

JERSEY / JUDGMENT

Larsen and Volaw [2015]

JRC 104 (14 May 2015)

[2015] JRC 104

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judgment

the commissioner: 1. There was before me on 13 th April, 2015, a summons for directions in the first two of the above listed cases. Fiduciana did not issue a summons and attended by reason of a direction of the Bailiff on 26 th February , 2015. The matters were heard together because of the similarity of the issues raised in both cases, which I shall call respectively the Volaw and Larsen proceedings and the Fiduciana proceedings. All concern notices from the Comptroller of Taxes("the Comptroller") requiring the provision of certain documentation to foreign tax authorities pursuant to the provisions of the Taxation (Exchange of Information with Third Countries) Regulations as amended in 2013 ("the 2008 Regulations as amended") purported to be made under the Taxation (Implementation)(Jersey) Law 2004 ("the 2004 Law") Article 2. In all there has been a challenge made by way of judicial review not only to the notices, but to the validity of the 2013 amendments to the Regulations themselves. In all leave to apply for judicial review has been granted. Since the main issue raised in the summons is of some general importance I reserved both my judgment and the reasons for it, but in order to assist the parties and the courts in their arrangements for the substantive hearing, indicated my conclusion in a letter sent to the parties on 16 th April, 2015. 2. I shall deal for convenience with the Volaw and Larsen proceedings first. They are a sequel to Volaw Trust and Corporate Services Limited and Larsen v Comptroller of Taxes

[2012] JRC 133 , a case ("Larsen No. 1") decided by the Court of Appeal under the 2008 Regulations in their then incarnation in which the Applicants made challenges to Notices served on Volaw on 28 th May, 2012, in response to a request made by the Norwegian tax authority ("NTA") pursuant to an agreement made between Jersey and the Kingdom of Norway for the exchange of information relating to tax matters which came into force on 7 th October, 2009, ("J/NTIEA"). These were dismissed by the Royal Court and Court of Appeal (Volaw Trust and Corporate Services Limited and Mr B Larsen-v-Officer of the Comptroller of Taxes

[2013] JCA 239 and Volaw -v-Tax Comptroller

[2013] (2) JLR 499), the Privy Council refusing leave to appeal further. As a result the information sought was provided to the NTA on the basis that it would be used in respect of the affairs of Mr Larsen only. 3. Mr Larsen was, at the time coincident with Larsen No 1, being prosecuted in Norway for tax evasion. On 4 th October, 2013, the District Court in Bergen found him guilty of criminal tax fraud, whose gravity, in its view, was indicated in his sentence of 5 years' imprisonment and a substantial fine ("the Bergen judgment"). Mr Larsen is appealing that judgment. 4. In the Volaw and Larsen proceedings the salient dates are these:- (i) On 27 th August, 2014, the Comptroller received a request from the NTA for information about the affairs of Volaw and 8 other companies (for convenience to be referred hereafter simply as ' Volaw ') pursuant, as before, to the J/NTIEA. (The Comptroller was at that date David Le Cuirot who had been appointed on 1st August, 2013. His deputy Andrew Cousins dealt with the matter on his behalf until his own departure from office on 13 th February, 2015). (ii) On 21 st October, 2014, the Comptroller, after seeking and obtaining clarification and further information from the NTA, issued 9 Notices to Volaw requiring disclosure of documents and records relating to the affairs of Mr Larsen and what were said to be associated corporate entities. (iii) On 7 th November, 2014, Volaw applied for leave to apply for judicial review supported by an affidavit of Mr Mark Healey, a Director of Volaw . (iv) On 18 th November, 2014, Mr Larsen applied for judicial review supported by his own affidavit dated 17 th November, 2014. (v) On 25 th November, 2014, Sir Michael Birt, the then Bailiff, granted Volaw and Mr Larsen leave to apply for judicial review against the Comptroller and the States. (vi) On 13 th February, 2015, Mr Michael de la Haye filed an affidavit on behalf of the States. (vii) On 13 th February, 2015, Mr Andrew Cousins filed an affidavit on behalf of the Comptroller. (viii) On 9 th April, 2015, Mr David Le Cuirot filed an affidavit on his own behalf. These three affidavits ("the three affidavits") in order to be rule-compliant should have been filed by 31 st January, 2015. Despite the opposition of Mr Larsen and Volaw I granted leave to the Respondents to rely upon them in an ex tempore judgment, subsequently edited for clarity, essentially because the delay occasioned no prejudice to them. On the 20 th April, 2015, Mr Cousins filed another affidavit ("Mr Cousins' second affidavit") exhibiting the Letters of Request without conceding any obligation to do so but in an effort to avoid disruption to the timetable indicated in the last paragraph of this judgment. 5. Mr Larsen and Volaw rely upon a variety of grounds in seeking to quash the Notice and to obtain a declaration that the Comptroller has no power to transfer any documents received pursuant to the Notices to the NTA. The main contentions are that:- (i) The 2008 Regulations as amended are ultra vires the enabling legislation, i.e. the 2004 Law and/or infringe various human rights enforceable in Jersey under the Human Rights (Jersey) Law 2000 ("the Human Rights Law" and/or the rule of law itself (there is a pithy summary of this contention in Sir Michael Birt's judgment of 25 th November, 2014, para 9). (ii) The Notices themselves are ultra vires those Regulations as imposing, unjustified and disproportionate requirements on Volaw . (iii) Volaw and/or Mr Larsen should have been given, but were not, an opportunity in advance of the services of the Notices to make informed representations as to why the Notices should not be served ("the natural justice

issue"). 6. Sir Michael Birt, in giving leave, (Larsen and Volaw Judicial Review

[2014] JRC 232) did not elaborate on his conclusion that "there is sufficient in the grounds to justify the granting of leave to apply for judicial review on all the grounds set out in the application" (paragraph 5 see also paragraph 10) though I note that he was not prepared to describe the challenge to the Regulations as amounting to a "strong prima facie case" (paragraph 15). I interpret his decision on sufficiency "in the grounds" to refer to the grounds themselves rather than to every point made in support of those grounds. 7. It is obvious that some of the grounds relied on raise pure points of law. For example, no evidence is required to determine the issue of whether the 2008 Regulations as amended, as a matter of construction, go beyond what is authorised by the 2004 Law, or indeed for the natural justice issue where the relevant facts are common ground. But the same is not true in respect of other grounds, e.g. whether the Regulations are compatible with the Human Rights Law or the Notices compatible with the Regulations. This is the reason why Mr Larsen and Volaw assert that both Respondents should be required to put all their cards on the table to explain and justify both Notices and Regulations respectively. 8. The request for full candour and specific disclosure was first raised in a letter from Mourant Ozannes to HM Solicitor General dated 30 th March, 2015, ("The MO letter") which requested documents from both Respondents. As to the Notices it stated, in material part:- "We assume that you are fully conversant with the duty of candour which applies to public authorities in judicial review proceedings. The principles are not controversial there is a very high duty on public authorities who are defendants in proceedings to assist the court with a full and accurate description of all facts relevant in a case and to provide the claimant with all documents and information which might assist the claimant and/or which might give rise to further grounds of challenge. In our view, the affidavits fall far short of meeting this duty. They are materially defective and do not respond to the grounds for judicial review filed on behalf of either Mr Larsen or Volaw Trust & Corporate Services Limited ("Volaw"). We therefore request in the first instance that the Defendants review the evidence which has been provided to date with a view to meeting the duty of candour to which they are subject. In relation to the affidavit of the Deputy Comptroller of Taxes - I interpolate being that of Mr Cousins -, the affidavit fails to exhibit a single document referred to. We consider that, at the very least, the following documents ought to be produced to the Claimants: (a) The nine further requests from the Norwegian competent authority dated 27 August 2014 referred to in paragraph 9; (b) The letter dated 12 September 2014 to the Norwegian competent authority seeking clarity as referred to in paragraph 10; (c) The response to the above dated 30 September 2014 and received on 6 October 2014 as referred to in paragraph 11; (d) All correspondence with the Law Officers' Department as detailed in paragraphs 12 and 13 or otherwise and all advice in respect of the Notices subject to appeal, including, without limitation, that specified in paragraph 17; (e) All further correspondence with the Norwegian competent authority as detailed in paragraphs 13 and 14 or otherwise; (f) All correspondence with any third party, including without limitation, any representative of the States of Jersey, in relation, or relevant, to the

Notices; (g) All internal notes or records of the deliberations, decisions and actions on the part of the Comptroller as detailed in his affidavit; (h) Any further document or note relevant to his decision to issue the Notices; and (i) A detailed explanation as to why he considers the information requested is foreseeably relevant to the administration and enforcement of the laws of Norway and how that is the case, and in respect of which party or parties." As to the Regulations it states (apart from noting the accidental omission of the relevant Hansard transcript, now before the Court):- "In any event, we consider the affidavit of the Greffier of the States to be incomplete and/or inadequate in that it fails to provide any justification or relevant material at all in relation to the 2013 Regulations, beyond the limited material in the public domain and, even in that respect, it is incomplete. We ask for this to be remedied by production of or, as appropriate, responses to, the following: (a) Provision of a copy of the Chief Minister's briefing paper to States members, and copies of the minutes of the Chief Minister's briefing meeting prior to the public sitting of the States of Jersey; (b) Copies of the evidence referred to in the report contained in the proposition to the 2013 Regulations, namely proposition P.132/2013 (the "Proposition") that the previous regulations had a "number of shortcomings that need to be addressed"; (c) An explanation as to how the 2013 Regulations addressed the identified shortcomings; (d) Full disclosure of material in relation to the 2013 Regulations in connection with the threat by the French to place Jersey on a list of non-co-operative jurisdictions; (e) Details of how the French blacklisting issue was resolved, including particular reference to how the cases referred to in the Proposition as expected to produce "favourable court judgments" were resolved and the impact of those cases on the blacklisting issue; and (f) Copies of any legal advice received in relation to the Regulations". This letter, I should add, is to some extent (but forgivably) obsolete since it preceded the filing of the three affidavits which, as noted already I have allowed to be admitted, and which sought to address the MO letter. I must therefore take those three affidavits into account for the purposes of the summons. 9. The origins of the duty of candour, discussed, inter alia, in Wade and Forsyth Administrative Law 11th edition ("Wade") pp 554-555 are to be found in the judgment of the English Court of Appeal in *R v Lancashire County Council, ex parte Huddleston*

[1986] 2 All ER 941 ("Huddleston") on the much litigated - in that era- subject of the residence qualifications for student grants. It was accepted that the local authority's rejection of the applicant's application for a mandatory award was unimpeachable. What was in issue was the degree of consideration given to whether she should be given a discretionary award. 10. In *Huddleston*, Sir John Donaldson MR observed:- "Although we were assured, and I fully accept, that some consideration was given to the grant of a discretionary award when it was decided that the applicant was not eligible for a mandatory award, there is no outward and visible sign of this in the contemporary correspondence and I am driven to conclude that any such consideration was cursory and inadequate. Mr Heginbotham, the head of the further education award section, reconsidered the application for a discretionary award in January 1985, after these proceedings had been launched, and

referred it to the chairman of the further education sub-committee of the education committee. According to Mr Heginbotham's affidavit: 'Having considered the circumstances of this case and having been informed that local education authorities do not receive reimbursement from central government of 90% of their expenditure under the specific grant arrangements, the said Chairman, on behalf of the County Council, felt that there were no special circumstances to justify him making such an award.' That is the decision which it is sought to quash. I confess that I do not find this reply wholly satisfactory. The only circumstance which is specifically identified is the fact that the cost of making a discretionary grant falls exclusively on the council, whereas mandatory grants attract 90% reimbursement from central government. As counsel for the council readily conceded, if this was regarded by the council as decisive, it would, in effect, be deciding that discretionary grants would only be made in circumstances in which it was inappropriate to do so because the applicant would be entitled to a mandatory grant. This would amount to a refusal to exercise the discretion conferred on the council by Parliament and would be unlawful. However she pointed out that the chairman was said also to have considered 'the circumstances of this case' and this implied that he had considered all the circumstances revealed by the papers." It was in that context that the duty of candour was discussed. 11. Sir John Donaldson continued:- "Counsel for the council also contended that it may be an undesirable practice to give full, or perhaps any, reasons to every applicant who is refused a discretionary grant, if only because this would be likely to lead to endless further arguments without giving the applicant either satisfaction or a grant. So be it. But in my judgment the position is quite different if and when the applicant can satisfy a judge of the public law court that the facts disclosed by her are sufficient to entitle her to apply for judicial review of the decision. Then it becomes the duty of the respondent to make full and fair disclosure." Certainly it is for the Applicant to satisfy the Court of his entitlement to judicial review and it is for the respondent to resist his application if he considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the majority of the cards will start in the authority's hand." 12. Having expatiated on the virtues of reasoned explanations for decisions of public authorities as for judges, and the judges' own awareness of the "realities of public administration", he added:- "The legal, as contrasted with the evidential, burden being on the applicant to establish his entitlement to relief, they are entitled and are very willing to assume that the authority has acted in accordance with law, until the contrary is shown. But authorities assist neither themselves nor the courts, if their response is a blanket assertion of having acted in accordance with law or one which begs the question. If the issue is whether an authority took a particular factor into account, it will be a sufficient response to show that it did. But if the allegation is that a decision is *prima facie* irrational and that there are grounds for inquiring whether something immaterial may have been considered or something material omitted from consideration, it really does not help to assert baldly that all relevant matters and no irrelevant matters were taken into consideration without condescending to mention some at least of the principal factors on which the decision was based." 13. Despite his criticism

of the Council's evidence and his endorsement of the desirability of a fuller explanation of the Council's reasoning process, it is also noteworthy that he ended:- "However, in the absence of such further and more detailed explanation, we have to decide whether on the materials which we have the authority erred in the exercise of its discretion. Although I would have liked more reassurance, I am not satisfied that it did and I would dismiss the appeal." 14. He added then a footnote referring to the judgments of his fellow judges, who concurred in the result, saying:- "Since this judgment was prepared I have had the advantage of reading in draft the judgments of Parker LJ and of Sir George Waller. In the light of those judgments, I would like to express my agreement with Parker LJ that the grant of leave to apply for judicial review does not constitute a licence to fish for new and hitherto unperceived grounds of complaint and with Sir George Waller that the appropriate response by the respondent will depend on the facts of each case which are almost infinitely variable ." 15. In *Huddlestone* , Parker LJ said:- "In the vast majority of cases authorities whose decisions are challenged will no doubt put before the court all that is necessary to enable justice to be done, for I agree that they have, or should have, a common interest with the courts in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected. I agree, therefore, that when challenged they should set out fully what they did and why, so far as is necessary, fully and fairly to meet the challenge. In so doing they will, in my view, be making full and fair disclosure and putting the cards face upwards on the table as referred to by Sir John Donaldson MR. I express my views in a rather more restricted way, for I would not wish it to be thought that once an applicant has obtained leave he is entitled to demand from the authority a detailed account of every step in the process of reaching the challenged decision in the hope that something will be revealed which will enable him to advance some argument which has not previously occurred to him." 16. In *Huddlestone* , Sir George Waller said:- "I do not wish to add anything concerning the reasons which should be given by an authority to justify its decision, because it seems to me that the facts of each case and of each decision vary so much. It is unfortunate if the only reason actually specified is an unattractive one, but if this is simply bad drafting this can be cured if leave is given. The important matter in every case where judicial review is granted is to make clear that all relevant facts have been considered, but this may not always require them all to be specified." 17. In my view the following propositions can be extracted from *Huddlestone* and are confirmed, not modified in any substantial way, in subsequent jurisprudence. See generally Fordham *Judicial Review* 6th edition para 10.4 passim which is replete with qualificatory references to "reasonably required", "proper disclosure" , "so far as necessary" , "adequately" etc , including *Tweed v Parades Commission of Northern Ireland*

[2007] 1 AC 650 ("*Tweed*") which also considered the related topic of disclosure. (See Fordham cit sup para 14.4.) - the more ample the candour the less the need for disclosure). (i) The duty of candour is triggered by the grant of leave or permission which itself demonstrates a judicial view that the application is arguable (see Wade op.cit.p.552). (ii) The core content

of the duty is to "lay before the court all the relevant facts and reasoning underlying the decision under challenge" (Tweed para 54) per Lord Brown in order to "show that they have been considered" (Huddlestone Sir George Waller). (iii) What the duty of candour requires is axiomatically fact specific. Its dimensions will depend upon the facts of any particular case (Huddlestone Sir John Donaldson MR and Sir George Waller). (iv) The respondents explanation and disclosure must be "full and fair" (Huddlestone Sir John Donaldson MR) "so far as is necessary to meet the challenge" . Huddlestone ditto and Parker LJ. But not every fact relied on by the respondent as relevant has to be specified (Huddlestone Sir George Waller). (v) It is pursuant to the duty of candour "ordinarily good practice" for a public authority to exhibit in its evidence any document of "significance to its decision" (Tweed Lord Bingham para 34). The practice may be modified if there are countervailing considerations, eg confidentiality (Wade p.556 fn

- 86) or public interest immunity or legal professional privilege. (vi) The Applicant is not, however, to be indulged as a Mr Micawber figure and granted disclosure (or an order that the Respondent file further evidence on some point) in the hope that something may turn up, or to put it in a less literary but more conventional way, to be given the opportunity for a fishing expedition. (vii) The Respondent will pay the price if it is insufficiently candid by having adverse inferences drawn against it, or by being penalised in costs, or even, in extreme circumstances, by being punished for contempt (Wade pp.554-555). (viii) Disclosure in judicial review is not the same (or as extensive) as disclosure in ordinary civil proceedings. It is required only where "for some substantial reason the application cannot be disposed of fairly without it" (Royal Court Rules 6/17 16/7(5). See too De Smith Woolf Jowell. Judicial Review 7th edition paras 16-070-16-0-71; It is not necessary "to flood the court with needless paper" (Tweed Lord Brown para 56). 18. I start from the necessary premise that the grounds for the application have passed the threshold of arguability . Nonetheless, it is for the Applicants to demonstrate how in what way they can claim to be disadvantaged in advancing any point in support of any particular ground, because of some perceived shortfall in the Respondents compliance with their duty of candour, and such demonstration requires identification of the specific arguable point. 19. Advocate Harvey Hills' submission, attractively advanced though it was, carried within it the seeds of its own destruction. He argued that, absent disclosure of the Letter of Request, it was not possible for Mr Larsen (or Volaw) to know whether the Letter was compliant with the N/JTIEA as required by Regulation 1(1):- "1. Interpretation
- (1) In these Regulations, unless the context otherwise requires -; "request" means a request that is made by the competent authority for a third country under a tax information exchange agreement for tax information regarding a person and that complies with the requirements of that agreement; " Therefore, he continued, it was not possible for Mr Larsen to know whether the issue of the Notices complained of under Regulation 3 was lawful. But it is always for an Applicant to establish that something may have gone wrong. It is insufficient for him to say that I cannot be sure that everything has gone right. I scoured both the affidavits of Mr Larsen and Mr Healey, and the grounds in support of the

application for leave for any viable assertion that the Letter of Request was non-compliant so infecting the rest of the procedure and could find none. 20. There is moreover a note of unreality about any submission that Mr Larsen and Volaw were entirely ignorant of why such request should have emanated from the NTA. There are two themes in the Bergen

judgment.

First, that Mr Larsen was guilty of aggravated tax evasion and breach of trust. Secondly, that companies in the Larsen group in form managed and controlled on Jersey were in fact his creatures. Hence the natural desire of the NTA to see whether those companies -the subject of the nine notices - were resident in Norway for tax purposes and so liable to declare their income- which they have not done-, in breach of Norwegian fiscal and criminal law and whether Mr Larsen himself has provided full information to the NTA about any income he has personally received from those companies. 21. The reasons for the issue of the Notices, against and reflecting this background, are fully and fairly set out in Mr Le Cuirot's affidavit and the exhibits to it, including a detailed analysis of the Bergen judgment and its relevance to the Notices. (I reject the ancillary submission that, notwithstanding that he was head of the Department, he was not competent to testify as to those reasons because Mr Cousins was more directly involved; in any event Mr Cousins' second affidavit entirely scotches the point paragraph 6). It will of course be open to the Applicants to say that the reasons are inadequate or otherwise fail the appropriate legal tests or that the Comptroller should not have relied on the Bergen judgment; but they are not, in my view, able to say that they are not sufficiently apprised of those reasons to advance their challenge. It can and could be no more than surmise on their part that the reasons are other than those asserted by the first Respondent. 22. Although the MO letter ingeniously identifies 23 documents, whose disclosure is said to be required they are all, on analysis, either:- (i) the Letter of Request or its derivatives (a), (b), (c), (e); or (ii) protected by legal privilege (d) (ii); or (iii) not proven to exist at all (f)-(h) or (iv) not a document at all (i). Although the Comptroller as, as I have noted, disclosed the Letter of Request itself, in my view he was not in law obliged to disclose it as fairly required to dispose of the application as formulated, or, applying the same criterion, obliged to disclose any of the other documents, a fortiori in the wake of the voluntary disclosure of the Letter of Request itself. 23. My conclusion is fortified by the decision of the Court of Appeal in *Durant International v AG*

[2006] JLR 112 ("*Durant*"), another mutual assistance case, albeit under a different statutory regime, i.e. the Investigation of Fraud (Jersey) Law 1991 where no Letter of Request was required to trigger co-operation:- Sumption JA for the Court said:- 34. The general principles are not, I think, in doubt. The Attorney General, having invited the appellants to make representations about whether he should disclose information in his possession to the Brazilian authorities, fairness may require him to disclose to the appellants information which they reasonably require in order to respond to that invitation. If the information is confidential to a third party, the public interest in protecting that confidence has to be balanced against the requirements of fairness to the appellants. In drawing that balance, the confidential character of letters of request issued in respect of

current criminal investigations is entitled to substantial weight. International practice is that they are kept confidential (see Jones & Doobay on Extradition & Mutual Assistance, para. 20-057, at 424 (2005)). They commonly contain, or are accompanied by, information about the current state of the investigation. Such information may have an important bearing on the Attorney General's decision whether to supply otherwise confidential financial information in response to the letters and it is clearly desirable that foreign courts and prosecuting authorities should be able to transmit it with proper safeguards against the disclosure of those parts of it which are confidential. Those authorities have a legitimate interest in withholding that material from the parties under investigation until the investigation is complete. They may have a legitimate interest in withholding it for longer if there is, for example, a danger that sources will be compromised or potential witnesses intimidated. Persons under investigation are, in many cases, ruthless and powerful criminals. It has been said by the Divisional Court in England that the court will ordinarily start from the position that the letter of request relating to a current criminal investigation is not a disclosable document, and that disclosure to the person under investigation of information about the nature of the criminal investigation will generally be enough (see Kennedy, L. J.'s judgment in *R. (Evans) v. Serious Fraud Office Director* (8)).

35. However, before one reaches the stage of balancing the competing requirements of disclosure and confidentiality, the appellants must suggest some plausible ground on which it can be said that they may need to see the letters of request in order to make their representations. 24. I draw these propositions from Durant ,which is both authoritative and in so far as applicable, binding upon me:- (i) If an Applicant wishes to see a Letter of Request s/he must suggest some plausible ground on which s/he can say that s/he needs it in fairness to protect his or her interests. (ii) Even if such need can be established, it must be balanced against competing considerations of confidentiality. (iii) The confidential character of Letters of Request in respect of current criminal investigations (including those in the sphere of tax evasion) is well established in international practice for obvious practical policy reasons. (iv) The default position is that such Letters (and by parity of reasoning any communications with the Requesting State) are not disclosable. (See further Article 26 of the OECD Model Convention With Respect To Taxes On Income And Capital Article 26 and the commentary thereon to the same general effect of presumptive confidentiality of Letters of Request). 25. I regard Durant as consistent with and supportive of my decision to reject the application to compel disclosure of the Letter of Request or derivative documents at this interlocutory stage. The decision of the Comptroller voluntarily to disclose it does not mean that he was obliged to do so, but the fact that the Larsen/ Volaw Applicants have now seen it must presumably inform their future approach to these proceedings. 26. The same Applicants referred me to one case which appeared supportive of their position that the letter of request must be a disclosable(and disclosed) document in judicial review (*Minister of Finance v Bunge* , a decision of the Bermuda Court of Appeal Civil Appeal No.4 of). A judgment of even so august a Court is in this jurisdiction of persuasive value only and cannot be preferred to that of the Jersey Court of Appeal in so far

at odds with it. Moreover the legislation there under consideration, the International Cooperation Tax Information Exchange Agreement Act 2005 ("the Bermuda 2005 Act") differs in its language from the 2004 Law and the 2008 Regulations as Amended. It is notable that Counsel for the successful Applicant, Bunge, had argued that the issue in that case was "governed by the terms of the 2005 Act" (para 16). 27. The salient parts of the Bunge

judgement

are:- "The Issue 10. The Application is for "an Order of Mandamus to compel production of the Request that gave rise to the Notice". Bunge's contention is that a notice is only valid under section 5 of the 2005 Act if the Minister requires the information "with respect to a request for assistance by a requesting party", meaning a request made under and in accordance with the relevant Agreement. Therefore, it is submitted, the person on whom the notice is served must know the terms of the request, in order to determine that the information is required "with respect to a request for information" that the Minister has received. And in order to comply with the Agreement, Argentina must have provided to Bermuda the detailed "information" listed in Article 5 paragraph 6 (a) to (h) quoted above. That too is something the recipient of the notice is entitled to know. 11. The Minister disputes that the terms of the request must be disclosed, contending that it is a document received in confidence from the Government of a foreign country, which it is not required to disclose under the terms of the 2005 Act. Moreover, Article 8 of the Agreement imposes a strict duty of confidence on the Government of Bermuda, whose international reputation would be seriously damaged if the confidence was broken."

Discussion 18. Having received a request for information from the Argentine authorities, the Minister is obliged by the Agreement to consider whether the request is made "in conformity with" the Agreement; if it is not, the Minister may decline to assist (Article 7(a)). The task includes considering whether Argentina "when making the request" has provided the "information" that Bermuda was entitled to receive under Article 6. 19. Having decided to obtain information from the Bermuda company, the Minister's powers are defined by the 2005 Act. The Minister may assist Argentina, but only "according to the terms of [the Agreement]" (section 3(2)). Therefore, the Minister was under a statutory obligation in Bermuda to consider whether, as required by Article 7(a) of the Agreement, the request was in conformity with Article 1, and whether Argentina had provided the relevant information required by Article 6. If satisfied, the Minister was permitted to issue a notice in writing requiring information from the Bermuda company "with respect to [the] request for assistance" the Minister had received (section 5 (1) of the 2005 Act). 20. Section 8A of the Act expressly permits judicial review of the Minister's decisions. In our judgment, the conclusion is inescapable that the legislators contemplated that the terms of the request would be made available to the Court for that purpose. Without them, the review could not be carried out. 21. Disclosure to the Court and for the purpose of court proceedings is expressly permitted by Article 8 of the Agreement. Such disclosure therefore does not involve any breach of the Article, and we note that the Argentine authorities in the present case, although they stressed the need for confidentiality in tax matters of this sort, recognised that the obligation is defined in Article 8 (paragraph 14 above). 23. The limits of disclosure in court proceedings are governed by the

discretion of the Court,....." 28. I accept that in Jersey (as in Bermuda under the 2005 Bermuda Act section 8A) judicial review is available to challenge a Notice, albeit with the constraints, themselves challenged, under Regulation 14 on the grounds that a Letter of Request was not in conformity with the relevant TIEA. But with great respect to the Bermuda Court of Appeal I am unpersuaded that accordingly "the conclusion is inescapable that the terms of the request would be made available to the Court for that purpose because without them the review could not be carried out". In my view this would not always be so, and indeed would only be so where there were arguable grounds that the Notice might be flawed in that way and the Letter of Request might establish if this were so or no; and even then the countervailing interest in its non-disclosure set out in Durant would need to be evaluated. The logic of Bunge is that once judicial review is afoot, disclosure of the Letter of Request is automatic even if there is no basis arguably established for questioning its propriety on grounds of such non conformity but merely a desire to see if such basis can be established. I do not consider that such is the law in Jersey. Speculation and unsubstantiated suspicion are not enough to require disclosure; the horse must come before the cart, not vice versa, I note, however, that given the disclosure made, the issue is now moot as far as the present proceedings are concerned. 29. Turning to the request made of the States, the hallmark case is *Wilson v First County Trust Ltd* (No 2)

[2003] UKHL 40 ;

[2004] 1 AC 816 (applied, inter alia, in 2009 EWHC 2336 (Admin), where Lord Nicholls explained how a Court should approach the issue of the compatibility of legislation-primary or delegated-with human rights derived from the ECHR and incorporated into domestic legislation. This in my view, provides apt and authoritative guidance to the Jersey courts:- "60 I now turn to consider whether a challenge to the compatibility of legislation with Convention rights may be a further instance of the innocuous use by courts of statements made in Parliament. 61. The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation. The courts are now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. In carrying out this evaluation the court has to compare the effect of the legislation with the Convention right. If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective which under the Convention may justify a prima facie infringement of the Convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture, as already instanced in the present case regarding the possible availability of a restitutionary remedy. As to the objective of the statute, at one level this will be coincident with its effect. At this level, the object of section 127(3) -I interpolate the reference being to the Consumer Credit Act 1974 under consideration)is to prevent an enforcement order being made when the circumstances specified in that provision apply. But that is not the

relevant level for Convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so. 62. The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force. ... 63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the "proportionality" of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the "mischief") at which the legislation is aimed. This may throw light on the rationale underlying the legislation. 64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be "questioning" proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation. 65. To that limited extent there may be occasion for the courts, when conducting the statutory "compatibility" exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptionable nature of this consequence receives some confirmation from the view expressed in the unanimous report of the parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), p 28, para 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability. 66. I expect that occasions when resort to Hansard is necessary as part of the statutory "compatibility" exercise will seldom arise. Should such an occasion arise the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or

outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions. 67. Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made *ex tempore* in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute." 30. In my view it is clear from the documents disclosed (Proposition P.132/2013) - a Report on the draft 2013 Amendments ("the Report") and the Hansard material that the reason for the 2013 amendment to the 2008 regulations was to reduce the delay in responding to a request under a TIEA; and to achieve this by abbreviating time limits and so reducing the routes of challenge, as well as to bring Jersey legislation into alignment with that of other States involved in the same exercise. The first reason is indeed apparent from a simple comparison of the amended Regulations with the Regulations in their form before those amendments (as well as the Explanatory Note to the former) ;and is confirmed by the documents I have referred to, which also and expressly evidence the second reason (see too the affidavit of Mr de la Haye). The French complaint may have been responsible for the reconsideration of the Regulations in their previous form and the speed with which the amendments (see the Report "this is why there is a need for an urgent response") were introduced, but the amendment stand or fall on their own merits. Once again I emphasise that the applicants are able to advance at the substantive hearing any argument they choose as to whether the reasons for the amendments are rational, disproportionate, human rights non-compliant or otherwise objectionable in point of law. But I do not consider that the duty of candour or the Wilson principles require the States of Jersey to produce more than it has already done in order to enable that challenge to be advanced. Nothing additional is required for fair disposal of the proceedings under this head of challenge. The other documents sought in the MO letter need not accordingly be disclosed. 31. I turn now to *Fiduciana* in which the salient dates are these:- (i) On 21 July

2014 the Indian tax authority ("ITA") requested information under the Agreement between Jersey and India for the Exchange of Information and Assistance in Collection of Taxes (the J/ITIEA) dated 3rd November 2011 in relation to an Indian taxpayer Mr M M Ventkatchalam , a discretionary beneficiary of the Merit Trust. (ii) On 15 January 2015 after seeking and receiving clarification on certain matters and the provision of further information, Mr Cousins sent a notice to JTC Trustees (Fiduciana's predecessors as trustee of the Merit Trust) requiring disclosure of various documentation relating to the Merit Trust. (iii) On 26 February 2015 Fiduciana applied for leave to apply for judicial review supported by an affidavit from Gaana Khomenko, Managing Director of Fiduciana . (iv) On the same date leave to apply was granted by the then Deputy Bailiff. (v) On 20th April 2015 the affidavit in reply by Mr Cousins was submitted on behalf of the Comptroller. (vi) On 22nd April 2015 an affidavit in reply was field by Mr Le Cuirot on his own behalf.

32. The grounds on which leave was sought by Fiduciana were more limited than those in Volaw in terms of specifics but similar to them in terms of generality. They were:- (i) Illegality/ultra vires inasmuch as the Notice required production of documents predating the coming into force of the J/ITIEA. (ii) Procedural unfairness because of the respondents failure to allow Fiduciana to make representations before issuing the Notice or to disclose the request ("the same natural justice issue as in Volaw ") or to disclose the Request ("the Request issue") and the failure by the Comptroller to perform his Tameside duty of due enquiry ("the due inquiry issue"). (iii) The Regulations themselves involved a disproportionate interference with rights inasmuch as to the extent they have removed procedural rights they disproportionately interfere with rights protected by common law and by Articles 6,8 and AIPI. 33. The Deputy Bailiff refused leave on ground 1 but granted it on grounds 2 and 3. Although there is no record available to me of his explanation for his decision it may naturally be presumed and moreover, it is clear from his differentiation between the Grounds that he carefully considered them, and once again I accept that the duty of candour is triggered. 34. Fiduciana issued no summons for the directions hearing and made no submissions other than in relation to timetable; moreover at the date of that hearing the Respondents had not filed any evidence in response to its application for judicial review. Nonetheless it may be of assistance if I express what are necessarily provisional views as to whether by the evidence filed the Respondents have now satisfied their duty of candour or whether they should be required to make further disclosure. I do not consider that Ground 2 requires any evidence at all in so far as it raises the natural justice issue for reasons already deployed. As to the Request issue Ganna Khomenko's affidavit at paragraph 19 twice complains about the difficulty in assessing the validity of the Notice absent the Request. Whether a Request must be disclosed either before or during the course of proceedings raises the same issue as in the Larsen and Volaw proceedings. I do not consider that Fiduciana's claim for disclosure is any stronger than that of Mr Larsen and Volaw

- and for the same reasons. No viable argument has so far been made that the Letter of Request was not conformable with the JI/TIEA Further in so far as Ground 2 raises the due inquiry issue., I consider that the First Respondent's affidavits sufficiently indicate the scope of the inquiry, i.e. the information requested, its checking against the JI/TIEA, the response to the clarification sought (Mr Cousins affidavit (paragraphs 5-10), Mr Le Cuirot's affidavit (paragraph 4), as well as the reasons for issue of the Notice. Whether the inquiry was itself sufficient in point of law is a matter for submission. In relation to Ground 3 I repeat what I said at paragraph 27. 35. I therefore reject the applications by Mr Larsen, and Volaw for any further elucidation of the Respondents' defences. The cases will proceed, absent any further order, on the evidential platform as it presently exists. All arguments, in respect of which leave has been given, remain alive. 36. I make additionally the following orders, subject to any appeal against my decision, as follows, having considered the submissions of the parties in relation to the timetable initially proposed by the Respondents:- (i) Respondents to file any further evidence by 23 rd April, 2015. (ii) Applicants to file any reply evidence by 15 th June, 2015. (iii) Applicants to file their skeleton arguments by th June, 2015, (with joint bundle of authorities if possible). (iv) Respondents to file their skeleton arguments by th July, 2015. (v) A final hearing of proceedings shall take place during 20 th -24 th July, 2015, (all cases to be heard together). Authorities Taxation (Exchange of Information with Third Countries) Regulations 2008. Taxation (Implementation)(Jersey) Law Volaw Trust and Corporate Services Limited and Larsen v Comptroller of Taxes

[2012] JRC 133 . Volaw Trust and Corporate Services Limited and Mr B Larsen-v-Officer of the Comptroller of Taxes

[2013] JCA 239 . Volaw -v-Tax Comptroller

[2013] (2) JLR 499. Human Rights (Jersey) Law 2000. Larsen and Volaw Judicial Review

[2014] JRC 232 . Wade and Forsyth Administrative Law 11th edition. R v Lancashire County Council, ex parte Huddleston

[1986] 2 All ER 941. Fordham Judicial Review 6th edition. Tweed v Parades Commission of Northern Ireland

[2007] 1 AC 650 . De Smith Woolf Jowell. Judicial Review 7th edition. Durant International v AG

[2006] JLR 112 . Investigation of Fraud (Jersey) Law 1991. Minister of Finance v Bunge Bermuda Court of Appeal Civil Appeal No.4 of 2013. International Cooperation Tax Information Exchange Agreement Act 2005. Wilson v First County Trust Ltd (No 2)

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