

Applications for leave to appeal to the Judicial Committee of the Privy Council and for a stay of execution of the Court of Appeal judgment dated 26 July 2024. Application by the Respondent for an order under s.75K(11) of the Income Tax (Guernsey) Law 1975 that the Notices be effective without modification pending the appeal, and that the Applicants be ordered to comply with the Notices forthwith.

[2024]GCA057

**IN THE COURT OF APPEAL OF GUERNSEY
(CIVIL DIVISION)
ON APPEAL FROM THE ROYAL COURT (ORDINARY
DIVISION)
Court of Appeal Case No. 573**

19 August 2024

Before:

**Lord Anderson of Ipswich KBE KC, President
Helen Mountfield KC
Jeremy Storey KC**

Between:

**MOURANT TRUSTEES (GUERNSEY) LIMITED
IN ITS CAPACITY AS TRUSTEES OF THE BOLERO TRUST**

First Appellant

**CAREZO (GUERNSEY) LIMITED
IN ITS CAPACITY AS TRUSTEE OF THE CAREZO TRUST**

Second Appellant

-and-

THE DIRECTOR OF THE REVENUE SERVICE

Respondent

**Advocate C Edwards for the Appellants
Advocate P M Grainge for the Respondent**

Anderson JA:

Introduction

1. This is the judgment of the Court in response to three applications made following our substantive judgment of 26 July ([2024]GCA050). In that judgment we upheld certain grounds of the Notice of Appeal, but dismissed the appeal as a whole. We therefore rejected the Appellants' challenges to the validity of Notices that were addressed to each of them by the Respondent on 23 February 2023, following requests made of the Respondent – originally in 2021 – on behalf of the Swedish Tax Authority (“STA”) under the terms of the Convention on Mutual Administrative Assistance in Tax Matters (“MAAC”).

2. By application dated 2 August 2024, the Appellants apply for leave to appeal to the Judicial Committee of the Privy Council (“JCPC”) (“the Leave Application”) and for a stay of execution of the Court of Appeal judgment (“the Stay Application”). By application dated 7 August, the Respondent applies for an order under s.75K(11) of the Income Tax (Guernsey) Law 1975 (“the Law”) that the Notices be effective without modification pending the appeal, and that the Applicants be ordered to comply with the Notices forthwith (“the s.75K(11) Application”).
3. We have received written submissions from the parties on these applications, supported by bundles of authorities, together with a fifth affirmation dated 6 August from Alexis Morgan, the Technical Lead (Exchange of Information on request) of the Guernsey Revenue Service, and a responsive second affidavit dated 12 August from Caroline Prow, a Director of Mourant Governance Services (Guernsey) Limited. Neither party requested an oral hearing and in the circumstances (which include a degree of urgency, as explained below) we are content to give our judgment on the basis of these written materials.
4. We deal first with the Leave Application, and then with the Stay Application and the s.75K(11) Application.

The Leave Application

5. Section 16 of the Court of Appeal (Guernsey) Law 2008, as amended, provides in relation to civil matters (Part II) that:

“No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal.”

The former exclusion from the need for leave when the monetary value of the claim was or exceeded £500 was removed with effect from 7 February 2022 by the Court of Appeal (Guernsey) (Amendment) Law 2021.

6. The JCPC grants leave to appeal in civil cases:

“for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time, bearing in mind that the matter will already have been the subject of judicial decision and may already have been reviewed on appeal; an application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground.”

(JCPC Practice Direction 3, para 3.3.3(a)).

7. In harmony with that approach it is the practice of this Court, as summarised in JJW Hotels and Resort Holdings Inc. v Benjamin Alexander Rhodes and others [2022] GCA 102 at [8], to grant leave in a case such as this only if it satisfied that there is (i) an arguable point of law, (ii) of general public importance, (iii) that needs to be determined by the JCPC at the present time. This Court will often be well placed to judge the general public importance of a point of Guernsey law. But the third test – that the point needs to be determined by the JCPC at the present time – is one that this Court will normally be slow to find satisfied, given the many competing claims on the time of the JCPC and its unique ability to assess their relative significance.

8. We turn now from the principles governing an application for leave to appeal to the basis upon which leave is sought in this case. The statutory appeal against the Notices under s.75K of the Law originally sought to proceed on two grounds: that the information requested by the Notices was not foreseeably relevant, and that the request was disproportionate in its scope (Substantive Judgment at [28]-[29]). Leave to proceed with the first ground was refused by the Royal Court and by the Bailiff, sitting as a single Judge of this Court, in an extempore judgment of 4 October 2023. Accordingly, the ambit of this case was limited to the issue of proportionality.
9. The draft Notice of Appeal produced by the Appellants summarises the proposed basis of appeal as follows:

“Despite holding (correctly) that the Lieutenant Bailiff had erred in law in his approach to the issues raised by the appeals, the Court:

- a. wrongly held that it was not open to the Appellants to argue that any part of the Notices was disproportionate on the grounds that the information sought went further than was foreseeably relevant to the administration or enforcement of Swedish tax law;
- b. in doing so, erred in law by failing to interpret the Bailiff’s decision to grant leave to appeal under s.75K of [the Law] with proper regard to the reasons given by him when making that decision (*Sans Souci Ltd. v VRL Services Ltd* [2012] UKPC 6 at §13); and,
- c. as a result of that error, wrongly failed to consider or determine issues that the Appellants had properly raised within statutory appeals for which they had been granted leave under s.75K of the Law.”

The central difficulty with this submission is obvious (and was foreshadowed in the Substantive Judgment at [31]): the Appellants expressly take issue with the refusal of this Court to address the issue of foreseeable relevance, notwithstanding that permission to proceed on this ground had been definitively refused. While the argument on foreseeable relevance appears to have focused in practice on the issue of whether the taxpayer to whom the request related was actually resident in Sweden or subject to Swedish tax law at any relevant time, there was no such limitation in the manner in which the ground was formulated in the cause of 17 March 2023 or in the Notice of Appeal of 8 August 2023.

10. The Appellants seek to infer from the terms in which the Bailiff expressed himself that it was his intention to leave the issue of foreseeable relevance for further argument, even as he refused leave to proceed on that ground. Reliance is placed, in particular, on references near the end of the Bailiff’s judgment to the question of whether information sought in the Notice could “be pursued under the terms of the provisions of the MAAC”, and whether it constituted “a ‘fishing expedition’ rather than falling within the bounds of what is foreseeably relevant”. The Respondent counters that these statements were cherry-picked and are to be understood in their particular context, which she seeks to explain. She maintains that having held there to be two discrete grounds of appeal, the Bailiff cannot have intended to allow the issue of foreseeable relevance, on which leave had been refused, to be argued by the back door.
11. Greater clarity might have been achieved if the legal distinction between the two grounds advanced by the Appellants had been properly spelled out in argument before the Bailiff. The principle of proportionality can, as a matter of law, be relevant to this case only in relation to the assessment of interference with private life under Article 8 of the ECHR. The question of whether or not the principle was complied with is to be answered by reference to the well-established four-part test in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700, set out in the

Substantive Judgment at [19]. However, even in argument before us, the Appellants sought, confusingly and as we have found incorrectly, to maintain that the determination of proportionality encompassed consideration of the extent of the powers conferred by the MAAC and in particular the issue of foreseeable relevance (see Substantive Judgment at [30]). It would appear that a similar approach was taken before the Bailiff as single judge. We further note that notwithstanding the Lieutenant Bailiff's erroneous formulation of elements of the legal test in the judgment under appeal, as identified in the Substantive Judgment, the actual approach of the Lieutenant Bailiff in his judgment of 7 March 2024 was to engage with all the specific submissions made by the Appellants regarding the scope of the Notices, and to do so in what he justifiably described as "[a] most careful, almost microscopic" manner. It was for that reason, among others, that we doubted the practical significance of the error identified at [48]. As to the error identified at [59], we examined for ourselves the alleged prejudice to third parties at [71]-[72] and found nothing in the arguments sufficient to establish a breach of the proportionality principle.

12. More could no doubt be said about these matters but in the context of an application for leave to appeal, we do not consider it necessary to do so. The error of law identified in the draft Notice of Appeal is an alleged failure "to interpret the Bailiff's decision to grant leave to appeal under s.75K of [the Law] with proper regard to the reasons given by him when making that decision". Reliance is placed upon Sans Souci Ltd. v VRL Services Ltd. [2012] UKPC 6, at [13]. Even assuming in the Appellants' favour that this Court wrongly interpreted the Lieutenant Bailiff's extempore judgment, that would not as it seems to us amount to an error of law. The legal principles set out in Sans Souci at [13]-[16] are uncontroversial in this jurisdiction and as the Respondent points out were respected in the Substantive Judgment, which made reference at [6] and [29] to the terms of the decision to grant leave to appeal. We do not consider therefore that the Appellants have identified an arguable point of law, let alone one of general importance.
13. Even if, contrary to our view, such a point of law had been identified, we would (as is generally the case: paragraph 7, above) decline the invitation to say that it needs to be determined by the JCPC at this time.
14. It follows that the application for leave to appeal to the JCPC is refused.

The Stay Application and the s.75K(11) Application

15. The Appellants retain the right to petition the JCPC for permission to appeal, a right which it must be assumed they may seek to exercise. This raises the question of what order (if any) this Court should make for the purposes of regulating the position until such time as it is clear whether the JCPC will agree to hear the case.
16. The Stay Application, issued by the Appellants on 2 August, seeks an order

"That the Respondent be restrained from transmitting the documents received from the Applicants to the Swedish Tax Authority until:

 - a. If leave is granted, final determination of that appeal; or
 - b. If leave is not granted, final determination of an application for special leave to appeal to His Majesty in Council."

Since we have not granted leave to appeal, it is subparagraph b that is relevant.

17. The s.75K(11) Application, issued by the Respondent on 7 August, is made pursuant to section 75K(11) of the Law, which provides as follows:

“Pending the determination of –

- (a) an application for leave to appeal against a notice, and
- (b) an appeal against a decision to give notice, the notice does not have effect unless the relevant tribunal, on the application of the [Director] and on such terms and subject to such modifications as the relevant tribunal thinks just, directs otherwise.”

The Respondent seeks an order that the Notices shall have effect until such time as leave to appeal to the JCPC is refused or, if leave is granted, until the substantive resolution of the appeal.

- 18.** Before turning to these applications we should address a preliminary objection, which was raised somewhat tentatively in the written submissions of the Respondent:

“there is an argument that no order under section 75K(11) is required (and that any stay of execution of the Court of Appeal judgment is already too late) as the time period for compliance with the Notices expired on 28 July 2024 and the Applicants have failed without reasonable excuse to comply with the Notices.”

In support of that argument the Respondent points out that the Notices required the specified documents and information to be delivered within 30 days, and calculates that even after allowing for the suspension of this period during court proceedings (from 14 March 2023 to 11 March 2024, and again from 19 March to 26 July 2024), it expired on Sunday 28 July 2024. The Respondent through her counsel informed the Appellants on 26 July of her view that the compliance period would expire on 28 July.

- 19.** Caroline Crow in her second affidavit of 12 August 2024 on behalf of the Appellants does not take issue with this calculation, but points to the full correspondence between the Appellants and the Respondent in the period after the Substantive Judgment. Having initially offered on 26 July to extend the compliance period until 23 August 2024 on condition that no further appeal was sought, the Respondent through Advocate Grainge on 30 July communicated a further offer in the following terms:

“As per my email to Chris on Friday, the Director’s view is that the time period for compliance with the notices has expired. Whilst you have indicated on behalf of your clients that you are instructed to seek leave to appeal, such application has not yet been made and as such the notices remain effective and your clients are not in compliance with the notices.

The Director would however be prepared to agree the following, that (i) your clients provide the documents to her in compliance with the notices, and (ii) that the Director agrees not to transmit the documents to Sweden pending determination of your clients’ application for a stay of execution of the Judgement of the Court of Appeal, and (iii) that such application be made by the end of this week.”

That offer was immediately accepted by the Appellants and documents were forwarded to the Respondent on the same day, in purported compliance with the Notices (though the extent of that compliance is or at least has been disputed). The Stay Application was made by the date specified in the Respondent’s offer.

- 20.** Clearly implicit in this exchange, as it seems to us, is an agreement by the Respondent to extend the period for compliance with the Orders. It is not therefore open to the Respondent to argue that the time period for compliance with the notices expired irrevocably on 28 July, or that no

stay of execution of the Substantive Judgment could be effective. We accordingly reject the Respondent's preliminary objection and proceed to consider the Stay Application and the s.75K(11) Application on their merits.

21. The legal principles governing a stay pending appeal are well-established and follow those applicable in England, as Judge Finch noted in Musa Holdings Limited v Newmarket Holdings (Guernsey) Limited [2013] GLR 383 at [6]. As Sullivan LJ remarked in DEFRA v Downs (No. 2) [2009] EWCA Civ 257 at [8]-[9]:

“A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.

It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal.”

In the specific context with which we are concerned, we note that s.75K(11) of the Law appears to be designed to qualify or displace the principle that a stay pending appeal is the exception rather than the rule. Accordingly we apply no such presumption against a stay in our analysis.

22. We refer also to Hammond Suddards Solicitors v Agrichem International Holdings Limited [2001] EWCA 2065, in which the English Court of Appeal observed at [22]:

“Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?”

23. As these authorities suggest, the risk of injustice is likely to be particularly strong if there is a prospect that to grant or to withhold a stay “would render nugatory” the outcome of the appeal: Investec Trust (Guernsey) Limited and others v Glenalla Properties Limited and others [2015] GLR 420 at [27], citing the analysis of McNeill JA in Judgment 2/2014 at [58].
24. We accept the Appellants' submission that if the documents and information specified in the Notices were to be provided to the STA, then (subject to the possibility of legal proceedings in Sweden, as to the potential scope of which there is no detailed evidence before us) the outcome of any appeal to the JCPC could be rendered nugatory. Though we consider the prospects of a successful appeal to be extremely low, we are not the final judge of that matter.
25. It is equally the case, however, that the outcome of the appeal would be rendered nugatory from the point of view of the Respondent and the STA if, by reason of the time required by the JCPC to consider the Appellants' application for permission to appeal and (if granted) their appeal, the requested documents and information could not be transmitted to the STA in time to beat the time bar under Swedish law for the purposes of assessing the taxpayer's tax liability for 2018. As we noted in the Substantive Judgment at [8], this is the only year remaining of the four years in respect of which information was originally requested in 2021, though it appears

that as a result of some information provided from Guernsey in accordance with the spontaneous exchange of information provisions in Article 7 of the MAAC, a significant reassessment for the 2017 tax year has been raised and is currently under appeal in Sweden.

- 26.** By letter of 31 July 2024 to the Respondent, the STA helpfully provided some practical information about the last date by which the information requested would need to be provided to them if the time bar is to be beaten. The letter said:

“Information received 14.10.2024 at the latest will give the Swedish Tax Agency time to analyse the information, write a proposal for the tax decision, communicate the findings with the taxpayer giving time for comments and to make a final tax decision for the tax period 2018 before year end 2024. The ‘last useful date’ for the Swedish Tax Agency to receive the requested information in order to be able to use the requested information in a tax decision for the tax period 2018 before the Swedish statute of limitation by year end 2024, is however difficult to pinpoint. It will depend on the amount of information gathered. This makes it extremely urgent that the requested information is gathered quickly in Guernsey and provided to Sweden by the most effective Exchange of Information means of transmission.”

In the light of this information, we are not prepared to grant an open-ended stay or one which would prevent the information from being transmitted to the STA until after 14 October 2024. To do so would risk the appeal process causing irremediable injustice to the Respondent and more broadly to those (including Sweden and its taxpayers) whose interests it is bound to protect under the MAAC and the Law. If the Appellants consider that they have a sufficiently strong case for a stay extending beyond this point, they must petition the JCPC for it.

- 27.** Balancing the risks of injustice as best we can, we propose to order that the Respondent be restrained from transmitting the documents and information received from the Appellants to the STA until any refusal of permission to appeal by the JCPC or 4pm on Friday 11 October 2024, whichever is the earlier. In order to ensure that the JCPC has as much time as possible to consider any application, that order will be conditional upon the Appellants lodging an application for permission to appeal to the JCPC within 7 days of the handing down of this judgment (which, for the sake of clarity, we understand to mean by close of business on the seventh day following the handing down) and seeking the expedited determination of that application.
- 28.** That leaves only the issue of the s.75K(11) Application. Although we have not received detailed submissions on s75K(11) from the parties, its purpose appears to be to reverse the normal presumption against a stay pending appeal by requiring notices not to have effect during appeal proceedings unless a competent court has ruled otherwise, on the application of the Respondent. The flexibility of such orders is emphasised in s.75K(11) itself, which permits orders to be granted on such terms and subject to such modifications as the relevant tribunal thinks just.
- 29.** We take the view that such an order is plainly appropriate at this stage, for the reasons we have given in relation to the issue of stay and since it might otherwise be argued that even after the expiry of the stay that we propose to order, a further application for a s.75K(11) Order would need to be made and determined in order to remove what would effectively be a statutory bar to the effectiveness of the Notices pending the final decision of the JCPC. Whether well-founded or not, argument on this point would be highly undesirable in such time-critical proceedings. The s.75K(11) Order is not however intended to conflict with the stay that we order and therefore it should provide that the Notices have effect subject to the provisions of the stay.

30. We invite the parties to agree the terms of an order conforming with our judgment. Any additional costs occasioned by these applications should be reserved, as was ordered by consent in relation to the costs of the appeal.

Conclusion

31. For the reasons we have given:

- (a) Leave to appeal to the JCPC is refused.
- (b) On condition that the Appellants have filed with the JCPC an application for permission to appeal within 7 days of the handing down of this judgment and sought expedited determination of that application, a stay is granted restraining the Respondent from transmitting the documents and information received from the Appellants to the STA until any refusal of permission to appeal by the JCPC or 4pm on Friday 11 October 2024, whichever is the earlier.
- (c) The Notices are to have effect pursuant to s.75K(11) of the Law, subject to the provisions of the stay above.
- (d) The costs of and occasioned by these applications are reserved.