Appeal against the decision of The Director of the Revenue Service, the Respondent, to issue two Notices pursuant to section 75B and C of the Income Tax (Guernsey) Law 1975, seeking information from the Appellants, which are trustee companies, relating to the potential liability for Swedish tax.

[2024]GCA050

IN THE COURT OF APPEAL (CIVIL DIVISION), GUERNSEY
ON APPEAL FROM THE ROYAL COURT (ORDINARY DIVISION)

Case No. 573

26 July 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 PM Grainge for the Respondent

Anderson JA:

1 This is the judgment of the Court.

Introduction

2 An appeal has been brought against a judgment of the Royal Court of 7 March 2024, in which Lieutenant Bailiff Finch dismissed an appeal against the decision of the Respondent to issue two Notices ("the Notices"), one addressed to each Appellant,

pursuant to section 75B and C of the Income Tax (Guernsey) Law 1975 ("the Law"). The Notices were issued on 24 February 2023 following requests of 3 June 2021 from the Swedish Competent Authority ("SCA") on behalf of the Swedish Tax Authority ("STA") under the terms of the Convention on Mutual Administrative Assistance in Tax Matters ("MAAC"), to which both Guernsey and Sweden are parties. The Notices sought information from the Appellants, which are trustee companies, relating to the potential liability for Swedish tax of Mr Peder Erik Pråhl for the tax years 2017 and 2018. According to the Notices, Mr Pråhl stated to the STA that he was the Settlor, Protector and Beneficiary of both the Bolero Trust and the Carezo Trust.

3 The Appellants told us that the Notice*s "form part of a long-running effort by the STA to obtain documents relating to the Taxpayer using compulsory powers available under the laws of other states".* Our attention was drawn in particular to the fact that notices under the equivalent Jersey legislation were issued in July 2020 by the Jersey Office of the Comptroller of Taxes (also described as the Jersey Competent Authority ("JCA")), in response to requests from the STA relating to the calendar years 2015-2018. Those notices were quashed by the Royal Court of Jersey on the basis that the information sought was no longer foreseeably relevant and that the request was therefore not in accordance with the requirements of the MAAC: Peder Erik Pråhl v The Office of the Comptroller of Revenue [2022] JRC 061.

4 So far as it relates to Guernsey, the history of this matter is one of consistent and determined opposition by the Appellants to the issue of the Notices and to their scope. Following the SCA's request of 3 June 2021, a number of earlier Notices were issued and withdrawn, following detailed and extensive correspondence between the Director, the SCA and the Appellants' lawyers, exhibited to the first affidavit of Alexis Morgan, the Respondent's Technical Lead (Exchange of Information on Request).

5 When the Respondent eventually issued the Notices on 24 February 2023, the Appellants sought leave from the Royal Court to institute a statutory appeal against them, as is required by section 75K(3) of the Law. The grounds upon which leave was sought were (1) that the information requested by the Notices was not foreseeably relevant to the administration or enforcement of Swedish tax law and (2) that the requests were disproportionate in scope. Following a rolled-up hearing on 14 June 2023, the Lieutenant Bailiff by judgment of 8 August 2023 ([2023]GRC 034) held that the Appellants had no real prospect of success on either ground, and so refused leave to institute a statutory appeal. He added at [19] that had leave been forthcoming, his decision and reasons would have been the same.

6 By judgment of 4 October 2023, following a hearing on the previous day, the Bailiff sitting as a single judge of the Court of Appeal confirmed the decision of the Lieutenant Bailiff to refuse leave to institute a statutory appeal on the first ground, but overturned his decision to refuse such leave on the second ground. The Bailiff at [47] of his judgment saw "some attraction" in treating the decision already reached by the Lieutenant Bailiff as determinative of the proportionality issue (bearing in mind, in particular, the Lieutenant Bailiff's comment that had he granted leave he would have dismissed the appeal on this ground). The Bailiff determined however that the statutory scheme ruled this out as an inadmissible short-cut, while commenting at [48] that the Lieutenant Bailiff, should the case go back to him, might well take the view that he had already performed the necessary proportionality analysis.

7 The Appellants therefore proceeded to institute a statutory appeal pursuant to section 75K(7) of the Law, on the sole ground that the requests for information in the Notices were disproportionate in their scope. The matter did go back to the Lieutenant Bailiff, and was heard before him on 8 December 2023. The Lieutenant Bailiff handed down the judgment under appeal on 7 March 2024, and on 3 April 2024 granted leave to appeal to this Court.

8 The original request of 3 June 2021 requested information in respect of the calendar years 2015-2018. As time has gone by, the investigation of Mr Pråhl's tax affairs has, year by year, become time-barred under Swedish law. The information specified in the Notices of 24 February 2023 is accordingly now sought only for the purposes of assessing Mr Pråhl's tax liability for 2018, the last of the four years for which information was originally requested. We were told that even that exercise will be possible only if the necessary information is provided in time for the STA to issue an assessment before the end of 2024. The passage of time was cited by the Bailiff at [49] of his judgment as a reason for expediting the hearing before him and for giving oral judgment on the following day. It is of concern to us also. The legitimate rights of Mr Pråhl must be protected; but there is a strong legitimate interest also in the lawful payment of tax, and justice would not be served were the Swedish investigation to become time-barred before a definitive resolution of the legal issues can be reached.

Legal framework

The MAAC

9 The Jersey Court of Appeal began its judgment in Imperium Trustees (Jersey) Limited v Jersey Competent Authority [2023] JCA 057 by emphasising the significance of the MAAC:

> "The common law principle that the courts do not enforce the revenue laws of other countries has been modified significantly in practice by legislation giving effect to international agreements which provide for co-operation between the tax authorities of different jurisdictions. 146 countries or jurisdictions participate in the OECD Convention on Mutual Administrative Assistance in Tax Matters done in Strasbourg on 25 January 1988 and amended by a Protocol done in Paris on 27 May 2010 …"

The MAAC as amended came into force in Guernsey on 1 August 2014, following approval by the States, and thus has effect, by its Article 28(6), in relation to taxable periods beginning on 1 January 2015. The Director's evidence before the Royal Court was to the effect that Guernsey has a long and well-established history of providing the effective exchange of information for tax purposes, having since 2002 received over 630 requests for information under the MAAC and various bilateral Tax Information Exchange Agreements and Double Taxation Agreements.

10 The preamble to the MAAC provides as follows:

> "Considering that the development of international movement of persons, capital, goods and services – although highly beneficial in itself – has increased the possibilities of tax avoidance and evasion and therefore requires increasing cooperation among tax authorities;
>
> Welcoming the various efforts made in recent years to combat tax avoidance and tax evasion on an international level, whether bilaterally or multilaterally;
>
> Considering that a co-ordinated effort between States is necessary in order to foster all forms of administrative assistance in matters concerning taxes of any kind whilst at the same time ensuring adequate protection of the rights of taxpayers;
>
> Recognising that international cooperation can play an important part in facilitating the proper determination of tax liabilities and in helping the taxpayer to secure his rights;
>
> Considering that fundamental principles entitling every person to have his rights and obligations determined in accordance with a proper legal procedure should be recognised as applying to tax matters in all States and that States

> should endeavour to protect the legitimate interests of taxpayers, including appropriate protection against discrimination and double taxation;
>
> Convinced therefore that States should carry out measures or supply information, having regard to the necessity of protecting the confidentiality of information, and taking account of international instruments for the protection of privacy and flows of personal data;
>
> Considering that a new co-operative environment has emerged and that it is desirable that a multilateral instrument is made available to allow the widest number of States to obtain the benefits of the new co-operative environment and at the same time implement the highest international standards of co-operation in the tax field;
>
> …".

Those words are significant, both for the premium that they place on international cooperation and for the indication they give of the balance that the MAAC was intended to strike between the requirements of national tax authorities and the legitimate interests of taxpayers, including in their privacy and confidential information.

11 One of the primary mechanisms by which that balance is struck is Article 4(1) of the MAAC, which provides under the heading "General Provision":

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

12 The issue of foreseeable relevance was determined in the Respondent's favour by the Lieutenant Bailiff of 14th August 2023, and again by the Bailiff on appeal against that decision. To the extent that the issue (or its echo) remains relevant to this appeal, we refer to the analysis of the term that was performed by the Jersey Court of Appeal in Imperium Trustees at [44] to [61]. Its starting point was the 2012 version of the Commentary, approved by the OECD Council, on Article 26 of the Model Tax Convention on Income and Capital ("the OECD Commentary"). The OECD Commentary forms part of the Standard which Guernsey has committed to implement as a member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, such implementation being subject to peer review.

13 The Jersey Court of Appeal at [47]-[49] noted that the OECD Commentary was not legally binding but emphasised its usefulness as an interpretive aid, notably for its comments that in the context of information exchange on request

> "the standard requires that at the time the 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",

and that, conversely, the requested State is not obliged to provide information in response to "fishing expeditions", in the sense of "speculative requests that have no apparent nexus to an open inquiry or investigation".

14 Whilst the Jersey Court of Appeal did not give an unqualified endorsement to the OECD Commentary, and stopped short of following the EU case law on foreseeable relevance, it noted at [51] that

> "The Respondent may rely on the information about the foreign tax regime provided by the requesting competent authority",

confirming that it is for the authorities of the requesting jurisdiction, including the courts, to determine any dispute between the taxpayer and the tax authorities of that jurisdiction about the application of its laws. The Jersey Court of Appeal further added at [52] that:

> "When considering whether the information sought meets the statutory test, the Respondent is of course entitled to rely on information and explanations provided to it by the requesting competent authority. And the threshold is not, as we have explained, an exacting one."

15 We agree with the emphasis placed on the OECD Commentary by the Jersey Court of Appeal. The "coordinated effort" envisaged in the preamble of the MAAC implies a degree of trust between the tax authorities of participating States. The requirement of foreseeable relevance is a valuable safeguard, which serves to concentrate the minds of both requesting and requested authorities on the scope of any request. Too stringent an interpretation of it is liable, however, to frustrate the effective and timely cross-border exchange of information that is the central goal of the MAAC and similar bilateral instruments. As this Court commented in the analogous circumstances of a Tax Information Exchange Agreement, substantially based upon the OECD model agreement for the exchange of information with respect to taxes:

> "… 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."

(A (a taxpayer) v Director of Income Tax [2016] GLR 382 at [46]). See to similar effect A Taxpayer v Director of Income Tax [2019] GLR 22 at [114]: while "more

than a mere box-ticking exercise is required", "the respondent is not required to engage in anything approaching a mini-trial in order to be satisfied that foreseeable relevance is made out".

16 Returning to the MAAC, we note that its central obligation relates to the exchange of information on request, which is provided for in Article 5 as follows:

> "1. At the request of the applicant State, the requested State shall provide the applicant State with any information referred to in Article 4 which concerns particular persons or transactions.
>
> 2. If the information available in the tax files of the requested State is not sufficient to enable it to comply with the request for information, that State shall take all relevant measures to provide the applicant State with the information requested."

Subsequent Articles provide for automatic exchange of information (Article 6), spontaneous exchange of information (Article 7), simultaneous tax examinations (Article 8) and tax examinations abroad (Article 9). Though not directly relevant to these proceedings, those Articles are, like Article 5, indicative of the breadth of cooperation envisaged by the MAAC. The same is true of Articles 11-16, which concern international assistance in the recovery of tax. Articles 18 and 20 govern the content of requests for assistance and responses from the requested State.

17 Reverting to the theme of taxpayer protection, Article 21(1) provides that:

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

It is common ground that those rights and safeguards include the provisions of the European Convention of Human Rights ("ECHR") that are given effect by the Human Rights (Bailiwick of Guernsey) Law 2000, and in particular by Article 8 of the ECHR:

> "**Article 8 – Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

> for the protection of health or morals, or for the protection of the rights and freedoms of others."

18 The requirement that any interference be in accordance with the law will be satisfied if the terms of the MAAC and of the Law have been complied with, notably the requirement that any information requested be foreseeably relevant. An interference with private life will be "necessary in a democratic society" when it is proportionate to a legitimate aim pursued. There was no dispute before us as to the existence of a legitimate aim, which we would characterise, in harmony with the Jersey Court of Appeal in Imperium Trustees at [130], as Guernsey's compliance with its obligations under the MAAC and the substantive public policy objectives to which such agreements are directed, including the economic well-being of Guernsey and its co-signatories.

19 As to proportionality, applying the well-known test in Bank Mellat v HM Treasury (No. 2) [2014] AC 700, per Lord Sumption at [20]:

> "… the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

It is the application of that test which lies at the heart of this appeal.

20 Returning once more to the MAAC, further safeguards are set out in Article 21(2) and Article 22. Article 21(2) requires the Convention not to be construed so as to impose upon the requested State various obligations, including to carry out measures which would be contrary to public policy and to supply information that is not obtainable under either its own laws or those of the requesting State. Article 22, which governs the confidentiality of information provided under the MAAC, provides:

> "1. Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.

> 2. Such information shall in any case be disclosed only to persons or authorities (including courts and administrative or supervisory bodies) concerned with the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party, or the oversight of the above. Only the persons or authorities mentioned above may use the information and then only for such purposes. They may, notwithstanding the provisions of paragraph 1, disclose it in public court proceedings or in judicial decisions relating to such taxes.
>
> …"

The Income Tax (Guernsey) Law 1975

21 Section 75B of the Law contains the powers necessary for the Respondent to inquire into the liability to tax of any person, including for the purposes of implementing an international agreement. Section 75B(1) provides that the powers conferred by the section may be used when the Director believes it necessary or desirable to do so for the purposes of performing the Director's functions. These powers include, by section 75B(2), a power by notice in writing to:

> "… 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 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."

By section 75B(6), failure without reasonable excuse to comply with a notice under section 75B(2) is a summary offence, punishable by a fine of up to £20,000 and by further daily fines of up to £2,000 for each day on which the failure to comply continues after the date of conviction.

22 Section 75C(1) of the Law provides:

> "The Director shall exercise his powers under sections 75A and 75B if, pursuant to the provisions of an approved international agreement, a request for information or for assistance in collection is made to him by the competent authority of a requesting state."

An amendment introduced by the Income Tax (Guernsey) (Amendment) Ordinance 2021 ("the 2021 Ordinance") inserted into section 75C(1) the mandatory words "The Director shall exercise" in place of the previous, discretionary formulation "The Director may exercise". We were shown a policy letter of 8 November 2019 from the Policy and Resources Committee of the States, which proposed this change on the basis that the former wording "may cause issues in Guernsey meeting its international obligations". The 2021 Ordinance also removed the former section 75C(2), the intended result being to ensure (according to the policy letter) that "there was no ambiguity that the Revenue Service must provide the relevant assistance upon receipt of a valid request, in accordance with the international agreements that Guernsey has committed to".

23 A right of appeal to the Royal Court is provided by section 75K of the Law to persons to whom a notice is addressed under sections 75A or 75B. The grounds of appeal, by section 75K(6), are:

> "(a) that the decision was *ultra vires* or unreasonable in law or that some other error of law (not being one mentioned in paragraph (b)) has been made, or
> (b) that a material error as to the facts has been made."

The right of appeal for material error of fact is (save in limited circumstances, e.g. error relating to the identity of the taxpayer) not available where notice has been given in response to a request made in accordance with the provisions of an approved international agreement.

24 Stringent time limits apply to appeals against decisions to give notice. An application for leave to appeal must be made to the Bailiff within 30 days of the date of the notice, and any appeal from the Bailiff's decision must be instituted within a period of 7 days, unless extended by the Court of Appeal (section 75K(3) and (5)). The appeal itself must be instituted within 7 days of the grant of leave, subject to the discretion of the Royal Court (section 75K(7)(a)).

25 Section 75M(1) of the Law provides that a requirement imposed by (*inter alia*) a notice under section 75B:

> "has effect notwithstanding any obligation as to confidentiality or other restriction on the disclosure of information imposed by statute, contract or otherwise; and accordingly, the obligation or restriction is not contravened by the making of a disclosure pursuant to such a requirement".

Where foreseeable relevance can be established, that provision is indicative of a strong legislative desire to prioritise access to information by the relevant authorities over financial privacy interests, including of third parties.

The judgment under appeal

26 Finch LB commented at the outset of the judgment under appeal that:

> "The nub of the matter, stripping aside a good deal of verbiage, is that Mr Pråhl does not want aspects of his affairs subjected to the unwelcome scrutiny of his native country's tax authority."

Quoting from the Respondent's skeleton argument, Finch LB noted that the SCA, as the executive arm of the STA:

> "intends to assess Mr Pråhl '*on the basis of his unlimited liability to worldwide income from all sources for the calendar year 2018. To do this, the STA require information on all of [his] financial interests, including those in Guernsey, as this information is foreseeably relevant to establishing and assessing his worldwide income"*',

and that the information was sought

> "to enable the STA to assess whether the Carezo and Bolero Trusts are transparent for tax purposes in Sweden and to ascertain the nature and extent of the assets, income and gains of those Trusts".

27 At [3]-[12] of his judgment, the Lieutenant Bailiff set out what he considered to be the applicable legal principles. As part of that exercise he addressed the meaning of the "foreseeably relevant" test; the need for a rational connection between the matters sought and the underlying investigations; the statutory constraints on the judicial function; the approach to be taken by the court in determining whether a decision-maker acted proportionately, both generally and with regard to the ECHR; the principle against doubtful penalisation; and the submissions of the parties. He then considered the specific questions that had been raised in relation to Bolero ([13]-[21]) and the additional points unique to Carezo ([22]-[23]). The Lieutenant Bailiff ended by praising those acting on the Respondent's behalf for their painstaking approach to the Swedish authorities, concluding that:

> "As a matter of public policy, where a request is received from a friendly state, which has responded fully to queries raised, and is on its face rational and … proportionate, Guernsey should respond in accordance with its obligations. Enquiries that, as here, seek "*foreseeably relevant*" information should be visited with success. International comity is important, as is the reputation of

> the Bailiwick as a co-operative and properly run finance centre. A most careful, almost microscopic examination of the Notices in this case has shown them to be lawful and rational."

The Royal Court therefore confirmed the Notices in respect of the tax year 2018, which as we have noted is the only year in respect of which the investigation is not already time-barred.

Scope of this appeal

28 The grounds for the original statutory appeal, as set out in the cause of 17 March 2023, were clearly distinguished as follows:

> "GROUND 1: The information requested by the Notices is not foreseeably relevant.
>
> GROUND 2: The request is disproportionate in scope."

29 The same distinction is made in the Notice of Appeal, dated 15 August 2023, by which the Appellants sought leave to appeal from the Royal Court's judgment of 8 August 2023 refusing leave to institute a statutory appeal:

> "GROUND 1: the Judge erred in holding that the Respondent acted lawfully in deciding that the requested information was foreseeably relevant to the administration of Swedish tax law
>
> GROUND 2: The Judge erred in holding that the Notices were proportionate in scope"

The Bailiff sitting as a Judge of this Court described these in his oral judgment of 4 October 2023 at [15] as "two discrete grounds", and made it plain at [46] that he was confirming the decision of the Royal Court to refuse leave on the first ground but reversing its decision to refuse leave on the second ground. It is clear therefore that the ambit of the statutory appeal, and therefore of the appeal before us, does not properly extend to foreseeable relevance, but is strictly limited to the issue of proportionality in the context of Article 8 of the ECHR.

30 We find it necessary to emphasise this at the outset because the issue of foreseeable relevance has continued to play a part in these proceedings, even after it should have been despatched by the Bailiff's judgment of 4 October 2023. We were not shown the written arguments of the parties but note that in the judgment under appeal, much of the Lieutenant Bailiff's reasoning on the detailed points advanced by the Appellants is

expressly directed to the issue of foreseeable relevance: see e.g. at [13], [14] and[18]. There was a further tendency to blur the issues of foreseeable relevance and proportionality in the course of the appeal before us. For example, the Appellants submitted in their "Final Notice of Appeal" to this court that the requirement of proportionality was not satisfied, among other reasons, because "there is no power to issue a Notice that goes further than what is foreseeably relevant; a notice that is excessive in its scope would be unlawful" (para 3(a)). They appear to have expected the court to satisfy itself as to the extent to which the entirety of the material required by the Notices was foreseeably relevant (Skeleton argument, para 54). Furthermore, the Appellants' detailed objections to the Notices (Skeleton argument, paras 59-89), though using the terminology of "rational connection" and "insufficiently closely connected", relate in significant part to considerations of foreseeable relevance rather than to the discrete elements (limbs 3 and 4) of the proportionality test.

31 We decline on this appeal to revisit the issue of foreseeable relevance, which was definitively determined in the Respondent's favour by the refusal of leave to appeal by the Bailiff in his judgment of 4 October 2023. The distinct ground of proportionality should not be seen as a basis on which to re-argue issues which properly formed part of the Appellants' unsuccessful case on foreseeable relevance.

32 Furthermore, the finding by the courts of Guernsey that the information sought is foreseeably relevant to the administration or enforcement of Swedish tax law, while not determinative of the proportionality issue, presents at a minimum serious obstacles to its success. Taking the four limbs of the Bank Mellat test in turn:

(a) It is not disputed in this case that the first limb (importance of the objective) is satisfied.

(b) Since the information sought has been found to be foreseeably relevant for the administration or enforcement of Swedish tax law, it must follow that the connection between the request and its objective is (at the minimum) a rational one. The finding of foreseeable relevance is therefore in practice determinative of the second limb of the proportionality test.

(c) It is not easy to imagine a way of achieving the cooperation sought by MAAC that would be less restrictive of Article 8 rights than a request conforming to its legal requirements (and no such way appears to have been suggested by the Appellants).

(d) While a fair balance must still be struck between private and public interests, the lawfulness of a request made in the public interest is on any view a weighty factor in that balance.

33 We would make four additional points in this regard.

34 First, it is all the more difficult to argue that the principle of proportionality was infringed by Notices that complied with the terms of the MAAC when the MAAC itself incorporates safeguards specifically designed to achieve a fair balance between individual and public interests. We refer by way of illustration to the "foreseeably relevant" test itself in Article 4, to the restrictions in Article 21 (including the prohibition on requiring the supply of information not obtainable by the requesting or requested States under their own laws (Article 21(2)(c)), and to the strict limits on the onward disclosure of information in Article 22. The override of duties of confidentiality provided for by section 75M(1) of the Law is also of relevance.

35 Secondly, the Jersey Court of Appeal in Imperium Trustees at [130] expressed scepticism that any separate question would arise in that case in relation to Article 8 of the ECHR, adding:

> "If the Notice in the present case is lawful, we doubt if it could be said to be disproportionate."

We agree, including for the reasons given at paragraph 32, above. It will in practice be a rare case indeed in which Notices which are compliant with the legal requirements of the MAAC and the Law will be judged a disproportionate interference with Article 8 rights.

36 Thirdly, we note that while the Bailiff in his judgment of 4 October 2023 granted leave to institute a statutory appeal on the ground of proportionality, he was open at [48] to the possibility that there was no more in the point than the Lieutenant Bailiff had found when refusing leave on 8 August 2023:

> "If the matter goes back before the same judge in the Royal Court it may well be that he takes the view that this has already been addressed and dealt with, in which case he will so say."

In that judgment, the Lieutenant Bailiff had indeed set out the four Bank Mellat limbs of the proportionality test (at [15]), and engaged conscientiously and at some length with the submissions on proportionality that had been advanced before him.

37 Fourthly, we are mindful of the comment of the Divisional Court in R (British Gas Trading Ltd.) v Secretary of State for Energy [2023] EWHC 737 (Admin) at [235], that:

> "[W]hen it comes to applying the principle of proportionality, the context is very important. The consequence may be that in practice the outcome may not be materially affected by the distinction between the concept of rationality and the principle of proportionality."

For reasons which we address below, we consider that this is such a case.

38 For all these reasons, the prospects for a successful appeal against the Lieutenant Bailiff's findings on proportionality could not be described, against that background, as promising. But the proportionality ground remains live on this appeal and we turn now to set out and to evaluate the specific grounds on which the judgment below is attacked.

Grounds of appeal

39 The first three grounds of appeal concern discrete ingredients of the legal test that it is incumbent upon a court to apply when determining the issue of proportionality under Article 8. The Appellants however rightly acknowledge that success on one or more of those grounds would not be sufficient in itself to demonstrate that the Notices are disproportionate. Accordingly by their fourth ground, the Appellants invite us to remit to the Royal Court (or alternatively, to perform ourselves) the exercise that they say is required in order to assess the proportionality of the Notices.

Ground 1: standard of review

40 By Ground 1, the Appellants claim that the Royal Court adopted an incorrect approach to the assessment of proportionality, asking itself whether the Respondent had acted irrationally when it should have assessed for itself the proportionality of the Respondent's decision.

41 Objection is taken, in particular, to the Lieutenant Bailiff's observation at [5] that

> "… in these proceedings the Judge is not standing in the shoes of the decision-maker. This is more emphatically so when the issue is one of proportionality",

and to the following passage from his judgment at [6]:

> "Whilst it is true that both R (and the Court) must act in a compatible way within the Convention, the problem is the Appellants are hardly '*victims*', their rights are not impacted by the Notices. In R (Horeau) v Secretary of State for Foreign and Commonwealth Affairs [2019] 1 WLR 4205 (DC) … at paragraph 95 it was said in considering '*proportionality*':
>
> > '*… in so far as this challenge relates to the* ***substance*** *of the decision reached by the Government, [the] test for judicial review is irrationality. The test is not proportionality …*'"

(emphasis in original). The reference to Horeau is said to be misplaced, on the basis that the Divisional Court made it plain in the words immediately preceding the passage cited that it was not addressing itself to the grounds of challenge based on the UK's Human Rights Act and thus on the ECHR. The Appellants seek to infer a further endorsement of the forbidden rationality test from the Lieutenant Bailiff's concluding observation at [24] that the Notices were "*lawful and rational*".

42 Two lines of authority are advanced in support of the submission that the wrong test was applied. We have already indicated that the first of those lines – the suggestion that the power to compel documents or information in order to comply with a request under MAAC is only available in respect of information that is "*foreseeably relevant to the administration or enforcement*" of the requesting state's tax law – is not available to the Appellants. That is a consequence of the refusal of leave to institute an appeal on the ground of foreseeable relevance, and the unsuccessful appeal against that refusal. The second line, founded on the Bank Mellat test, is to the effect that the Royal Court failed in its duty to examine for itself the question of proportionality, and in particular the third and fourth limbs of the test: whether the Notices went further than was necessary to secure the objective of supplying the requesting state with information to which it was properly entitled, and whether it imposed a disproportionate burden or difficulty.

43 Shortly before the hearing before us and without objection by the Appellants, the Respondent made a further submission to the effect that if the Appellants succeed on Ground 1, any error does not matter as the Royal Court was entitled to afford great weight to the decisions taken by the Director on the matters at issue. Reference was

made to the context and nature of the decision, and to the deference due to the Director as referred to under Ground 2.

44 We accept immediately that the proportionality of an interference with ECHR rights falls to be assessed on any legal challenge by the court itself (subject to the application of the appropriate margin of deference or appreciation, which is the subject of Ground 2). As Baroness Hale said in Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420 at [31]:

> **"**The first, and most straightforward, question is who decides whether or not a claimant's Convention rights have been infringed. The answer is that it is the court before which the issue is raised. The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."

The point was summarised by Lord Mance at [44], when he said "The court's role is to assess for itself the proportionality of the decision-maker's decision."

45 Starting with the judgment under appeal at [5], we reject the criticism of the Lieutenant Bailiff for his observation that "the Judge is not standing in the shoes of the decision-maker". That phrase seems to us consistent with the points, made by the Supreme Court in R (Lord Carlile) v Secretary of State for the Home Department [2015] AC 495, that

> "no review, however intense, can entitle the court to substitute its own decision for that of the constitutional decision maker"

(per Lord Sumption at [20]) and that

> "while proportionality is ultimately a matter for the court, it 'does … not entitle [domestic] courts simply to substitute their own assessment for that of the decision maker'"

(per Lord Neuberger at [67], quoting from Lord Reed JSC in Bank Mellat which is a case cited in the judgment under appeal). From the fact that the court must make up its own mind on the proportionality of a decision, it does not follow that it must stand in the shoes of the decision-maker.

46 More questionable, though ultimately inconclusive in the context of this appeal, is the Lieutenant Bailiff's comment that "This is more emphatically so when the issue is one of proportionality": As Baroness Hale made clear in the passage we have cited from the Belfast City Council case, proportionality in the human rights context requires

more rather than less intensive scrutiny than in ordinary judicial review. It is correct however that in neither case is it for the court to substitute its own assessment for that of the decision-maker, so nothing of substance turns on this point.

47 Turning to the judgment under appeal at [6], we have not found it easy to understand what the Lieutenant Bailiff concluded about the legal test. The purpose of the citation from Horeau is not entirely clear (coming as it does between comments on victim status and on third parties) but the citation appears out of place because it endorses a judicial approach that is not appropriate to a proportionality analysis in the context of a human rights claim. The citation may well, as the Appellants submitted, be suggestive of a misapprehension that in performing a proportionality analysis the court was required simply to apply a test of irrationality to the Director's decision. On the other hand, the Lieutenant Bailiff appears to have appreciated that rationality and proportionality were distinct concepts when he commented at [24] that Guernsey should accede in accordance with its obligations to a request "which has responded fully to queries raised, and is on its face rational, and …. proportionate". He further went on to describe his own consideration of the Notices in this case (at [13]-[23] of his judgment) as "most careful, almost microscopic" – a standard which, if met, would comfortably exceed the requirements of any rationality review.

48 The practical significance of the Lieutenant Bailiff's error (if such it was) may therefore be limited, a subject to which we shall come later. That said, and although the position is not entirely clear, we are prepared to give the Appellants the benefit of the doubt and to accede to their submission that the relevant test was incorrectly formulated in the judgment under appeal.

Ground 2: margin of appreciation

49 By Ground 2, the Appellants claim that the Lieutenant Bailiff applied an "*enhanced margin of appreciation*", by analogy with the case of R (British Gas Trading Ltd.) v Secretary of State for Energy [2023] EWHC 737 (Admin) where such a margin was said (at [239]) to be appropriate "*when reviewing the decisions of the executive in a context involving scientific, technical and predictive assessments*". The Appellants submit that there is no comparison between the British Gas case, which concerned critical economic or social choices, and the present case which concerns the application of concepts of foreseeable relevance and proportionality in the context of tax information. The decision-maker in British Gas was given substantial latitude, because the decision was "*well outside the expertise and institutional competence of*

the courts". The issues raised by the present case, by contrast, are said to be well within both.

50 We agree that British Gas is of little relevance on its facts to the present case, which is not chiefly concerned with "scientific, technical and predictive assessments". British Gas serves chiefly as an illustration of the broader principle, enumerated by Lord Neuberger at [68] of the Lord Carlile case and cited both in British Gas at [238] and by the Lieutenant Bailiff at [5]:

> "There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality."

The essential issue under Ground 2 is whether the Lieutenant Bailiff erred in according to the Director a wide margin of discretion because of her relevant knowledge and expertise.

51 Advocate Grainge, for the Respondent, characterised that expertise before us as relating to such matters as the necessity of enforcing tax obligations, whether to give effect to a request, whether it was necessary or desirable to enquire into the affairs of a taxpayer and whether a person is likely to have documents of a particular kind in their possession. She referred us to two detailed affidavits of Alexis Morgan and their exhibits, which are replete with examples of such judgements being made on the basis of expertise and information provided. She also relied on section 75B of the Law, with its references (cited above) to the belief and/or opinion of the Director as a precondition for the exercise of powers under that section.

52 Advocate Edwards, for the Appellants, contended that the business of responding to a request was effectively no more than a disclosure exercise, requiring skills that were for the most part familiar to judges. He submitted in the alternative that even if expert functions were involved, they relate to procedural questions of whether assistance should be given, rather than to the issue of proportionality which is the true focus under this ground.

53 We agree with the Appellants' alternative submission that the margin of appreciation needs to be decided upon by reference to the task of assessing the proportionality of a Notice (or intended Notice) rather than by simply pointing to the undoubted complexities of tasks which routinely confront a decision-maker in the position of the Respondent. However, we do not conclude that this approach lends decisive support to their overall argument. It is true that the first limb of the Bank Mellat proportionality test (the importance of the objective relied upon) is fairly self-evident in this case, and as easy for a court as for the Director to discern. The first limb is however not in dispute; and other limbs of the Bank Mellat test seem to us to involve the making of judgements to which the Respondent is likely to bring a considerable degree of particular knowledge and expertise.

54 The second limb (rational connection), as we have already noted, has strong similarities with foreseeable relevance, the determination of which will plainly depend on a close understanding of the scope of the requesting State's investigation, the contested issues in that investigation and the likelihood that the information sought will be available and will assist. These are matters on which the Respondent has particular expertise and is likely to have built up particular knowledge, as is evident from the correspondence exhibited to the affidavits that we have reviewed. The same is true in relation to the third limb (less restrictive alternative), on which the Respondent will have more hands-on knowledge than is available to any court of possible alternative ways in which it might or might not be possible for the legitimate objectives of the requesting state and of the procedures for cross-border exchange of information, to be achieved.

55 The balancing exercise between private and public interests that is required by the fourth limb is the type of exercise that courts are required to perform in a variety of contexts. The appropriate degree of deference is likely to be less in a context such as this than in cases where (for example) the decision-maker has specialised understanding of a particular technology and its effect on human health, or where the importance of a public policy objective is properly a matter for the exercise of political judgement at the highest level. Nonetheless, we are mindful of the special knowledge that the Respondent undoubtedly built up in the course of extensive dealings over a period of years with both the Swedish authorities and the Appellants. There is no doubt that the Respondent acquired an understanding of the relevant Swedish law; and as Alexis Morgan, deposed in her first affidavit:

> "… the underlying Requests had … provided more than adequate detail and background and the subsequent consultation with the Swedish Competent

> Authority had been extremely detailed and certainly far beyond the Standard that was required to confirm foreseeable relevance."

The Respondent also had the benefit of protracted correspondence with the Appellants' lawyers, which gave them every opportunity to express the Appellants' concerns and those of third parties, and which indeed contributed as we have noted to the withdrawal of earlier versions of the Notices. While these are not reasons for the court to abdicate its role in striking a balance, they are certainly factors that work in favour of a degree of caution.

56 Looking at the various limbs as a whole, a case such as this one seems to us to fall somewhere in the middle of the spectrum described by Lord Neuberger in Lord Carlile, with the degree of deference applied being dependent on the limb of the test that is being applied. The Lieutenant Bailiff's statements of principle must be read together with his careful examination of the Notices both in his judgment of 8 August 2023 and in the judgment under appeal. Taking the judgment as a whole, he approached his task under this head in what seems to us an appropriate manner.

Ground 3: rights of third parties

57 By Ground 3, the Appellants claim that the Lieutenant Bailiff fell into error when he held at [6] of the judgment under appeal, having noted that the Appellants were "hardly 'victims'" for the purposes of the Human Rights (Bailiwick of Guernsey) Law 2000, that "if the information is foreseeably relevant, one cannot look at the impact on third parties, as a means of claiming that the Notices are disproportionate". The Appellants further assert that it would be absurd to apply the provisions of the MAAC without having regard to the impact on third parties, and indeed that the risk of adverse impact on third parties such as Mr Pråhl is precisely why it is essential to scrutinise the proportionality of the Notices.

58 The invocation of "private life" by a trustee company may seem counter-intuitive, as it appears to have done to the Lieutenant Bailiff. Nonetheless, like other natural and legal persons, the Appellants have a right to respect for their correspondence, private information and data under Article 8 of the ECHR. It was not disputed either before the Lieutenant Bailiff or before us that for that reason they are, in principle, capable of constituting "victims" whose rights stand to be impacted by the Notices, and that they are therefore, by section 7(1) of the Human Rights (Bailiwick of Guernsey) Law, entitled to rely on Article 8 in legal proceedings.

59 The Lieutenant Bailiff relied upon the limitations on disclosure of information (as to which, see Article 22 of the MAAC) as the reason why the impact of the Notices on the rights of third parties (such as those referred to in the judgment under appeal at [16]) could not be relevant to the issue of proportionality. Such limitations may indeed be highly material to the effects of any intrusion and thus to its overall proportionality. They cannot however be determinative of the range of people who are collaterally affected by an intrusion and whose Article 8 rights may therefore need to be taken into account for the purposes of a proportionality analysis. We conclude that the Lieutenant Bailiff fell into error when he determined that the impact on third parties could not be looked at as part of the proportionality analysis.

Ground 4: disproportionality of the Notices

60 The Appellants claim that the errors of law which they seek to identify in Grounds 1-3 (some though not all of which we have accepted) are sufficient basis for the judgment under appeal to be overturned. They invite us, having done so, to remit the case to the Lieutenant Bailiff for reconsideration in accordance with what is said to be the correct judicial approach. Alternatively, they ask us to perform the exercise ourselves, applying the standards applicable to a first instance court since there is said to have been no consideration of proportionality in accordance with the correct legal criteria. The Respondent, no doubt conscious of the limited time remaining before the final time bar descends at the end of the year, submitted in contrast that if Ground 4 is reached, we should address it ourselves.

61 The Appellants identify a number of substantive aspects in which both the Bolero Notice and the Carezo Notice are said to be disproportionate – though the majority of them relate in practice more closely to the issue of foreseeable relevance. They summarise their detailed points in the Grounds of Appeal as follows:

> "a. Some of the information requested has no rational connection to the justification for the STA's request, namely the assessment of the Taxpayer's income in respect of the calendar year 2018;
>
> b. Other requests are (i) extremely broad, and (ii) insufficiently closely connected to that justification to warrant a request of such breadth;
>
> c. Still others are simply so unclear or unworkable in practice that to require the Appellants to comply with them would impose a disproportionate burden on them."

The Appellants seek to make good those points by detailed reference to paragraphs 1-9 of the Bolero Notice and their equivalents in the Carezo Notice, and to paragraph 1 of the Carezo Notice.

62 We address these submissions, to the limited extent that it is necessary to do so, in the context of the assessment to which we now turn of the position that we have reached as a consequence of our findings above.

Assessment

63 We have rejected Ground 2 of the appeal. Our conclusions on Grounds 1 and Ground 3 of the appeal are that the Lieutenant Bailiff mis-stated the test applicable to the assessment of proportionality by a court in the context of the ECHR; and that he was incorrect in stating that "one cannot look at the impact on third parties, as a means of claiming that the Notices are disproportionate".

64 It remains for us to consider the consequences of those errors. We do so in the context of our findings that:

(a) The issue of foreseeable relevance having been determined, only the third and fourth limbs of the proportionality test are in practice in issue: paragraph 32, above.

(b) The safeguards inherent in the MAAC (e.g. in relation to the nature of information that can be requested under Articles 4 and 21, and the uses to which information can be put under Article 22) are factors militating against a finding of disproportionality in relation to a request that is compliant with the MAAC, as is section 75M of the Law to the effect that information disclosed pursuant to a Notice will not contravene any obligation of confidence: paragraph 34, above.

(c) It will be a rare case in which Notices which are compliant with the legal requirements of the MAAC and the Law will be judged a disproportionate interference with Article 8 rights: paragraph 35, above.

(d) The Lieutenant Bailiff has already given careful consideration to the detailed arguments put to him, in his judgment of 8 August 2023 (as noted by the

Bailiff when granting leave to appeal) and in the judgment under appeal: paragraph 36, above.

(e) There are proportionality cases (of which this may be one) in which the outcome is not materially affected by the distinction between the concept of rationality and the principle of proportionality: paragraph 37, above.

65 Whilst nothing that we say should be seen as in any way dismissive of the need to ensure that individual rights are protected and upheld, we recall that there is also a strong public interest in the recovery of tax lawfully due and in the timely and efficient working of international agreements for the exchange of information. That public interest is reflected in the preamble to the MAAC, in the OECD Commentary and in the short time limits for proceedings under the Law (paragraphs 10-15 and 24, above).

66 We have reviewed with care the specific arguments that are made in relation to both the Bolero Notice and the Carezo Notice, conscious that they were considered also by the Lieutenant Bailiff but mindful of our duty to revisit them in the light of the applicable law as we have declared it to be. We address those arguments not in the order in which they appear in the Notice of Appeal but to by reference to the third and fourth limbs of the proportionality test which are, as we have noted, the only parts of it that have not already been effectively determined in the Respondent's favour. That is to simplify the task considerably, since many of the arguments, as we have noted, do not touch upon the third and fourth limbs of the proportionality test but are concerned rather with foreseeable relevance, whether described as such or by reference to the rational connection limb which is subsumed in it.

67 The third limb (whether a less intrusive measure could have been used) features barely at all in the Appellants' criticism of the Notices. While there are various submissions that items of information were not needed, or were excessively broad, or were insufficiently closely connected to the objectives of the exercise, these go to issues of foreseeable relevance and/or rational connection. Such submissions are not accompanied by suggested alternative means of achieving the legitimate objectives of the exercise that would have intruded to a lesser extent into the privacy rights of the Appellants or of third parties; and indeed it is not easy to see how any such suggestion could credibly be made since if information is foreseeably relevant, its provision is liable to impact on the relevant rights regardless of the means by which it is requested and furnished. Without remitting the issue to the Royal Court but determining the issue for ourselves, as we would be required to do at first instance, we have no hesitation therefore in finding no breach of the third limb of the proportionality test.

68 The fourth limb requires the court to engage in the somewhat imponderable exercise of determining whether a fair balance has been struck between the rights of the individual and the interests of the community. This involves consideration of whether the individual is called on to bear a disproportionate and excessive burden or, in the summary formulation of Lord Reed in Bank Mellat at [74], "whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure".

69 As we have indicated at paragraph 55 above, a measure of judicial caution is called for in approaching this exercise in the circumstances of the present case. The legitimate privacy concerns of a professional trustee complying with a lawful request for information will normally be slight, particularly when balanced against what the States have accepted is a legitimate public interest in facilitating requests for information by other national tax authorities for the purposes of collecting such tax as may lawfully be due. That is so, particularly, given that in view of the conclusion of the courts on the foreseeable relevance issue, all the information sought must be assumed to be of at least potential value; that the legitimate interest of taxpayers in the privacy of their financial affairs is protected under the scheme of the MAAC by the provisions of Articles 21 and 22; and that section 75M of the Law indicates the clear intention of the legislature that where information is disclosed pursuant to a requirement imposed by a Notice, that disclosure will not contravene any obligation of confidence. This is not to say that an otherwise lawful request might not give rise to an individual and excessive burden: but the circumstances in which this might conceivably be so are likely to be extremely rare.

70 The Notice of Appeal pleads in general terms that some of the requests "are simply so unclear or unworkable in practice that to require the Appellants to comply with them would impose a disproportionate burden on them". The practical difficulties referred to by the Appellants (for example, over the identification of companies owned or controlled by Mr Pråhl, and whether payments were made "through" a company: Notices of Appeal, paragraphs 27, 32, 44 and 49) are plausibly said by the Respondent to be exaggerated and do not as it seems to us come anywhere close to what would be required to establish a breach of the fourth limb.

71 The potential effects of the Notices on third parties are prayed in aid, for example in paragraph 40 of the Notice of Appeal where it is suggested that Trust accounts and statements covering the relevant period could contain substantial information about the confidential financial affairs of people or companies other than the Appellants. As we have found when upholding the third ground of appeal, it is legitimate for such effects to be taken into account as part of the proportionality analysis. Given the

purpose of the exchange arrangements and the unchallengeable findings of the Guernsey courts on foreseeable relevance, together with the protections in Articles 21 and 22 of the MAAC and the provisions of section 75M(1) of the Law, we find nothing in these arguments sufficient to establish a breach of the fourth limb.

72 Finally, the submission is made at paragraph 49 of the Notice of Appeal that the Carezo Notice at 1.4 seeks information about the income of CGL, a Guernsey company, without any basis having been identified for piercing the corporate veil between Mr Pråhl and that company. The Respondent points out (as did the Lieutenant Bailiff at [23] of the judgment under appeal) that CGL was 100% owned by Mr Pråhl for at least the majority of the relevant period, and that CGL appears only to act as Trustee to the Carezo Trust – points made also by the Lieutenant Bailiff when he rejected this submission at [24] of the judgment under appeal. The foreseeable relevance of this request having been (understandably in our view) established, any attempt to establish a breach of the fourth limb of the proportionality test on this basis is artificial and indeed hopeless.

73 Accordingly, though assessment for rationality and proportionality are different exercises, this case falls into the category (noted in British Gas: paragraph 37 above) in which the outcome is the same regardless of which test is performed.

Conclusion

74 For the reasons we have given, Grounds 1 (in part) and 3 of the Notice of Appeal are upheld, but the appeal as a whole is dismissed and the validity of the Notices is therefore affirmed. We are minded to award the Respondent her reasonable costs of the appeal on the standard basis, but invite short written submissions, to be provided within seven days of the handing down of this judgment, should either party seek to persuade us to take a different course.

75 We have previously indicated our concerns about the passage of time in this matter, and received a welcome assurance from Advocate Edwards that he and his firm would proceed promptly to provide the information requested in the event that the Notices were upheld. We hope that this can now be achieved.