



CAREY OLSEN

## Ariel v Halabi and HMRC: Jersey Court of Appeal considers comity in cross border insolvency cases

Service area / [Dispute Resolution and Litigation, Trusts and Private Wealth](#)

Location / [Jersey](#)

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The Court of Appeal of Jersey has now considered<sup>1</sup> in an appeal against the Royal Court's decision of 10 January 2018<sup>2</sup> the case of a UK trustee in bankruptcy (the "Trustee"), whose appointment had been recognised in Jersey by order of the Court and who had been authorised to obtain documents and/or information for particular purposes, who was later subject to coercive measures in his home jurisdiction requiring the disclosure of such material for different, unauthorised purposes (in this case an Information Notice issued by HMRC pursuant to Schedule 36 of the UK Finance Act 2008 (the "Information Notice" and "Schedule 36" respectively)).

The Royal Court's decision releasing the trustee from the restrictions that had been imposed on him was fully considered in Carey Olsen's [briefing note](#).

The Court of Appeal upheld the Royal Court's decision to release the Trustee from his "dilemma" by authorising him to disclose documents to HMRC, holding that "powerful factors" pointed towards it doing so.

### The issues on appeal

#### Inherent jurisdiction to vary continuing orders

As explained in our previous note, the Royal Court had held that it is the ultimate arbiter of whether material supplied in proceedings and subject to restrictions on disclosure may be disclosed elsewhere and that the court always has an ongoing ability to vary an order made in respect of the confidentiality of

material produced in proceedings before it, whether such proceedings had been held in public or in private.

Before the Court of Appeal, Mr Halabi argued the Trustee's application had been made under the Court's jurisdiction to grant recognition of foreign bankruptcies and therefore to purport to exercise the power for any purpose other than to assist in an insolvency related matter would be impermissible. Mr Halabi therefore argued that the liberty to apply conferred by the Consent Order was constrained by the scope of the power and the basis on which it had been exercised.

The Court of Appeal held that the Royal Court was correct that it had jurisdiction to entertain the Trustee's applications, finding that inherent jurisdiction is "an authority in a court to do everything to uphold, protect and fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner, which must include all procedural power necessary to act as a court in a meaningful sense". The Court of Appeal went on to say that "it must include all powers necessary to enable the court adequately to deal with an issue properly brought before it".

The Court of Appeal considered that to find that the Royal Court has no power in its inherent jurisdiction to revisit a continuing order would be to deprive the court of the power to do justice between the parties. The power to vary an ongoing order is a separate power from that exercised when the order was first made, and is not, for example, an attempt to exercise a power to correct or alter the initial order.

<sup>1</sup> [2018]JCA114, Sir James W McNeill, President, George Bompas QC and Sir Wyn Williams Kt.

<sup>2</sup> [2018]JRC 006A, Sir Michael Birt, Commissioner and Jurats Crill and Ramsden

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## Indirect enforcement of foreign revenue laws

As also explained in our previous note, a further issue in the case was whether varying the orders or granting leave to the Trustee to provide the documents sought by HMRC offended Rule 3 in *Dicey, Morris and Collins, The Conflict of Laws* (15th edition), which provides that the courts have no jurisdiction to entertain an action for the enforcement, directly or indirectly, of a penal, revenue or other public law of a foreign state.

Rule 3 is based on a well-known decision of the English House of Lords in *Government of India v Taylor*<sup>3</sup> which was found to be part of the law of Jersey in *Re Tucker*<sup>4</sup>. The Royal Court had held that Mr Halabi's case mirrored the position in the State of Norway<sup>5</sup> case, i.e. that HMRC's powers arising from Schedule 36 were investigatory powers rather than enforcement powers, so that for the Royal Court to provide assistance was not to enforce a foreign revenue law.

Before the Court of Appeal, Mr Halabi submitted that the Royal Court had misconstrued the decisions in this area and that "enforcement" for the purposes of Rule 3 went well beyond the mere collection of taxes. He also contended that the Royal Court was wrong to analyse the State of Norway case as giving rise to a general principle that information gathering procedures were excepted from the general revenue rule.

The Court of Appeal considered afresh the terms of Schedule 36 in order to identify its true nature, finding on the evidence that Schedule 36 included both elements of investigation and enforcement, the totality of which is to provide a regime which seeks to reduce instances of tax avoidance and tax evasion by enforcing the implementation of UK tax statutes.

However, the Court of Appeal held that Rule 3 was not engaged in this case on the basis that the investigations under Schedule 36 were not proposed to be carried in a foreign state given that the Trustee was resident in the UK and the relevant material proposed to be disclosed was also situate there.

### Exercise of discretion

Finally, the Royal Court had listed a number of factors that it had considered in deciding to permit the Trustee to comply with the Information Notice. Among them was that while in general, consent to disclosure for tax purposes should not be given where there is an alternative route for obtaining that information (e.g. pursuant to the TIEA between Jersey and the United Kingdom), the majority of information sought by HMRC in this case related to period before the TIEA came into force in 2010 and therefore could not be sought by that route.

The Court of Appeal agreed with the Royal Court that the existence of a TIEA between the UK and Jersey does not necessarily mean that the court should refuse to permit disclosure to HMRC of information held by the trustee in every case, finding that the existence of the TIEA was but one of a number of factors to be taken into consideration.

<sup>3</sup> [1955] AC 491

<sup>4</sup> [1987] JLR 473

<sup>5</sup> *Re The State of Norway (Nos 1 and 2)* [1990] 1 AC 723

Disagreeing with the Royal Court, the Court of Appeal found that the assumption that the Trustee "would be penalised" in the event of non-compliance with the Information Notice was incorrect – it was held to have been clear, already at the time of the hearing in the Royal Court, that the Trustee did not face prosecution if unable to disclose material to HMRC due to the restrictions he was under. That was put beyond doubt in the Court of Appeal, where Counsel for HMRC confirmed that no such prosecution would be brought if the appeal was allowed (so that the restrictions on disclosure continued).

Nevertheless, the Court of Appeal affirmed the decision to release the restrictions on disclosure, identifying the following "powerful factors" informing this position:

1. that no other means existed to secure the disclosure to HMRC of much of the information which was the subject of the Recognition order and the Consent order;
2. that such information is, at the very least, important for HMRC to further its investigation of Mr Halabi's tax affairs;
3. that the scope of that investigation and the need for the information has been explained to the FTT in the UK which court thought it appropriate to approve the Information Notice;
4. that the trustee is subject to that notice and, although he may not be at risk of sanction for non-compliance, it still amounts to direction to him by a court within the jurisdiction in which he practises to disclose information and, but for the orders in Jersey, with which he would comply; and
5. that Mr Halabi, as an individual, had refused to provide the information voluntarily and had failed to comply with an Information Notice served upon him seeking the same or substantially the same information.

The Court of Appeal held that the public interest is served by upholding the order, with the strongest consideration in favour being that if the court refused to lift the restriction, this would prevent the Trustee from complying with the law of the State in which he resides and practises, that State being recognised by Jersey as an appropriate recipient of mutual recognition provided for under Article 49.

### Comment

The Court of Appeal decision reaffirms that the Jersey courts have inherent jurisdiction to vary their own orders where persuaded that it is appropriate to do so, including to permit use of documents or information obtained pursuant to such an order for purposes not originally contemplated. As it is a matter of inherent jurisdiction, this is not subject to any fetters arising from the scope of the original power under which such order was made.

Continued

The Court of Appeal has sounded some important notes of caution in relation to the modern tendency to apply Dicey's Rule 3 (lack of jurisdiction to enforce foreign revenue claims) in a narrower sense than in times past. The Court of Appeal has found that Schedule 36 to the UK Finance Act 2008 contains elements of investigation and of enforcement, contrary to the Royal Court which it had held it be merely investigatory. It appears inevitable that the courts of Jersey and the other Crown Dependencies will be required to give future consideration to Dicey's Rule 3 in the context of Information Notices served under Schedule 36.

*Andreas Kistler acted for a party convened to the Trustee's application to the Royal Court.*



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