IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

Misc No. 43/2014

IN THE MATTER	of the Income Tax Act 1997
AND	
IN THE MATTER	of an Agreement between the Government of the Cook Islands and the Government of Sweden for the exchange of information relating to tax matters
AND	
IN THE MATTER	of a request by the Ministry of Finance and Economic Management ("MFEM") of the Government of the Cook Islands
BETWEEN	**ORA FIDUCIARY (COOK ISLANDS) LIMITED** First Applicant
AND	**THE NEW WORLD TRUST, THE INTERNATIONAL TRUST, GREAT EAGLE LIMITED AND GOODWILL LIMITED** Second Applicants
AND	**THE TREASURER OF THE REVENUE MANAGEMENT DIVISION OF THE MINISTRY OF FINANCE AND ECONOMIC MANAGEMENT** Respondent

Counsel: Geoffrey Clews (New Zealand Counsel) and David McNair for Applicants

Cheryl McCarthy, Solicitor-General, for Respondent

Date of hearing: 22 September 2014

Judgment: 7 October 2015 (NZT)

JUDGMENT

Introduction

[1] On 9 September 2014, the second applicants (the first applicant was subsequently joined) applied to the High Court for orders in terms of s220(4), Income Tax Act 1997. That application concerned an Information Request (the Notice) given by the Collector dated 26 August 2014 requiring the applicants to deliver certain documents to him as well as specified information. The applicants opposed that Notice and their application sought to have the Court discharge it.

[2] The Collector's Notice followed, in turn, an earlier request made to him by the Swedish Tax Authorities (STA) dated 18 July 2014. The initiating request by the STA was made in terms of an agreement entered into between the Government of the Cook Islands and the Government of Sweden for the exchange of information relating to tax matters. Such agreements are relatively common and generally go by the acronym of TIEA (Tax Information Exchange Agreement). The relevant TIEA (the Cook Islands has entered into some 25 of such agreements) was signed between the two governments in Canberra on or about 16 December 2009. The TIEA contemplated that each country would subsequently enact legislation to give effect to the agreement.

[3] The TIEA is based upon models and commentaries prepared and circulated by the Organisation for Economic Cooperation & Development (OECD). The TIEA is governed by the Vienna Convention on the Law of Treaties 1969. It is to be given a liberal interpretation with a view to implementing the true intention of the parties.

[4] The initial application brought under s220(4) was in relatively brief form and supported by an equally brief affidavit by Mr Wichman (Managing Director of Ora Fiduciary (Cook Islands) Limited) dated 9 September 2014. The affidavit attached a copy of the request made by the Collector to Mr Wichman on behalf of the first applicant dated 26 August 2014.

[5] By mid 2015, the first applicant had been joined as a party, and on 15 June 2015, the applicants filed their fourth amended application. That application formed the basis of the matter as heard before me. In August 2015 the applicants filed three affidavits and, on 24 August 2015, detailed written submissions. On 11 September 2015 the respondent filed two affidavits together with submissions (the submissions filed 17 September 2015). The respondent filed reply submissions on 18 September 2015. It can be seen that, although the application was filed

some time ago, the bulk of the materials considered by the Court were filed only in August and September of this year, shortly prior to the hearing itself.

[6] I express my gratitude to counsel for the thorough and professional way in which they have addressed the issues. The written submissions were of a high order as were the oral submissions made at the hearing. Although the issues in dispute are novel (this is the first such application to be considered by the High Court of the Cook Islands), the Court's duties were much assisted by counsel's diligence.

The applicants

[7] The first applicant is a trustee company operating in the Cook Islands. Its wholly owned subsidiary, Ora Trustee Limited, is trustee in relation to the two trusts cited as second applicants.

[8] Turning, then, to the second applicants. There are four of them – two trusts and two companies. In Mr Wichman's second affidavit he says that the two trusts, and the two companies in which one of them is the beneficial shareholder, are ultimately associated with an undisclosed client of the first applicant (who is not Mr Setterberg - whose identity is discussed below).

[9] The evidence before the Court appears to show that The New World Trust is the beneficial owner of the shares in the two companies Great Eagle Limited and Goodwill Limited. There is material before the Court which appears to show that, in or about January or February 2008, Goodwill Limited made a payment of Eur4m to Mr Setterberg. Mr Setterberg agrees that he received a payment of that amount but, in his affidavit (discussed below), says he does not know where the payment came from.

[10] It is common ground that the four trusts and companies fall within the relevant definitions in the Income Tax Act and can properly be subject to the relevant requests (all else being equal).

Dramatis personae

[11] The request by the STA particularly concerns Mr Olof Setterberg, a Swedish tax resident. In an affidavit sworn in Sweden on or about 14 August 2015, he describes himself as a company director of Stockholm. He also acknowledges he has been the subject of a civil investigation by the STA concerning the receipt into a Swiss bank account in his name of the Eur4m (being the monies mentioned above).

[12] Mr Michael Olesnicky describes himself as *"a special adviser"* in the Hong Kong tax team of KPMG. Up until October 2014 he was a specialist tax partner in the law firm of Baker & McKenzie in Hong Kong. Mr Olesnicky was described by counsel for the applicants as the architect of a structure comprising the second applicants, said by Mr Olesnicky to be established on behalf of the first applicant's undisclosed client. Mr Olesnicky swore an affidavit in Hong Kong on or about 21 August 2015 which I return to below.

[13] Mr Wichman, Managing Director of the first applicant, has already been introduced above. He swore two affidavits with the second of these being the most significant.

[14] Mr Andrew John Haigh is the Treasurer of the Revenue Management Division of the Ministry of Finance and Economic Manager and is the Collector of Inland Revenue. As with Messrs Setterberg, Wichman, and Olesnicky, he has filed an affidavit. His affidavit was filed on 17 September 2015. I will refer to him as *"the Collector"* in this Judgment.

Taxation Information Exchange Agreement

[15] The TIEA entered into between the Governments of the Cook Islands and Sweden is eleven pages long. It comprises 13 Articles, most of which are then subdivided into further paragraphs. The object and scope of the agreement is set out in paragraph 1 of Article 1 as follows:

> *"1. The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information."* (emphasis added)

[16] The expression emphasised in the above quote, *"foreseeably relevant"*, was a key factor in the application and will be discussed in more detail below.

[17] It will be seen that the above quoted extract uses the expression *"the requested Party"*. This language is used throughout the TIEA and is

intended, in the present case, to be a reference to the Government of the Cook Islands. The corresponding expression, *"the applicant Party"*, refers to the Government of Sweden.

[18] Article 4 sets out the definitions. I have already addressed (see paragraph [10] above) the terms *"person"* and *"company"* and noted that the second applicants fall within these definitions.

[19] Article 5 is the operative provision providing for the exchange of information upon request. Paragraph 2 of Article 5 provides:

> *"2. If the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes."*

[20] The required content of the request by the applicant Party to the requested Party is then set out in paragraph 5 of the same Article. Although this is quite lengthy, it needs to be set out in full:

> *"5. The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under the Agreement to demonstrate the foreseeable relevance of the information to the request:*
>
> *(a) the identity of the person under examination or investigation;*
> *(b) a statement of the information sought including its nature and the form in which the applicant Party wishes to receive the information from the requested Party;*
> *(c) the tax purpose for which the information is sought;*
> *(d) grounds for believing that the information requested is held in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party;*
> *(e) to the extent known, the name and address of any person believed to be in possession of the quested information;*
> *(f) a statement that the request is in conformity with the law and administrative practices of the applicant Party, that if the requested information was within the jurisdiction of the applicant Party then the competent authority of the applicant Party would be able to obtain the information under the laws of the applicant Party or in the normal course of administrative practice and that it is in conformity with this Agreement;*
> *(g) a statement that the applicant Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties."*

[21] Although it is probably clear from what I have set out above, the requirements of paragraph 5 apply to the request made by the STA of the Collector. The use of *"statement"* in three of the subparagraphs above makes it clear that the requesting Party is not required to set out chapter and verse in relation to the specified matters. Rather, it is to make *"a statement"* and the assumption of the TIEA appears to be that the requested Party then takes that largely at face value.

[22] Article 7 provides for the possibility of a request by the STA being declined by the Collector in circumstances where the information requested would amount to a trade secret or would breach legal privilege. Both of those issues arise in this case and will be addressed below.

[23] Article 8 provides for confidentiality and provides that requests such as those made by the STA will, themselves, remain confidential. In the present case, I was advised that the Government of Sweden consented to the disclosure of the request made by it as well as subsequent correspondence. All of that correspondence has been put before the Court and will be discussed below.

[24] Article 10 of the TIEA provides that the contracting parties shall enact any legislation necessary to give effect to it. I will shortly discuss the legislation enacted by the Parliament of the Cook Islands.

[25] Finally, Article 12 provides for the Entry into Force of the TIEA. Two different dates are provided for depending upon whether the request concerns criminal tax matters or whether it concerns all other matters.

[26] It is common ground that the TIEA falls to be interpreted by reference to the OECD commentary dated 2002. This commentary sets out reasonably detailed comments by reference to each Article. In relation to Article 1, paragraphs 2-6 make it clear that the standard of *"foreseeable relevance"*, as highlighted above, is intended to provide for the exchange of information in tax matters to the widest possible extent. The commentary acknowledges that the parties are not at liberty to engage in *"fishing expeditions"* and that is a countervailing consideration. It is expressly noted that requests may not be declined in cases where a definite assessment of the pertinence of the information can only be made following receipt of the information.

[27] In relation to Article 7, the commentary notes, at paragraphs 71-93, that:

[a] A requested Party is under no obligation to research or verify the statements provided by the applicant party. The responsibility for the accuracy of the statement lies with the applicant Party (paragraph 77).

[b] It is anticipated that only *"in certain limited cases"* will the disclosure of financial information potentially reveal a trade business or other secret (paragraph 80);

[c] Legal privilege will be properly claimable only if the legal representative acts in the capacity as legal adviser (paragraph 88).

[28] In addition to that commentary, the respondent referred to a more recent commentary provided by the OECD in relation to Double Tax Agreements which also uses the language of *"foreseeably relevant"* in Article 26. Mr Clews cautioned against the ready acceptance of this commentary bearing in mind the different circumstances. While that reservation is properly made, I note the following part of the commentary. 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 (paragraph 5).

[29] Mr Clews emphasised that there are two competing interests which are in tension and which need to be balanced. On the one hand, the requested Party is intended to give effect to the TIEA so as to obtain the requested information. On the other hand, the interests of the international business community, including the trust company business in the Cook Islands, are based upon the need to maintain the confidentiality of their clients.

Income Tax Act

[30] The Income Tax Amendment Act 2011 introduced a new s86 into the Income Tax Act (ITA) which came into effect from 1 September 2011. The new s86 addressed the position both of Double Taxation Agreements (DTA) and also Information Exchange Agreements. S86(1) provided that every such agreement *"shall, subject to the provisions of this section, have effect according to its tenor"*. The effect, thus, was to incorporate the relevant TIEA into the law of the Cook Islands.

[31] The same amendment to the ITA introduced a new s220(4). This was in the following terms:

> *"220(4) A person or a public authority to which a request is made, if they believe the request is improper may, within 14 days from the date the request was received apply to the High Court to have the request discharged or varied and the court on hearing such application may discharge the request or make such variation to it as it thinks fit."* (emphasis added)

[32] It is not entirely clear where the adjective *"improper"* came from. It is not revealed in the Parliamentary history and counsel have not been able to locate any documentary references to it. It is not a term used in corresponding legislation in other countries.

[33] S220(4) does not, directly, set the standard of review for the High Court. The adjective *"improper"* qualifies the state of the mind of the applicant. That is, the trigger point, so far as the subsection is concerned, is whether the applicant believes the request is improper. The drafting assumption appears to be that the Court, in turn, assesses whether the request is improper but this is not made explicit. Both counsel concluded that it was for the Court to assess whether the request was *"improper"* as well.

[34] It is common ground that *"improper"* does not refer to moral turpitude. Rather, counsel submit, it is intended to deal with the statutory purposes and to be determined consistently with them. I note that s219(2) uses the expression *"...all proper questions"*. Use of the contrasting adjective *"proper"* appears to support the approach taken by counsel.

[35] Although I have set out s220(4) on a stand-alone basis above, it really needs to be considered as part of the entire text of s220 which I now set out:

> *"220 Information to be furnished on request of the Collector –*
>
> *(1) Every person (including any officer employed in or in connection with any department of the Government or by any public authority, and any other public officer) shall, if required by the Collector or by any officer of the Department authorised in that behalf, furnish in writing any information and produce any books and documents which the Collector or officer considers necessary or relevant for any purpose relating to the enforcement of this Act (including giving effect to agreements described in section 86), or any other Act administered by the Collector, and which may be in the knowledge, possession, or control of that person. This section shall not be limited by sections 227 and 249 of the International Companies Act 1981-82,*

section 23 of the International Trusts Act 1984, and section 72 of the Limited Liability Companies Act 2008.

(2) Without limiting the foregoing provisions of this section it is hereby declared that the information in writing which may be required under this section shall include lists of shareholders or companies, with the amount of capital contributed by the dividends paid to each shareholder, copies of balance sheets and of profit and loss accounts, and other accounts and statements of assets and liabilities of any person.

(3) The Collector or any officer of the Department authorised in that behalf may require any written information or particulars furnished under this section to be verified by statutory declaration or otherwise.

(4) A person or a public authority to which a request is made, if they believe the request is improper may, within 14 days from the date the request was received apply to the High Court to have the request discharged or varied and the court on hearing such application may discharge the request or make such variation to it as it thinks fit." (emphasis added)

[36] It will be noted that the heading of this section uses the expression *"request"*. Thereafter, however, subsections (1), (2) and (3) speak in terms of a requirement. Subsection (4) then returns to the use of *"request"*. The noun *"request"* is not really apt to describe the notice given by the Collector to the applicants. Truly, it was in the nature of a requirement. However, counsel confirmed that the present application does not turn on any distinction between the use of *"request"* or *"requirement"*.

[37] S220(1) provides that the Collector, having received the request from the applicant Party, must then decide whether it is *"necessary or relevant"* for him to then make an information request within the Cook Islands. As is discussed in more detail below, this is not an onerous obligation and the Collector is not required to double-guess the STA request. On one view of it, it might be said that this is a purely subjective standard. However, that seems inherently unlikely bearing in mind the powers of the Court conferred by s220(4). Mr Clews submitted that this standard is to be assessed by the Court objectively and I believe that is correct. I discuss this further below.

STA request

[38] The STA request dated 18 July 2014 was addressed to Mr Haigh. The letter was said to be *"in conformity with the laws and administrative practices of Sweden"*. The writer of the letter gave various confirmatory

statements in terms of the requirements in Article 5 of the TIEA. I do not repeat those here. The letter made it clear that the STA was investigating the affairs of Mr Olof Setterberg including his involvement in the New World Trust. The investigation was said to concern criminal tax matters for the period January 2008 until December 2012.

[39] The primary focus of the letter appears to be upon the Eur4m payment already introduced above. This is referred to on pages 4-6 of the letter.

[40] The letter, also, included the following:

> *"We also need bank statements and other information concerning the bank accounts at the ANC Bank in Cook Island. Mr Setterberg has never mentioned the Trusts or its underlying entities in his tax returns during the investigated period... Any assets and transactions made by the Trust may then lead to direct tax consequences for the Settlor or to whom who has control, alt. (sic) the person controlling the Trust assets."*

[41] The above quoted words were emphasised by the respondent as showing that the request by the STA focused not only the Eur4m but upon wider tax issues along the lines indicated. The STA made it clear it was investigating the apparent connection between Mr Setterberg and the second applicants.

The request by the Collector

[42] The Collector's request has already been referred to several times above. It was addressed to Mr Wichman of the first applicant and referred specifically to the four entities that comprise the second applicants. The request was brief – it comprised two short parts. So far as the two trusts were concerned six categories of documents and/or information were requested as follows. The numbering set out in the below quote is the same numbering used in the Notice.

> *"5. Copy of the trust deeds and any amending deeds.*
>
> *6. Full names and addresses of the settlors, trustees and beneficiaries.*
>
> *7. Instructions to the trustees relating to the affairs of the trust, showing instructions of the settler as to the beneficiaries, the settled funds and their management, investment, distribution of assets, capital or income airing in the trust from 6 October 2011 to date.*
>
> *8. Copies of any financial accounts or account statement from the period 6 October 2011 to current.*

> 9. *Details of dispositions or payments made by the trustees on behalf of the trust, from 6 October 2011 to current, whether by loan, gift or transfer of any other means or whether made to any other person at their request or instruction.*
>
> 10. *Copies of underlying documents transactions undertaken by the trustee, including copies of payment orders, cheques, debit and credit vouchers, transfer forms or other instructions or memos relating to transactions on behalf of Mr Olof Setterberg, The New World Trust and the International trust and its underlying entities, Great Eagle Limited and Goodwill Limited."*

[43] So far as the two companies were concerned, two requests were made numbered 11 and 12 as follows:

> *"11 Copies of financial accounts, including profit and loss accounts and balance sheets.*
>
> *12 Copies of accounting records, including sales and purchase invoices, day books, sales, purchase and nominal ledgers."*

[44] Various matters of detail were challenged by the applicants in relation to a lack of key dates in some respects. It was also said the Notice was deficient because it did not acknowledge the TIEA exclusions in relation to trade secrets and legal privilege. These issues are now largely resolved. It is common ground between the parties that the earliest possible effect, so far as the TIEA is concerned, is in relation to documents/information arising after 6 October 2011 (in relation to a criminal tax investigation in Sweden). The respondent accepts that the Notice issued by him needs to make this clear in all respects. The Notice should also make clear that the end date for any documents is December 2012. These date issues primarily concern the questions numbered 10, 11 and 12 set out above. However, paragraphs 7, 8 and 9 are also deficient in that the reference to the current date should be a reference to December 2012.

[45] In addition, it is common ground that the Notice does not apply in relation to legal privilege strictly so-called and does not apply in relation to trade secrets strictly so-called. There is a dispute between the parties as to whether this needs to be acknowledged in the Notice itself. There is also a dispute as to whether the various claims made by the applicants to trade secrets are sustainable.

Subsequent correspondence

[46] Following receipt by the Collector of the initial request made by the STA dated 18 July 2014 (received 30 July 2014) there was a reasonably

extensive correspondence in September and October 2014. This correspondence was put before the Court by way of the respondent's affidavits. In correspondence from the STA, it can be seen that the STA generally resisted attempts by the Collector to limit documents to the post-6 October 2011 period. This exchange illustrates that the Collector gave consideration to his legal obligations and did not merely rubber stamp the originating request made by the STA.

[47] Following the correspondence in the September/October period of 2014, there was then some silence until the STA wrote again on 11 June 2015 setting out some updating advice. The STA maintained its earlier request. It noted that Mr Setterberg had provided a new version of how the Eur4m came to be paid to him. It said:

> *"Mr. Setterberg has recently redefined his version of the situation and states that the third part* (sic)*, who is a long-time friend of Mr. Setterberg, needed money. To get this money Mr. Setterberg borrowed money from Casa De Suecia and Inversora during the years 1996-2006 and then he lend* (sic) *them to his friend. The total amount lend* (sic) *during these years were almost 4 million EUR. The 4 million Eur he received to his bank account in January 2008 was the repayment from the third party. Mr. Setterberg then settled his debt with Casa De Suecia and Inversora. He state that he has never received a gift from Goodwill."*

[48] While I have read that correspondence I am not certain that anything significant turns on it and counsel did not strongly urge any particular consequences that flowed therefrom.

[49] I note that I raised with counsel whether the Collector's conclusion, that he was not entitled to demand documents pre-dating 6 October 2011 (other than trust deeds), was correct. Having heard argument, I am satisfied that the conclusion was properly reached.

Issues in dispute

[50] The following two issues are those mainly in dispute:

[a] The role of the Court in addressing the s220(4) jurisdiction and the standard of review to be undertaken by the Court;

[b] Whether the Court could be satisfied that the *"foreseeable relevance"* standard was met in the present case: were the documents requested by the Collector forseeably relevant to the tax inquiry underway in Sweden?

[51] There were also other issues in contention being:

[a] Whether a criminal tax inquiry actually was underway in Sweden;

[b] Whether the STA had exhausted all domestic avenues for document gathering;

[c] Even if a criminal tax investigation were underway in Sweden, could the Collector seek documents (post-6 October 2011) in relation to an investigation into events that pre-dated 6 October 2011?

[d] Whether the exclusions for privilege, trade secrets, and public policy considerations, were properly taken into account.

[e] Whether any Articles in the Cook Islands' Constitution were engaged.

[52] The first three of these subsidiary issues will be discussed at the same time as addressing the two main issues. The fourth and fifth issues summarised above will be considered separately once the two main issues are discussed (see paragraph [50] above and paragraph [111] below).

[53] It was common ground that the Court has wide powers to vary or discharge the Collector's request and that, even if I discharged the request, that would not prevent the STA from renewing their request in some different form.

The role of the Court

[54] It was common ground that the present application under s220(4) is not an analogue of judicial review. In judicial review, the role of the decision-maker is respected and the role of the Court is to review that decision against specified criteria of unlawfulness, unreasonableness, and breach of natural justice. Mr Clews made the point that, prior to the introduction of s220(4), the means of testing s220 was by way of judicial review. He submitted that the introduction of the new subsection, coupled with the adjective *"improper"*, clearly indicated that a different test was to be utilised. I accept that general proposition.

[55] At the other end of a possible spectrum, it was common ground that the role of the Court is not to conduct a mini-trial.

[56] In other words, the correct approach to be adopted by the Court falls somewhere between judicial review at one end and a mini-trial at the

other. The applicants contended for a more extensive role for the Court and the respondent a less extensive role. Nevertheless, it was common ground that the Court could take account of new information presented to the Court not otherwise available to the Collector in making his or her request.

[57] Mr Clews argued that the role of the Court was as the final arbiter of the request. That involved reviewing both the original decision of the Collector and the new information. That role did not require the Court to be drawn into speculation. He also acknowledged that the original decision by the Collector to make a request did not need to be the product of a detailed inquiry by him.

[58] So far as any new evidence was concerned, Mr Clews accepted that, for the Court to take it into account, it must be dispositive of the issue of whether the requested documents and/or information was *"foreseeably relevant"*. In his reply submissions, Mr Clews submitted:

> *"3.9 The evidence led by the Applicants is dispositive of the matter in that it undermines the fundamental premise on which the STA request to the MFEM was made, ie that Mr Setterberg is the controlling hand behind the Second Applicants. Mr Setterberg expressly denies this, and that position is corroborated by professional persons responsible for the establishment and operation of the second applicants, namely Messrs Olesnicky and Wichman respectively. Against that evidence there is simply insufficient information given to the Collector by the STA to justify the MFEM request being sustained."*

[59] Put in shorter terms, the applicants' case was that there was no relevant connection established between Mr Setterberg and the second applicants and that the new evidence was dispositive of that issue.

[60] The respondent submitted that the Court should assume a lesser role. So far as the original decision by the Collector was concerned, the role of the Court was submitted to be in the nature of a good faith review only. This was said to be by analogy to the decision of the Privy Council in *New Zealand Stock Exchange v CIR* [1992] 3 NZLR 1 and the subsequent decision of the High Court in *Lupton v CIR* (unreported, CIV 2005-485-2687, 22 December 2006, Randerson J). In relation to any new evidence, the respondent agreed with the applicants' submission that it must be dispositive of the issue in order for the Court to take it into account.

[61] I have some hesitation about relying upon these two decisions because each was a judicial review case. What, I think, can be taken from the decisions, though, is the general indication that the Court should be slow to intervene in the issue of a Notice such as that under consideration here.

[62] The Solicitor-General argued that, ultimately, the Court stood in the shoes of the Collector both so far as the original decision was concerned and so far as any new evidence was concerned. The Court would decide the matter as if it were the Collector. While Mr Clews did not accept this proposition in such terms, I do not think that his final position was far removed from it. He said that the Court should apply the same tests as would the Collector but taking into account the new information. The assessment is objective rather than subjective.

[63] Mr Clews referred to six decisions given by Courts in Jersey, Bermuda and Singapore in relation to TIEAs. These, of course, are not binding but there is no good reason to disregard that jurisprudence. I have considered all six decisions but ultimately rely only on two as now discussed.

[64] *Volaw Trust & Corporate Services Limited V The Comptroller of Taxes* [2013] JCA 239 was a decision of the Jersey Court of Appeal in relation to a TIEA between Jersey and Norway. The request made by Norway to Jersey concerned the tax affairs of a Norwegian national and resident, Mr Larsen.

[65] The decision-making process to be adopted by the Controller, upon receiving the request from Norway, was discussed at length. At paragraph [32] the Court noted that the Controller was not to hold a mini trial. The Court said:

> *"As long as he has reasonable grounds for his belief or opinion on the material, before him, he is empowered to act on that belief or opinion."* (emphasis added)

[66] At paragraph [54] the Court then said:

> *"The Court's function, when hearing the appeal, will be to concentrate on whether the material in front of the Controller at the time he issued the Notice provided him with reasonable grounds for his belief, and not to be drawn, as happened in the instant case, albeit given the novelty of the situation understandably, into permitting adduction of an extensive volume of such evidence... Any affidavit evidence from the appellant [the party challenging the decision] should be concise and only*

> *entertained if it purports to contain is (sic) some truly dispositive point..."* (emphasis added)

[67] The legal standard, in Jersey, specifically referred to *"reasonable grounds"*. There is not equivalent language in the Cook Islands' ITA. To that extent, the Jersey decision needs to be approached with a little caution. I return to this issue shortly.

[68] At paragraph [154], the Court referred to the decision, issued the previous year, in the Singapore High Court, of *Controller of Income Tax v AZP* 14 ITLR 1155 in which the Court had taken a robust approach in relation to a request from the Republic of India. The request was set aside. The Jersey Court of Appeal seemed disinclined to take such a robust review and distinguished the Singaporean decision on its facts.

[69] There was significant discussion, towards the end of the Jersey Court of Appeal Judgment, of the particular facts of the case. The taxpayer had sworn as to the truth of certain facts. The Court noted that it was not its role to assess whether that affidavit evidence was the truth. It noted that the subsequent investigation in Norway, for which the documents and records were sought, would resolve that actual dispute (see paragraphs [164] and [171]). This, I think, is particularly significant in the present case in which I am asked to accepted untested affidavits as stating the whole truth of the matter.

[70] At paragraph [197] the Court noted that it was not its position to resolve contentious issues of Norwegian tax law or to reach definitive conclusions about whether the person the subject of the request was (or was not) liable to Norwegian tax.

[71] Then, at paragraph [200] it repeated:

> *"The Controller's task was, and ours now is, simply to ask whether the threshold criteria specified in paragraph 1 Regulation 3, carefully formulated as they have been, are satisfied."*

[72] The Court was satisfied that Controller had acted properly and that the request was legitimate. The Court declined to set aside the notice.

[73] A month later, the Royal Court of Jersey issued its decision in *APEF Management Company 5 Limited v The Comptroller of Taxes* [2013] JRC 262. The Court expressly acknowledged the recent decision in *Volaw Trust* discussed above. The Court was concerned with a request from the French Tax Authorities in relation to a French tax payer, Mr Piranda.

Ultimately, the Court set aside the request on the basis that the fresh information provided was, in the Court's view, dispositive of the French tax issue. The key discussion can be found at paragraph [70] et seq. The Court noted that the evidence filed by the appellant, although not tested, convincingly show that the taxpayer had acted contrary to the view taken by the French Tax Authorities. It removed the entire foundation upon which those authorities had based their request. A particular factor was that full details of the relevant transactions were already known to relevant French regulators and, it seems, the French Tax Authorities also (for example, see paragraphs [54] and [71]).

[74] At paragraph [81] the Court noted that it was not for the Comptroller to reach any final conclusion on where the truth lay or to act as a final adjudicator on the issues. Nevertheless, in face of the new information provided, that was not the end of the matter: the Comptroller should re-engage with the French Tax Authorities.

[75] Paragraph [97] is curious in that, as it stands, it appears in stark contrast with the preceding paragraphs and, furthermore, in stark contrast with the conclusion following. Although it is speculation on my part, I suspect that paragraph [97] reflected submissions made by the Court which, implicitly, were rejected by it.

[76] While the Royal Court in *APEF* said it followed the decision of *Volaw*, the outcome was quite different. This illustrates how, ultimately, the present case must be determined on its own facts.

[77] In his oral submissions, Mr Clews said that the affidavit evidence, although not tested by cross examination, nevertheless showed that the Collector's decision to issue the request was *"unsafe"*. I am not persuaded that the use of this language adds anything to the analysis.

[78] Against the above discussion, I set out my conclusion as to the role of the Court as follows. In an application by a person brought under s220(4), ITA, the Court should determine:

[a] Whether the Collector reasonably determined to issue the Notice of Request and, in particular, whether the Collector reasonably determined:

- that the applicant Party's request complied with the requirements of the TIEA;

- that the information/documents requested were foreseeably relevant to the relevant tax inquiry or other tax matters;

- that the request was necessary or relevant for the purposes of giving effect to the TIEA;

[b] Whether, if new evidence is subsequently tendered to the Court, it is dispositive of the issue of whether the information/documents were foreseeably relevant to the relevant tax inquiry or other tax matters.

[79] I have used the adverb *"reasonably"* to recognise the objective standard which I believe governs the Collector's decision-making. I believe a purely subjective standard would be unworkable for the purposes of any review by the Court. However, I need to make it clear that use of the adverb *"reasonably"* is not intended to require some separate assessment in addition to the three factors specifically listed in paragraph [78][a] above (and even they tend to merge one with the other at a certain point).

[80] At this stage, I address the third topic set out in paragraph [51] above. While Mr Clews submitted that the Collector could not, as a matter of law, seek documents that related to an investigation into events that pre-dated 6 October 2011, he did not strongly press the point and, I think, rightly so. As he acknowledged, criminal tax matters are not necessarily date specific. I believe the Collector correctly proceeded on the basis that documents generated post-6 October 2011 might be foreseeably relevant to a criminal tax inquiry arising from events that predated that period.

Foreseeable relevance to tax inquiry

[81] This part of the case is potentially concerned with the quality of the decision-making at any one of the following levels:

[a] In Sweden prior to issuing the request to the Collector;

[b] By the Collector in issuing the request to the applicants;

[c] By the Court in assessing the Collector's decision as above and the new evidence (if any).

[82] Mr Clews was critical of the decision-making by the STA. For example, he submitted that the STA failed to disclose documents held by them and

upon which they apparently relied. That submission appears to be correct but I do not believe it is a valid criticism. Ultimately, the request by the STA is to be approached by this Court as it stands.

[83] The relevant inquiry, for present purposes, is how the Collector should have responded to that request. If, indeed, there are deficiencies in the STA request then it would be expected that they would be identified by the Collector in forming a view as to necessity or relevance in terms of s220(1). Thus, it makes more sense to focus upon the request subsequently issued by the Collector based upon the underlying STA request.

[84] In his reply submission, Mr Clews set out the steps which he submitted the Collector should follow:

> *"3.3(a) The Collector is obliged by section 220(1) to consider whether the information sought from the First Applicant is necessary or relevant for the purpose of giving effect to the TIEA.*
>
> *(b) To do that the Collector has to decide what information the TIEA requires the Cook Islands to obtain and exchange (in this case) with Sweden.*
>
> *(c) The TIEA requires that the Collector obtain and provide information that is within the Cook Islands and which is foreseeably relevant to a specific tax inquiry notified by Sweden and which is not excluded from inquiry under one or more of the exceptions and limitations in the TIEA.*
>
> *(d) Under section 220(1) the Collector is required to have reached the conclusion that what he sought from the First Applicant meets the three broad criteria referred to in (c).*
>
> *(e) An "improper request" application requires an objective consideration by the Court to decide if the Collector correctly concluded that the information he sought met the criteria in (c).*
>
> *(f) Undoubtedly the Court will need to consider the material that was before the Collector at the time of his decision but it must also consider other evidence led in support of a section 220(4) application."*

[85] Broadly speaking, I agree with this summary. Mr Haigh, in his affidavit at paragraphs 19-21 and 32-38, sets out the decision-making process that he went through. I believe that this follows the prescription set out by Mr Clews (with the exception of those matters identified at [44] and [45] above).

[86] So far as the Collector's Notice is concerned, Mr Clews' fundamental complaint focused upon the Eur4m. He submitted that there was not a proximate relationship between the payment in January/February 2008 and the request for documents that post-dated 6 October 2011. He referred to this in his oral submissions as *"the gap"*. He asked, rhetorically, how accounts that post-dated 2011 could be foreseeably relevant in relation to a transaction said to have occurred in January/February 2008.

[87] In his written submission Mr Clews put his argument as follows:

> *"7.1(b) There being no or insufficient information proximate to the period to which the MFEM request can lawfully relate, the STA request has effectively taken on the character of a fishing expedition, which is the antithesis of a taxpayer-specific TIEA request. The effect of the request is clear from the evidence led before the Court for the Applicants. It shows that, based on information that predates the present trusteeship of the Trusts and which deals with an alleged payment that occurred some 4 years prior to the period which the MFEM request can lawfully cover, the STA request will sweep up information that relates to someone quite different from the STA's target taxpayer;*
>
> *7.5 The STA relied on the establishment of the Second Applicants in the Cook Islands. This is hardly evidence of foreseeable relevance. The STA has to be able to show sufficient evidence of Mr Setterberg having established the Second Applicants. As to that the STA has been told by Mr Setterberg that he was supposed to be involved in the establishment of Trusts but pulled out. That is acknowledged in the STA's request to the Collector but is clearly not believed. Mr Setterberg has confirmed that position on oath in these proceedings. Mr Olesnicky, the lawyer who set up the Trusts and Companies has confirmed that he did not do that for Mr Setterberg. That confirmation was sent to Mr Setterberg's lawyers in Sweden who supplied it to the STA. It has now been supported on oath by Mr Olesnicky in these proceedings."*

[88] The applicants repeatedly described the evidence upon which the STA relied to make its request as *"stale"*.

[89] The respondent answered the applicants in three ways.

[90] First, it was not for the Collector (and, impliedly, not for the Court either) to embark upon his own examination of the tax inquiry underway in Sweden. Secondly, and in any event, the respondent observed that the accounts from 2011 onwards would inevitably reflect transactions which had already taken place prior to that time. Thirdly, the respondent

argued that the STA request was not limited to the Eur4m but to wider tax concerns (see paragraph [40] above).

[91] In reply, Mr Clews met the third ground by saying that the request by the STA was hopelessly broad. If such an approach were to be upheld by this Court it would effectively amount to giving approval to a fishing expedition.

[92] Mr Clews accepted that categories 5 and 6 (see [42] above) – relating to trust instruments – were not necessarily date-limited as were the other categories of documents. That is because Trust documents can be said to be forever speaking.

[93] I do not believe that the decision made by the Collector, at the point of issue of the Notice, was deficient (except to the limited extent identified elsewhere in this Judgment). He carefully addressed the request by the STA and satisfied himself of those matters which he was required to address. The applicants' complaint is that, in part, he did not accept the arguments they now put forward as to the nature of the inquiry being undertaken in Sweden. These are the first two issues identified in paragraph [51] above. But I do not understand the Collector to have been required to go behind the statements made by the STA and which, on their face, cannot be said to be clearly inaccurate. I do not believe the Notice can be categorised as if it were a fishing expedition.

[94] I believe that the STA disclosed sufficient information showing a connection between Mr Setterberg and the second applicants for the purposes of issuing their request. Although Mr Clews argued for the contrary proposition, most of his argument focused upon the so-called new evidence available to the Court. I now turn to that.

[95] So far as the new material is concerned, Mr Clews referred to the affidavits of Messrs Setterberg, Olesnicky and Wichman (the second affidavit). He accepted that some or all of the information contained in these affidavits was already known to the STA at the point their request was issued in July but said that, assessed overall, this could fairly be described as new information available to the Court and not to the Collector.

[96] In his written submissions Mr Clews summarised the applicants' position as follows:

> *"7.9 Against that the evidence for the Applicants addresses:*
>
> *(a) The reason Mr Setterberg might have appeared to have an original connection with the Second Applicants;*
>
> *(b) That this did not result in him settling the Trusts but pulling out of that;*
>
> *(c) That the Second Applicants were established by Mr Olesnicky for another person altogether;*
>
> *(d) That since 2009, and particularly in the period that the MFEM request can lawfully address, the First Applicant has had no dealing with Mr Setterberg consistent with the STA theory of his controlling the Second Applicants;*
>
> *(e) Instead all such dealings have been with another person altogether who is positively identified by the First Applicant as being its client in relation to the conduct of the Second Applicants."*

[97] The letter attached to Mr Olesnicky's affidavit, which had been provided to the STA previously, was not new. However, what Mr Clews submitted was new, was the fact that Mr Olesnicky was now deposing to the accuracy of that letter. In paragraph 7 Mr Olesnicky deposed that Mr Setterberg had no involvement with the New World Trust and that his dealings with the relevant client were not with Mr Setterberg. He also deposed that the two named companies effectively owned by the New World Trust were not connected with Mr Setterberg. In paragraph 8 he said he did not believe himself to be at liberty to disclose *"the principal or client... because of duties of confidentiality"*. He concluded, in paragraph 9, by saying that the administration of the Trusts and companies continued, as before, with no connection to Mr Setterberg.

[98] Mr Clews also emphasised that Mr Wichman, in his affidavit, was now deposing to matters that had previously been asserted but not by way of affidavit under penalty of perjury. Mr Wichman's eight page affidavit (plus some annexures) covered a arrange of topics including:

[a] The first applicant became trustee of the trusts on 21 January 2009 and there were no dealings with Mr Setterberg in relation to that;

[b] The first applicant had stringent *"know your client"* requirements with which it complies;

[c] In the time that the first applicant had been responsible for the trusts, Mr Setterberg had not been associated with them. The services rendered to the second applicants *"carried on upon advice and with guidance from, and for objects which are generally in the interests of, another individual altogether..."* (paragraph 16);

[d] Mr Wichman had extensive dealings with his undisclosed client. None of these dealings involved Mr Setterberg in any relevant capacity;

[e] At paragraphs 18-22 Mr Wichman explained some limited dealings in late 2014 concerning Mr Setterberg but said these were the extent of any dealings he has had;

[f] At paragraphs 23-28 he referred to how he dealt with his undisclosed client including by telephone on a regular basis.

[99] What, then, is the Court to make of sworn statements such as those contained in the affidavits? Those affidavits were not tested by way of cross examination. Mr Clews submitted that the role of the Court could be discerned by reference to the approach taken by the Jersey Courts in such a case. Could it be said that the new evidence was dispositive of the matter?

[100] I do not believe it is.

[101] First, I do not believe that the matters set out in these affidavits can realistically be described as new. The essential matters canvassed simply re-framed propositions already communicated to the STA prior to making its request. The truth of the propositions can be tested in any relevant Swedish proceeding.

[102] I think that Mr Clews largely accepted that the information contained in the affidavits was not, per se, new. Rather, he emphasised the fact that the affidavits now contained sworn evidence where, previously, there had been unsupported statements to similar effect. Literally, I suppose, the evidence can be said to be new because now it is sworn evidence but this does not, without more, conclude the matter.

[103] Secondly, some aspects of Mr Setterberg's affidavit were not entirely satisfactory and, indeed, appear to support the respondent's case. I refer, for example, to paragraphs 10 and 11. Paragraph 10 refers to Mr Setterberg still having an involvement as sole administrator of various

companies associated with his friend (the first applicant's undisclosed client). His affidavit, somewhat unpersuasively, says: *"I still hold this role but I do not know any of the details of how those companies are owned."* Paragraph 11 also refers to payments made by Mr Setterberg from one of those companies of which he was administrator to Great Eagle Limited. These details are tantalising and not put in much of a context. There is obviously an ongoing relationship between Mr Setterberg and his *"friend"*. I gain a clear sense that these details are contained so as to avoid any suggestion that Mr Setterberg has misled the Court by omission. Yet the sparse details that are provided clearly suggest there is more to this than meets the eye.

[104] Even his explanation as to the Eur4m payment seems sparse (see paragraph 8).

[105] I see Mr Setterberg's affidavit as a carefully constructed document trying to weave its way through some difficult rapids. I accept that the statements made by Mr Setterberg in paragraph 16 of his affidavit are fairly unequivocal but they do not sit compellingly alongside the balance of his affidavit as discussed above.

[106] Mr Clews acknowledged that Mr Setterberg's evidence, taken alone, might be regarded with scepticism. He said:

> *"9.4 Mr Setterberg has provided evidence. On its own it might be regarded with scepticism, given that he is the STA's target taxpayer. However, his evidence is not uncorroborated or unsupported. Mr Olesnicky attests to the fact that Mr Setterberg was not the person for whom he set up the Second Applicants and Mr Wichman attests to his dealing with the person for whom the Second Applicants were established, who is not Mr Setterberg. Based on this evidence it is simply unsafe to allow the MFEM request to stand."*

[107] This submission, though, assumes that the Court should regard Mr Olesnicky as a reliable and independent source of information. The difficulty for the Court is that there is no sensible way of testing this and the uncertainties raised by Mr Setterberg's own affidavit identified above are in no way laid to rest by what Mr Olesnicky says.

[108] Equally, Mr Wichman's second affidavit, although very clear on its terms, does not put the disputed issues to rest.

[109] Thirdly, I do not think that the analogy of *APEF* helps. While each case is confined to its own facts, I do not see the matters canvassed in the

affidavits as being dispositive in the same way as they were in that case. For example, in *APEF* it appears to have been important to the Court's approach that the French Tax Authorities were already aware of the matters in respect of which they had made their request.

[110] Ultimately, then, I do not think that the information can be described as new and, perhaps more importantly, neither do I think it can be described as dispositive. There are still disputes. The STA is plainly not moved by the further information provided. That, of course, is not a complete answer but it illustrates that there is a dispute which needs to be resolved in Sweden.

Remaining issues

[111] The first issue to be considered here is whether the Notice given by the Collector was deficient because it did not expressly contain reference to exclusions for legal privilege. This needs to be addressed in the context of Article 7 of the TIEA, paragraph 3, which provides:

> *"3. The provisions of this Agreement shall not impose on a Contracting Party the obligation to obtain or provide information, which would reveal confidential communications between a client and an attorney, solicitor or other admitted legal representative where such communications are:*
>
> *(a) produced for the purposes of seeking or providing legal advice, or*
>
> *(b) produced for the purposes of use in existing or contemplated legal proceedings."*

[112] Mr Clews relied upon the decision of the New Zealand Court of Appeal in *Green v Housden* (1993) 15 NZDC 10,053 at 10,063 for his submission that the Notice should expressly acknowledge the right of the recipient to withhold documents on the ground of legal privilege. In his submissions he said:

> *"3.4 ... Moreover in making requests for information it is not unreasonable to confine the Collector to reliance on a notice which meets the requirements of his inquiry power and to strike out a notice which, being improper in the required sense, does not."*

[113] The Solicitor-General submitted that such an approach should not apply in the present case. Amongst other things, she submitted that there was no need to draw attention to the right, already existing at law, to withhold documents on the ground of legal privilege. Also, she

submitted, the applicants would have been well aware of their rights in that regard.

[114] While there is much to commend the respondent's submission to that effect, I think the better view is that the Notice should expressly acknowledge the right to withhold documents on the ground of legal privilege. The Notice did not do this and for that reason would need to be re-issued. This defect can easily be remedied.

[115] For the avoidance of any doubt, though, I note that legal privilege needs to be properly applicable. It is not enough simply that lawyers may have been involved in correspondence. The right to claim legal privilege is not to be lightly assumed.

[116] The second issue to be considered here is whether the notice given by the Collector was deficient because it did not contain reference to exclusions for trade secrets and/or grounds of public policy exclusions. Article 7, paragraphs 2 and 4, are relevant and are now set out:

> *"2. The provisions of this Agreement shall not impose on a Contracting Party the obligation to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. Notwithstanding the foregoing, information of the type referred to in Article 5, paragraph 4 shall not be treated as such a secret or trade process merely because it meets the criteria in that paragraph."*
>
> *4. The requested Party may decline a request for information if the disclosure of the information would be contrary to public policy (ordre public)."*

[117] It is common ground that trade secrets (etc) need not be disclosed. It is asserted by Mr Wichman in his affidavit (see paragraphs 33 to 39) that the investment methods of the undisclosed client, which would be revealed in the requested materials, amount to relevant trade secrets. Mr Clews did not cite any authority in support of his proposition.

[118] I do not accept that submission. Reading the OECD commentary it is clear that trade secrets has a more specific meaning than that claimed by Mr Wichman in his affidavit.

[119] Nevertheless, the Notice should have referred to the exclusion in relation to trade secrets in the same way as I have found, above, that the right to withhold documents on the ground of legal privilege should have been made clear. The Notice needs to be remedied.

[120] Public policy considerations are also relied upon by Mr Clews. He set out a number of factors in his submissions which he said should have been brought to account. These, though, all relate to other aspects of the case and do not, I think, provide a distinct ground of objection. Moreover, I do not think there is anything that needs to have been referred to in the Notice.

[121] Thirdly, and somewhat faintly, the applicants referred to the Constitution of the Cook Islands in their reply submissions. These received no reference in oral address. I do not believe constitutional issues arise.

Decision

[122] For the reasons set out above I agree that the Notice issued by the Collector is defective in some limited respects so far as it does not properly provide date limitations, and does not properly provide for exclusions for legal privilege and trade secrets. The Notice is capable of variation and can be varied to accommodate these deficiencies.

[123] In all other respects, though, I uphold the Notice as issued. In substance, then, the respondent prevails. I do not discharge the Notice as requested by the applicants.

[124] I think it would be sensible if counsel could confer as to the form of an appropriate Judgment rather than having me attempt to design one without having heard submissions on that. If necessary, there can be a telephone conference to discuss the form of any Judgment.

Costs

[125] At the same time as conferring on the question of the Judgment I direct that counsel should confer on the question of costs. I do not know whether the parties will seek costs. The case, to an extent, was regarded as a test case and that might be relevant to any thinking on the topic. Nevertheless, I do not have any particular views at this stage. I will address costs if the parties require me to do so. Leave is reserved to apply.

Tom Weston
Chief Justice