John David Ariel (as trustee in bankruptcy of Simon Halabi) v Simon Halabi (as executor of the estate of X deceased)

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Crill, Ramsden, Birt
Judgment Date:	10 January 2018
Neutral Citation:	[2018] JRC 6A
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Date:	10 January 2018
Court:	Royal Court

Text

[2018] JRC 6A

Royal Court

(Samedi)

Before:

Sir Michael Birt, Commissioner, and Jurats Crill and Ramsden.

Between
John David Ariel (as trustee in bankruptcy of Simon Halabi)
Representor
and
Simon Halabi (as executor of the estate of X deceased)
First Respondent
Her Majesty's Revenue and Customs
Second Respondent

Advocate W. A. F Redgrave **for the Representor**.

Advocate J. Harvey-Hills **for the First Respondent**.

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

Authorities

Bankruptcy (Désastre) (Jersey) Law 1990.

Trusts (Jersey) Law 1984.

Re M Trust, 2012(2) JLR 51.

British Motor Syndicate Limited v Taylor & Son [1900] 1 Ch 577.

Arbuckle Smith & Co Limited v Greenock Corporation [1960] 1 All ER 568.

Sans Souci Limited v VRL Services Limited [2012] UKPC 6.

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

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

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

Government of India v Taylor [1955] AC 491.

Re Tucker 1987 JLR 473.

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

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

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

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

Bank of Crete SA v Koskotas (No 2) [1992] 1 WLR 919.

EMI Records Limited v Spillane [1986] 1 WLR 967.

Investigation of Fraud (Jersey) Law 1991.

Volaw Trust and Corporate Services Ltd and Larsen v Comptroller of Taxes [2013] (2) JLR 499

Trust — application by the Representor for directions concerning the compliance with an

information notice.

THE COMMISSIONER:

1 This is an application by the representor in his capacity as trustee in bankruptcy of Simon Halabi ("Mr Halabi") for directions as to whether compliance with an information notice issued to him by the Second Respondent ("HMRC") in England requiring the production of documents which he obtained in Jersey would amount to a breach of the orders of this Court whereby he obtained such documents and, if so, whether this Court should now grant him leave to comply with the information notice.

2 The application raises difficult issues as to the approach of this Court when it authorises documents and/or information (which, to avoid repetition we shall refer to as 'material') to be supplied for a specific purpose but the person in receipt of that material is then subject to measures in his home jurisdiction requiring the supply of such material for a different purpose which this Court did not have in mind when it granted the authorisation.

Factual background

3 Mr Halabi was declared bankrupt on 30 th March, 2010, by order of the High Court of England and Wales. On 9 th April, 2010, Geoffrey Carton-Kelly was appointed as trustee in bankruptcy of Mr Halabi's estate by the High Court. As happens automatically, Mr Halabi was discharged from bankruptcy on 30 th March, 2011, but the trustee in bankruptcy continues to administer the estate.

4 As part of his duties, the trustee in bankruptcy was required to take control of and realise the assets of Mr Halabi located in England and Wales and other jurisdictions for the benefit of his creditors. Mr Carton-Kelly ascertained that Mr Halabi had financial interests in Jersey and accordingly procured a letter of request from the High Court requesting this Court to exercise its jurisdiction pursuant to Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Bankruptcy Law") so as to recognise Mr Carton-Kelly's appointment and give him appropriate powers to be exercised in Jersey.

5 Mr Carton-Kelly's application came before this Court on 26 th October, 2012, on an *ex parte* basis. The Court made an order ("the Recognition Order") recognising the appointment and giving the trustee in bankruptcy authority to exercise in Jersey all the powers that he was entitled to exercise in England and Wales to the extent that they would not be contrary to Jersey law. The Recognition Order went on to confer specific authority to obtain material from a number of named parties in relation to various trusts and other entities.

6 Paragraph 9 of the Recognition Order was in the following terms:-

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

7 The Representor was appointed to replace Mr Carton-Kelly as trustee in bankruptcy of Mr Halabi with effect from 30 th April, 2013. He has therefore stepped into the shoes of the former trustee in bankruptcy and remains in that position. We shall for convenience use the expression 'the Trustee' to cover both Mr Carton-Kelly and the Representor unless there is need to distinguish between them.

8 On 22 nd November, 2013, pursuant to a consent order ("the Consent Order"), the Trustee was joined to proceedings under Article 51 of the Trusts (Jersey) Law 1984 brought by the trustees of the A Trust. Paragraph 1 of the schedule to the Consent Order required the trustees of the A Trust to provide to the Trustee all pleadings, acts of court, affidavits, documentary evidence, skeleton arguments and bundles filed in connection with the proceedings (redacted to remove certain confidential information) but such provision was subject to the following restriction:-

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

At paragraph 9, the Consent Order also conferred a specific liberty to apply.

9 The Trustee had sought to be joined to the representation of the trustees on the basis that the estate in bankruptcy was a substantial creditor of the A Trust.

10 The Trustee duly received material from certain parties pursuant to the Recognition Order and he also received material pursuant to the Consent Order (together "the Jersey Orders").

11 On 9 th May, 2017, the First-Tier Tribunal (Tax Chamber) ("FTT") in London approved the issue of an information notice by HMRC which required the Trustee to produce to HMRC, amongst other things, all documents and information which it had received pursuant to the Recognition Order and the Consent Order (referred to in the information notice as 'the Jersey Documents').

12 The Trustee is concerned that compliance with the information notice would require him to act in breach of the Recognition Order and/or the Consent Order. He therefore brings the present representation seeking the Court's leave under the Recognition Order to comply with the information notice and seeking a variation of the Consent Order to like effect if the Court considers that he would otherwise be in breach of either order.

13 The Trustee's representation was served on all those from whom material was obtained pursuant to the Recognition Order and upon all the parties to the Consent Order. All of those who provided material pursuant to the Recognition Order have not participated in the hearing and are apparently content to rest on the wisdom of the Court. In relation to the Consent Order, X was one of the parties to the Consent Order and her estate is the only party which has played any part in these proceedings, the others apparently being content to rest on the wisdom of the Court. Mr Halabi is the named executor of the estate of X.

14 The representation was originally due to be heard on 4 th August, 2017, but, having been informed that Advocate Harvey-Hills proposed to raise certain issues of principle on behalf of X's estate and that the Trustee proposed to remain neutral, HMRC applied for leave to intervene and be joined to the proceedings. This was granted by the Court on 4 th August and directions were given for the filing of evidence and skeleton arguments.

The English position in more detail

15 Schedule 36 of the Finance Act 2008 confers certain information gathering powers upon HMRC. Paragraph 2 of the Schedule provides that HMRC may serve an information notice on a third party seeking provision of information or the production of documents if the information or document is reasonably required for the purpose of checking the tax position of another person whose identity is known to HMRC (“the taxpayer”). Such a notice may only be given with the prior approval of the FTT unless the taxpayer consents. There is no appeal against an information notice which has been approved by the FTT.

16 If a recipient of an information notice fails to comply with it, he is liable to a penalty of £300 and thereafter to a daily penalty of £60 for so long as the failure continues. Liability to the penalty does not arise if the person satisfies HMRC that there is a reasonable excuse for the failure and there is a right of appeal from the decision of HMRC to the FTT on that issue.

17 According to the affidavit sworn by Natalie Ball on behalf of HMRC, they are engaged in checking the tax position of Mr Halabi. She asserts that HMRC believes that information which pre-dates the bankruptcy is required to establish Mr Halabi's present tax position as well as his past tax position. HMRC believes that information about the various trusts in Jersey is relevant to Mr Halabi's tax position. By letter dated 30 th June 2014, HMRC invited Mr Halabi to consent to provide information directly or to consent to the Trustee providing the information but he declined to do so. It was in those circumstances that HMRC sought approval from the FTT for the service of an information notice on the Trustee.

18 The Trustee made written representations to the FTT expressing concern that any order in respect of the Jersey Documents would place him in breach of the Jersey Orders, i.e. the Recognition Order and the Consent Order and also asked the FTT to stay consideration of

HMRC's application until he had applied to the bankruptcy court for directions. The FTT judge adjourned the matter to allow time for the Trustee to issue proceedings in the bankruptcy court.

19 The Trustee subsequently took this course and on 15 th October, 2015 Registrar Derrett gave detailed directions in connection with the provision of documents to HMRC pursuant to the information notice. HMRC appealed those directions on the basis that the bankruptcy court had no jurisdiction to make the directions given. That appeal was heard by Mann J in the High Court and on 8 th July, 2016, the appeal was allowed and Registrar Derrett's directions were set aside on the basis that there was no jurisdiction to grant them.

20 On 17 th January, 2017, the FTT rejected an application by the Trustee that there could be an *inter partes* hearing in relation to HMRC's application. The FTT held that Schedule 36 envisaged only *ex parte* hearings on applications for an information notice.

21 HMRC's application duly returned to the FTT on an *ex parte* basis but the Trustee was permitted to make detailed written representations. In particular, those representations included a report on matters of Jersey law from Advocate Redgrave, which supported the Trustee's contention that providing the Jersey Documents to HMRC pursuant to the information notice would breach the terms of the Jersey Orders and put him at risk of being in contempt of this Court.

22 In a decision dated 9 th May, 2017, Judge Mosedale sitting in the FTT, approved the issue of the information notice. However, she noted the concern of the Trustee and said as follows at paras 42 to 47 of her decision:-

> *"42. As I have said, my only options are to include or exclude the Jersey Documents from the order. If I exclude the documents from the Sch 36 Order, HMRC will be deprived of them in circumstances where it may in fact not be either particularly difficult or expensive to obtain a variation from the Jersey Court. But if I include the documents within the Sch 36 Order, it will put the Trustee to trouble and expense in seeking a variation, in circumstances where it is not certain he will obtain it, and therefore it necessarily carries the risk that the Trustee will face a choice of breaching the Sch 36 Order or being in contempt of court.*
>
> *43. Could it ever be proper for the Tribunal to impose such a choice on a person? At first glance it would seem not but there are two considerations. Firstly, HMRC put the case that there is a presumption of regularity and in particular that HMRC would not behave with disregard towards a person's obligations to the courts, even those of foreign jurisdictions. The Tribunal therefore ought to presume that HMRC would not in practice require compliance with an approved Sch 36 notice in these circumstances without first giving the third party sufficient opportunity to obtain a variation from the court, nor would*

HMRC require compliance at all where the third party, having used his best endeavours to obtain the variation to the Orders, was unable to do so. In particular, HMRC would not impose a penalty in such circumstances (see paragraph 45 of Sch 36). Secondly, if HMRC did impose a penalty for non-compliance with the Sch 36 Order, the Tribunal has the power to allow an appeal where satisfied that the third party has a reasonable excuse for non-compliance (¶ 45) and a failure to obtain a variation, having used best endeavours in the time allowed to obtain it, would be almost certain to amount to a reasonable excuse.

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

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

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

47. My conclusion was that, taking these considerations into account, it is not necessarily unreasonable nor unjustified to include the Jersey Documents in any Sch 36 Order. It is a matter of balance ….”

23 It is against this background that the Trustee now applies to this Court.

Issues

24 It seems to the Court that, having regard to the contentions put forward by Advocate Harvey-Hills on behalf of the estate of X and Advocate Le Maistre on behalf of HMRC – Advocate Redgrave having confirmed on behalf of the Trustee that he was neutral – the following issues arise for determination:-

(i) Would compliance with the information notice constitute a breach by the Trustee of

the Recognition Order and/or the Consent Order?

(ii) If so, does this Court have jurisdiction either to consent (under the Recognition Order) or to vary the orders so as to permit the Trustee to comply with the information notice?

(iii) If so, should the Court do so as a matter of discretion?

25 We shall consider each of these issues in turn.

(i) Would there be a breach?

26 Taking the more straightforward case first, we are in no doubt that compliance with the information notice would amount to a breach of the Consent Order and we think that, by the end of the hearing, Advocate Le Maistre was not really maintaining a contrary position. We so conclude for two reasons:-

(i) The Consent Order refers not just to the documents not being used for any purpose other than the representation but goes on to say " *and shall not be disclosed to any third parties …*". In our judgment, documents and information are disclosed to a third party (in this case HMRC) even if disclosed under compulsion. To disclose something is to make it known or impart it to another. That is so whether this occurs as a voluntary act or to comply with some obligation. If the Trustee were to comply with the information notice, the documents and information would be 'disclosed' to HMRC. That would therefore amount to a breach of the Consent Order.

(ii) Quite apart from the wording of the Consent Order, the case of *Re M Trust*, 2012(2) JLR 51, makes it clear that it is a contempt of court for a party to court proceedings held in private (such as an Article 51 application) to disclose any documents they have received in those proceedings without the leave of the Court (save to the extent that they were in possession of such documents independently of those proceedings). No such leave has yet been obtained and accordingly compliance with the information notice would amount to a contempt of court.

27 Less straightforward is whether compliance with the information notice would amount to a breach of the Recognition Order. That is because there is no reference in paragraph 9 of that Order to ' *disclosure*', only to the fact that the Trustee shall only ' *use*' the information or documents so produced for the purposes of the bankruptcy.

28 Advocate Le Maistre submitted that complying with an information notice under threat of penalty did not amount to ' *use*' by the Trustee of the material obtained pursuant to the Recognition Order. He referred first to the Shorter Oxford English Dictionary (1992 reprint) and in particular to the second meaning of the verb ' *use*' which is in the following terms:-

> *" to make use of (some immaterial thing) as a means or instrument; to employ for a purpose;*
>
> *to employ (an article, etc) esp for a profitable end; to turn to account;*
>
> *to work, manipulate (a member tool etc);*
>
> *to employ (a person, animal, etc) in some function or capacity, esp for an advantageous end …"*

29 He referred to two cases. The first was *British Motor Syndicate Limited v Taylor & Son* [1900] 1 Ch 577 in which the plaintiffs were the registered proprietors of a patent for apparatus for starting gas motor engines. The patent conferred on the plaintiffs the sole privilege to, amongst other things, ' *use*' the invention within the United Kingdom and commanded all Her Majesty's subjects that they should not at any time during the continuance of the patent ' *either directly or indirectly make use of or put in practice the invention …*'.

30 The defendants purchased in England some starters which were infringements of the patent. They sold some in England and it was not disputed that they were liable in respect of those starters. However, they sent the remainder abroad to their branch in Paris where they were sold. The question therefore was whether the defendants had used or made use of the infringing starters in England by carrying them out of England with a view to selling them.

31 At 583, Stirling J said this:-

> ***"The first meaning assigned to the word 'used' in Johnson's Dictionary is 'to employ to any purpose'; it is, therefore, a word of wide signification.*** It seems to me that the terms 'used' and 'make use of' are intended to have a wider application than 'exercise' and 'put into practice,' and, without saying that no limit is to be placed on the two former expressions in the patent, I think, on the best consideration that I can give, that they are not confined to the use of a patented article for the purpose for which it is patented. In my opinion the transport within the United Kingdom of the articles made according to the plaintiff's patent under the circumstances which occurred in this case was, indirectly at least, 'making use of' those articles within the meaning of the patent, and consequently is an infringement."

32 In *Arbuckle Smith & Co Limited v Greenock Corporation* [1960] 1 All ER 568, the issue before the House of Lords was whether, at a time when the owners of warehouse premises were carrying out alterations to the premises but otherwise undertaking no activities there, they were in occupation of the premises for the purposes of the relevant legislation concerning the payment of rates in Scotland. The House of Lords held that they were not in occupation. The relevant legislation did not contain the word ' *use*' but Lord Radcliffe

considered the question of use in order to assist in determining whether there was occupation. Advocate Le Maistre placed particular reliance upon the emphasised part of the following passage from the opinion of Lord Radcliffe at 574:-

> ***"It accords with principle that, to be a rateable occupier, a person must enjoy some benefit from the lands; his occupation must be 'a thing of value'.*** The explanation has been said to be that the owner of an empty house does not use it 'as a house' within the meaning of the original Poor Relief Act 1601 ….; and it has been decided at various times that, while putting the owner's furniture in the house does set up rateability, presumably because some use of it as a house is being obtained, keeping a caretaker in the house merely as a custodian does not constitute occupation by the owner. It is evident, therefore, that there will not be occupation in the context of rating unless some use is made of the hereditament in the course of the relevant year. 'Use' is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed ." [emphasis added]

33 Contrary to Advocate Le Maistre's submission, we have not found this observation to be of assistance. It is clear that Lord Radcliffe was considering the meaning of 'use' in the context of rateability. That emerges very clearly from a later passage at 574 where he said this:-

> ***"The whole issue is whether the acts that were done in carrying out these works amounted to such a use of the hereditament as set up an occupation within the year.*** In my opinion they did not. Since language is not a precise instrument, it is possible to say that there was use of the premises in the circumstances that they were entered and subjected to the work of adaptation. I do not think, however, that it is this sort of user that is relevant when the court is considering whether a warehouse was in rateable occupation. There was no enjoyment of the value of the building as a warehouse. …"

34 Thus Lord Radcliffe was accepting that there was ' *use*' of the premises by carrying out the works but that this did not amount to ' *use*' which was relevant when deciding whether the owners were in rateable occupation.

35 Advocate Le Maistre argued that complying with an obligation in law is not ' *use*' of the material by the Trustee for his benefit. The disclosure serves no purpose of the Trustee, nor does he derive any advantage from the provision of the material to HMRC. The avoidance of sanction for breach of a legal obligation is not enjoyment of a benefit but the absence of a negative, and does not result in any ' *use*' of the material itself.

36 In our judgment, the better view is that, if he were to comply with the information notice, the Trustee would ' *use*' the information for a purpose other than the administration of the bankruptcy. Our reasons for so concluding are as follows:-

(i) We agree with Stirling J that ' *use*' is a word of very wide meaning.

(ii) While there will often be an element of profitability or benefit as envisaged in the dictionary definition referred to earlier, we do not think that that is essential. Indeed the dictionary itself uses the expression ' *esp*' in the second and fourth bullet points above, thereby inferring that one can still use something even without it being for a profitable or advantageous end.

(iii) In *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6, Lord Sumption, speaking for the Privy Council on the topic of the interpretation of court orders, said this at [13]:-

> ***"In the opinion of the Board, this approach to the construction of a judicial order is mistaken.*** It is of course correct that the scope of a ***remission depends on the construction of the order to remit.*** But implicit in the Proprietor's argument is the suggestion that the process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any 'ambiguities' which may emerge from the first. The court's reasons, so it is said, are relevant only at the second stage, and then only if an 'ambiguity' has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the court considered to be the issue which its order was supposed to resolve ."

(iv) In our judgment, the intention of the Court in making the Recognition Order with the inclusion of paragraph 9 is clear. The Court was exercising a power under the Bankruptcy Law to allow the Trustee to force entities in Jersey to disclose confidential material to the Trustee. The Court would undoubtedly have wished to ensure that the material which was obtained by the Trustee by means of compulsion was used only for the purpose for which the Court had granted its order, namely the administration of a bankruptcy. If this information were to be supplied to HMRC for tax purposes, the information would have been used for a purpose other than the administration of a bankruptcy. The order should be construed bearing in mind the limited purpose for which it was intended that the information should be obtained.

(v) We accept that the concept of ' *using*' something normally involves the concept of a voluntary act. During the course of the hearing, Advocate Harvey-Hills conceded that, if a search warrant were to be obtained against a person in the position of the Trustee which enabled the holder of the warrant to search for and seize the relevant

material without any action on the part of the Trustee, there would be no ' *use*' of the material by the Trustee in such circumstances. We think he was right to make that concession. However, the position is different here. The Trustee has a choice as to whether to comply with the information notice. It is noted, for example, that apparently Mr Halabi has failed to comply with an information notice in relation to his affairs. If the Trustee refuses to comply, the consequence may be that he will face a penalty. But ultimately he has a choice as to whether to comply or whether to refuse and pay the penalty. It would ultimately therefore be a voluntary decision on his part to supply the Jersey Documents to HMRC even if made under some pressure in order to avoid incurring the penalty.

(vi) Putting these matters together, we conclude that, given the clear intention of the Recognition Order, the wide meaning of the word ' *use*' and the fact that the Trustee has a choice (albeit one influenced by the risk of a penalty) as to whether to comply with the information notice, a decision by him to supply the Jersey Documents pursuant to the information notice would amount to ' *use*' by him. It would therefore constitute a breach of the Recognition Order.

37 Having held that compliance with the information notice would constitute a breach of both the Recognition Order and the Consent Order, we turn to consider whether we have jurisdiction to make the orders requested by the Trustee.

(ii) Jurisdiction

38 In relation to the Recognition Order, the Trustee requests either that the Court should give leave to comply with the information notice pursuant to the opening words of paragraph 9 of the Recognition Order itself or alternatively that paragraph 9 should be varied so as to add wording which permits compliance with the information notice.

39 In relation to the Consent Order, there is no wording which at present envisages the Court consenting and therefore a variation of the Consent Order is sought so as to permit compliance with the information notice.

40 Advocate Harvey-Hills submits that there is no jurisdiction for the Court to make any of these orders under two main headings:-

(i) The purpose of Article 49 of the Bankruptcy Law.

(ii) The rule against enforcement of foreign taxes.

(i) Article 49 of the Bankruptcy Law

41 Article 49(1) of the Bankruptcy Law provides as follows:-

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

42 Advocate Harvey-Hills emphasised the heading to Article 49 and the words ' *relating to the insolvency of a person*' in Article 49(1).

43 He submitted that the Court could only make an order under Article 49 in order to provide assistance to the courts of another country relating to the insolvency of a person. Article 49 cannot be invoked for any other purpose. Thus, he submitted, if the original application had been to request information for the purposes of giving it to HMRC so that HMRC could carry out a tax investigation, the Court would have had no jurisdiction under Article 49 to make such an order. So far, the Court agrees with him.

44 However, he then goes on to assert as a general proposition that the Court cannot do by variation what it could not have done originally. It cannot therefore under Article 49 grant consent for the material received by the Trustee to be supplied to HMRC for tax purposes even where that supply is pursuant to an enforceable measure in the UK.

45 It is at this point that we part company with him. All parties accept that the Recognition Order was properly made for the purpose of assisting the High Court in connection with an insolvency matter, namely the bankruptcy of Mr Halabi. It would have been perfectly possible for the Court to have made an order which did not include paragraph 9. The Court would in such circumstances no doubt have been relying upon the general principle summarised recently by the UK Supreme Court in *R (Ingenious Media PLC) v Revenue and Customs Commissioners* [2016] 1 WLR 4164 where Lord Toulson said at para 17:-

> ***"It is a well-established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes."***

In such circumstances, if the Trustee were to be served with enforceable legal process in England requiring him to produce the material obtained pursuant to the Recognition Order, there would have been no ostensible need to revert to this Court and the fact that this had occurred would not in any way invalidate the Recognition Order or alter the purpose for which it was made.

46 On this occasion the Court chose to insert the provision in paragraph 9, as indeed it normally does when making orders under Article 49. However, it inserted the qualifying words ' *save with the leave of this court …*' at the beginning of paragraph 9. It thus clearly envisaged that, with the leave of the Court, the material obtained pursuant to the

Recognition Order could be used for a purpose other than the administration of Mr Halabi's bankruptcy. The fact that this might become necessary and that information might have to be used for some other purpose does not change the fact that the order was made for the purposes of assisting in a bankruptcy. Furthermore, we do not see the wording of Article 49 as being so restrictive as to deny the Court the ability to allow material originally obtained for the purpose of insolvency to be used for some other purpose if that becomes necessary.

47 An example is to be found in the case of *Re AG (Manchester) Limited (in liquidation)* [2005] JRC 035D. In that case, the joint liquidators of AG (Manchester) Limited had obtained an order pursuant to what was then Article 48 of the Bankruptcy Law (and is now Article 49) for the production of information and gave an undertaking that any information obtained pursuant to the order would only be used for the purposes of the company's liquidation; in other words, similar wording to that in paragraph 9 of the Recognition Order.

48 It transpired that the Official Receiver in England and Wales was carrying out an investigation into the failure of the company and requested the liquidator to pass on the information obtained from Jersey. There was a statutory obligation upon the liquidator to do so pursuant to the English Insolvency Act. This Court noted that passing information to the Official Receiver and the Secretary of State pursuant to a statutory obligation did not fall within the wording of the undertaking, but nevertheless agreed to the liquidator releasing the material to the Official Receiver and allowed him to amend his undertaking accordingly. We do not think that the fact that in that case the restriction on the use to which the liquidator could apply the material was contained in an undertaking whereas in the present case it is contained in the order itself can make any difference to the Court's jurisdiction.

49 In our judgment, it is ultimately a matter for the Court as to the level of restriction which it places upon the use of material obtained pursuant to an Article 49 order and the Court must have jurisdiction to vary that in the light of changed circumstances. We therefore reject Advocate Harvey-Hills' submission that there is no jurisdiction in this Court to vary an order under Article 49 so as to allow information to be used for another purpose, if satisfied that a change of circumstances requires this to occur.

50 The Consent Order was of course not made under Article 49. However it was by its nature not a final order. It sought to control onward disclosure of material supplied to a party in Article 51 proceedings. In our judgment, the Court is ultimately the arbiter of whether material supplied in proceedings may be disclosed elsewhere. For example, documents disclosed in ordinary public litigation are subject to an implied undertaking that they will not be used for any other purpose, but the Court undoubtedly has jurisdiction to permit disclosure for another purpose where convinced that it is appropriate and there are many cases to that effect. In our judgment, the Court always has an ongoing ability to vary an order which it has made about the confidentiality of material produced in proceedings before it whether held in public or in private. Furthermore, the Court specifically gave liberty to apply in connection with the Consent Order (although we do not consider that this was necessary in order for the Court to have jurisdiction to vary an order of this nature). We accordingly have jurisdiction to vary the Consent Order in the light of changed

circumstances if we think fit.

(ii) Enforcement of foreign taxes

51 Advocate Harvey-Hills' alternative basis for submitting that the Court has no jurisdiction to make the orders requested is that to do so would amount to the indirect enforcement of a foreign revenue law contrary to Rule 3 of Dicey Morris and Collins, *The Conflict of Laws* (15th edition) at 5R-019 which states:-

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

Rule 3 is based upon the well-known decision in the House of Lords in *Government of India v Taylor* [1955] AC 491.

52 The Rule accurately reflects the position under Jersey law just as it does under English law. The question is whether the orders requested by the Trustee would amount to indirect enforcement of a foreign (in this case UK) revenue law.

53 In *Re Tucker* 1987 JLR 473 a trustee in bankruptcy of an English bankruptcy sought assistance from this Court under the Bankruptcy Act 1914 so as to be able to examine a Jersey resident about assets of the bankrupt held in various trusts. The sole remaining creditor of the bankruptcy was the Inland Revenue. The Court held that examination of a Jersey resident when the sole creditor was the Inland Revenue amounted to an indirect attempt to enforce a foreign revenue law and therefore refused to grant the requested order.

54 However, that decision was reached some 30 years ago and before the decision of the House of Lords in *Re the State of Norway (Nos 1 and 2)* [1990] 1 AC 723. In that case a letter of request from a Norwegian court sought assistance under the Evidence (Proceedings in other Jurisdictions) Act 1975 in the form of an order for the examination of witnesses in England in connection with assessments to tax in Norway of a Norwegian citizen. The House of Lords held that granting such assistance did not amount to the indirect enforcement of the revenue laws of the State of Norway. Lord Goff said at [52]:-

> ***"I cannot see any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself."***

55 Advocate Harvey-Hills argued that the position was different here. First, he submitted that Schedule 36 had been held to be an enforcement provision in *R (on the application of Jimenez) v the First Tier Tribunal (Tax Chamber)* [2017] EWHC 2585 (Admin). Secondly, he submitted that the material in the possession of the Trustee was subject to this Court's

jurisdiction because it was only in the possession of the Trustee because of the granting of the Recognition Order and the Consent Order. Putting these two matters together, varying the two orders so as to permit the Trustee to comply with the information notice would amount to indirect enforcement of a UK revenue law.

56 We do not accept that either of these submissions assists him. The issue in *Jimenez* was whether there was jurisdiction to issue an information notice under Schedule 36 to a taxpayer who was resident out of the jurisdiction. Charles J held that Schedule 36 did not have extraterritorial effect and an information notice therefore could not be directed towards a non-resident. In considering the various arguments, Charles J examined the nature of Schedule 36 and noted that the investigatory powers in the Schedule had 'teeth' (because of the provisions for penalties in default of compliance). He therefore regarded Schedule 36 as an ' *enforcement jurisdiction*' when considering the issue of extraterritoriality.

57 However, this classification was for a very specific purpose. He had earlier at paras 46, 52 and elsewhere in the judgment referred to the ' *investigatory powers conferred by Schedule 36*'. In our judgment, this is an accurate statement of the position. It is also consistent with observations of the English Court of Appeal in *R (Derrin Bros Properties Limited) v First Tier Tribunal (Tax Chamber)* [2016] 1 WLR 2423 where, at para 68, Sir Terrence Etherton C said this in relation to the provisions of Schedule 36:-

> ***"68. The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them."*** [emphasis added]

58 The Chancellor made a similar observation at para 80 where he stated:-

> ***"Parliament has balanced those extensive rights of HMRC to obtain documents and information from third parties, at the investigatory stage of checking possible tax avoidance or evasion, with a number of protections against abuse and excessive intrusion by the executive."*** [emphasis added]

59 In our judgment, it is clear that the provisions at Schedule 36 are investigatory powers which enable HMRC to gather information for the purpose of checking a taxpayer's tax position. Whilst, as Charles J made clear, there are some ' *teeth*' so as to ensure so far as

possible that persons comply with an information notice, that does not turn the provision into an enforcement provision for our purposes. The whole purpose of Schedule 36 is to gather information in order to assess a person's tax position. It is not a measure for the enforcement or collection of a tax liability.

60 As to Advocate Harvey-Hills' second point, whilst we agree that the Trustee holds the material as a result of the Jersey Orders and will be in contempt of court if he deals with them in breach of those orders, the fact remains that this material is situated in England and that the Trustee is resident in England and subject to the jurisdiction of the English courts and of English law.

61 Putting these matters together, we do not see that a variation by the Court which recognises the fact that the Trustee is on the horns of a dilemma (in that, without any variation, he must either place himself in contempt of this Court or fail to comply with an obligatory notice under English law) and therefore permits the Trustee to supply material to HMRC for the purposes of their investigation of Mr Halabi's tax position, amounts to indirect enforcement of a foreign tax law.

62 Accordingly, we hold that the Court has jurisdiction to grant the relief sought by the Trustee.

(iii) Discretion

63 Having held that the Trustee would be in breach of the Jersey Orders if he were to comply with the information notice and that the Court has jurisdiction to allow him to comply, the question then is whether in the exercise of its discretion the Court should do so.

64 Here, Advocate Harvey-Hills is on stronger ground. Bankruptcy and tax are two very separate matters. Consistent with its general approach of seeking to ensure that Jersey acts as a responsible member of the international community, the States has passed legislation which enables confidential information in Jersey to be obtained both to assist in overseas insolvencies and for the purpose of preventing tax evasion in other jurisdictions. However, the States has provided two very different routes for obtaining such information.

65 For insolvency matters, Article 49 of the Bankruptcy Law is the relevant route. It enables trustees in bankruptcy and similar officers in overseas insolvencies to be given assistance by this Court in obtaining material in Jersey relevant to the insolvency. For those cases covered by Article 49, this requires a letter of request from the relevant court and an application to this Court. Where Article 49 does not apply, this Court has exercised an inherent jurisdiction to like effect. As this case shows, the Court will readily grant assistance, but seeks to emphasise and ensure, by means of an undertaking or a specific term of the order, that the confidential material which is disclosed as a result is used only for the purposes for which it was supplied, namely to assist in the insolvency. This is consistent with the purpose of the legislation.

66 For tax matters, a completely different route has been established by the legislature. Jersey has entered into Tax Information Exchange Agreements (TIEAs) with many countries including the United Kingdom. These confer an ability for an overseas tax authority to direct a request to the Comptroller of Taxes in Jersey requesting that he exercise his powers to obtain confidential material in Jersey. The States has passed the necessary legislation to confer such a power upon the Comptroller, namely the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008.

67 The TIEA with the UK is in fairly standard form. It provides that any request for information from the requesting tax authority shall be formulated with the greatest possible detail and shall specify a number of matters as set out in Article 5(5) of the TIEA. The requested authority (in this case the Comptroller) considers the information provided and decides whether it falls within the terms of the TIEA. He can request further information if he thinks fit. Thereafter, if satisfied, he can issue a notice requiring a person in Jersey to provide the stipulated material.

68 In our judgment, where two distinct routes have been established by the legislature, it would as a matter of general principle be wrong for this Court to mix them up. Thus, if a trustee in bankruptcy requires material from within Jersey, he should make the necessary application under the Bankruptcy Law and if HMRC require material about tax, they should make a request under the TIEA. There should in normal circumstances be no difficulty in obtaining either type of material assuming that the requirements of the relevant route are satisfied. The Court is therefore likely to continue to impose a condition or require an undertaking in applications under Article 49 which limits the use of material obtained to the purpose for which it was obtained, namely the administration of the relevant bankruptcy or insolvency procedure.

69 However, one has to acknowledge that on occasions, persons in receipt of material subject to a restriction as to its use may find themselves the subject of obligatory measures requiring its disclosure. Although they were not referred to by counsel, we would mention two cases which touch upon this situation.

70 In *Bank of Crete SA v Koskotas (No 2)* [1992] 1 WLR 919, the plaintiff Greek bank brought an action in England against the defendants alleging misappropriation of its funds. The High Court made an order against an English bank and several overseas banks with branches in London requiring each of them to disclose to the plaintiff bank information and documents relating to specified accounts. The order permitted use of the information and documents disclosed solely for the purposes of the action. The Bank of Greece appointed a special investigator to inquire into the affairs of the plaintiff bank. He was under a duty under Greek law to report to the governor of the Bank of Greece and to the Greek examining magistrate in criminal proceedings. The plaintiff bank therefore applied for variation of the disclosure order to permit use of the disclosed material in order to enable the special investigator to make his report.

71 The matter came before Millett J and we think his decision is encapsulated in the headnote which reads:-

> ***"Held, that while it would not normally be right to authorise the plaintiff bank voluntarily to make use of the material disclosed for any other purpose, the court, in the exercise of its discretion, ought not to place the plaintiff bank in the position of having either to infringe its undertakings to the court or to find itself in breach of its duties under Greek law; the question of the subsequent disclosure and use of the material should be determined according to Greek law, and the English court should not be astute to prevent a party who had obtained material by the use of its coercive powers from producing it in a foreign jurisdiction if compellable to do so; and that, accordingly, the order would be varied to permit the plaintiff to use the material disclosed for the purpose of producing audit reports and to supply them to any person to whom it was obliged under the law of any other jurisdiction to supply them."***

72 However, a more restrictive approach was taken by Sir Nicolas Browne-Wilkinson V-C in *EMI Records Limited v Spillane* [1986] 1 WLR 967. The facts of that case are complicated but in essence the plaintiffs had obtained documents and other items from the defendants pursuant to an Anton Piller order. The orders contained personal undertakings by the plaintiffs' solicitors to retain the goods and documents in their safe custody until further order. Subsequently, the Customs and Excise Commissioners served a notice on the plaintiffs' solicitors requiring them to produce for inspection all documents in their possession relating to the business run by the two defendants which they had obtained pursuant to discovery and to the Anton Piller orders. Criminal proceedings had been issued against two of the defendants relating to the fraudulent evasion of Value Added Tax.

73 On the unusual and rather complicated facts of the case, the Vice-Chancellor held that the documents were now held solely to the order of the defendants (the action having been settled) and therefore the Vice-Chancellor gave consent. However, he went on to say this at 977:-

> ***"I wish to make it clear, however, that, apart from the special circumstances flowing from the order of 4 May 1984 whereby the documents are simply held to the order of [the defendants], I would not have relaxed the undertakings so as to authorise production of the documents.*** I have already held that, apart from the order of 4 May 1984, the Commissioners could not have demanded production of the documents under paragraph 8(3) from Hamlyns. Even if I am wrong in that view, I would not have exercised my discretion so as to allow them to be released. So long as documents are held solely as the result of discovery, particularly discovery under compulsion under an Anton Piller order, in my judgment, it would be quite wrong to authorise their use in criminal proceedings brought under fiscal laws and having no connection with the original cause of action. Speeches in *Home*

> *Office v Harman* ***… all emphasise the importance, in the public interest, of preserving documents obtained on discovery from use for other purposes; unless the documents are so preserved, discovery will not be properly given and the administration of justice will suffer.*** …"

74 In our judgment, those observations of Browne-Wilkinson V-C in relation to general discovery are equally applicable in connection with conditions restricting the use of material obtained for the purposes of an insolvency. If it were to become common for material supplied for insolvency purposes to then be disclosed to taxation authorities for tax purposes, this would be to circumvent the separate routes established by the legislature and to allow revenue authorities to obtain information via the back door.

75 Accordingly, in our judgment, in the ordinary case, this Court should refuse a variation permitting a trustee in bankruptcy to comply with an information notice where HMRC are able to obtain that information using the agreed procedure of a TIEA.

76 Advocate Le Maistre expressed concern that, if HMRC did not attempt to obtain the relevant material by means of an information notice, they would run into difficulty pursuant to the provisions of Articles 5(1), 5(5)(i) and 7 of the TIEA. Article 5(1) includes the provision:-

> ***"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."***

Article 5(5)(i) requires HMRC to confirm this in the letter of request and Article 7 permits the Comptroller to decline to assist where HMRC 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.

77 We do not see this as a difficulty. Advocate Harvey-Hills conceded (rightly) that, if this Court refused to vary the Jersey Orders and if the Trustee refused thereafter to comply with the information notice, HMRC would satisfy the requirements of Article 5(1) and the Comptroller would not be able to refuse to assist pursuant to Article 7.

78 Indeed, we would go further. In our judgment, given the principles which we have sought to outline in the preceding paragraphs, if in future a trustee in bankruptcy is in possession of material obtained from Jersey under Article 49 with a similar restriction as to the use of such material as in the present case, HMRC would not need to go to the extent of serving an information notice. They would know that, to require the trustee in bankruptcy to comply with an information notice would require him to act in breach of the order of this Court and that this Court would not in normal circumstances consent to vary its order so as to allow compliance. In those circumstances the Comptroller would be entirely justified in

concluding that HMRC had pursued all means available in their own territory to obtain the information without insisting that they serve an information notice. Recourse to an information notice would undoubtedly give rise to disproportionate difficulty because this Court could be expected to refuse consent to the trustee in bankruptcy disclosing material obtained in Jersey pursuant to Article 49.

79 It may also be argued that, given the existence of Schedule 36, it would be unreasonable of this Court not to agree to a trustee in bankruptcy complying with an information notice and to insist on HMRC following the TIEA route when it has power under English law to obtain the material by means of an information notice. However, it seems to us that the position is no different from that which existed in the litigation concerning Mr Larsen. In that case, the Norwegian Police Authority, who were investigating Mr Larsen's tax affairs, had received material obtained in Jersey as a result of the Attorney General serving a production notice under the Investigation of Fraud (Jersey) Law 1991. When transmitting the material, the Attorney General had obtained an undertaking from the Norwegian Police Authority that the material transmitted would be utilised only for the purposes of criminal investigations and any subsequent criminal proceedings.

80 Subsequently the Norwegian Tax Authority (NTA) wished to investigate Mr Larsen's affairs for the purposes of possible assessment and collection of tax and sought to obtain the relevant material from the Norwegian Police Authority. The Norwegian Police Authority asked the Attorney General for his permission to be released from the original restriction on the use to which the material could be put so that it could comply with the request from the NTA, but the Attorney General declined to do so. The NTA accepted that decision and subsequently applied under the TIEA between Norway and Jersey and ultimately were successful in obtaining the relevant material – see *Volaw Trust and Corporate Services Ltd and Larsen v Comptroller of Taxes* [2013] (2) JLR 499. It seems to us that, in the ordinary course, there is no reason why HMRC should not proceed in the same manner as the NTA and apply pursuant to the TIEA to obtain the relevant material even where the material is already physically situated in the UK because of an order of this Court under Article 49. This would be more consistent with respecting the arrangements entered into between Jersey and the UK.

81 We endorse the observation of Bailhache Bailiff in the *AG Manchester Limited* case which concerned the provision by a trustee in Jersey of information about a trust to a liquidator pursuant to an order made by the Royal Court to provide assistance. At paragraph 3 the Court said this:-

> ***"It is a serious matter to break down the duty of confidentiality which a trustee owes its client.*** Where a liquidator persuades this Court that the duty of confidentiality must yield to some other more pressing public interest, and ***gives an undertaking to the Court in relation to the use of any information obtained, the greatest possible care should be taken to ensure that nothing is done outside the ambit of that undertaking."***

82 Having concluded that in general, consent to disclosure for tax purposes should not be given when there is an alternative route of obtaining that information, we turn to consider the facts of this case.

83 We were informed that HMRC has now applied under the TIEA between the UK and Jersey to obtain material in Jersey relating to Mr Halabi's tax affairs. However, the terms of the TIEA do not permit material prior to 2010 to be obtained. Advocate Harvey-Hills argued that such material could not be relevant as all the tax liabilities arising prior to Mr Halabi's bankruptcy have been proved and deemed to be discharged as part of the bankruptcy. However, we were informed that in this case, HMRC requires information going back to the early 1990s as transactions undertaken then may be relevant to assessing Mr Halabi's present position, i.e. his tax position since his bankruptcy. The information notice states that the period covered is from 6 th April, 1993 – 5 th April, 2013, and we note that the information notice has been approved by the FTT as the independent judicial monitor.

84 In these circumstances, we have to determine whether to consent to the Trustee complying with the information notice in circumstances where, if we were to refuse and the Trustee were subsequently to refuse to comply, either he would be penalised, (possibly on a daily basis) or HMRC would be denied access to material situated within the United Kingdom to which they are entitled under English law, where an independent judicial monitor has found their request for the information to be reasonable and where there is no alternative route available under the TIEA.

85 In these particular circumstances, bearing in mind the considerations mentioned by Millett J in the *Bank of Crete* case, we conclude that the right course is to grant our consent under the Recognition Order and to vary the Consent Order so as to permit the Trustee to comply with the information notice.