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Cross-border Insolvency, Comity and Disclosure of Confidential Material to HMRC

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Synopsis

The Jersey Royal Court in the case of *Ariel v Halabi* [2018] JRC006A exercised its discretion to vary the terms of its previous court orders to allow an English Trustee in Bankruptcy to comply with an Information Notice served by HMRC in respect of the bankrupt's tax affairs in Jersey.

Following a contested appeal in the summer, the Jersey Court of Appeal has upheld the Royal Court's decision on the basis of 'powerful factors' and public interest (*Halabi v Wilson and HMRC* [2018] JCA114).

Factual background

Mr Simon Halabi, a former billionaire property developer, was declared bankrupt on 30 March 2010 by order of the High Court of England and Wales. On 9 April 2010, Mr Geoffrey Carton-Kelly² was appointed as his Trustee in Bankruptcy ('TIB') to take control of and realise the assets of Mr Halabi for the benefit of his creditors. Through various investigations, the TIB learned of Mr Halabi's financial interests in Jersey.

Pursuant to a request from the English High Court made pursuant to Article 49 of the Jersey Bankruptcy (Désastre) (Jersey) Law 1990 ('Article 49'), the Royal Court, following an ex-parte application by the TIB, made an order recognising the TIB's appointment and gave him appropriate powers to be exercised in Jersey (the 'Recognition Order'). The Recognition Order also conferred specific authority on the TIB to obtain material from a number of named parties in relation to various trusts and other entities, so long as the material so produced was used for the purposes of the administration of Mr Halabi's bankruptcy 'save with the leave of this court'.

On 22 November 2013, pursuant to a consent order (the 'Consent Order') the TIB was joined into proceedings brought by the trustees of the A Trust under Article 51 of the Trusts (Jersey) Law 1984. The Consent Order

required the trustees of the A Trust to provide the TIB with certain material in connection with the proceedings which was not to be used or disclosed for any other purpose other than those proceedings. The TIB had sought to be joined to those proceedings as Mr Halabi's estate was a substantial creditor of the A Trust.

The TIB therefore received confidential documents pursuant to both the Recognition Order and the Consent Order (the 'Jersey Orders') (the 'Confidential Material').

On 9 May 2017, the First-Tier Tribunal (Tax Chamber) ('FTT') in London approved the issue of the Information Notice by HMRC pursuant to paragraph 2 of Schedule 36 to the Finance Act 2008 ('Schedule 36') requiring the TIB to disclose to HMRC the Confidential Material it had received pursuant to the Jersey Orders. Mr Halabi had declined to supply this information to HMRC direct.

Compliance with the Information Notice would have, on the face of it, breached the Orders of the Jersey court. Non-compliance with the Information Notice from HMRC may have led to a financial penalty. This placed the TIB in a catch-22 position.

The TIB responded by applying to the Royal Court for directions as to whether compliance with the Information Notice would be a breach of the Jersey Orders and, if so, to seek leave as provided for in the Recognition Order to permit him to comply with the Information Notice and a variation of the Consent Order as appropriate.

Jersey Law

The Court considered three issues:

1. Would compliance with the Information Notice constitute a breach by the TIB of the Jersey Orders?
2. If so, does this Court have jurisdiction either to consent (under the Recognition Order) or to vary the Jersey Orders so as to permit the TIB to comply with the Information Notice?

Notes

¹ Since writing this article, Nicola Roberts has left Ogier.

² He was later replaced by Mr John Ariel in 2013. Mr Ariel later retired and was replaced by Mr Mark Wilson in late 2017.

3. If so, should the Court do so as a matter of discretion?

In relation to the first issue, the Royal Court held that complying with the Information Notice would amount to a breach of the Consent Order as the Order stated the documents should not be disclosed to any third parties, which would include HMRC. The Court further considered the case of *Re M Trust* where it was held to be a contempt of court for a party to court proceedings heard in private (such as the Article 51 application in this case) to disclose any documents they have received in those proceedings without the leave of the court (save to the extent that they were in possession of such documents independently of those proceedings).

On a similar note, any disclosure of documents received by the TIB under the Recognition Order in violation of the restrictions imposed in that Order would be a contempt of court.

On the matter of jurisdiction, the Royal Court has inherent jurisdiction to vary its own orders – even in circumstances when there are varying levels of restrictions in place on the use of materials obtained pursuant to powers granted under Article 49.

The Royal Court further considered whether the variation of the Jersey Orders or granting leave to permit disclosure of the Confidential Materials to HMRC would contravene Rule 3 of Dicey Morris and Collins, *The Conflict of Laws* (15th edition) which states ‘English courts have no jurisdiction to entertain an action ... for the enforcement, either directly or indirectly, of a penal revenue or other public law of a foreign state’ (‘Rule 3’). Rule 3 is based upon the well-known decision in the House of Lords in *Government of India v Taylor* and has been found to accurately reflect the position under Jersey law in *Re Tucker*.

Decision of the Royal Court

The Royal Court granted its consent under the Recognition Order and duly varied the Consent Order to permit the TIB to comply with the Information Notice and disclose the Confidential Materials to HMRC.

With regards to the Recognition Order, it held that it was ultimately for the court to determine the level of restrictions it places upon how material obtained pursuant to an Article 49 order may be used and as such the court must have jurisdiction to vary that in the light of changed circumstances. In the present case, the Royal Court expressly chose the words ‘save with the leave of this court’ to be inserted into the Recognition Order, this clearly envisaged that the material obtained pursuant to the Recognition Order could be used for a purpose other than Mr Halabi’s bankruptcy.

In respect of the Consent Order, the Royal Court held that it was by its nature not a final order, rather

it sought to control onward disclosure of material supplied to a party in Article 51 proceedings. The Royal Court further held that they are the arbiter of whether material supplied in proceedings may be disclosed elsewhere. By way of example, it observed that documents disclosed in ordinary public litigation were subject to an implied undertaking that they will not be used for any other purpose, but the Royal Court undoubtedly had jurisdiction to permit disclosure for any other purpose where appropriate.

The Royal Court concluded that varying either of the Jersey Orders to allow the TIB to supply the Confidential Materials to HMRC for the purpose of its investigation of Mr Halabi’s tax position would not amount to indirect enforcement of a foreign tax law. The Royal Court placed prominence on the comments by Lord Goff in the House of Lords case of *Re the State of Norway (Nos 1 and 2)* where he opined that he could not see ‘any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue laws of Norway in Norway itself’. The Royal Court found that Mr Halabi’s case corresponded with the aforementioned case and that it was clear the provisions at Schedule 36 are investigatory powers which enable HMRC to gather information for the purpose of checking a taxpayer’s tax position, rather than being enforcement powers.

In considering the final issue of discretion, the Royal Court noted that bankruptcy and tax are very separate matters and the process to obtain information is very distinct under each regime. In bankruptcy, a foreign insolvency practitioner should apply under the Bankruptcy (Désastre) (Jersey) Law 1990. For tax matters, Jersey has entered into a Tax Information Exchange Agreement (the ‘TIEA’) with the United Kingdom and therefore all requests should be made to the Comptroller of Taxes in Jersey.

The Royal Court emphasised that ordinarily a trustee in bankruptcy would be refused permission if HMRC was able to obtain the information using the TIEA regime, however, in this case, the TIEA did not allow material prior to 2010 to be obtained and HMRC required material dating back to 1993.

The Royal Court was also unwilling to frustrate HMRC’s access to material situated in the UK which it was permitted to obtain as a matter of English law and where an independent judicial monitor, in this case the FTT, had found the request to be reasonable.

Lastly, the Royal Court was mindful of the warning by Millett J in *Bank of Crete SA v Koskotas (No 2)* that the courts should be astute to avoid a situation where a party is placed in a position of having to infringe duties restricting circulation of documents or information arising in one jurisdiction by reason of being subjected to duties of production in another jurisdiction.

Court of Appeal

On 2 July 2018, the Court of Appeal upheld the decision of the Royal Court to release the TIB from his 'Catch 22' position and comply with the Information Notice. The reasons were as follows:-

Jurisdiction

The first issue considered by the Court of Appeal was whether the Royal Court had jurisdiction to vary the Jersey Orders.

Mr Halabi argued that the decision of the Royal Court was to say that the scope of power of the Royal Court was wider on a variation than it would have been on the making of the original order. He argued that the application under Article 49 was clearly made to the Royal Court and to purport to exercise the power for any purpose other than to assist in an insolvency would have been a wrongful and invalid exercise. The wording of the restriction in the Recognition Order merely reflected the scope of the power and the basis on which it had been exercised and to rely on the 'save with the leave of this Court' wording would give the Royal Court a power which it did not have.

The Court of Appeal held that the Royal Court was correct to identify that it had jurisdiction to entertain the TIB's applications to vary the Jersey Orders, 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 the law in a regular, orderly and effective manner, which must include all procedural power necessary to act as a court in a meaningful sense'. Furthermore, the Court of Appeal went on to say that 'just as this will include the power to correct errors in its orders, it must include all powers necessary to enable the court adequately to deal with an issue properly brought before it'.

The Court of Appeal held that the court must have power to consider whether any new circumstances are so pressing that a limited release from any restrictions imposed are warranted.

Whilst the nature of a new circumstance might not be found to be sufficiently material to permit a review of the original order, to find that a court had no power to revisit a continuing order would be to deprive the court of the power to do justice as between parties.

Indirect enforcement of UK revenue laws

The second issue was whether varying the Jersey Orders offended Rule 3 and would amount to indirect enforcement of UK revenue law.

Mr Halabi submitted that the Royal Court had misconstrued the decisions in this area and that Rule 3 was not about enforcement or collection of tax liability, it

was about enforcement well beyond the collection of tax. He also contended that the Royal Court had not considered properly, or at all, the nature of direct and indirect enforcement. Further, the Royal Court was also wrong to analyse the decision in the *State of Norway case* as giving rise to some general principle that information gathering was excepted from the revenue rule.

The Court of Appeal accordingly considered afresh whether the powers given to HMRC under Schedule 36 constituted a revenue law which is to be used through an exercise of extraterritorial sovereignty, which required consideration of the terms of Schedule 36 in order to identify its true nature and, if found to be of a revenue nature, to identify whether or not the orders which might be given would amount to direct or indirect enforcement.

The Court of Appeal held that Rule 3 was not offended in this case as the official investigations pursuant to the Schedule powers are not proposed to be carried out in a foreign state given that the TIB was resident in the UK and the Confidential Materials are under his control and were situated in that jurisdiction.

Exercise of discretion

The final point was whether, in the exercise of its discretion, the Royal Court should have made the orders to permit the TIB to comply with the Information Notice.

The Court of Appeal, disagreeing with the Royal Court, considered that the risk of sanctions being imposed upon the TIB in the event of failing to comply with the Information Notice was remote. It found no basis to conclude that the TIB would be penalised. Further, it was of the opinion that the TIB would not be exposed if the appeal was allowed.

Nevertheless, the Court of Appeal listed a number of 'powerful factors' that it had considered which affirmed the decision of the Royal Court to permit the variation of the Jersey Orders and to allow for disclosure of the Confidential Materials:

1. That no other means existed to secure the disclosure to HMRC of much of the information which was the subject of the Jersey Orders;
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 who thought it appropriate to approve the Information Notice;
4. That the TIB is subject to the Information Notice and, although he may not be at risk of sanction for non-compliance, it still amounts to a 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 also held that the public interest would be served by affirming the decision of the Royal Court, as refusing to lift the restriction would prevent the TIB from complying with the law of the state in which he resided and practiced, such state being one which is recognised by Jersey as an appropriate recipient of the mutual recognition provided for by Article 49.

Conclusion

In the current political times, when tax authorities are focused on issues related to tax evasion and avoidance,

mutual assistance is an essential tool and it is right for the Jersey courts to support foreign revenue authorities when situations arise that are in the public interest.

Both of these cases are therefore reminders that in certain situations, such as in the *Halabi* case, the Jersey courts will use its inherent jurisdiction to vary its own orders if persuaded that it is appropriate to do so, including to permit disclosure of confidential materials for purposes not contemplated in the original orders to a foreign tax authority.

That said, in the ordinary course, the Jersey Courts have made it clear that they expect all foreign tax authorities to use the established mechanisms currently in place (ie. TIEAs) to obtain the information situated in Jersey or within the jurisdiction of its court.

Jersey has now entered into TIEAs with over 30 jurisdictions and all of them are in line with the international standards, and broadly follow the Organisation for Economic Co-operation and Development (OECD) model agreement on Exchange of Information on Tax Matters.

International Corporate Rescue

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