

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2019/0037

BETWEEN

COMPASS STAR LIMITED

Claimant

AND

INTERNATIONAL TAX AUTHORITY

Defendant

Appearances: Mr. Yuri Saunders and Ms. Sanyu Richards, Counsel for the Claimant
Mrs. Jo-Ann Williams-Roberts, Solicitor General, Counsel for the Defendant

2020: December 3rd
2021: December 31st

JUDGMENT

[1] **ELLIS J:** In the claim herein, Compass Star Limited (“the Claimant”) seeks to have the Court review the decision of the International Tax Authority (“the ITA”) to serve a notice on it requiring production of specific information itemized in Schedule 1 to the notice (“the Notice”). The Claimant seeks the following relief:

- i. an order of mandamus requiring the Defendant to provide the explanation and information sought by the Claimant as listed below A-C (set out in attorneys' letter dated 23rd October 2018)¹ or otherwise a sufficient level and degree of information by which to enable the Claimant to make representations as to the lawfulness of the Notice to Produce Information which was served by the Defendant on the Claimant and/or otherwise to act in such fair manner as the Court may direct;

¹ See: paragraph 17 herein

The Background

- [2] The Claimant is a company incorporated under the laws of the Virgin Islands and its activities include the offering of an IT platform for those requiring documented vetting processes for directors or other corporate officers in respect of the requirements of the Companies Act 2006 of England and Wales.
- [3] The ITA, established pursuant to the **International Tax Authority Act, 2018** (“the Act”), is the competent authority of the Territory of the Virgin Islands under certain tax information exchange agreements which provide assistance through exchange of information that is foreseeably relevant to the administration or enforcement of the domestic laws of the requesting parties concerning tax matters covered by the Tax Information Exchange Agreements. Under section 5 of the Act, all functions, powers and duties that, prior to the coming into force of this Act, vested in, the Financial Secretary or any other officer by virtue of any mutual legal assistance legislation, agreement or arrangement signed or extended to the Virgin Islands that deals with exchange of information or the international standards in relation to cross border tax matters were vested in the ITA.
- [4] The ITA performs its functions in accordance with its powers under the **Mutual Legal Assistance (Tax Matters) Act, 2003** (“the MLA Act”). Under the MLA Act, the ITA is empowered to inter alia, require the production of such information as is necessary in order to comply with requests from foreign governments. The ITA is able to exercise its power to compel the recipients of notices issued under the MLA Act to disclose otherwise confidential information to foreign authorities. This is backed by the imposition of criminal sanctions.
- [5] It is common ground that on 29th March 2018, the ITA received a request for information made under the Tax Information Exchange Agreement between the Virgin Islands and the United Kingdom (“the Request”). That Agreement mirrors the OECD Model Tax Information Exchange Agreement and it contains provisions that have been deemed to meet the international standard by the Global Forum.
- [6] Following receipt and processing of the Request, the ITA issued the Notice to the Claimant pursuant to its powers under section 5 (1) of the MLA Act. The Notice stated as follows:
- “1.) Please provide financial statements of the Company for the period 6th January 2016 – 31st July 2017. If these financial statements are not kept by the Company, please*

provide copies of other records and underlying documents that are maintained by the Company. If no financial accounts or other accounting records are kept, please provide a reason why the Company has not kept these documents.

2.) Please provide the name and address of any associated companies.

3.) Does the Company maintain any bank accounts? If so, please provide all bank account information including but not limited to, account number, bank name, bank branch and sort code.”

The Notice required the Claimant to produce the required information within 10 working days.

- [7] On 23rd October 2018, the Claimant through Counsel wrote to the ITA indicating that it is unable to assess the validity of the Notice because it lacked the following necessary information:
- a) The identity of the relevant taxpayer or payers resulting in the Notice;
 - b) The tax purpose or purposes for which the information is sought;
 - c) The reasons for believing that the information requested in the Notice is relevant to the enforcement of the laws of the unidentified requesting state; and
 - d) An explanation as to how the request was vetted by the ITA and found to be in conformity with the laws of the Virgin Islands.
- [8] In a letter dated 29th January 2019, the ITA wrote to the Claimant indicating the Agreement under which the Request was processed. The ITA also noted that as any further disclosure could only be made with the permission of the Requesting State, such permission was being sought.
- [9] By letter dated 30th January, 2019, the Claimant wrote to the ITA requesting:
- a) The date of the stated Request(s),
 - b) The length of time before the Notice is withdrawn; and
 - c) Confirmation that there is foreseeable relevance.
- [10] By Notice of Application filed on 8th February 2019, the Claimant sought leave to apply for leave for judicial review of the Notice and of the ITA's subsequent refusal to respond to the Claimant's requests for information or to consider the same.

[11] By letter of 23rd May 2019, the ITA responded to the Claimant's correspondence of 23rd October 2018 indicating; inter alia that the Notice was made pursuant to a request of the United Kingdom Her Majesty's Revenue & Customs Department ("HMRC") ("the Requesting State"). The ITA also stated that after communicating with the Requesting State, it was confirmed that due to the sensitive nature of the ongoing enquiry, further information from the Request could not be disclosed because it would seriously hinder the ongoing investigation. Responding in turn to the Claimant's specific queries, the ITA noted that:

- a) The identity of the tax-payer or tax payers cannot be divulged;
- b) There has been abuse of the VAT Flat Rate Scheme in relation to UK Taxpayers which involve the Company. The eligibility to the Scheme and benefits to the UK taxpayers may not have considered all relevant facts in respect of the Company's connection to the UK taxpayers. Any further information disclosed to the Company may severely hinder the investigations in the United Kingdom;
- c) The request for information was made under the Tax Information Exchange Agreement entered into between the United Kingdom and the Virgin Islands; and
- d) The Tax Information Exchange Agreement is a part of the Mutual Legal Assistance (Tax Matters) Act, 2003. Therefore, when a request for information is received by the ITA the relevant Tax Information Exchange Agreement is examined to ensure that the request is made in conformity with the laws of the Virgin Islands. Following which, the ITA confirms to the recipient of a Notice to Produce Information that this step has been completed, that the request has been vetted and is found to be in conformity with the laws of the Virgin Islands.

[12] By way of response, the Claimant in a letter dated 17th June, 2019 continued to take issue with the Notice. After no doubt making appropriate inquiries, the Claimant learned from Aspire Partnership LLP, a UK based firm of financial advisors which had acted for as many as 2,135 English companies that had had both the VAT numbers and their respective liabilities to make use of the Flat Rate Scheme cancelled. These decisions were overturned on appeal. A copy of HMRC correspondence referencing **Abcesrtion Limited and Others**" was attached for ease of reference. The Claimant requested that the ITA seek further clarification from the Requesting State.

[13] As a consequence, the ITA duly raised the new issues with the Requesting State. The Requesting State replied to the ITA on 3rd July, 2019 and as a result, the ITA was in a position to make certain disclosures to the Claimant with regard to the Notice by letter dated 3rd July, 2019. The communication in essence stated the following:

- a) The ITA sought the consent of the United Kingdom and has provided the information as per that consent.
- b) The ITA's actions in regard to this matter have been in compliance with the relevant Tax Information Exchange Agreement and international obligations.
- c) That the Request was received by the ITA on the 28th March, 2018 and remains pending.
- d) The ITA has vetted the request for information and in conversations with the United Kingdom are satisfied that the request for information made under the relevant Tax Information Exchange Agreement has been correctly made and is valid;
- e) That the ITA has acted fairly in this matter and have provided further information as requested and within the limits of the Agreement that covers the confidentiality of the request for information;
- f) That further correspondence from the United Kingdom Competent Authority concerning the letter dated 5th June, 2019 (Bennet (HMRC UK)/Nolan (Aspire)) concerning Registration for VAT and use of the Flat Rate Scheme in relation to Abcesrtion and others confirms:
 - i. The taxation issues relating to the request for information and the HMRC statutory review case decision that has been referred are broadly similar. However, the Entities which were the subject of that review case are not the same as the entities relating to the request for information received by the BVI;
 - ii. That the UK believes that it has demonstrated the foreseeable relevance of their request for information (which the ITA agrees) and that the domestic avenues have been exhausted and that they have met the terms of Article 5 of the Tax Information Exchange Agreement to make a valid request; and
 - iii. The investigation that the UK request for information stems from is ongoing and HMRC is within its rights to continue to gather information and the matter remains valid.

[14] On 5th July, 2019, the Claimant again wrote to the ITA requesting, *inter alia* clarification of the term "associated companies". On 5th July, 2019, the Defendant responded to that request for clarification indicating that "*...associated companies*" means *any other Company or group of Companies in*

which Compass Star Limited has interest (this includes the beneficial owners of Compass Star Limited or persons that have the ultimate control of Compass Star Limited) This interest, directly or indirectly may be by way of beneficial ownership (as per the definition in BVI Law), an ownership interest (i.e. legal ownership), a Director or any person that has the ultimate control of the other entity.”

[15] On 8th July 2019, following an *inter partes* hearing of the Application for Leave to Apply for Judicial Review, the Court granted leave to the Claimant to apply for judicial review on the grounds of want of procedural fairness/breach of natural justice for failure of the provide the following information:

1. The identity of the relevant taxpayer or taxpayers concerned in the Notice.
2. The tax purpose or purposes for which the information as contained in the Notice is sought.

[(3). is intentionally omitted]

- (4.) An explanation as to how the request was vetted by the ITA.

[16] On 22nd July 2019 (one day prior to the service of the Fixed Date Claim Form), through Counsel, the Claimant wrote to the ITA detailing specific concerns as to the staffing and skills available at the ITA. On the 14th August 2019, the ITA filed a lengthy affidavit in response which was no doubt intended to address the concerns raised in the Claimant 22nd July 2019 letter. However, the Claimant did not find this evidence to be responsive and so in a further letter of 20th August 2019, the Claimant reiterated its concerns regarding the fact that appropriate staff recruitment in the ITA only followed the issuance of the Notice and raised a number of concerns arising from the affidavit evidence. According to the Claimant, it has received no substantive response to its queries and so they are no closer to establishing the existence and use of proper systems by the ITA.

THE ISSUES FOR DETERMINATION

[17] The following issue therefore arise for determination:

- i. Whether the ITA performed its public function with a want of procedural fairness and in breach of natural justice by failing to provide the following information to the Claimant:
 - a) the identity of the relevant taxpayer or payers resulting in the 5th October, 2018 Notice to Produce Information;

- b) the tax purpose or purposes for which the information as contained in the Notice is sought; and
- c) an explanation as to how the request was vetted by the International Tax Authority.

THE PARTIES' SUBMISSIONS

- [18] The Claimant submitted to the Court that the ITA is an administrative body acting in the context of international cooperation and not an investigative and adjudicative body. In that context, the evidence revealed that the individual who vetted the request underlying the Notice was a Ms. Naresha Martin who holds bachelor's degrees in Economics and Marketing Management. Counsel for the Claimant submitted that in light of her qualifications, Ms. Martin is left with no prospect (certainly none *demonstrated*) as to her having the knowledge of whether the request was one within the ambit of the applicable BVI law as she is not an attorney. He further submitted that there is no evidence that Ms. Martin has built up any significant amount of experience vetting such requests. As such it is in these regrettable – and entirely *avoidable* – circumstances that the Claimant has been asked to disclose information which affects the rights of not only it but all its clients.
- [19] The resulting unfairness is that, because the ITA has not particularized to any degree, the nature of the investigation being conducted, the ITA leaves itself with no choice but to request all of the information in the Claimant's possession. Counsel submitted that such production would inevitably involve the disclosure of confidential and sensitive information of the Claimant's clients. The Claimant asserts that it cannot simply hand over that information without a justifiable legal basis for doing so.
- [20] While the evidence filed by the ITA sets out the procedure adopted in vetting a request for disclosure, there was a paucity of information which could shed light on the complaint relevant to HMRC's request sufficient to put the Claimant in a position to investigate the lawfulness or to make representations. Counsel for the Claimant submitted that if the ITA were to give appropriate particulars, the Claimant would be able to know which of its client's accounts were affected and either seek to make representation in relation to those or disclose that subset of its records. As it stands, the Claimant will be forced to provide indiscriminate disclosure which may prejudice of the rights of third parties irrelevant to the investigation.

[21] Counsel for the Claimant submitted that if it is given a better understanding of the investigation being conducted in England, it would be in a better position to make representations as to the relevance of the Request and its merits so that those could be weighed by the ITA in making a decision. Instead, all that the Claimant has been told about the investigation is that:

“there has been abuse of the VAT Flat Rate Scheme in relation to UK Taxpayers which involve the Company. The eligibility to the Scheme and benefits to the UK taxpayers may not have considered all relevant facts in respect of the Company's connection to the UK taxpayers.”

[22] Counsel submitted that the first sentence in that statement is a broad and unhelpful allegation. That there is an investigation underway by HMRC suggests that it is concerned with the abuse of the tax laws of the UK. The second sentence which is an attempt to particularise that allegation fails as the word “may” used therein suggests that there is doubt whether an abuse has in fact taken place. He concluded that the combination of the two statements is that the Claimant is in no better position to criticise the request on the basis of it being a fishing expedition, or, on the basis of there being genuine evidence supportive of the Request underlying the Notice.

[23] The fact of such evidence would greatly assist the Claimant in making a decision whether to disclose the information. While it is accepted that all or most of the underlying material cannot be disclosed to the Claimant, the law is that sufficient material must be disclosed to permit it to respond helpfully. Counsel for the Claimant submitted that hand-in-hand with the right to be heard is the right to be given sufficient information to make proper representations. By way of example, he cited the judgment of the Court of Appeal in the Antiguan case **Stuart A. Lockhart v [1] Valentina Noniniand Maurizio Pandini and [2] The Disciplinary Committee**² where at paragraph 18, the Court approved the following dicta of Lord Denning in the decision of the Privy Council in **B Surinder Singh Kanda v Government of the Federation of Malaya**:

“The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo iudex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations.”

² ANUHCVP2019/0004

- [24] Counsel also submitted that as framed, the Notice amounted to no more than a fishing expedition and in this regard he referred the Court to **Oberson on International Exchange of Information in Tax Matters** where at page 22, paragraphs 3.21 – 3.22 the authors noted that the standard of foreseeable relevance in international requests pursuant to a Double Taxation Convention (a MLAT by another name, really) proscribes requests for information that are merely searching for proof and are speculative in their nature.
- [25] Counsel for the Claimant pointed out that in the case at bar, the Claimant had revealed to the ITA the fact that there had been a number of successful appeals in the HMRC case of Abscesrtion Limited and others which relates to the abuse of the Value Added Tax Flat Rate Scheme. He submitted that this demonstrated that the matter is not a straightforward one, which is even more reason for there being greater candour with the Claimant regarding the request. He concluded that in these circumstances, the Notice itself must be meet the necessary standard because it is cannot be open to the ITA to simply submit that a specific disclosure application could be made by which properly to assess a challenge to the ITA's Notice.
- [26] The Claim was trenchantly opposed by the ITA who contended that it has acted fairly and not in breach of natural justice in the performance of its statutory functions. Counsel for the Claimant relied on the judgment in **Lloyd v McMahon**³ where at page 702 the English court had this to say:
- “My Lords the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”
- [27] However, Counsel for the ITA submitted that a court should apply so much and no more by way of additional procedural safeguards as will ensure the attainment of fairness. The court should only supplement addition procedures to the statue where the court finds that some additional procedure

³ [1987] Appeal Cases 625

is necessary in order to achieve fairness⁴. Applying these principles to the case at bar, Counsel for the ITA submitted that it has acted with procedural fairness and that it has not breached natural justice by failing to give an explanation as to how the Request was vetted by the ITA, because that information was shared with the Claimant.⁵

[28] Counsel for the ITA further submitted that automatic disclosure of all the information in the Request is not consistent with the legislative scheme. Rather, the position must be that such requests are to remain confidential because invariably, indiscriminate disclosure could derail the confidence in the system of mutual legal assistance thus defeating the ultimate goals that intra governmental requests are intended to achieve.⁶

[29] Nevertheless, Counsel for the ITA submitted that whilst the Request is considered confidential, the ITA has not resorted to the shield of confidentiality but has sought to consider and address the Claimant's concerns pertaining to the validity of the Notice. Instead at all material times, the ITA carried out a proper balancing exercise where the concerns of the Requesting State was concerned, whilst, still providing sufficient information to the Claimant to permit it to assess the validity of the Notice. All efforts were made to diligently communicate appropriate information to the Claimant and where the information could not be shared, that was communicated as well.

[30] Counsel pointed out that the evidence in this case discloses that after finalizing discussions with the United Kingdom, the ITA responded to the Claimant giving all the information permitted by the Requesting State. Indeed, she submitted that further information was continually solicited so as to respond to questions or concerns raised by the Claimant and Counsel demonstrated that on more than one occasion it sought further information from the Requesting State in order to satisfy the Claimant's request that it to be put in a position to properly assess the validity of the Notice and (if necessary) to make representations. First, with the permission of the Requesting State, the ITA identified the Requesting State which made the Request, the date of the Request, the subject matter of the Request, matters to which the Request does not relate, the reason for believing that the Request is relevant to the laws of the Virgin Islands, and the manner in which the Request was

⁴ Wiseman v Bourneman [1971] AC 297 at page 308

⁵ See the Affidavit of Latoya James as pages 133 – 144 of the Hearing Bundle

⁶ Friar Tuck Ltd and Quiver Inc. v ITA BVIHCV2015/0339 and 0340 – [2017]

vetted. The only information which was specifically requested, but which the ITA is not permitted to provide is the identification of the relevant tax-payer(s).

[31] In not providing the identity of the relevant taxpayer(s), Counsel for the ITA argued that the ITA has not breached the principles of natural justice because, although it consulted the Requesting State, the Requesting State did not give the ITA permission to release that information to the Claimant.

[32] The ITA therefore contends that the Claimant has enough information to assess the validity of the Notice and to make any challenge to the Notice on substantial grounds.⁷ The Defendant further relies on the principles laid down in Royal Court of Jersey in **Durant International Corporation and others v Attorney General and Federal Republic of Brazil**⁸ which recognizes that the interest of justice can usually be met if when a request is made for disclosure of a letter of request, information is given as to the nature of the investigations and the exact source of the letter of request.

[33] Counsel for the ITA submitted that the ITA did indeed take note of the information gathered by the Claimant's legal representative in which they identified a number of successful appeals in the HMRC case of Abscesrtion Limited and Others a case which related to the abuse of the Value Added Tax Flat Rate Scheme in relation to UK taxpayers. The ITA has also noted the Claimant's concern that the successful appeals may be connected to the Request that is the subject of these proceedings. The ITA has also noted the Claimant's concern that as a result of this Ruling, there may well be no remaining basis for the inbound request. However, Counsel submitted that the ITA did consult further with the Requesting State, and was able to verify that the VAT review cited to the Claimant was not connected to the present investigations ongoing in the United Kingdom which have resulted in the Request. By letter dated 3rd July 2019, the Director of the ITA specifically addressed this issue indicating as follows:

“The taxation issues relating to the request for information and the HMRC statutory review case decision that has been referred to by you are broadly similar. However, they have confirmed that the Entities which were the subject of that review case are not the same as the entities relating to the request for the information received by the BVI.

⁷ Re Evans v the Serious Fraud Office [2003] 1 Weekly Law Reports at 29

⁸ [2006] JLR 31

The UK believed that it has demonstrated the foreseeable relevance of their request for information and that the domestic avenues have been exhausted and that they have met the terms of Article 5 of the Tax Information Exchange Agreement to make a valid request.

The investigation that the Request stems from is ongoing and HMRC is within its rights to continue to gather information.”

- [34] The ITA also maintains that its procedures to assess whether the Request were valid and that in all the circumstances the proper processes were applied in the vetting of the Request before the Notice was issued. Counsel for the ITA submitted that a detailed explanation of the processes entailed in vetting the Request was provided to the Claimant. That outlined in detail the two step approach adopted by the ITA when vetting the underlying request, including but not limited to, ensuring that the Request was made in accordance with Article 5 and other relevant elements of the applicable the Agreement, as well as ensuring the foreseeable relevance of the requested information. The ITA further contends that in order to determine the foreseeable relevance of a request, the Requesting State, in this case provided sufficient information concerning the investigation being conducted within their jurisdiction. Where sufficient information is not provided it is always open to the ITA to request further information so as to satisfy itself as to the foreseeable relevance of the requested information. However, the ITA cannot to conduct its own independent investigation into the background of the Request or seek to arrive at its own conclusion as to whether the information once produced, will result in a sanction in the Requesting State.
- [35] The ITA further accepts that as long as communication between the parties remained ongoing, the ITA had a duty to continually review the validity request. Counsel submitted that the facts of this case demonstrate that when the Claimant presented the ITA with information concerning the disposal of the HMRC case of Abscesrtion Limited and others, following the leave stage of these proceedings, the ITA appropriately consulted the Requesting State so as to ensure that the Request remained valid and did not now constitute an act of bad faith.
- [36] Counsel for the ITA therefore concluded that the ITA has properly exercised its duty in accordance with the principles of procedural fairness, and that given the status of the matter as an investigation and given the purpose and intent of the Territory of the Virgin Islands’ regime on the exchange of

information on tax matters that those aspects of the Request yet undisclosed should remain confidential.

COURT'S ANALYSIS AND CONCLUSION

- [37] The relevant legal principles where are applicable here are not in dispute. Both sides accept that as a matter of general principle whenever a public function is being performed, there is an inference, (in the absence of an express requirement to the contrary), that the function is required to be performed fairly. That inference is generally more compelling where such action or decision-making has the capacity to adversely affect a person's rights or interests or when a person has a legitimate expectation of being treated fairly.⁹ Courts have regularly supplemented statutory powers with an obligation to adhere to the principles of procedural fairness. Lord Bridge's articulation of the legal principle in **Lloyd v McMahon** has since been reinforced in **Bank Mellat v HM Treasury**¹⁰ where Lord Sumption stated:

"The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise. As Byles J observed in **Cooper v Board of Works for the Wandsworth District (1863) 14 CB(NS) 190, 194**, "the justice of the common law will supply the omission of the legislature."

- [38] Counsel for the ITA has however correctly submitted that in following this course, judicial restraint is necessary. Lord Reid made this clear in **Wiseman v Bourneman**¹¹ where he stated;

"For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

- [39] The Court is fully cognizant that the duty of procedural fairness cannot be applied in a hard and fast way. The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and rights affected. Ultimately, administrative decisions must be

⁹ DeSmith's Judicial Review, Seventh Edition – paras 7-009

¹⁰ [2013] UKSC 39 at para:35

¹¹ [1971] AC 297 at 308

made in a fair and open procedure which is appropriate to the statutory, institutional and social context of the decision which is to be made.

[40] To assist in giving focus, courts have identified a non-exhaustive list of factors which are relevant to determining what is required by the common law duty of procedural fairness in any given set of circumstances. These include inter alia:

1. The nature of the decision and the process followed in making it.
2. The nature of the statutory scheme and the express terms under which the public body operates.
3. The importance of the decision to the individual(s) affected and the consequences which follow.
4. The legitimate expectations of the person likely to challenge the decision.

[41] In the case at bar, the relevant context is that of mutual legal assistance/international cooperation. Specifically, the claim concerns a request made to the ITA for information relating to taxes pursuant to a Tax Information Exchange Agreement (TIEA) entered into between the BVI and the United Kingdom. The BVI's decision to enter into tax information sharing agreements with foreign governments arises from its formal written commitment to the Global Forum on Transparency and Exchange of Information for tax purposes which causes it to be peer reviewed and monitored as to its standard of transparency and exchange of information against the 2002 OECD's Model Agreement on Exchange of Information on Tax Matters and its commentary and Article 26 of the OECD Model Tax Convention on Income and on Capital and its commentary. Such agreements are therefore intended to achieve compliance with the OECD's principles of transparency and exchange of information as set out in the OECD Agreement on Exchange of Information on Tax Matters.

[42] The BVI's obligations under TIEA are given effect in domestic law by MLA Act which empowers the ITA to compel the recipients of notices issued under the Act, to disclose otherwise confidential information to foreign authorities. The power given to the ITA is backed by the imposition of criminal sanctions. However, it is important to note that the Act and tax information exchange agreements made in relation to it, contemplate the transmission of information to the requesting state often at an early and investigative stage. If the information obtained is used in criminal or civil or other

proceedings, the subject of the request would then have an opportunity to respond and to make representations.

[43] The following provisions are critical to the determination of this Claim:

- i. Article 1 of the Agreement prescribes that 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 and tax matters including information which is foreseeably relevant to the determination, assessment a, verification, enforcement, recovery or collection of tax claims with respect to person subject to such persons.
- ii. Section 9 of the Act provides that “*the particulars of and all matters relating to a request shall be treated as confidential*” and provides that “*no person who is notified of a request...or in any way becomes aware of a request, shall disclose the fact of the receipt of such a request or any of the particulars required or information supplied to any person except in accordance with the Agreement.*”
- iii. Article 8 of the Agreement provides that information relative to the request may be disclosed to the taxpayer, his proxy or to a witness; this does not include communication to third parties notwithstanding that there may be the holder of the requested information.

[44] It is not disputed that the ITA is purporting to exercise a power to compel the Claimant to disclose otherwise confidential information to an unknown foreign authority. This power is backed by a criminal sanction for any failure to comply. Compliance is therefore neither discretionary nor optional. It is clear that when the decision to issue the Notice is made, it is determinative of the issue. Representations are not generally solicited or considered prior to the issuance of the Notice. Most importantly, there are no appeal procedures provided within the statute to challenge the ITA decision to issue the Notice.

[45] It follows that the only recourse open to an individual or entity who receives such a notice is to bring a legal challenge via judicial review. As such notices are lawful only if in furtherance of a request which is valid under the Agreement and complies with the provisions thereof, without a thorough understanding the factual basis of notice, potential claimants would be unable to assess their validity and where appropriate challenge their issue on substantive grounds.

[46] In fact, this is precisely the contention of the Claimant herein. It has repeatedly sought “*a sufficient level and degree of information by which to enable the potential making of representations as to the lawfulness of the Notice (and the requests contained in the Schedule thereto)*” and it contends that as at the date of the hearing it is still handicapped.

[47] Having reviewed the evidence in the case at bar and having considered the written and oral submissions of the Parties, the Court is not satisfied that there is any genuine basis for the complaint which has been levied in this case. Turning first, to the Claimant’s contention that it has not been provided with an explanation as to how the Request was vetted by the ITA. It is apparent that details of the vetting and processing of the Request was painstakingly set out at paragraphs 12 – 19, of the affidavit of Latoya James filed on 14th August, 2019. The affidavit also exhibited a list of documents including inter alia:

- (a) The Guide to the ITA which sets out its procedures.
- (b) The Tax Information Request Checklist which is based on the relevant TEIA and which outlines the information required to make a request (Article 5) against which requests are to be vetted.

[48] However, the Claimant contends that this evidence is insufficient as it did not address the concerns expressed in its letter earlier letter of 22nd July, 2019 and so by letter dated 20th August, 2019 it raised a number of queries in particular:

- (a) The apparent lack of relevant training of Ms. Martin.
- (b) The absence of details of the “*systems, procedures and processes.*”
- (c) The inadequacy of the Guide which was exhibited.
- (d) Whether statement had been obtained that the Requesting Party has pursued all means available in its own Territory to obtain the information.
- (e) Whether there has been any actual scrutiny of the claim by the Requesting Party that any disclosure of the particulars of the request would seriously hinder its investigations.
- (f) The staffing and training issues.
- (g) Issues relating to CGLS Accountancy Limited (a UK company).
- (h) Issues relating to the UK Flat Rate Vat assessment challenges.

The Claimant contends that despite its efforts, it is no closer to establishing the existence and use of proper systems by the ITA.

- [49] The Claimant has raised general concerns about what it terms to be staffing and training issues and specifically the apparent lack of relevant training of Ms. Martin, the finance cadet officer who holds 2 degrees in Economics and Marketing and who was assigned to process the Request. In her affidavit of 14th August 2019, Ms. La Toya James, director of the ITA represented that Ms. Martin is a trained assessor with the Global Forum who has completed a number of training sessions with regard to exchange of information and the international standard on combating Money Laundering and Financing of Terrorism & Proliferation. Counsel for the ITA has submitted that Ms. Martin has upwards of four years of practical experience in dealing with and processing requests for information, which she does on a daily basis. Ms. Martin's portfolio of countries includes the United Kingdom and as such she is responsible for all requests for information emanating from the United Kingdom.
- [50] Ms. James further indicated that all responsible officers with the ITA follow the systems, procedures and processes developed to aid with the completion of the daily tasks of processing requests. These systems, procedures and processes are set out in the ITA handbook entitled – “the Guide to the International Tax Authority” which is available online of the ITA’s website. She confirms that Ms. Martin followed all the relevant steps involved in vetting the Request and thereafter issued the Notice. However, because there were issues raised by legal counsel on behalf of the Claimant, in accordance with the established practice of the ITA, the director of the ITA then became involved and thereafter all communications regarding the case was personally supervised by her.
- [51] In attempting to articulate the Claimant’s complaint regarding this issue, Counsel for the Claimant has submitted that despite Ms. Martin’s qualifications she would have no knowledge of whether the request was within the ambit of the BVI law. The implication appears to be that because she is not an attorney, Ms. Martin would be unable to assess and verify whether the Requests satisfied the statutory and legal requirements. This Court has no hesitation in dismissing this contention.

- [52] First, Counsel was unable to advance any legal authority which supports the submission that legal training is a prerequisite for vetting and processing requests under this statutory and legal regime. Moreover, given Ms. Martin's training and experience in dealing with such requests the Court has some difficulty in accepting the Claimant's contention that she would be unqualified to vet the request, to verify that it was properly made under the TIEA between the Virgin Islands and the United Kingdom and ascertain that the information sought is within the scope of the Agreement and foreseeably relevant to the administration and enforcement of the domestic laws of the Requesting State.
- [53] The weakness of this Claimant's argument is borne out in the fact that it has not even attempted to demonstrate with any degree of cogency that there is an indelible connection between the absence of legal qualifications/training and the inability to properly apply the provisions set out in the Act and the TIEA. This is critical because it is normal for statutory provisions to be interpreted and applied by so called "lay persons" in almost every sphere of human endeavor. It follows that even assuming that the Claimant was unaware of the qualifications of the vettor/assessor (which is not the case here), the Claimant has failed to demonstrate how this information (without more) would be essential in the circumstances of this case.
- [54] Secondly, in the Court's judgment, the Claimants correspondence delivered after the filing of the Fixed Date Claim Form reveals an attempt to broaden the scope of the grounds upon which leave was sought and granted. First, in light of Ms. James' evidence of 14th August, 2019, and the documents exhibited thereto, it cannot be said that the details of the *systems, procedures and processes* of the ITA have not been disclosed. At paragraph 14 of her affidavit of 14th August, 2019, Ms. James makes it clear that "The systems, procedures and processes utilized by authorized officers are set out in the ITA handbook entitled "guide to the International tax Authority", particularly in pages 3 to 5." Although that Guide is available online on the ITA's website a copy was exhibited to Ms. James' affidavit. The Claimant takes issue with what it termed to be the "*inadequacy of the Guide*". It may well be that the Claimant finds the details of such *systems, procedures and processes* wanting, however, that is not the basis upon which this claim for judicial review has proceeded. In this case, leave was sought and granted on the basis that the principles of natural justice had been breached because the ITA has failed to provide a sufficient level and degree of information which

would enable the Claimant to make representations as to the lawfulness of the Notice. If the contention is that the Guide does not establish proper systems then that must be the subject of a different claim, then, in the Court's judgment that must be the subject of another leave application. In any event, it is clear to the Court that other than the bare contention, the Claimant has failed to cogently demonstrate precisely why it still asserts that the information contained in the Guide or Checklist is inadequate for the purpose. In the Court's judgment, this raises serious doubts as to the genuineness of this complaint.

[55] Thirdly, during the course of the trial, it became clear that by letter dated 23rd May, 2019, the ITA represented that it had obtained confirmation that the Requesting State has pursued all means available in its own Territory to obtain the information sought in the Notice. It is equally clear that ITA had obtained verification that any actual scrutiny of the claim by the Requesting State that any disclosure of the particulars of the Request would seriously hinder its investigations. These matters therefore do not require further discussion. However, the Claimant persists in raising issues relating to CGLS Accountancy Limited (a UK company) and issues relating to the legal challenges to the UK Flat Rate Vat assessment, when it clear that the ITA is not an investigative or adjudicative body but rather an administrative body operating within a context of international mutual legal assistance agreements. That legal framework contemplates only the transmission of information to the requesting state once a request has been properly vetted as being valid. Moreover, it is apparent that by letter dated 23rd May 2019, the ITA would have represented the Requesting State had made assurances that the UK entities which were the subject of the review/appeal challenges are not the same as those relating to the Request.

[56] The Court has considered the Claimant's case in the round and it is evident that the preceding issues are not the mainstay of the Claimant's complaint. In the Court's judgment, the real issue of contention stems from the fact that the ITA has refused to disclose the identity of the relevant taxpayer or taxpayers resulting in the Notice or the tax purpose or purposes for which the information as contained in the Notice is sought. The Claimant contends that in the absence of such information, it is being deprived of its right to natural justice because it would not have sufficient information to properly make representations. According to the Claimant unless the ITA were to give appropriate

particulars, it would be not able to know which of its client's accounts were affected and thus be able to make representation in relation to those or disclose that subset of its records.

[57] In support of this contention, the Claimant has relied extensively on the judgment of the BVI High Court in **Friar Tuck Ltd. and Quiver Inc. v International Tax Authority**. In the Court's judgment, such reliance is misplaced. It is clear from *ratio decidendi* that that case was decided on the basis of the ITA's blanket reliance on the shield of confidentiality set out in the relevant tax information exchange agreement with no apparent regard to the scope of confidentiality actually and specifically necessary in the circumstances of that case. From that facts of that case it was clear that the ITA provided no evidence that it contacted that requesting state to positively verify that there was the potential for prejudice to their investigation or whether indeed any concessions could be made on disclosure. The Court examined the relevant case law and determined that this "*implacable position adopted was clearly not consistent with the modern day practice.*"

[58] However, the facts of **Friar Tuck Ltd. and Quiver Inc. v International Tax Authority** are clearly distinguishable in the case at bar. Here, the evidence discloses that while there may have been some delay in receiving necessary feedback from the Requesting State, on more than one occasion the ITA approached the Requesting Party with the Claimant's concerns. This is not surprising given the guidance iterated in the **Friar Tuck Ltd. and Quiver Inc. v International Tax Authority** decision. Having revealed as much information as was possible in the circumstances, the ITA represented that it was obliged to decline to disclose the identity of the taxpayer(s) as this may prejudice the ongoing investigation.

[59] It is clear that the court in **Friar Tuck Ltd. and Quiver Inc. v International Tax Authority** was also fully seised of the relevant context and had this to say:

"Of course there is an obvious caution to be applied here. The peculiar context here demands that proper weight be ascribed to the need for confidentiality. Clearly the approach adopted by the Bermuda authorities' pre-2001 was unwarranted and disproportionate. Automatic disclosure of such request is clearly inconsistent to the legislative scheme. **This Court is satisfied that that there are very good reasons which support the Defendant's contention that starting point or default position should be that such request are to remain confidential. There can be no doubt that indiscriminate disclosure runs the risk that nefarious scoundrels would be able to benefit from early notice of the status of an investigation and through delay tactics frustrate the course of justice. Invariably**

indiscriminate disclosure could derail confidence in the system of mutual legal assistance thus defeating the ultimate goals.

In the Court's judgment **the peculiar context here prescribes that intra governmental request are confidential and should not be disclosed unless the justice of the case demands it. The Court is not satisfied any such threshold has been satisfied in this case."**

- [60] Clearly, there is a balancing exercise to be undertaken. In that context, the judgments in the case of **Bertolli v Malone**¹² are instructive. At first instance, the appellants sought declarations that they were entitled to be heard by the Cayman Mutual Legal Assistance Authority on a request by U.S. Authorities for legal assistance with respect to criminal proceedings instituted against them in the United States. On appeal, the Cayman Islands appellate court observed that the purpose of the Mutual Legal Assistance (United States of America) Law 1986 and the Mutual Legal Assistance Treaty was to speed up the process involved in the investigation, prosecution and suppression of crime between the two countries and in the circumstances the principles of natural justice could not be meant to be applied as rigid rules to frustrate the intent of the Legislature.
- [61] The Court concluded that the Legislature had not provided that the person in respect of whom the information is sought should be heard and in the circumstances there would appear to be no necessity based on the demands of fairness that the Courts should supplement the legislative requirements by imputing a requirement that the Authority should decide whether such a person should be heard or not. Georges J.A. concluded that the Appellants could not be parties to the determination as to whether the assistance should be granted or denied under the Mutual Legal Assistance (United States of America) Law and Treaty and as a consequence, the Authority was under no obligation to consider whether they should be heard.
- [62] **Bertolli v Malone** was appealed to the Privy Council, and in the judgment delivered on 22nd April 1991¹³, their Lordships wholly adopted the reasoning of Georges JA. The Board held that the respondent was under a duty to act fairly. In order to decide what procedural fairness required in this case it was necessary to examine the Mutual Legal Assistance (United States of America) Law

¹² [1990] CILR 58

¹³ [1991] UKPC 17; [1992] LRC (Const.) 960

1986 and Treaty of Mutual Legal Assistance 1986. The Board noted that the Law and Treaty were designed to provide speedier machinery for the investigation, prosecution and suppression of crime. The demands of law enforcement were intended to override the duty of confidentiality. Moreover, the Law and Treaty, in particular part 3(2), did not provide that the person in respect of whom the information was sought ought to be heard, which was understandable as the Treaty may be used at an investigatory stage when it would be undesirable for the suspect to be notified of the investigation and afforded the opportunity to destroy evidence.

[63] As the appellants were not party to the decision as to granting assistance, the Cayman Mutual Legal Assistance Authority was held to be under no obligation to consider whether to hear a party who was the subject of a mutual assistance request under the Mutual Legal Assistance (USA) Law 1986 which had been properly construed as granting that Authority the power to gather and produce confidential information. This authority represents just one of many¹⁴ which demonstrate the regard which courts have had for the demands of law enforcement in the context of mutual legal assistance/international cooperation. The ability to provide effective international cooperation is not an optional feature of a tax information exchange regime, but an essential requirement. The peculiar context here prescribes that mutual legal assistance requests are confidential and should not be disclosed unless the justice of the case demands it.

[64] Turning to the relevant facts in the case at bar, we see that Notice in question seeks:

- i. Financial statements of the Claimant for the period 6th January 2016 – 31st July 2017.
- ii. If these financial statements are not kept by the Claimant, the Claimant is to provide copies of other records and underlying documents that are maintained by the Claimant.
- iii. If no financial accounts or other accounting records are kept the Claimant must provide a reason why the Company has not kept these documents.
- iv. The Company must provide the name and address of any associated companies. In subsequent correspondence, the term “associated companies” was defined as
- v. Whether the Claimant maintain any bank accounts.

¹⁴ R v Manchester Crown Court ex p. Taylor 1988 1 W.L.R. 705; R. v. Director of the Serious Fraud Office ex p. Johnson 1993 C.O.D. 58; Acturus Properties Ltd and others v Attorney General [2001] 3 ITLR 360

- vi. If so the Claimant must provide all account information including but not limited to the account number, bank name, bank branch and sort code.

- [65] In subsequent correspondence, the ITA communicated a thorough definition of the term “associated companies”. The Claimant was also broadly advised as to the relevant tax purpose – [*There has been abuse of the VAT Flat Rate Scheme in relation to UK taxpayers which involve the Claimant. The eligibility of the Scheme and benefits may not have considered all relevant facts in respect of the Claimant’s connection to the UK Taxpayers*] as well as the process by which the Request was vetted prior to the issuance of the Notice.
- [66] Following the grant of leave and during the course of the trial, the Claimant’s case mutated. In oral submissions, Counsel argued that the information disclosed was insufficient to draw any connection between the declared tax purpose and the requested information. According to Counsel the tax purpose was too broad as it referenced UK tax payers generally without disclosing how the Claimant’s financial records could assist in that investigation.¹⁵ This is especially so when there is no allegation of any specific wrongdoing on the part of the Claimant company. Counsel contended that the vague statement of the tax purpose left the Claimant with no idea of what is being investigated and the relationship to the Claimant. Counsel described that purported missing link as bewildering.
- [67] It goes without saying that this was not how the Claimant framed its leave application and it is not the basis upon which the order granting leave was made. It follows that ITA would not have been suitably positioned to provide any effective defence because these allegations would have been raised in oral submissions during the trial. There are numerous authorities which make it clear that this is wholly unsatisfactory. See: per Gordon JA in **Margaret Joseph v [1] The Attorney General [2] Raphael Hamilton Civil Appeal No. 9 of 2003** applied in **Shankiell Myland v Commissioner of Police et al GDAHCV2012/0045 at paragraphs 37 – 45**. In light of the way that the Claimant has chosen to plead his case, the Court is satisfied that the Claimant cannot in legal submissions purport to advance a claim which he chose not to advance in his written pleadings and evidence.

¹⁵ The Court notes that Article 5 of the TIEA does not impose this threshold. Instead it simply provides that the information “*shall include the tax purposes for which the information is sought and the reason why the requested information is foreseeably relevant to the administration or enforcement of the domestic law of the requesting party*”.

[68] What had been advanced by the Claimant was that because of its activities, the Claimant contends that the production of the material requested will inevitably involve the disclosure of confidential and sensitive information of its clients. This is by no means unusual. The declared tax purpose has enabled the Claimant to conduct its own inquiries and following such inquiries, it has gleaned that there is an HMRC investigation into the abuse of the Value Added Tax Flat Rate Scheme which has resulted in a successful appeal by a number of taxpayers. It appropriately sought clarification that the subjects of the current investigation are not numbered among the successful appellants. The HMRC have put the matter beyond doubt and this has been communicated to the Claimant in correspondence dated 3rd July, 2019.

[69] It is therefore apparent that the ITA attempted to verify that at the stage at which the investigation currently stands, disclosure of the identity of the relevant taxpayer would prejudice the ongoing investigation. In that same correspondence, the ITA indicated that the identity of the taxpayer(s) could not be divulged because – *“After communication with the United Kingdom it was confirmed that due to the sensitive nature of the ongoing enquiry further information from the request cannot be disclosed as it would seriously hinder their investigation.”*

[70] It is now well established that the requirements which fairness imposes will differ depending on the circumstances which prevail. In the Court’s judgment, the fact that one is concerned with an investigation into unlawful conduct cannot be ignored. The judicial approach has been reflected in some of the decisions cited herein but a leading authority is **IRC v Rossminster Ltd**¹⁶. That case involved the issue of a search warrant in connection with an investigation into tax fraud. Rossminster, whose premises had been searched pursuant to the warrant, brought proceedings for judicial review to quash the warrant. The House of Lords held:

‘... that the warrants, which conferred the power to enter and search premises, regardless of their ownership, were strictly and exactly within the authority of section 20C(1) and **under them the occupants had no right to be told at that stage what offences were alleged to have been committed, who were alleged to have committed them or the “reasonable ground” which the judge was satisfied existed for suspecting that an offence involving fraud relating to tax had been committed.**’ Emphasis mine

¹⁶ [1980] STC 42, [1980] AC 952

- [71] The ITA has correctly contended that the fact that a request comes from the central authority of the requesting state is sufficient to establish that a request is lawful.¹⁷ In the Court's judgment the presumption of regularity applies with full force to decisions of the ITA taken pursuant to the statutory and legal regime herein. It would, in the Court's judgment, be quite wrong to insist on the ITA (any more than the police in an ordinary criminal investigation) disclosing the identity of the persons under investigation or indeed that exact state of the investigation. Such information would often be of very considerable assistance to those under investigation and could lead to the investigation being hampered or thwarted.
- [72] There is an obvious public interest in ensuring that such investigations are not hindered by unmeritorious claims for judicial review which may be brought simply to achieve delay. This is particularly significant in the specific context of mutual legal assistance/international cooperation which demands that enquiries undertaken in order to assist foreign investigations should not become stalled in the courts.
- [73] Ultimately, fairness will usually be assessed by reference to a wide range of factors including the nature of the individual's interest and the impact of the decision on it, the importance of the decision for the individual and for society, the type of decision being made, whether the decision is preliminary or final, the subject matter of the decision, and the terms of any relevant statutory provisions. In considering these factors, the Court has noted that the information sought to be disclosed would ordinarily be confidential. However, it is clear that in the event that the information is deployed in criminal or civil proceedings almost certainly, the subject would have an opportunity to respond.
- [74] In the Court's judgment it is also appropriate that the Court taken into account the relevant context and this has been done. The system of cooperation between authorities established the MLA Act and TIEAs is founded on rules intended to create confidence between States, ensuring that cooperation is efficient and fast. The requested authority must, in principle, trust the requesting authority and assume that the request for information it has been sent both complies with the domestic law of the requesting authority and is necessary for the purposes of its investigation. The requested authority does not generally have extensive knowledge of the factual and legal framework

¹⁷ *Durant International Corporation v Attorney General* [2006] JLR 31)

prevailing in the requesting state, and it cannot be expected to have such knowledge. Moreover, the requested authority cannot substitute its own assessment of the possible usefulness of the information sought for that of the requesting authority.

- [75] However, the requested authority must nevertheless itself verify whether the information sought is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority. In that regard, it is important to note that Article 5 (especially 5 (6)) of the TIEA sets out matters that are relevant for the purposes of that review. These include information which must be provided by the requesting authority such as the identity of the person under examination or investigation and the tax purpose for which the information is sought; the period for which the information is requested and a declaration of conformity with the terms of the TIEA. In order to enable the requested authority to proceed with the verification, the requesting authority must provide an adequate statement of reasons explaining the purpose of the information sought in the context of the tax procedure underway in respect of the taxpayer identified in the request for information.
- [76] Of course, if required, the requested authority may, for the purposes of that verification, ask the requesting authority for additional information that may be necessary in order to rule out, from its own perspective, the possibility that the information sought manifestly has no foreseeable relevance. The review to be carried out by the requested authority is not limited, therefore, to a brief and formal verification of the regularity of the request for information in the light of those matters, but must also enable that authority to satisfy itself that the information sought is not devoid of any foreseeable relevance having regard to the identity of the taxpayer concerned and that of any third party asked to provide the information, and to the requirements of the tax investigation concerned.
- [77] From the evidence in this case,¹⁸ it is apparent that after reviewing the Request the ITA was satisfied that the Article 5 checklist was satisfied. Further, it is clear that the ITA (even after making further inquiries when relevant information was supplied by the Claimant which may have put the matter in doubt and after it personally reviewed its file and verified that the entity identified by the Claimant had no connection or relation to the UK taxpayer or the Request) was satisfied that the Requesting State had demonstrated the foreseeable relevance of the requested information. It is therefore

¹⁸ Paragraphs 15 – 19 of the Affidavit of La Toya James on 14th August 2019

apparent that the ITA agrees that there is a nexus and that the Request was correctly made and is valid.

[78] Having considered the evidence advanced by the Claimant and having considered its legal submissions, the Court was not persuaded that there was insufficient information provided in the Notices and the succeeding correspondence by which an individual applying common sense would have gleaned the background and subject matter/ tax purposes of the investigation/inquiry. In addition to the representations made in the ITA's letter of 23rd May 2019, its letter of 3rd July 2019 further states that "*the taxation issues relating to the request for information and the HRMC statutory review case decision that has been referred to by you [the Claimant] are broadly similar.*" It follows that unlike the case in **Friar Tuck Ltd. and Quiver Inc. v International Tax Authority**, the Claimant herein has not been completely relegated to mere surmise and conjecture. When the Notice is read together with the information provided in the successive correspondence from the ITA, the Court is satisfied that there is enough basis upon which the Claimant is able to assess the validity of the Notice.

[79] Although in the normal course, in order for a person to be given a full hearing of his case in relation to the lack of any foreseeable relevance of the requested information, a person/entity should be provided with as much information of the Request as necessary, redacting any sensitive material, to show that the requirements in Article 5 have been met.¹⁹ This issue must be examined in relation to the specific circumstances of each case, including the nature of the act at issue, the context of its application and the legal rules governing the matter in question. Counsel for the Claimant has unfortunately not put before the Court any judicial authority in which the requesting state would have been unequivocal about the likely prejudice to an ongoing investigation if that information were to be disclosed. It seems to the Court that in the face of such a representation, the Court is obliged to carry out a balancing exercise. Having done so, this Court is satisfied that in the circumstances of this case, fairness does not demand that the Claimant be provided with the identity of the taxpayer in order to raise its challenge to the validity of the Notice. In that regard the Court is guided by the dicta in the case of **Acturus Properties Ltd v Attorney General**.²⁰ In that case the Attorney General

¹⁹ *Berlioz Investment Fund SA v Directeur de l'administration des Contributions directes* (Case C-682/15)

²⁰ (2001) 3 ITCLR 360 since considered and approved by the Jersey Court of Appeal in *Volaw Trust & Corporate Services Limited v Mr. Berge Gerdt Larsen v The Office of the Comptroller of Taxes*

had issued notices under the Investigation of Fraud (Jersey) Law 1991 in response to a letter of request from an agency of the Government of South Africa seeking assistance with a criminal investigation into a fraud there taking place. Entities named in the letter of request, contended, on an application for judicial review of the Attorney General's decision, that the Law Officer could not simply accept what was asserted in the letter of request: on the contrary he was bound to make further enquiries, to check the facts alleged in the request and even to ask for affidavit evidence in support of allegations so as to satisfy himself that there were genuine grounds for believing that a fraud had been committed. The relevant dictum of the Jersey Court is set out at paragraph 72:

“Mr Clarke raised a number of criticisms in relation to the form of the notices. The first related to the second, third and fourth notices where the person under investigation was described as 'Wheels of Africa Group'. Mr Clarke submitted that this was not a 'person' being neither an individual nor a legal entity. It was an informal name for a number of companies, which were not specified in the notice as comprising the Wheels of Africa Group. The 1991 Law could only be exercised where there was good reason to investigate the affairs of 'any person' and WOA was not a person. In our judgment this was a point without merit. In the first place we think that the expression 'person' includes the plural and can therefore include a group of persons. **More importantly, as was stated in the *Rossminster* case, the law does not require that the persons under investigation be named in documents such as a notice under the 1991 Law. That is for good reason. The persons under investigation may change as the investigation progresses and more information becomes available. Alternatively, it may be prejudicial to the enquiry to disclose who is under investigation. In our judgment a notice under the 1991 Law does not, as a matter of law, have to say who is under investigation. It follows that any incomplete description of the person who is under investigation cannot invalidate the notice either. In saying this we would not wish to encourage the Attorney General to omit the name of the person(s) under investigation in all cases.** It has been the practice hitherto to give some indication of the person under investigation and we think that it is helpful to the recipients of notices to have some idea of the general nature of the investigation being undertaken. **We are not aware of any evidence that including the name has in practice caused difficulties. Accordingly, we would recommend that, save where there is good reason to do otherwise, the name of the person(s) under investigation should continue to be included but merely as a matter of good practice, not a requirement of law.**” Emphasis mine

- [80] Given the unequivocal indication of the Requesting State and for the reasons set out herein, the Court is therefore not satisfied that the Claimant has made out its claim.

[81] Finally, the Court is obliged to express its concern about the manner in which this matter was prosecuted by the Claimant. It is apparent that the litigation was precipitously commenced whilst the Parties were still engaged on ongoing discussions. This may well have contributed to the evolving metamorphosis of the Claimant's case during submissions. This is unfortunate given that there was no indication that the ITA was unwilling to chase up the Claimant's queries or any particular urgency as the ITA was still in the process of obtaining instructions and had not representation and intention to initiate criminal sanctions.

COSTS

[82] Finally, CPR 56.13 (6) provides that no order for costs may be made against a claimant for an administrative order unless the Court considers that the claimant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. Notwithstanding the Court's findings, this case does not fall within that matrix.

[83] **It is therefore ordered as follows:**

- i. **The Claimant's claim is dismissed.**
- ii. **No order as to costs.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar