[2023]GRC034

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between:

(1) MOURANT TRUSTEES (GUERNSEY) LIMITED IN ITS CAPACITY AS TRUSTEES OF THE BOLERO TRUST	**First Appellant**	**("A")**
(2) CAREZO (GUERNSEY) LIMITED IN ITS CAPACITY AS TRUSTEE OF THE CAREZO TRUST	**Second Appellant**	

-and-

(3) THE DIRECTOR OF THE REVENUE SERVICE	**Respondent ("R")**

Appeal under the provisions of section 75K of the Income Tax (Guernsey) Law, 1975 (as amended) ("The Law")

Case heard on: 14th June 2023

Before: John Russell Finch Esq., OBE, Lieutenant Bailiff

Counsel for the Appellant: Advocate C Edwards;

Counsel for the Respondent: Advocate P M Grainge

Materials referred to

The Income Tax (Guernsey) Law, 1975, as amended, Sections 75B, 75C and 75K;
The Income Tax (Guernsey) (Approved International Agreements) (Amendment) Ordinance, 2014;
The Convention on Mutual Administrative Assistance in Tax Matters (2014), Articles 1 and 5;
The OECD Model Tax Convention on Income and Capital (as updated in 2012).

Guernsey Cases referred to

Chick v Guernsey FSC [2020] GCA 078;
A Taxpayer v The Director of Income Tax, 2019 GLR 22.

Jersey Cases referred to

APEF Management Company 5 Limited v Comptroller of Taxes [2013] JRC 272;
Pråhl and Triton Administration (Jersey) Ltd v The Office of the Comptroller of Revenue [2022] JRC 061;
Imperium Trustees (Jersey) Limited v The Office of the Comptroller of Revenue [2022] JRC 300;
Larsen v Comptroller of Taxes [2015] (2) JLR 209.

Other Cases referred to

James v Hertsmere BC [202] EWCA Civ 489;
Kotton v First-Tier Tribunal (Tax Chamber) (and another) [2019] EWHC 1327 (Admin);
Kandara and others v Revenue and Customs Commissioners [2021] EWCA Civ 1082;
Lundberg v First-Tier Tribunal (Tax Chamber) and others [2022] EWHC 566 (Admin);
Secretary of State for Education and Science v Tameside Borough Council [1977] AC 1014;
R (RP) v Brent London Borough Council [2011] EWHC 3251 (Admin);
R (Balajigari) v Home Secretary [2019] EWCA Civ 673;
Comptroller of Income Tax v BKW and others [2013] SGHC 205;
MH Investments v CITIA [2013] 16 ITCR 274;
Comptroller of Income Tax v AZP [2012] SGHC 112;
Bank Mellot v H. M. Treasury [2013] UKSC 39.

DECISION

Introduction

1. A seeks leave to bring a statutory appeal in respect of Notices issued by R, pursuant to section 75K of the Income Tax (Guernsey) Law, 1975, as amended ("the Law"). This was a "rolled up" hearing, so argument was heard from the parties as to whether leave should be granted, and the grounds for appeal were put forward in full. Leave is required under section 75 (K)(3) of the Law. The statutory provisions are set-out below. The Notices, which are the subject of these proceedings, were issued by R under section 75B and 75C of the Law, compelling A to produce documentation and information relating to Mr Pedr Erik Pråhl following a request from the Swedish Competent Authority on behalf of the Swedish Tax Authority ("STA"). Originally it was also claimed that Judicial Review was available, but the parties agreed that it was only the statutory appeal that needed to be considered. This was, with respect, sensible, as where there is a statutory right of appeal it will cover the full range of Judicial Review grounds, see e.g. James v Hertsmere BC [2020] EWCA Civ 489, at paragraphs 31 -32.

2. The parties were also in agreement as to the applicable test for granting leave under the Law, which is silent on this question. This was found in the Guernsey Court of Appeal case of Chick v Guernsey FSC [2020] GCA 078, at paragraph 42, namely:

> *"…….This Court will only grant leave (a) if an appeal has real prospects of success; or (b) in exceptional circumstances…….in the public interest……"* It was accepted that only (a) applied in the present matter.

3. There were two grounds of appeal adduced on behalf of A:
   (i) the information requested by the Notices was not foreseeably relevant to the administration or enforcement of Swedish tax law: and
   (ii) the requests are disproportionate in scope.

Background

4. Guernsey is a member of the Convention on Mutual Administrative Assistance in Tax Matters ("MAAC"), which entered into force on 1st August, 2014. The States of Guernsey approved the Income Tax (Guernsey) (Approved International Agreements) (Amendment) Ordinance, 2014, which ensured that Guernsey's membership of MAAC became an approved international agreement for the purposes of section 75C of the Law. The relevant provisions of the Law and the applicable Chapters of MAAC are set-out below. On 8th June, 2021, R received two requests from the STA seeking information and documentation under the terms of the MAAC. The Notices issued by R referred to information that is or may be held by two trusts; the Bolero Trust and the Carezo Trust. Mourant Trustees (A) are the trustees of the Bolero Trust and Carezo (Guernsey) are the trustees of the Carezo Trust. These Notices were issued on 24th February, 2023. Earlier Notices were withdrawn following lengthy and detailed correspondence with A's Advocates and the Swedish Competent Authority (the "SCA"), which is responsible for international tax matters, including the MAAC. The background to this is the Swedish enquiry into the tax affairs of Mr Pråhl, who is a Swedish citizen and also has the right of permanent residence in the UK, where he is entitled to vote. There is a large amount of documentation and correspondence exhibited to R's representative, Alexis Morgan's, detailed affidavit in R's second bundle.

The Legislation

5. The relevant sections of the Law, showing amendments in brackets, are as follows:

Power to call for documents, etc, relation to taxpayer.

75B. (1) The powers conferred by this section may be used for the purpose of inquiring 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 tax measure, or any provision thereof, for the purposes of regulations made under section 171A (regulations in respect of substance requirements)],[in any case in which [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].

(3) Before a notice is given to a person by the [Director] under subsection (2), that person must be given a reasonable opportunity to deliver or make available the documents in question or to furnish the information in question [voluntarily], unless the [Director] believes that that would prejudice the inquiry to which the document or information relates or the performance by the [Director] of his functions.

[(3A) However, in respect of a person or body of persons, corporate or unincorporated, holding or deemed to hold a licence, registration or authorisation from the Guernsey Financial Services Commission under the regulatory Laws, subsection (3) applies as if for the word "must" there were substituted the word "may"; and accordingly there is no obligation pursuant to that subsection, before giving a notice under subsection (2), to give such a person or body a reasonable opportunity to deliver or make available the documents in question or to furnish the information in question voluntarily.

(3B) In subsection (3A) the "regulatory Laws" means –

(a) the Protection of Investors (Bailiwick of Guernsey) Law, 1987,
(b) the Banking Supervision (Bailiwick of Guernsey) Law, 1994,
(c) the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000,
(d) the Insurance Business (Bailiwick of Guernsey) Law, 2002,
(e) the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002,
(f) the Registration of Non-Regulated Financial Services Businesses Law, 2008,
(g) any other enactment or statutory instrument prescribed for the purposes of this section by regulations of the [Committee].]

(4) The [Director] may direct a person to whom a notice is given under subsection (2) [or who is, pursuant to subsection(3), given a reasonable opportunity to deliver or make available the documents in question or to furnish the information in question voluntarily] that he must not –

(a) inform, or cause or permit to be informed, the taxpayer that the notice [or, as the case may be, the opportunity] has been given, or

(b) disclose, or cause or permit to be disclosed, to any person (including the taxpayer) any information or matter which is likely to prejudice the inquiry to which the notice [or, as the case may be, the opportunity] relates or the performance by the [Director] of his functions, and a person who fails to comply with such a direction is

guilty of an offence and liable on summary conviction to fine not exceeding twice level 5 on the uniform scale, unless he can show –

(i) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself and by any person under his control, or

(ii) in the case of an offence under paragraph (b), that he did not know or suspect that the disclosure was likely to be prejudicial to the inquiry or to the performance by the [Director] of his functions, and, for the avoidance of doubt, the institution and prosecution of an appeal under section 75K against the decision of the [Director] to give the notice under subsection (2) does not itself constitute a failure to comply with a direction under this subsection.

(5) To comply with a notice under subsection (2), copies of documents may be delivered instead of originals, but –

(a) the copies must be in such form as the [Director] may specify, and

(b) if so required by the [Director], the originals of the documents must be made available for inspection by the [Director] in accordance with the requirement, and a failure to comply with a requirement under this subsection constitutes a failure to comply with the notice under subsection (2).

(6) A person who without reasonable excuse fails to comply with any provision of a notice under subsection (2) is guilty of an offence and liable on summary conviction to a fine exceeding twice level 5 on the uniform scale and to a further fine not exceeding level 3 on the uniform scale for each day on which the failure to comply continues after the date of conviction.

(7) For the avoidance of doubt, and without limitation, the persons to whom a notice may be given under subsection (2) include States departments and committees and officers and servants thereof.

Notices under section 75A and 75B: requests for information.

75C. (1) Subject to [subsection (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.

[NB the functions of the Director of Income Tax were transferred to the Director of the Revenue Service as a result of an amendment to section 205 of the ITL following the commencement of the Income Tax (Transfer of Functions) (Guernsey) Ordinance 2018.]
[NB section 75C (1) was amended to make this a mandatory exercise of powers by The Income Tax (Guernsey) Ordinance 2021.]

[(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.]
[NB section 75C(2) was repealed by The Income Tax (Guernsey) Ordinance 2021. The repeal becoming effective in relation to requests received after 15 July 2021.]

(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[or taxation] [,which is made between the States of Guernsey and the government of another territory, or which is otherwise binding upon Guernsey and governed by international law (including, without limitation, an agreement [or arrangement] which has been acceded to or ratified by the United Kingdom on behalf of Guernsey) [or specified in Resolution of the States under section 172]], and which is specified for the purposes of this Law by Ordinance of the States,*

"competent authority" *means the person or authority designated by the requesting state as the competent authority for the purposes of the approved international agreement pursuant to which the request for information is made [or specified as the competent authority for the purposes of this Law by regulations of the [Committee]], and*

"requesting state" *means the party to the approved international agreement on behalf of which the request for information is made.*

(5) This section is without prejudice to the generality of sections 75A and 75B.]

Right of Appeal to Royal Court

75K. *(1) A person aggrieved by a decision of the [Director] to give him notice under section 75A or 75B may, subject to subsection (3), appeal against the decision to the Royal Court.*

*(2) A person appealing against a decision to give notice is referred to in this section as "**the appellant**".*

(3) An appeal against a decision to give notice may not be instituted unless the Bailiff, on the application of the appellant made within a period of [30 days] immediately following the date of notice, gives leave to appeal.

(4) An application to the Bailiff for leave under subsection (3) must be instituted by summons served on the [Director] stating the grounds and

material facts on which the appellant intends to rely on his appeal to the Royal Court.

(5) An appeal from a decision of the Bailiff made under subsection (3) –

(a) lies to the Court of Appeal (which may for the purposes of this subsection be constituted by a single judge of that Court) on a question of law, and

(b) must be instituted within a period of 7 days immediately following the date of the Bailiff's decision [or such longer period as the Court of Appeal may in any particular case allow], and the decision of the Court of Appeal (whether sitting fully constituted or as a single judge) is final.

(6) The grounds of appeal to the Royal Court against a decision to give notice under section 75A or 75B 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,

but where the [Director](pursuant to section 75C) gives notice under [section 75A or 75B] in response to a request for information [or for assistance in collection] made by the competent authority of a requesting state pursuant to the provisions of an approved international agreement [or a request for information [or for assistance in collection] made pursuant to the provisions of an international tax measure] then, provided that the request is made in accordance with the provisions of the agreement [or measure], the decision to give notice in response to the request cannot be challenged under the ground mentioned in paragraph (b) [unless the Bailiff, when giving leave to appeal under subsection (3), is satisfied –

(i) that the material error as to the facts relates to the notice itself (including, without limitation, facts relating to the identity of the taxpayer or other person to whom the notice is addressed) and not to the circumstances of or giving rise to the liability or alleged liability to tax under the law of the requesting state [or (as the case may be) of the territory from or in respect of which the request for information [or for assistance in collection] is made], and

(ii) that it would be just and convenient for the decision to be challenged on that ground in the courts of Guernsey].

(7) An appeal against a decision to give notice must be instituted – (a) within a period of 7 days immediately following the day on which leave to appeal was given pursuant to subsection (3) or (5) [or such longer period as the Royal Court may in any particular case allow], and (b)

by summons served on the [Director] stating the grounds and material facts on which the appellant relies.

(8) The [Director] may, where an appeal against a notice, or against a decision of the Bailiff under subsection (3), has been instituted, apply to the relevant tribunal, by summons served on the appellant, for an order that the appeal be dismissed for want of prosecution; and, upon hearing such an application, the relevant tribunal may –

(a) dismiss the appeal or dismiss the application (in either case on such terms and conditions as the relevant tribunal may direct), or
(b) make such other order as the relevant tribunal considers just,

*and in this section **"the relevant tribunal"** means the Royal Court or, in cases where the Court of Appeal or a single judge thereof is seized of the matter, the Court of Appeal or, as the case may be, that single judge.*

(9) The provisions of subsection (8) are without prejudice to the inherent powers of the court of to the provisions of the rule 36(2) of the Royal Court Civil Rules, 1989.

(10) On an appeal against a decision to give notice the Royal Court may – (a) set the notice aside and, if the Court considers it appropriate to do so, remit the matter to the [Director] with such directions as the Court thinks fit, or (b) confirm the notice, in whole or in part.

(11) 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.

(12) The Bailiff, where an application is made to him for leave under sub section (3), or the relevant tribunal, where an appeal to it is instituted under this section, may order the applicant or appellant –

(a) to lodge with the court all or any of the documents sought by the [Director] in his notice under section 75A or 75 B,

(b)to provide any information (whether or not under oath or affirmation) relating to any such documents or their whereabouts (including, without limitation, a list of documents), and

(c) to enter into such undertakings on such terms as may be specified, and a contravention of or failure to comply with an order or undertaking under this subsection is punishable as a contempt of court.

(13) An appeal from a decision of the Royal Court made under this section lies, with leave of the Royal Court or the Court of Appeal, to the Court of Appeal on a question of law.

(14) Section 21 of the Court of Appeal (Guernsey) Law, 1961 ("powers of a single judge") applies to the powers of the Court of Appeal to give leave to appeal under subsection (13) as it applies to the powers of the Court of Appeal to give leave to appeal under Part II of that Law.

(15) The Royal Court sitting as a Full Court may by Order make rules for the purposes of appeals and applications under this section, and such rules may modify any provision of this section and may be amended or repealed by subsequent rules hereunder.]

The MAAC

6. The relevant parts of the MAAC are:

Chapter 1 – Scope of the Convention
Article 1: Object of the Convention and persons covered

1. The Parties shall, subject to the provisions of Chapter IV, provide administrative assistance to each other in tax matters. Such assistance may involve, where appropriate, measures taken by judicial bodies.

2. Such administrative assistance shall comprise:
a) exchange of information, including simultaneous tax examinations and participation in tax examinations abroad;
b) assistance in recovery, including measures of conservancy; and
c) service of documents.

[NB The application of Article 1 of the MAAC is modified in Guernsey's case with the result that the administrative assistance Guernsey has committed to under the MAAC is restricted to *"the exchange of information, including simultaneous tax examinations and participation in tax examinations abroad*"].

Chapter III – Forms of assistance
Section I – Exchange of Information
Article 4 – General provisions

1. 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.

2. Deleted

3. Any Party may, by a declaration addressed to one of the Depositaries, indicate that, according to its internal legislation, its authorities may inform its resident or national before transmitting information concerning him, in conformity with Articles 5 and 7.

Article 5 – Exchange of Information on request

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.

Ground 1 of A's submissions

7. As mentioned in paragraph 3 above, this is the question as to whether the information requested in the Notices is *"foreseeably relevant*". It is accepted that R has to form a view in accordance with normal principles, i.e. *"Wednesbury rational",* following a "*Tameside duty of investigation*". R submits that a detailed investigation of the underlying tax matters in Sweden is not required. Also R is entitled to assume that the requesting authority is behaving lawfully. The case of Kotton v First-Tier Tribunal (Tax Chamber) and Another [2019] EWHC 1327 (Admin), which is item 5 in R's first bundle, is relied upon. There the (Swedish) Claimant argued that a Notice issued by HMRC by way of assistance to the STA was not "*reasonably required*" by the STA to assess if he was resident in Sweden for tax purposes, so that there was no power to approve or issue it (hence the First-Tier Tribunal had no power to approve the Notice). The similarities to the present case are apparent. Simler J held that :

> *"60. Secondly, the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are "reasonably required" for the purpose of "checking" the tax position of the taxpayer. It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. That is unsurprising given that the scheme is directed at an early investigatory state and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued. As the Court of Appeal observed in Derrin Brothers."*
>
> *"68…it is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory state it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them."*
>
> *Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to be the lawfulness of the investigation,*

but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax.

61. Nor is it necessary (as Mr Simpson submits) as a precondition for giving a third party notice to show that a positive liability to tax will arise or that liability will arise in a particular way. A valid investigation may result in no tax charge at all.

62. Thirdly and for the same reasons, the question for the FTT in relation to the information and documents sought by a third party notice is also expressly limited: the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of notice conditional on the tax investigation itself being reasonably required."

These observations were expressly approved in Kandore Ltd and others v Revenue and Customs Commission [2021] EWCA Civ 1082, at paragraph 72, by Singh LJ: which is item 6 in R's first bundle, as well as in Lundberg v First-Tier Tribunal (Tax Chamber) and others [2022] EWHC 566 (Admin) (item 7), another Swedish dispute. Linden J referred to Simler J's observations as being explained "*in a characteristically lucid way".*

8. The Lundberg case is also useful in dealing with other issues. There the taxpayer's "*central point*" was that the STA decided earlier that he had unlimited tax liability, so the information sought in the Notice was not needed. Linden J dealt with this in the following way:

> "*47. In my judgment, the answer to the claimant's central point is as follows. On the evidence from the STA, there clearly was at all material times an ongoing investigation into the claimant's tax position. It was not the case that that investigation had concluded, still less that any issues which the claimant may have had in relation to the STA's views on unlimited liability had been resolved. Nor was it the case that the STA's view on the substantial connection ground was accepted by the claimant or that his obligations to the STA had been finally determined or agreed.*
>
> *48. The particular issue which was being investigated, and to which the disputed information is relevant, was indeed the question whether the claimant was resident in Sweden during the relevant period, although, of course, it may also have been relevant to this connections with Sweden for the purposes of the third potential criterion for tax residency which I have referred to above. I also note that there is no real dispute that the information sought is rationally connected to the question of the claimant's residence during the relevant period.*

49. On analysis, the true nature of the claimant's complaint is therefore not that there is no investigation or enquiry or that the investigation has come to an end. It is that the investigation which, on the evidence, is being carried out is not reasonably required and is unjustified because the STA has already decided that the claimant has unlimited liability. It therefore need not investigate further, still less investigate other bases on which the claimant may be liable or seek other information which may lend support its view that he is liable. However, on the authorities including Kotton, such a complaint is not open to him given that the question whether the STA should still be investigating or should be investigating where he was resident at the relevant time is not a matter for the HMRC or the FTT. He does not suggest that such an enquiry would be in bad faith and nor is there any evidence in this case to support a contention that the STA's enquiries are anything other than genuine and legitimate in the relevant sense."

This approach was followed in the Guernsey case of A Taxpayer v The Director of Income Tax 2019 GLR 22 (R's item 8). The Deputy Bailiff made it clear that R *"is not required to engage in anything approaching a mini-trial in order to be satisfied that foreseeable relevance is made out*" and furthermore the decision-maker "*can assume the correctness of what he is told and is under no obligation to ask the ITA to produce the material on which the information in the request made is based.*" (paragraph 114, item 8). In his helpful oral submissions, Advocate Edwards accepted that a mini-trial by R was not required, but the other considerations remain.

9. In paragraphs 43 – 45 of A's skeleton there is reference to the Tameside "*duty of investigation*" mentioned in paragraph 7 above. The case of Secretary of State for Education and Science v Tameside Borough Council [1977] AC 104 (A's Tab 12) is noticeable for the principles enunciated in Lord Diplock's speech at 1065 B. As A's skeleton at paragraph 44 – 45 puts it, there are three aspects to consider which are of general application "*to all relevant decision-makers and a necessary condition for a decision to be characterised as lawful*" (R (RP) v Brent London Borough Council [2011] EWHC 3251 (Admin), found at A's Tab 16). The principles and their application were enunciated by Underhill LJ in R (Balajigari) v Home Secretary [2019] EWCA Civ 673 (R's item 8) at paragraph 70:

> "*The general principles on the Tameside duty were summarised by Haddon-Cave J in R (Plantagenet Alliance Ltd v Secretary of State for Justice [2015] 3 All ER 261, paras 99-100. In that passage, having referred to the speech of Lord Diplock in Tameside, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to Wednesbury challenge (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see R (Khatun) v Newham London Borough Council [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision.*

Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

It is the first, second and third principles which are most relevant in the present case. This approach was also endorsed in the case of A (supra). The Deputy Bailiff (at paragraph 46 of his judgment) stated that any enquiry in Guernsey *"into whether in fact the request is foreseeable to the requesting Country's tax administration or enforcement of tax collection is likely to be of limited compass."* He added that the Director 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."* R's skeleton (paragraph 38) referred to the case of Comptroller of Income Tax v BKW and others [2013] SGHC 205 (item 12), a Singapore case dealing with the disclosure of information to the Indian Revenue under the income tax legislation and in accordance with an Exchange of Information Agreement between the two countries. Andrew Ang J referred to the " *internationally agreed standard*" reflected in the legislation, and at paragraph [13] of his judgment held that the requested information must be foreseeably relevant for carrying out the provisions of the agreement "*or to the administration or enforcement of the requesting State's domestic tax laws"*. This standard of foreseeable relevance "*only requires a reasonable possibility that the information may be relevant at the time a request is made. Whether the information once provided actually proves to be relevant is immaterial."*

10. This leads on to the proposition made by A that section 75C of the Law may require R to " *interrogate the assertions made by the requesting state, in order to make a decision as to whether or not the request is compliant"* (paragraph 38 of A's skeleton). At A's paragraph 46 three cases are referred to, which need to be examined and assessed:

    (i) MH Investments v CITIA [2013] 16 ITLR 274 (A's Tab 18). The Grand Court of the Cayman Islands quashed a decision of the Cayman Islands Tax Information Authority to supply information to the Australian Tax Office. The Tameside principle (supra) applied. The reasons for the decisions show a number of significant errors by the Cayman Authority. The first was that the tax information agreement with Australia only related to events from 1st July 2010. The request referred to taxable periods before that date and information had therefore be unlawfully supplied. The necessary consent of the Grand Court before responding to some of the requests had not been obtained. Lastly, the legislation reflecting the agreement provided for notice to be given to the taxpayers concerned, and a right to go to court. This had not been done.

Unsurprisingly (as it could be suggested that any one of these errors would suffice on its own) the decision of the Cayman Authority were quashed;

(ii) Comptroller of Income Tax v AZP [2012] SGHC 112 (A's Tab 19). The Singapore High Court dismissed an application by the Comptroller on behalf of the Indian Tax Authority to allow the production of records from two Singapore companies` bank accounts; the only nexus between the Indian taxpayer under investigation and the companies was unsigned transfer instructions which the Indian Authorities considered demonstrated a link between the Indian taxpayer and the bank accounts. The judge decided that the evidence was inadequate to demonstrate that the accounts were linked to the individual under investigation. This was without prejudice to the possibility of a further application with more complete evidence. The requirement of "*foreseeable relevance*" had not been met. "*Clear and specific evidence"* was needed to prevent unwarranted disclosure.

(iii) APEF Management Company 5 Limited v Comptroller of Taxes [2013] JRC 272 (A's Tab 8). This was a case where the Royal Court of Jersey set aside two notices, which had been issued pursuant to a request from the French Tax Authorities, which suggested that the taxpayer had transferred shares to a Jersey holding company for no value. After the issue of the Notice, evidence showed that the transfer had been for a value, and that the transactions had been fully disclosed. As the Commissioner said, at paragraph 73…

> *"This information, in our view, remains in its entirety the formulation upon which the French Tax Authorities had, on the face of their request based their suspicion and give as the reason for the request."*

These cases are all good illustrations of the principle that each case depends on its own facts. In (ii) the evidence was inadequate but there was opportunity to remedy it later on; In (iii) the whole basis of the request was nullified. If anything, these cases demonstrate the range of mistakes and inadequacies that can vitiate a request, and, it is hardly surprising what conclusions these three different Courts came to. The question is what ensued with the Guernsey authorities in the present case.

11. A referred in some detail to the Jersey case, involving Mr Pråhl, who is, it appears, assiduous in protecting his affairs from the Swedish authorities. This is Pråhl and Triton Administration (Jersey) Ltd v the Office of the Controller of Revenue [2022] JRC 061 (A's Tab 9), particularly paragraph 45 of Sir Michael Burt's judgment onwards. There is, submitted Advocate Edwards, a duty on R to ask the right questions (emphasis supplied). In this case, the wrong answer was also supplied by the Jersey authorities. It was hinted, incorrectly, that the STA "had proposed some form of settlement". The right question that should have (on the facts) been asked, was nothing to do with a settlement, but whether they were re–considering Mr Pråhl's tax residence. As paragraph 49 concludes " *The JCA never asked the right question and therefore it never got a focused answer to that question in response*." Paragraph 50 states:

> *" It was, or should been, immediately apparent that the JCA may have been acting upon out of date information. It was duty of the JCA to establish whether this was so, or whether the information upon which it had relied hitherto was still accurate."*

Advocate Edwards went further in both his written and oral submissions. His point is encapsulated in paragraph 55(b) of his skeleton. It is suggested that in this case the Swedish authorities "*gave separate consideration to the question of residency*". They had issued a draft decision concerning this question and later confirmed that this was being reconsidered after further information had been supplied by the taxpayer. It has always been R's position in arguing the present case that "*residence cannot….be determined separately".* R understands, as a matter of Swedish law "*that there is no separate and anterior stage at which the STA makes a preliminary determination of whether a person is tax resident in Sweden, before going on to decide whether to issue a tax assessment, and (if so) what the quantum of that assessment should be."* (R's skeleton paragraph 43), Advocate Grainge, orally and in writing, referred to there being a "*misunderstanding*" here. In the Jersey case there was out of date information, but not in this present case. It was strongly emphasised that under Swedish law the matter of residence cannot be determined separately and this is only done upon the issue of the Final Assessment (see paragraph 48 of R's skeleton). It was submitted that the present case is very different from the facts before Sir Michael Burt; "*here the issues had been followed-up on residence*". Hence R is doing everything required under section 75C(2) of the Law. The Court was taken to part of the comprehensive affidavit of Alexis Morgan, an officer of the Guernsey Revenue Service (R's second bundle paragraphs 93 – 95). The facts that are set-out show that R has liaised fully with the Swedish authorities and made full efforts, it was suggested, to obtain the relevant information. Advocate Grainge further submitted that the questions were asked and answered. Advocate Edwards submitted that the request for documents in the circumstances cannot meet the requirements of "*reasonable relevance*". A's skeleton at paragraph 58 states that this cannot be a proper and lawful exercise of R's powers to accede to the STA's request, when the STA wishes to obtain evidence by compulsion "*without needing to make a decision on residency at all".*

12. It is helpful to consider the relevant passages of the affidavit referred to above. They, it is submitted by R, explain the "*misunderstanding*" in the present case:

> *93. The Appellants suggest that the STA issued a "Draft Decision" concerning the question of residency and that it was later confirmed in a letter dated 22 December 2020 that the Draft Decision was being reconsidered following the provision of further information by the taxpayer, Mr. Pråhl. In their letter of 2 August 2022, Swedish Competent Authority explained to me that in November 2020 a "partial proposal for tax decision" for the period 2015 to 2018 inclusive was given to Mr Pråhl. Although at this stage Mr Pråhl had informed the STA he had paid tax in the UK, he had only provided a summary statement and so the STA were unable to see what income he had paid tax on, and on what basis. The proposed partial decision therefore only included salary from Mr Pråhl's Jersey companies and dividends on Swedish shares. Mr Pråhl was presented with an opportunity to comment on this proposal. In his response document of December 2020, he chose only to comment on the residency aspect of the*

proposed assessment. The Court is referred to the Clarification letter from the Swedish Competent Authority dated 2 August 2022 (specifically pages 739 to 741).

94. *As I explained to Mourants in my letter to Chris Edwards dated 23 November 2022 (pages 57 to 71 of EF2, particularly page 59 and 60):*

"The misunderstanding seems to come from the reliance on a comment from a translated STA letter dated 22 December 2020, included in your email dated 24 July 2022, which stated:

"Your clients seem to believe this indicates the STA are yet to make a determination on the Taxpayer's residency and have assumed it is an acknowledgement that the STA "need to consider matters afresh".

Unfortunately your clients are incorrect in their understanding. It appears your client have misunderstood the reference to "decision". This refers to a future, final assessment determination, i.e. the final assessment which would be generated when the STA believed they had all of the income information and at which point they would simultaneously consider the Taxpayer's representations on his residency before the decision of final determination. This is supported by the STA letter of 14 October 2021, which detailed:

"Where there is a dispute about tax residence, Skatteverket [STA] only issue a determination of tax liability which includes a determination of tax residence."

As a further explanation, I would again refer you to my letter of 9 June 2022, where I explained that a draft decision ("the proposed assessment") is first issued and comment from the Taxpayer may be made. This was the Förslag till beslut dated 4 November 2020, provided at Appendix 45 of the Taxpayer's December response, and the Taxpayer has duly provided his response, albeit elected only to respond on the residency element and appears to have chosen not to respond to aspects of the draft decision at sections 2, 3 and 4 which related to sources of income the STA had already established.

A translation of the Förslag till beslut was not provided in your pack and so, in the event that your clients are not aware of its contents, the Draft decision explains the basis for the tax liability in Sweden for the tax years 2015 to 2018 inclusive. The decision (at the section Motivering "Justification") translates to show the STA acknowledge this is not a full determination: "This proposed decision is limited to the income you declared in Jersey and dividends on Alimak Group AB and Ambea AB. The investigation of your other income continuous" (my emphasis).

This clearly reflects that the STA's acknowledgement that more information is required regarding the worldwide income (i.e. the information requested under these MAAC requests) prior to the final determination being made.

A translation of this standardised cover sheet accompanying draft Decision is provided attached to this letter, but the process as I understand it, is as follows: The next step will be to issue a final decision (the assessment, and the "decision" to which the email of 22 December 2020, referenced above, referred). As residency and

assessment cannot be made separately, this will include the residency aspect of the enquiries.

Logically, the STA will not be in a position to issue the final decision until such time they are content they have all of the relevant information of the Taxpayer's worldwide income. This would include information that has been requested under any MAAC requests. It would appear from comments at paragraph 34 of [2022] JRC061 that the Taxpayer's tax representatives have been informed that no new draft decision would be made in 2021. Further supporting that, a draft decision including the worldwide income and then a final decision (assessment) cannot be made until this additional information has been received.

In conclusion, it is not correct that the disputed residency in any way compromises the validity of the Notices issued under section 75B of the Law or the underlying MAAC requests. It is not possible to issue a separate determination of residency under Swedish Tax Law and therefore it is not an isolated, outstanding matter to be resolved prior to issue of Final Assessments in Sweden."

95. As my letter contained an explanation of another jurisdiction's administrative processes, a draft copy of this 23 November 2022 letter was provided to the Swedish Competent Authority to ensure I was accurately representing both the general STA procedures and specific situation with Mr Pråhl's assessments for 2017 and 2018. The Swedish Competent Authority had provided comment and feedback to this draft on 16 November 2022, so I am satisfied that my understanding as expressed in the 23 November 2022 letter, and specifically the excerpt above, is an accurate reflection of the STA's procedures generally and position and investigation into Mr Pråhl's liabilities for the relevant period.

13. In addition there is a letter (pages 826 – 827 in R's second bundle) from the Swedish authorities, dated 15 December 2022, in response to a request for clarification from R. Two parts of it are highly relevant to consideration of the first Ground of A's submissions:

> "*The Swedish investigators in the underlying Swedish investigation…..confirm that they have not made any promise to establish residency first before moving to liabilities…..(The Swedish Tax Agency) does not issue a separate determination of tax residence and has no legal grounds for doing so."*

And:

> *"It follows from the Swedish determination of residence procedure….that if there is no taxable income, there will be no determination of tax residency in Sweden. It is therefore foreseeably relevant for the Swedish tax investigation to request further information from Guernsey about other things than the tax residency, e.g. about income before the tax residency is formally determined in Sweden."*

There seems to be, accordingly, a real difference between the present set of circumstances and the 2022 Jersey Triton case. That case rightly belongs with three cases referred to in paragraph 10 above – the authorities made significant errors in those

cases and, unfortunately, the Jersey authorities did the same (relying on out of date information) in the 2022 case.

14. R has fulfilled her Tameside duty as explained in the Balajigari case, referred to in paragraph 9 above. A perusal of the large volume of correspondence between R and the Swedish authorities in R's second bundle, shows detailed questions being posed and lengthy responses to them. Indeed, the matter has taken-up a considerable amount of time and effort before coming to this hearing. Hence R's observation (paragraph 40 of the skeleton) that the Director asked herself the right questions and carried out "*adequate enquiries*" to satisfy herself on the issue of foreseeable relevance is correct. The picture can be obtained from Alexis Morgan's affidavit and the accompanying documents. This is, when the merits are considered, far from removed from a fishing expedition. It is also noteworthy that Alexis Morgan at paragraph 56 of her affidavit states " *I would note that the level of detail the Swedish Competent Authority provided in this and other responses went far beyond the Standard for the exchange of information on request……"* In relation to the issue of "foreseeable relevance", the whole of paragraph 88 can be cited:

> *88. I am satisfied that the information requested is foreseeably relevant to administration or enforcement of Swedish tax law. This was satisfied in the context of the original Requests and, when the Trustees (and taxpayer at certain points) have disputed this, the SCA have provided extensive information that has exceeded the requirements of the Standard but has assisted in supporting my determination that the Requests were and continued to be in conformity with the provisions of the MAAC. Therefore, it is my view as a Delegated Competent Authority that the February Notices were properly and lawfully issued.*

Having considered the submissions of counsel and the relevant documentation, the explanations provided on behalf of R and the cases lead to the conclusion the information requested was plainly foreseeably relevant, and A fails on that Ground.

Ground 2 of A's submissions

15. This concerns the proportionality of the scope of the requests made in the Notices. In A's second bundle at Tab 10 the Jersey case of Imperium Trustees (Jersey) Limited v The Office of the Comptroller of Revenue [2022] JRC 300, is provided. This applied the test on proportionality described by Lord Sumption in Bank Mellot v HM Treasury [2013] UKSC 39 and previously applied in Jersey by Commissioner Beloff in Larsen v Comptroller of Taxes [2015] (2) JLR 209, Lord Sumption's observations were as follows:

> *"The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap….Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the*

consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

A submits these requirements are not met. Ground 2 can be summarised as posing the question of scope and proportionality, as indicated. Looking at each of the different points raised by A:

(i) A complains that proportionality has been raised with R, who has failed to engage meaningfully on this. Paragraphs 51 and 52 of A's skeleton set this out and Advocate Edwards dealt with it in his oral submissions. It is submitted that the Notices go beyond reasonable bounds "*and stray into the territory of a fishing expedition*". This was raised on behalf of the Trusts with R, "*who has failed to meaningfully engage with the points raised*", and although some wording has been changed, the scope of the Notices remains "*disproportionate".* R has, on a reasonable view of the facts, engaged with the concerns. Alexis Morgan's long letter to Advocate Edwards of 23 November 2022 (pages 57 – 60 in A's second bundle) is an extensive response. R draws particular attention to pages 67 – 68. The gist of there is that the STA, in order to discharge their task, need to obtain "*information about the Taxpayer's assets and income, the underlying agreements to ascertain the liability and the quantum of that liability*", and the STA *"need to establish income from all sources".* The information requested "is *foreseeably relevant to the tax affairs of the Taxpayer*". It is pointed out that the residency "*cannot be determined in isolation*" (emphasis in original). The letter goes on to say that as the Taxpayer has informed the STA that he is the Settlor, Protector and Beneficiary of the trusts, documentation on the value of the assets and any income *generated " is foreseeably relevant to establishing the worldwide income of the Taxpayer".* This may not be the answer wished for by A, but it is hard to see how there is a lack of meaningful engagement;

(ii) a paragraph 67 of A's skeleton it is alleged that the Notices contain requests for information not related to assisting the STA on the question of the Taxpayer's residence "*but instead seek wide-ranging information about the Taxpayer's financial affairs in Guernsey*." So the contents of these Notices "*are not rationally connected to the purpose to which the Director proports they have been issued for*." R replies by suggesting that, as in Ground 1, this is based on a misunderstanding as to the STA's decision-making process. As set-out above, "*there is no separate and anterior stage at which the STA makes a preliminary determination as to whether a person is resident in Sweden before going on to issue a tax assessment."* The STA in their letter of 15 December, 2022 stated that "*The requested information on income is foreseeably relevant and absolutely necessary for tax assessment 2017 and 2018 of Mr Pråhl in Sweden."* (letter as pages 826 – 827 of R's second bundle). (The letter also states that "*if there is no taxable income there will be no determination of tax residency in Sweden*"). As Advocate Grainge put in an oral argument, the questions have to be wide. The history of the case, incidentally, shows that R has not been a rubber stamp for the Swedish authorities. Reference has already been made to the dialogue between R and the STA and requests for the clarification. R draws

attention to paragraph 35 of Alexis Morgan's affidavit, where part of the request was refused on behalf of R, as it "*would not be foreseeably relevant to the affairs of Mr Pråhl."* The material in question would only have given the fees of an earlier Trust Company who had acted, and not any details of Trust income.

(iii) A also complains about the following paragraphs in the Notices:

a. Paragraphs 4 and 5
Copies of any guidance or instructions in effect during the period from any person to the Trustee relating to the affairs of the Trust. This includes, but is not limited to, those from the Settlor of the trust, those related to Mr Pråhl (or any person acting on his behalf) as Settlor or beneficiary of the Trust, or those related to the companies owned or controlled by him (paragraph 4 of the Notices);

Copies of any guidance or instructions from any person to the Trustees that had effect in the period relating to the assets of the Trust and their management, investment, and distribution of assets, or capital or income arising in the Trust (paragraph 5 of the Notices).

b. Paragraphs 2, 6 and 7
All documents showing the income of, or payments to the Trust (including dividends, proceeds or return on assets held by the Trust and documents showing any other payments to the Trust e.g. loans from companies held for the trust) (paragraph 2);
Copies of any Trusts accounts/statements covering the period, or part of the Period (paragraph 6);
Details of all assets that were held in the Trust since and including the original settlement of 10 GBP. To include:

a) description of assets;
b) who made the contributions;
c) the date of settlement or the acquisition of the Trustee of each asset;
d) method of acquisition and supporting documents (contracts, funding etc);
e) value of the assets;
f) any documents or correspondence confirming its fair market value or fair acquisition cost where different; and
g) where the assets consist of shares in companies, confirmation of how much of the share capital and votes were held. I require an explanation of how much of the share capital and votes were owned, respectively.

If persons other than Mr Pråhl (or any person acting on his behalf) or companies other than those owned or controlled by him are mentioned in documents, their names can be redacted (paragraph 7).

c. Paragraph 3
Copies of all correspondence (including but not limited to letters, memos, emails, notes of telephone discussions or instructions) in any form which refer to or contain details of Mr Pråhl and/or the companies owned or controlled by him.

The essence of A's concerns is that, in respect of paragraphs 4 and 5, the request relates to the terms on which the taxed assets are managed, but it is unclear "*how this is relevant to the Taxpayer's residence, or indeed, liability for taxation in Sweden".* (A's paragraph 64). In respect of paragraph 2, 6 and 7 A submits that these paragraphs refer to payments being made into, and assets held by the Trusts, *"and are not relevant to the determination of income of the Taxpayer".* (paragraph 65). R's response is found in Alexis Morgan's letter of 23 November, 2022 (pages 67 and 68 of A's second bundle):

> *"(2) There is no legal recognition of Trusts in Sweden and therefore it is my understanding that the Trust would be classified transparent for tax purpose. Therefore, the entire income of the Trust (and the rest of the information requested regarding the respective trusts including aspects of their control such as the instructions of management and the control of assets) are foreseeably relevant to the tax liabilities of the individual.*
> *(3) Requesting copies of the financial accounts of the Trusts is not disproportionate for the reasons above. As specified in the Notice, the Taxpayer has informed the STA that he is the settlor, Protector and Beneficiary of the Trust and so documentation which details the value of the assets in the trust and the income generated is foreseeably relevant to establishing worldwide income of the Taxpayer.*
> *(4) Under their obligations of the Income Tax (Approved International Agreements) (Implementation) (Common Reporting Standard) Regulations, 2015, the Trustees of the Trusts should be aware of the OECD published guidance to the CRS and the accompanying FAQ "Definitions" at Section VIII> C.11 and the explanation on the meaning of as "indirect distribution" and how those payments may be considered of benefit to the Taxpayer including those payments made to a third party….."*

There is then, it should be noted, no law of trusts in Sweden. There is an analogist concept called *"stiftelse"*, which is narrowly defined. If the criteria not met, as here, then the Settlor is considered to be the legal owner of the Trusts` assets and liable to tax on any income or gains. So that:

> *"If the assets of a foreign trust are not to be considered to be separate from the Settlor's assets, the Settlor is treated as the owner of the assets for tax purposes. In such cases the Settlor is taxed in accordance with the tax laws applicable to persons taxable in Sweden."*
> (STA's letter of 16 November, 2022, pages 788 – 790 of R's second bundle).

In addition to the STA's letter sets out why "wide" questions are requested in the Notices. Broadly, "*The Documents are requested in order to classify the Trust and to establish the*

taxable income of Mr Pråhl." At page 742 onwards, details are given as to why the documents are sought. These include details of the Settlor, any changes in the Trust Deed since the original, Beneficiaries, Trust income, guidance or instruction to the Trustees relating to the affairs of the Trusts and the Trust's assets, and payments made by the Trustees to Mr Pråhl, directly or indirectly, etc. The STA in summary, and as already explained, wish to establish the worldwide income of Mr Pråhl. These extensive enquiries are foreseeably relevant to achieving that task, and R's submissions here are correct. A's submissions to the effect that this is "*far too wide*" and there is no nexus with tax liability are not in accordance with the information provided in detail, by the STA. It is not apposite for anyone in Guernsey to seek to reconfigure Swedish tax legislation for their own purposes;

> (iv) paragraph 66 of A's skeleton refers to the broad nature of one of the requests. It is suggested that "*this is unlikely to be workable*" due to the "*challenge associated with finding a reliable way to ascertain all responsive documents*". The offending passage reads:
> *Copies of all correspondence (including but not limited to letters, memos, emails, notes of telephone discussions or instructions) in any form which may refer to or contain details of Mr Pråhl and/or the companies owned or controlled by him.*

16. The length and breadth of the request has already been referred to at (iii) above and page 742 onwards of R's second bundle explains the STA's reasons for this amount of information, in particular the degree and level of control is important in relation to Mr Pråhl's status as Settlor and Beneficiary. R also makes the point that the requirement only extends to documents that are in " *power or possession*" of the person holding information. The Guernsey Financial Services Commission (unsurprisingly) requires anti-money laundering and other obligations, and A will be aware of the need for due-diligence. Advocate Edwards suggested in oral argument that R might just as well have said "*give us everything"*. R's rejoinder is to the effect that reference can be made to the OECD Model Agreement on Exchange of Information in Tax Matters ("OECD Model TIEA") and the Bailiwick is committed to implement the principles contained in it ("the Standard"). This is referred to in paragraph 9 of Alexis Morgan's affidavit, and the OECD Model TIEA is exhibited to her affidavit at pages 79-110. The Standard is also contained in Article 26 of the OECD Model Tax Convention on Income and Capital ("the OECD Model DTA") and at pages 111-128 of the exhibits the update to Article 26, as approved by the OECD Council in 2012 is produced. It is emphasised that Guernsey is bound by this, as a member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes. The commentary to Article 26 (with the update in bold letters) reads as follows:

> *Paragraph 1*
>
> *"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 a 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."***

17. R draws attention to the words: "*The Standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent*" and "*whether the information, once provided, actually proves to be relevant is immaterial*." Also R draws attention (paragraphs 70-77 of the skeleton) to the record-keeping obligations of A, as well as the need for the Trustees to meet their fiduciary responsibilities and produce the relevant information. R`s submissions are correct. The response to the request falls within the scope of international obligations to which Guernsey is subject. In this case not only (of course) are the particular facts very important to those concerned, but so is the wider consideration that the Bailiwick should respond fully and properly from requests from other jurisdictions, which are sound in law, in accordance with binding international agreements. The facts in the present case, particularly having regard to the detail carefully provided on behalf of the Swedish authorities, show that this is far removed, as stated above, from some sort of fishing expedition.

Conclusions

18. The cases cited, which show courts unresponsive to various disclosure applications, are all explicable, as has been mentioned, by errors on the part of authorities of the jurisdictions receiving the requests. The present case is different. There is, also as has been mentioned, a considerable degree of correspondence between R and the Swedish authorities, and information in great detail has been provided. These communications also show, as had been made apparent, that R has not acted as a rubber-stamp. A, despite energetic efforts to avoid what he doubtless deems to be the prying eyes of the STA, must

take the domestic law on residence and assessments as he finds it. Advocate Edwards has enviable experience and expertise in administrative law appeals and Judicial Review in Guernsey, and his typically well-crafted submissions have resulted in a pretty minute examination of the circumstances in the present case – but nevertheless it is considered that R's actions are lawful and proportionate and survive his critical examination. Going back to what can perhaps be considered as first principles, the Kotton case (supra) and the clear observations of Simler J (see paragraph 7 above) cover the present matter. As Simler J observed at paragraph 68 of her judgment:

> *"Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient."*

Accordingly, after careful consideration of the submissions put forward on behalf of A, R's response is correct and prevails on the facts shown.

Decisions

19. As intimated in paragraph 2 above the test to apply is that given by the Guernsey Court of Appeal in the Chick case (supra). Does A's appeal have "real prospects of success"? This formulation is accepted by the parties, and in any event binds the Royal Court. It seems to be a higher hurdle to get over than that required for Judicial Review, which (to cut a very long story short) can essentially be described as having an "arguable" case. On the conclusions reached, the case put forward on behalf of A does not have a "real prospect of success". Leave is therefore refused, as required by section 75K(4) of the Law. Thus, under section 75K (10) of the Law the Notices are confirmed in whole. Had leave been forthcoming the decision and reasons would be the same.

Costs

20. These will be dealt with on any written representations which the parties submit, within 14 days of the date the judgment being issued in final form.

Afterward

21. Both counsel are to be commended for their helpful and clear submissions, written and oral. These facilitated the process of coming to a decision in this case.

J R Finch, O.B.E.,
Lieutenant Bailiff

Dated: 8th August, 2023