 I accept:–

(i) The J/NTIEA acknowledges that it is subject to *"the rights and safeguards secured to persons by the laws or administrative practice"* of Jersey.

(ii) This is consistent with the OECD Model TIEA and the Guidance thereon which

refers expressly to Data Protection at paragraph 26.

(iii) The DPA is such a law.

(iv) The information which is the subject of the request may include personal data within the meaning of DPA Article 1(1).

(v) The Comptroller is a data controller within the meaning of the DPA Article 1(1) and (4).

(vi) Subject to any exception, the Comptroller must accordingly comply with the first, second and third data protection principles which enjoin in broad paraphrase lawfulness, fairness, propriety and precision of purpose and proportionality.

149 The obligations under the DPA are, however, qualified by Article 29 entitled: “Exemption: crime and taxation”

(1) Personal data processed for any of the following purposes –

(a) the prevention, detection, or investigation, anywhere of crime;

….

(c) the assessment, or collection, anywhere of any tax or duty, or of any imposition of a similar nature, wherever due,

are exempt from the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3) and Article 7 in any case to the extent to which the application of those provisions to the data would be likely to prejudice any of the matters referred to in sub-paragraphs (a)-(c).

(2) Personal data that –

(a) are processed for the purpose of discharging functions under any Law; and

(b) consist of information obtained for such a purpose from a person who had it in the person's possession for any of the purposes referred to in paragraph (1)(a)-(c),

are exempt from the subject information provisions to the same extent as personal data processed for any of the purposes referred to in paragraph (1)(a)-(c).

(3) Personal data are exempt from the non-disclosure provisions in any case in which –

(a) the disclosure is for any of the purposes referred to in paragraph

(1)(a)-(c); and

(b) the application of those provisions in relation to the disclosure would be likely to prejudice any of the matters referred to in paragraph (1)(a)-(c)."

(This is in harmony with SECTION V of EC 95.46 the Data Protection Directive Article 13

Exemptions and restrictions

1. Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Article 691), 10, 11(1), 12 and 21 when such a restriction constitutes a necessary measures to safeguard:

(e) an important economic or financial interest of a Member States or of the European Union, including …. taxation matters.

150 I shall approach this issue on the basis that (i) The exemption can apply ***"only in so far as strictly necessary"*** C-473/12Institut Professional des Agents Immobilier at para 39 (ii) in *R (on the application of Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 Munby J said that it would be necessary to consider whether the equivalent exemption under the English legislation was engaged ***"in any particular case"*** and that it was for the Data Controller to ***"show that one of the statutory objectives is likely to be prejudiced in the particular case in which the question arises"*** para 94 (iii) that 'likely' equates to, may very well, but less than more probable than not (para 100). I accept too that there is no evidence that the Comptroller considered the DPA, but even applying the rigorous *John v Rees* test set can see no basis for concluding that he would or might have altered his decision had he done so given the conclusions he in fact reached. If he has decided that the documentation sought was for a lawful purpose was *"foreseeably relevant"*, to the taxpayer's liability and not excessive even if some of it may contain personal data I cannot see how consistently he could contemplate that the exemption would not bite.

Be that as it may, the exercise that it is said he is obliged to carry out is not easy to describe. If, for example, the Letter of Request asked to take a fanciful example for production of electronic love letters sent by a taxpayer to his girlfriend or other documents which could not conceivably bear on his tax liability, no doubt the Comptroller would be oblige to recognize that these contained personal data not *"foreseeably relevant"* to it. In fact the document sought under the letters of request were business records and unlikely, save incidentally, to contain personal data at all. In my view it cannot be contemplated that he should sift through any documents provided to him to see whether in his view (ignorant as he is of the full picture available to the requesting state) their removal from what is transmitted would not prejudice the investigation which itself should not be unduly delayed. The decision of Foskett J in *Trushin v NCA* [2014] EWHC 3551 (Admin) dismissing a strike out application of an argument based on the English DPA springs from a wholly dissimilar factual context and therefore is not of any assistance on the issue before me.

151 The fact that the argument is a latecomer does not mean *ipso facto* that it should be dismissed. Second thoughts can be better thoughts; but not in my judgment in this case. I am gratified that Sir Michael Birt B in a judgment on 15 th July, 2014, ([2014] JRC 143) another chapter in this prolonged saga rejected an equivalent argument based on the DPA as *"not seriously arguable"* para 42.

Fiduciana

152 I turn now to *Fiduciana*. Mr Ventkatchalam is an Indian national and a discretionary beneficiary of the Merit Trust. The taxpayer and the witness who received the Notice (the former trustee) did not challenge the Notice. The new trustee, Fiduciana, has commenced these judicial review proceedings.

153 The salient dates are these:–

(i) On 21 st July, 2014, the Indian Tax Authority ("ITA") requested information under the Agreement between Jersey and India for the Exchange of Information and Assistance in Collection of Taxes (the J/ITIEA) dated 3 rd November, 2011, in relation to an Indian taxpayer Mr M M Ventkatchalam, a discretionary beneficiary of the Merit Trust.

(ii) On 15 th January, 2015, after seeking and receiving clarification on certain matters and the provision of further information, Mr Cousins sent a notice to JTC Trustees (Fiduciana's predecessors as trustee of the Merit Trust) requiring disclosure of various documentation relating to the Merit Trust.

(iii) On 26 th February, 2015, Fiduciana applied for leave to apply for judicial review supported by an affidavit from Gaana Khomenko, Managing Director of Fiduciana.

(iv) On the same date leave to apply was granted by the then Deputy Bailiff.

(v) On 20 th April, 2015, the affidavit in reply by Mr Cousins was submitted on behalf of the Comptroller.

(vi) On 22 nd April, 2015, an affidavit in reply was field by Mr Le Cuirot on his own behalf.

154 The grounds on which leave was sought by *Fiduciana* were more limited than those in Volaw in terms of specifics but similar to them in terms of generality. They were:–

(1) Illegality/ *ultra vires* inasmuch as the Notice required production of documents predating the coming into force of the J/ITIEA (" *ultra vires*").

(2) Procedural unfairness because of the respondent's failure to allow *Fiduciana* to make representations before issuing the Notice or to disclose the letter of request ("the same natural justice issue as in Volaw") or to disclose the Request ("the Letter of Request issue") and the failure by the Comptroller to perform his Tameside duty of due enquiry ("the due inquiry issue").

(3) The Regulations themselves involved a disproportionate interference with rights inasmuch as to the extent they have removed procedural rights they disproportionately interfere with rights protected by common law and by Articles 6, 8 and AIPI ("proportionality").

155 The Deputy Bailiff refused leave on ground (1). (It is only in relation to Ground 1 that the differences between the I/JTEIA and the N/JTIEA relate are germane and it is therefore not necessary for me to set out the full text).

156 The Deputy Bailiff granted leave on grounds (2) and (3) describing as ***"respectable"*** the argument that a party out with the two categories had standing and ***"there is the general principle that there cannot easily be an ouster of the Court's jurisdiction to review judicially at the instance of someone who had locus standi".***

157 As to ground (2) the natural justice issue is rejected for the same reasons as those in the Larsen/ Volaw proceedings Advocate Evans succinctly submitted that given an opportunity to make representations prior to the issue of the Notice, production of documents might have been resolved without need for a notice. That may be so but it does not of itself bear on the question of whether such a right exists, and what Fiduciana might have said in this or any other topic is moot.

158 The letter of request issue is disposed of in my disclosure ruling.

159 The due inquiry issue may be rejected since I cannot see what enquiry that Comptroller was obliged to but failed to make. Obviously he needs to consider if a Notice of Request is convention and T/IEA compliant, (as he did) but to impose upon him a duty to make further enquiries is a duty too far above. It is for Fiduciana in any event to show that the Comptroller did not ask himself the right question or take reasonable steps to enable him to answer it correctly; the Comptrollers evidence especially the affidavit of Mr Cousins shows that he did both.

160 As to Ground (3) I repeat that the issue is not what procedural rights were removed, but what procedural rights exist and whether the latter survive the test of fairness. For the same reasons as set out in relation to the Larsen/Volaw proceedings. I conclude that they do.

161 There is no challenge as to the reasonableness of the Comptroller's decision. Information about the Merit trust is reasonably foreseeable to the assessment of Mr Ventkatchalam's tax

position in India.

Conclusion

162 I therefore dismiss all the applications for judicial review in these several applications. Counsel will draw up an Act of Court reflecting my decisions. Submissions on consequential matters should be made in writing within 14 days of the handing down of this judgment.