IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION Appeal No. 507
On appeal from the Royal Court of Guernsey (Ordinary Division)

21 December 2016

Before:

Mr John Martin QC
Sir David Calvert-Smith
Mr William Bailhache, Bailiff of Jersey

Between:

(1)	**A, a Taxpayer**	**Appellant**
	-and-	
(2)	**Director of Income Tax, States of Guernsey Income Tax Office**	**Respondent**
(3)	**B, a Trust Company**	**Interested party**

Advocate Christopher Edwards for the Applicant
Crown Advocate Jason Hill for the Respondent

BAILHACHE, JA

Introduction

1. This is the judgment of the Court.

2. The Appellant is both a national and resident of a country (the "Requesting Country") which has entered into a tax information exchange agreement with the States of Guernsey (the "TIEA"). On 30th August 2016 the Respondent delivered a notice to the Interested Party pursuant to section 75B of the Income Tax (Guernsey) Law 1975 as amended ("the Law"). By this notice the Interested Party was required to provide documents and to furnish information within its possession or power which, in the opinion of the Respondent, might be relevant to an enquiry into the liability to tax of the Appellant. The Respondent expressed himself satisfied that the request for information was made in accordance with the provisions of the TIEA. The entities

connected with the Appellant as tax payer were said to be X, a limited company incorporated in the British Virgin Islands, the Y Trust and the Z Trust. The notice set out the documents and information required which covered the period between 1st April 1999 and 31st March 2015.

3. The Appellant, becoming aware of this notice, instructed Messrs Mourant Ozannes to request from the Respondent a confirmation that the notice would be withdrawn. Three grounds were advanced in the Mourant Ozannes' letter of 21st September 2016, put briefly as follows:-

    a. The notice sought information which pre-dated the entry into force provision of the TIEA, and was thus *ultra vires*.

    b. The notice sought information which was not foreseeably relevant to the relevant tax investigation.

    c. The notice was premature in that it was issued prior to the relevant tax authority having exhausted its domestic measures.

4. The Respondent declined to withdraw the notice. The concern that some of the questions seeking information required the production of documents pertaining to all trusts said to be connected to the Appellant irrespective as to whether the documents actually made reference to him and irrespective as to whether the documents made reference to other persons apart from him was rejected and the Respondent required the production of documents in a non-redacted format. Finally the Respondent confirmed that the taxpayer with whose liability the Respondent was concerned was the Appellant – the reference to specific connected entities was set out in an attempt to assist the Interested party in determining the structure in which the Appellant might have been involved, and it was confirmed by the Respondent that the notice applied to all trusts connected with the Appellant, and was not limited to the Y Trust and the Z Trust.

5. The Appellant sought judicial review of the notice on the grounds that it was unlawful and/or irrational, and also sought leave to appeal the notice under Section 75K of the Tax Law, with a stay of the notice pending the determination of the judicial review/appeal.

6. The matter was heard at very short notice by the Royal Court (Judge Finch) on 29th September who refused leave to appeal upon the basis that the Appellant, not being a recipient of the notice, had no statutory right of appeal because on its proper construction, Section 75K of the Tax Law conferred such a right only on persons who had actually received a notice. Judge Finch also refused the Appellant permission to proceed with a claim for judicial review, on two grounds:-

    a. The Respondent's decision to issue the notice was not justiciable because it would involve consideration of an international agreement; and

    b. The Appellant had an alternative remedy available to him in the Requesting Country.

7. The Appellant was ordered to pay the costs of the Respondent and the Interested Party, and leave to appeal and a stay pending appeal was refused.

8. In this court the Appellant does not challenge the conclusion that no statutory right of appeal was available to him. However he does challenge the remainder of the decision below.

9. On 30th September 2016, the Bailiff, sitting as a single judge of the Court of Appeal granted leave to appeal and made an order prohibiting the Respondent from transmitting the documents obtained to the Requesting Country's Tax Authorities ("TA"). The Bailiff also indicated in granting leave that the Court of Appeal might wish to hear the substantive issues and the parties should therefore be prepared for a substantive hearing.

10. Accordingly the Appellant invites this court either to uphold the claim on the grounds that he has put forward reasons why his application for judicial review should succeed and the Respondent has failed to answer them, or alternatively, grant permission for judicial review and remit the claim back to the Royal Court. The Interested Party has complied with the Respondent's notice to it and has not participated in this appeal.

Hearing in public

11. The Appellant made an application to us that the hearing of the appeal should take place in private on the grounds that it contained references to confidential information and that damage to the Appellant or others might occur if it were heard in public. The principle of open justice is well established in this jurisdiction and it is only in rare circumstances that there is some compelling public interest which would lead the court to sit in private. In the present case we are satisfied that no such compelling case arises, and that furthermore it is very much in the public interest that the court sits in public and publishes its judgment. We have however indicated that for the time being the judgment and other documents will be anonymised which ensures that the private nature of the underlying information is protected while the principle of open justice is protected.

The statutory framework

12. Section 75B of the Tax Law in its material parts for the present case provides as follows:-

> ***"(1) The powers conferred by this section may be used for the purpose of enquiring into the liability [or the amount of the liability] to tax of any person ("the taxpayer") [or for the purpose of the enforcement of any such liability and the collection and recovery of any amount due] [or for the purpose of the implementation (within the meaning of Section 75CC) of any approved international agreement or any provision thereof] in any case in which the [Director] believes it necessary or desirable to do so for the purposes of performing his functions.***
>
> ***(2) Subject to the provisions of this section, the [Director] may by notice in writing require any person other than the taxpayer to deliver to the [Director] or, if so required by the [Director], to make available for inspection by the [Director] such documents, and to furnish the [Director] with such information, as are in that person's possession or power and which (in the [Director]'s opinion) are, or may be, relevant to –***
>
> > ***(a) any liability to tax to which the taxpayer is or may be or may have been, subject, and***
> >
> > ***(b) the amount of any such liability [and/or***
> >
> > ***(c) the enforcement of any such liability and the collection and recovery of any amount due]."***

13. Section 75C of the Tax Law in its material parts provides as follows:-

> ***"(1) Subject to sub-section (2), the Director of Income Tax may exercise his powers under Sections 75A and 75B if, pursuant to the provisions of an approved international agreement, a request for information is made to him by the competent authority of a requesting state.***

(2) The Director of Income Tax must be satisfied that the request for information is made in accordance with the provisions of, and for the purposes of, the approved international agreement pursuant to which it is made.

(3) The Director of Income Tax may ask the competent authority for further information, documents and particulars in support of a request for information.

(4) In this part of this law –

'Approved international agreement' means an agreement or arrangement providing for the obtaining, delivery, making available, furnishing and/or exchanging of documents and information in relation to tax which is made between the States of Guernsey and the government of another territory, or which is otherwise being upon Guernsey and governed by international law (including, without limitation, an agreement which has been acceded to or ratified by the United Kingdom on behalf of Guernsey', and which is specified for the purposes of this Law by Ordinance of the States,

… "

The issues on this appeal

14. The Royal Court below refused permission for judicial review on two grounds, the first being that the decision which had been made to issue the notice was non-justiciable.

15. The second ground on which the Royal Court was persuaded that leave should not be given was that the Appellant had an alternative remedy available in the Requesting Country, which was indeed considered by the Royal Court to be a more suitable remedy.

16. It is these two points to which we shall turn shortly, but before doing so we need to review the provisions of the TIEA.

Tax Information Exchange Agreement

17. The agreement was signed in 2011 and was expressed by Article 14 to come into force on the date of receipt of the later of notifications which each of the contracting parties was to give to the other in writing of the completion of their procedures for entry into force of that agreement. There is no dispute that the TIEA came into force in 2012. Article 14.2 of the Agreement contains provisions material for this purpose:-

"This Agreement shall enter into force on the date of receipt of the later of the notifications referred to in paragraph 1 of this Article and shall thereupon have effect forthwith:

(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 taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date."

18. The Agreement is substantially based upon the OECD model agreement for the exchange of information with respect to taxes, and by a protocol, which forms part of the Agreement, the parties accepted that the competent authorities could take into consideration the commentaries pertaining to the 2002 Agreement on exchange of information on tax matters of the OECD for the purposes of interpreting those provisions of the TIEA which are identical to the provisions in the OECD model.

19. The object and scope of the Agreement is settled by Article 1:-

> ***"The contracting parties, through their competent authorities, shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement. 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 or information."***

20. Given the provisions of Article 14.2 set out above, it is relevant to note that Article 4 contains some relevant definitions – in particular "*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 laws or the laws relating to taxes covered by this Agreement of the requesting Party."***

21. The TIEA does not contain provision for automatic exchange of information – it operates only upon request. The obligation on the requested party is to provide information for the purposes referred to in Article 1. There is no requirement that the requested party should need such information for its own tax purposes or that the conduct being investigated might constitute a crime under its laws. Article 5.1 finishes with one caveat potentially relevant to this case:-

> ***"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."***

22. The TIEA contains provisions requiring the requesting party to provide information to the requested party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request (Article 5.6). This includes the possibility of a request from the requested party that the requesting party make a statement that it has pursued all means available in its own territory to obtain the information except those that would give rise to disproportionate difficulties.

23. Paragraph 7.3 of the TIEA contains the following provisions to which we were also referred in argument:

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

Non justiciability

24. The Royal Court reached its conclusion that the application was non justiciable on this basis:

> "**There are some types of decision which are not justiciable. International agreements are not justiciable by the courts. It is the treaty which is under consideration and this is unsuitable for review by the courts, submitted R1, see R (on the application of Campaign for Nuclear Disarmament) v Prime Minster & Ors [2002] All ER (d) 295. I note here particularly paragraph 47(i) of Simon Brown LJ's judgement again which I need not read.**

Although the case of Gentle R (on the application of) & Anor v Prime Minster and Anor [2008] 1 AC 1356 involved issues of a much more fundamental nature and on a higher plane, the principles expressed there, with respect, seem apposite and relevant to the present case. Put simply, some exercises of power are not susceptible to judicial review."

25. Before us, Crown Advocate Hill sought to support this conclusion. He submitted that the Director had had conferred on him a very high level of discretion and that it was up to him as to how he exercised it. The rights of privacy which citizens have in their ordinary business and private lives have been subordinated to the exercise of this discretion. The TIEA imposed a mandatory obligation on Guernsey and indeed was the superior document to the Tax Law which contained the provisions it does at section 75A *et seq* only to regulate the way TIEA requests are handled.

26. We are unable to accept that approach. The TIEA is an international agreement made by Guernsey and the Requesting Country containing obligations on the part of the contracting parties only. It is not part of the domestic law of the island. In order to confer power on the Director, as the competent authority, to perform the terms of the TIEA, it was necessary to pass legislation so enabling him. Those sections contain not only powers conferred on him but also obligations on the part of the recipients of notices which he issues, which are enforceable through penal sanction. The legislation makes possible the performance of Guernsey's obligations under the TIEA in domestic law.

27. To acquiesce in the Respondent's approach would be to accept that the Royal Court either has no jurisdiction to consider, or should not consider, the rights of those affected by insular legislation concerning a TIEA. We think that cannot be right as indeed the judgment in the CND case, on which the Royal Court relied, illustrates. In that case, the claimants sought declaratory relief as to the true meaning of UN Resolution 1441 inviting the court to declare that the United Kingdom government would be acting in breach of international law were it to take military action against Iraq without a further resolution. The application was confined to the determination of preliminary issues which included the matter of justiciability. The defendants' argument, which the Court of Appeal found compelling, was that the court had no jurisdiction to rule on matters of international law, unless they were in some way related to the court's determination of some domestic law right or interest. Having reached the conclusion that the court should not declare the meaning of an international instrument operating purely on the plane of international law, (paragraph 36 lines 1 and 2) Simon Brown LJ went on towards the end of that paragraph:

"Laws LJ's dictum in paragraph 40 of his judgment in *Marchiori* (see paragraph 21 above) that "democracy itself requires that all public power be lawfully conferred and exercised, and of this the courts are the surety", contrary to Mr Singh's submission, is not in point here: the domestic courts are the surety for the lawful exercise of public power only with regard to domestic law; they are not charged with policing the United Kingdom's conduct on the international plane. That is for the International Court of Justice."(emphasis added)

28. As was said at paragraph 40 by Simon Brown LJ, in that case there was no foothold in domestic law for any ruling to be given on international law. Hence he concluded at paragraph 47:

"**i) the court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights or duties under domestic law. That is the position here." (emphasis added)**

29. Richards J, in agreeing with Simon Brown LJ said at paragraph 61:

"A further objection to the claim is that it asks the national court to declare the meaning and effect of an instrument of international law. The objection can be analysed in this way:

i) The basic rule is that international treaties do not form part of domestic law and that the national courts have no jurisdiction to interpret or apply them (see e.g. *R v. Lyons* [2002] 3 WLR 1562 at paras 27 and 39). The same basic rule must in my view apply to an instrument such as Resolution 1441 which has been made under an international treaty and has been negotiated in the same way as a treaty.

….

iii) By way of exception to the basic rule, situations arise where the national courts have to adjudicate upon the interpretation of international treaties e.g. in determining private rights and obligations under domestic law and/or where statute requires decisions to be taken in accordance with an international treaty; and in human rights cases there may be a wider exception…" (emphasis added)

30. In the Gentle case, the claimants' case as summarised in the headnote was that article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, imposed a substantive obligation on the Government to take reasonable steps to ensure that it did not send servicemen to face the risk of death in military activities without taking reasonable steps to ensure that those activities were lawful, that the Government had arguably been in breach of that substantive obligation by failing to take reasonable steps to satisfy itself as to the lawfulness of the Iraq invasion under international law, and that the Government therefore had a procedural obligation under article 2 to initiate an effective public investigation into the deaths which would inquire into the question whether the Government had taken reasonable steps to be satisfied that the invasion of Iraq was lawful under international law. Lord Bingham said at page 1367 D/E:

"They do, however, say, in my view rightly, that in deciding whether a right exists it is relevant to consider what exercise of the right would entail. Thus the restraint traditionally shown by the courts in ruling on what has been called high policy, peace and war, the making of treaties, the conduct of foreign relations does tend to militate against the existence of the right: R v Jones (Margaret) [2007] 1 AC 136, paras 30, 65—67."

31. That seems to us to be addressing a wholly different subject matter, as indeed the court below recognised. In Gentle, the court had to identify whether there was any basic right which existed so as to found a cause of action to which the subordinate right of a claim for an enquiry could be attached. This is not what we face here. In the instant case, the court is asked to review judicially the lawfulness of the exercise of power by the Director, not under the TIEA or as matter of prerogative or high policy, but under the Tax Law. Such a review is anticipated in the legislation itself by the creation of rights of appeal on the part of the recipient of the notice (see Section 75K of the Tax Law). Clearly there are circumstances where the Court may have to consider issues arising under either the Tax Law or the TIEA, and the legislature must be taken to have contemplated that the court might exercise such a jurisdiction. In all the circumstances, it seems to us that the cases on which the court below relied do not support the conclusion which it reached.

32. We have considered whether the creation of a statutory right of appeal on the part of a recipient of a notice excludes the right of judicial review which any other person affected by the notice would have. It does not seem to us that there is any reason for such a conclusion. The recipient of the notice will in most circumstances be a third party financial services provider whose interest in objecting to the provision of the information is at best indirect whereas the account holder or the taxpayer who is the subject of the notice – they are not necessarily the same - has a direct interest. Whether the account holder or taxpayer under investigation, that person has an interest

in ensuring that executive power is exercised in accordance with the law. There seems no legitimate basis on which it might be said that judicial review should not in principle lie. It may seem surprising that the legislature has thought fit to create a right of appeal for third party recipients of a notice and leave only judicial review for those most affected by such a notice, but that is where things stand. There is nothing in the Tax Law which can be said to exclude or limit judicial review.

33. Central to the issue of justiciability is the task of the court to identify whether there is any exercise of domestic executive power which is in question. If there is, then it follows that the fact that the review of domestic power also calls into question the content of an international agreement is no bar to the exercise of the jurisdiction which the court clearly has. As we consider that there is a legitimate basis on which the exercise of power by the Director might be challenged in domestic law, we reject the conclusion reached by the court below that the application for judicial review is non justiciable on the basis it involves consideration of an international agreement.

Alternative remedy

34. The Royal Court held on this point as follows:

> **"On the question of discretion, which should be covered in case I am technically wrong on the non-justiciability point, there is an alternative review remedy available in [the Requesting Country], a country with a distinguished legal tradition under a common law system. See also Article 7, paragraph 3 of the TIEA alluded to in R1's skeleton argument at paragraph 3-13. It is right to consider this at this permission stage. There is an alternative remedy available and indeed a more suitable one, see, for example, *Willford, R (On the Application Of) v Financial Services Authority [2013] EWCA Civ 677* at paragraph 38. For these reasons, unavoidably terser than I would have wished, the applications brought by Advocate Edwards, despite the care with which he produced them, do not succeed and are rejected."**

35. Willford is indeed a case where the court at first instance failed to recognise that there was an alternative remedy which enabled the applicant to challenge the Decision notice in question and therefore better fitted the statutory arrangements. As a consequence the exercise of discretion below was set aside on appeal. The difference in the present case is that the Royal Court found – and this has not been challenged on appeal – that the Appellant had no right of appeal against the Director's decision to issue a notice. There was thus no mechanism under the statutory arrangements for the Appellant to challenge the Director's decision, other than to seek permission for judicial review.

36. It was said for the Appellant that the remedy needs to be assessed against the executive action which is being criticised. If there were to be an assault on the making of the request for information under the TIEA, it was accepted that that should obviously be taken in the jurisdiction of the maker of the request. Where, however, what fell to be examined was the exercise of power by the Director under Guernsey legislation, it was clear that the remedy did not lie in the Requesting Country but rather in Guernsey. Advocate Edwards relied on M H Investments & another v Cayman Islands Tax Authority 16 ITLR 274. The facts as set out in the headnote are these:

> **"The Cayman Islands Tax Information Authority Law (CITIA) created and regulated the Cayman Islands Tax Information Authority. The TIA Law provided that where the CITIA was requested to provide information to another authority under a Tax Information Agreement, it would serve a notice on the taxpayer to whom the information related. The TIA Law also provided that the CITIA would not permit any requesting authority to use information for purposes other than those for which it was**

provided without obtaining the leave of a judge. The government of the Cayman Islands entered into a tax information agreement with the government of Australia on 30 March 2010. The TIA allowed and regulated the exchange of information between the two jurisdictions. Such information had to relate to criminal tax matters from 1 July 2010 or to charges to tax which arose or taxable periods which began after that date. Information provided under the TIA was confidential and only to be used for the purposes for which the information had been provided. In 2009, the Australian Tax Office began investigating entities which were subsidiaries of MH Investments as part of a larger investigation into tax evasion and money laundering. The ATO also issued assessments against those entities relating to tax years between 2000 and 2007 and also commenced recovery proceedings in the Australian courts. Those entities also began proceedings in the Australian courts against the ATO. Starting on 5 May 2011, the ATO issued a series of requests for information from the CITIA relating to MHI. The CITIA provided the information requested without having served the statutory notice on MHI and without having made inquiries as to the purpose of the information relating to previous tax years. One of the requests from the ATO sought CITIA's approval to pass information to the UK tax authorities, which CITIA gave without seeking the leave of a judge. The applicants sought judicial review of the decisions of the CITIA. The primary ground for the applications was that the information sought by the ATO related to taxable periods before 1 July 2010. The CITIA argued, inter alia, that the proceedings were an abuse of process as they had been instituted by related parties for the same purposes as the Australian proceedings and that the CITIA had no duty to enquire further of the ATO beyond satisfying itself that the request had been certified by the ATO as being in compliance with the Agreement."

37. Mr Edwards relied on this case for a short paragraph where Quin J, sitting in the Grand Court of the Cayman Islands and holding that the application for judicial review was not an abuse of process, said this:

> **"[165] The applicants are claiming that the respondent's actions were unlawful because they were outside of the Tax Information Agreement made between the Cayman Islands and Australia, which is only justiciable in the Cayman Islands and could never be brought in Australia."**

38. This, it was said, showed that it was taken as obvious by the judge that a challenge to the authority's actions in Cayman could never be mounted in the requesting state.

39. For the Respondent, Crown Advocate Hill submitted that the Appellant did not have to have an alternative identical remedy but that where he had an alternative suitable remedy, he should not be given leave to commence judicial review proceedings in the exercise of the court's discretion. In this case, the Respondent argued before the court below that the Appellant had not demonstrated that there was no alternative remedy. Furthermore, relying on paragraph 7.3 of the TIEA it was argued that any dispute with regard to the tax claim should be heard in the Requesting Country, which was the appropriate forum for relief.

40. In this court, the Respondent maintained that approach and in addition relied on the commentary to the OECD Model Agreement on which the TIEA is based:

> **"5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes of every kind and description imposed in these States even if, in the latter case, a particular Article of the Convention need not be applied. The standard of "foreseeable relevance" is intended to provide for**

exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting 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. In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. A request may therefore not be declined in cases where a definite assessment of the pertinence of the information to an ongoing investigation can only be made following the receipt of the information. The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination. Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are "fishing expeditions", i.e. speculative requests that have no apparent nexus to an open inquiry or investigation."

41. Thus it was said that in looking at whether there was an alternative remedy, the court should have regard to the fact that the TIEA imposed a mandatory requirement for the disclosure of tax information on request, and that the widest possible interpretation should be given to the expression "foreseeably relevant". It was said that it is ultimately for the requesting party to determine whether something is foreseeably relevant to the administration and enforcement of its tax laws.

42. In our judgment the proper starting point in this respect is to examine the relevant parts of the Tax Law. Section 75C(1) confers on the Director a discretionary power to issue a notice requiring the provision of information where he has received a request from the competent authority of a requesting state. That power is subject to subsection (2), which requires the Director to be satisfied that the request is made in accordance with the provisions and for the purposes of the approved international agreement pursuant to which it is made. We say at once that we do not accept the Respondent's contention that the proper construction of this language is that the Director must only be satisfied that the request is made in accordance with the agreement and not that it is in accordance with it. Such a construction is inconsistent with the additional requirement that the Director must be satisfied that the request is made for the purposes of the agreement in question too. In our judgment, the natural construction of this language is that the Director must be satisfied that the request is consistent with the provisions of the agreement. The extent of that duty may be the subject of more extensive discussion on another occasion, but we will make some comments in passing later in this judgment.

43. In our judgment, it is a conclusive answer to the Respondent's objection that there is a suitable alternative remedy that one could not expect the courts of the Requesting Country to determine the lawfulness of the Director's exercise of power under the Tax Law. That could only be properly assessed by the courts of Guernsey and it follows that the proposed alternative remedy is not a true alternative at all. Whether an alternative remedy is in reality an alternative remedy will depend on the relief which the claimant seeks as well as the nature of the claim which is being made; and here the issue is the lawfulness of the Director's actions.

44. For these reasons we think that the Royal Court misdirected itself, when dealing with the application at very short notice, on these technical points of law in finding that there were two knock out points which militated against the granting of leave. In the circumstances that the Respondent has not advanced any other objections to the granting of leave, notwithstanding Advocate Edwards making the point more than once in his admirably succinct submissions, we set aside the decision of the Royal Court and grant permission for the judicial review proceedings to continue.

45. In our view it is important to add that there is every reason why the parties should assist the Royal Court in bringing the proceedings to a conclusion as soon as reasonably possible, consistent with the terms of the TIEA which envisage that request for information should not be delayed any longer than is necessary. For that reason we have added the direction that a directions hearing be listed in the Royal Court by January 16th 2017 so that any preliminary issues such as the Appellant's application for specific disclosure and leave to amend the Cause of Action can be dealt with expeditiously and a timetable set for the final hearing. In the meantime, the injunction ordered by the Bailiff as single judge of this court referred to in paragraph 9 of this judgment shall remain in force pending further Order of the Royal Court.

46. As we are told that this is the first occasion on which a TIEA request and notice issued in consequence has been challenged in the Royal Court, we think it is desirable to add the following comments in case they should be useful in considering leave applications in the future. Crown Advocate Hill referred to the superiority of the TIEA over the terms of the Tax Law, a contention which we have rejected, but in doing so we make it clear that the international agreement obviously has great importance in assessing the lawfulness – including the reasonableness - of the Director's actions. The discretion conferred on him is to be exercised so that Guernsey can comply with its international obligations and in that connection the OECD commentary on the Model Agreement may be helpful. It follows that any enquiry in Guernsey into whether in fact the request is foreseeably relevant to the requesting country's tax administration or enforcement of tax collection is likely to be of limited compass. The Respondent is right to refer to the provisions of paragraph 7.3 of the TIEA in this connection. While it is true that the Director must be satisfied that the request is in accordance with the TIEA, he is unlikely in our judgment to be required to make an exhaustive investigation of foreign law so to be satisfied. He is entitled to proceed on the assumption that the requesting state is acting lawfully, at least until material is put before him that this might not be the case, at which time he should make such enquiries as would be reasonable to satisfy himself that the request is a proper one to which effect should be given.

47. Secondly, the Director must act rationally in the exercise of his powers, and for the purposes for which the power exists. This does not mean that he must examine critically the letter of request nor does it mean that the applicant for judicial review is necessarily entitled to see that request. There are of course the competing requirements of respecting the European Convention rights including the Article 8 rights of those affected including the Appellant and the right of disclosure necessary to assess the proportionality of any interference with those rights on the one hand, and of the proper response on the other to a request from a treaty partner where there is the obviously legitimate purpose, now clearly recognised internationally, of ensuring that taxes which are due in the country where they arise are accurately assessed and paid. This issue will arise in the Royal Court in the present case and we have not had put before us all the information which will necessarily be relevant to determining the application so we will say little about it – but although we have not been addressed on it, it appears to us that there should be at least some plausible ground advanced on which it can be said that the Appellant needs to see the request to make the representations which are to be properly advanced on judicial review.

48. Thirdly, Crown Advocate Hill submitted that a consequence of granting leave for judicial review was that the taxpayer might then be able to assert that he has a right to be informed of the Director's provisional intention to respond affirmatively to a request received so that the taxpayer has the opportunity to object. We are aware that in some jurisdictions that obligation is imposed

on the competent authority by the relevant legislation, albeit there are exceptions where criminal activity is being investigated or there are other good reasons for not doing so; and indeed the existence of such legislative provision might be thought to be an important safeguard in ensuring that those most likely to have an interest in ensuring the lawfulness of the Director's actions have at least sufficient information about them to object and/or start the appropriate proceedings. However, our view of the current state of the legislation in Guernsey is that no such obligation exists at present. Whether it would be appropriate to amend the legislation to introduce a requirement of this kind is not a matter for us but one for the States of Deliberation if so minded. One consequence of not introducing such a provision is that there may well be cases in the future where the account holder or taxpayer is simply not in possession of the information which would allow him to apply through judicial review for a remedy to which, had he had the information, he would have been entitled.

Order accordingly.