

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

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/0035

BETWEEN:

MAGNUM INVESTMENT TRADING CORPORATION

1st Claimant

NITEROI LIMITED

2nd Claimant

-AND-

THE ATTORNEY GENERAL OF THE BRITISH VIRGIN ISLANDS

1st Respondent

MAGISTRATE AYANNA BAPTISTE–DABREO

2nd Respondent

Appearances: Mrs. Monica Carrs-Frisk, QC, Mr. Paul B. Dennis, QC with Ms. Nadine Whyte, Counsel for the Claimants
Mr. Hefin Reese, QC, Mrs. Jo-Ann Williams-Roberts (Solicitor General), and Mrs. Kaidia Edwards-Alister, Ag. Principal Crown Counsel, Counsel for the Respondents

2018: July 19

JUDGMENT

[1] **Ellis J.:** The Claimants are both BVI registered companies which indirectly own shares in a Russian company, OJSC Togliaytiazot (“ToAZ”), one of the most successful mineral fertilizer production companies in Russia.

- [2] By letter of request dated 19th June 2015 (received on 1st October 2015), (“the Request”) the Russian Authority, namely the Investigative Committee of the Russian Federation, sought assistance of the First Respondent in obtaining evidence in aid of criminal investigations taking place in the Russian Federation involving the offence of “swindling”. The Request indicated that the Russian Authority is investigating a criminal case against named individuals, Makhelai Vladimir Nikoloayevich, Makhelai Sergei Vladimirovch, Korolev Evgeniy Anataloyveich, Andreas Zivi and Beat Reprecht (the “Persons under Investigation”) for allegedly stealing products from ToAZ valued at approximately USD\$3Million by “deception and abuse of confidence” over the period 1st January 2008 – 31st December 2011. The Request further provides that during the period of the alleged swindling, three of the Persons under Investigation managed ToAZ via foreign legal entities which included Thornton Ventures Limited and A.S. Industries Limited.
- [3] The Request contends that in December 2012, shares in ToAZ which belonged to Thornton and AS Industries were transferred to the Claimants respectively pursuant to agreements for sale. On that purported basis, it is contended that the circumstances under which the Claimants were established, the purchase of the shares in ToAZ and the management of those shares are critical to the investigation and so assistance was sought in obtaining certain confidential documents and information belonging to the Claimants.
- [4] The Request sought the following:
- i. Certified extracts from the trade registers of the Claimant Companies for the period starting from their date of incorporation to the date of the Request.
 - ii. Interrogatories of the directors and other managers of the Claimant Companies soliciting responses to the following questions: (a) when the Companies were incorporated and what are their core activities, (b) the banks where the Companies accounts opened from the date of incorporation to present, (c) who are the beneficial owners of the companies from date of incorporation to present, (d) what role did the Persons under Investigation play in the companies, (e) where, when and under what circumstances did the companies acquire the shares in ToAZ (indicating the seller of the shares, the date of the relevant sale and purchase agreement and the number of shares acquired), (f) to whom and in what amount and to what accounts are the proceeds from the purchase of the shares to ToAZ transferred, (g) who represented the company interest at annual general meetings of the shareholders of ToAZ, (h) where, when and under what circumstances were the shares of ToAZ sold (indicating the buyer of the shares, the date of the relevant sale and purchase agreement, the number of shares acquired), or transferred to another asset management company

(indicating the company, the date of the relevant trust agreement and the amount of shares transferred), (i) to whom and in what amount and to what accounts were the dividends received on shares of ToAZ transferred.

- iii. The Respondent was to provide a soft and hard copy of the interrogation signed by the person questioned and person who conducted the inquiry.

- [5] On 11th November 2015 Corporate Agents (BVI) Limited, the registered agent of the director of the First Claimant received a request from the Financial Investigation Agency ("FIA") seeking information pursuant to section 4(2)(d) of the **Financial Investigation Agency Act 2003** (the "FIAA"). On the 18th November 2015, in response to this request, the registered agent delivered a number of documents to the FIA.
- [6] On 8th January 2016, the First Respondent in accordance with section 6(7) of the Criminal Justice (International Cooperation) (Amendment) Act 1993 as amended by the Criminal Justice (International Cooperation) (Amendment) Act 2004 (together referred to as the "CJICA"), directed the FIA to apply to a Magistrate for a search warrant to search the premises of Corporate Agents (BVI) Limited for the purpose of investigating criminal offences involving of the Claimants.
- [7] The warrant was granted on 12th January 2016 further to an ex parte application. That warrant sought production of *"all original files, documents, accounts and all other records, kept in the ordinary business whether those records are in written form or kept in microfilm magnetic tape or mechanical or electrical data retrieval mechanism, paid cheques, inter account transfers, telegraphic transfers and all correspondence and notes including all office notes made concerning the company formation. All details concerning changes of the company name and all changes or registered agent, together with all transactions in relation to the Claimants and any other company, trust or bank accounts concerned with the BC's numbers mentioned which is alleged to be connected to a case of swindling ..."*
- [8] The documents retrieved were submitted to the FIA by Corporate Agents (BVI) Limited on 22nd January 2016. There was in fact not actual search conducted. The Claimants contend that these are the same documents which had been requested and provided to the FIA earlier in November 2015.

[9] The Claimant also contend that although the warrant demands that the documents retrieved should be brought before the Magistrate's Court to be dealt with as the law directs, this was not done in this case. Instead, they allege that steps were taken to transmit the documents to the Russian Authority. This step was only averted by the interlocutory injunctive relief granted on 3rd February 2016 in which the High Court ordered the First Respondent to abort the transmission pending an *inter partes* hearing. By order dated 10th February 2016, following an *inter partes* hearing, the Court prohibited the First Respondent from recommencing transmission pending the hearing of the Claimants' Application for Leave to apply for Judicial Review.

[10] This claim seeks to engage the Court's supervisory jurisdiction to review three decisions:

- i. The First Respondent's decision of 8th January 2016 to direct the FIA to apply for a search warrant.
- ii. The Second Respondent's decision on 12th January to grant the search warrant.
- iii. The First Respondent's decision on 28th January 2016 that the documents gathered pursuant to the search warrant could be sent to the requesting foreign authority without regard to representations made by the Claimants.

[11] The Claimants seek the following relief:

- i. An order of certiorari quashing these decisions.
- ii. An order of mandamus requiring the return of the documents to the Claimants.
- iii. An order prohibiting the First Respondent (his servants or agents) from transmitting the documents to any third party.
- iv. Costs.
- v. Such further and other relief as the Court deems just.

[12] The Claimants contend that the Request was issued for improper purposes and formed part of an unfair and unlawful campaign by Russian entities and authorities against the Claimants and entities connected with them. The relief is claimed on the following grounds:

- i. The Respondents unfairly and unlawfully failed to provide to the Claimants the materials relied upon in support of the decisions and the Second Respondent failed to give reasons for her decision to grant the warrant.
- ii. The First Respondent failed to investigate and make necessary inquiries before acceding to the request of the Russian Authority.
- iii. The Respondent acted *ultra vires* in that the statutory preconditions for the exercise of their powers were not met.

- iv. The Respondents failed to properly exercise their respective discretions.
- v. The failure to make full and frank disclosure /non-compliance with the duty of candour in relation to the information provided to the Second Respondent before she made her decision.
- vi. The First Respondent failed to consider the Claimant's representations before taking the decision to transmit the documents to the Russian Authority.

STANDARD AND BURDEN OF PROOF IN JUDICIAL REVIEW

[13] Generally, administrative actions are presumed to be legal and valid.¹ However, this presumption is rebuttable. The classic statement of this legal principle is set out in the judgment of **R v Inland Revenue Commissioners ex p Rossminster**²;

“Where Parliament has designated a public officer as decision-maker for a particular class of decisions the High Court ...must proceed on the presumption *omnia praesumuntur rite esse acta* until that presumption can be displaced by the [Claimant] for review - upon whom the onus lies of doing so.”

[14] Accordingly, the burden is on the party who seeks to set aside any determination, order or decision to bring sufficiently cogent evidence to show that the decision is invalid, unreasonable or unlawful.

[15] In **R v Lambeth London Borough Council ex parte Ireneschild**³, the English Court of Appeal made it clear that the onus is on the applicant to show the failure to take into account relevant considerations. The applicant also bears the burden of proving that the irrelevant considerations were in fact taken into account and in the same way, the general position is that the onus is on an applicant to demonstrate unreasonableness. See: **Standard Commercial Property Securities Ltd v Glasgow City Council**⁴.

[16] It is with these principles in mind that the Court must now turn to consider the Claimants' grounds for review. The Claimants' submissions reveal that there is much overlap. In the premises, the Court has classified the main decisions in the Claim and has considered the grounds of challenge

¹ See Wade and Forsyth, Administrative Law, 9th Edition (2004) at pages 292 – 3 and the many cases there cited.

² [1980] AC 952 at 1013 F – H

³ [2007] EWCA Civ. 234 at paragraph 45

⁴ [2006] UKHL 50 at page 61 relying on R v Birmingham City District Council Ex P O [1983] 1 AC 578, 597 C – D per Lord Brightman

made in respect of each decision maker. The first being the decision taken by the Attorney General to process the request and to direct the FIA to apply for the search warrant. The second matter concerns the circumstances leading up to and surrounding the decision taken by the Magistrate to grant or issue the warrant. The final challenge concerns the decision to transmit the documents retrieved to the Russian Authority.

DECISION TO PROCESS THE REQUEST AND TO DIRECT THE FIA TO APPLY FOR THE SEARCH WARRANT

[17] First, the Claimants contend that the First Respondent erred in failing to take any or adequate steps to investigate the background to the Request. Counsel for the Claimants pointed out that the evidence filed on behalf of the Attorney General discloses that he undertook no independent investigations or inquiries before deciding to process the Request.

[18] Counsel for the Claimant submitted that public law requires that decision makers ask themselves the right questions and take reasonable steps to acquaint themselves with the relevant information to answer these questions before taking decisions. She referred to this as the “Tameside duty”, so called after the case, **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**⁵ where at page 1065 B the Court observed:

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred... It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, per Lord Greene M.R., at p. 229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

⁵[1977] AC 1014; Counsel also relied on the judgment of Quin J in *MH Investments and JA Investments v CITIA* Grand Court of the Cayman Islands 13th September 2013 and *R (Propend) v Central Criminal Court* [1996] 2 Cr. App. R. 26.

- [19] Counsel argued that the First Respondent was clearly required as a matter of fairness and in the proper exercise of his discretionary powers to undertake his own investigations prior to directing that a warrant be sought. She pointed to the specific statutory power prescribed under section 6(3) of the CJICA to direct an officer to conduct an investigation but she also submitted that the Attorney General had the ability on his own accord to make inquiries in order to ensure that he was apprised of all relevant facts.
- [20] Counsel argued that because search and seizure orders are such a draconian infringement of an individual's rights, in the case of a request from foreign state such as Russia with a well-known track record for disregarding the rule of law, it is critical that the Attorney General carefully consider the making of such an order.
- [21] In a collateral submission, Counsel also argued that the First Respondent breached the principles of natural justice when he elected to proceed with an ex parte application for a search warrant. He argued that the decision to employ this procedure deprived the Claimants of sight of the evidence upon which the application was based and denied them an opportunity to make representations at the hearing of the application for the warrant.
- [22] The Claimants also argued that the Attorney General's decision to action the Request was ultra vires because the relevant statutory preconditions for the exercise of his powers under section 6 of the CJICA were not satisfied. Section 6 provides as follows:
- (1) Subject to subsection (2), this section has effect where the Attorney General receives, either directly or through the Governor, a request for assistance in conducting an investigation and obtaining statements and other relevant evidence for the purposes of criminal proceedings that have been instituted, or a criminal investigation that is being carried on, in a country or territory outside the Virgin Islands, from
 - (a) a court or tribunal exercising criminal jurisdiction in a country or territory outside the Virgin Islands or a prosecuting authority in such a country or territory; or
 - (b) any other authority in that country or territory which appears to him to have the function of making such requests.

(2) The Attorney General shall not exercise his powers under this section unless he is satisfied that:

- (a) an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed;
- (b) criminal proceedings in respect of that offence have been instituted in the country or territory in question or that an investigation into that offence is being carried on there; and
- (c) either
 - (i) the conduct constituting the offence which is the subject of the proceedings or investigation would constitute an offence if it had occurred in any part of the Virgin Islands; or
 - (ii) there is in force, in relation to the Virgin Islands and the country or territory in question, a treaty that provides that the rendering of assistance for the purposes of criminal proceedings or investigations:
 - (A) by the Virgin Islands to that country or territory shall not be subject to the condition that the conduct constituting an offence in that country or territory shall constitute an offence if it had occurred in any part of the Virgin Islands; and
 - (B) by that country or territory to the Virgin Islands shall not be subject to the condition that the conduct constituting an offence in the Virgin Islands shall constitute an offence if it had occurred in any part of that country or territory.

[23] Counsel submitted that the decision to grant the warrant is ultra vires because the statutory pre-conditions were not in fact satisfied. Specifically, they contend that there were no reasonable grounds for suspecting that an offence had been committed under the laws of Russia contrary to section 6(2)(a) of the CJICA. They assert that other than the bare assertion that the Persons under Investigation allegedly stole ammonia and carbamide valued at USD\$3Billion between 1st January 2008 and 31st December 2011, the Request fails to reveal any foundation for the allegations raised in the Request.

[24] Further, the Claimants contend that there were no reasonable grounds to believe that the documents sought by the warrant related to the alleged offence of swindling. According to Counsel, the Request establishes no connection between the alleged stealing of products from

ToAZ by the individuals during the relevant period and the subsequent transfer of ToAZ shares to the Claimants one year later in December 2012. She submitted that there are no reasonable grounds for suspecting that the registered office of the Claimants in the BVI would have contained evidence relevant to the alleged theft of these products from a site located in Russia some five years prior to the date when the warrant was sought.

[25] In light of the Claimants' submission that there was a failure to verify that the statutory preconditions were met, it is perhaps surprising that the Claimants also went on to argue that the Respondents appear to have considered that the only relevant question before them was whether the statutory preconditions were in fact satisfied. Counsel for the Claimants argued that in doing so, the First Respondent failed to properly exercise his discretion. Counsel submitted that in addition to considering the preconditions, the First Respondent was obliged to consider whether a warrant was strictly necessary in all the circumstances of the case. The relevant circumstances of this case include the fact that the documents in question had already been provided by the Claimants to the FIA in November 2015.

[26] Finally, Counsel for the Claimants argued that the First Respondent have failed to properly disclose his reasons for directing that the search warrant be obtained. Counsel argued that the absence of such reasons supports an inference that there are no good reasons for that decision. See: **Brian Gibbs v John Mitchell Rea**⁶.

[27] The Respondents trenchantly disputed the matters raised under this challenge. Counsel for the First Respondent submitted that the Claimants merely rely on the existence of powers under the CJICA permitting investigation in support of their contention that the First Respondent erred in law in failing to take any adequate steps to investigate the background to the Request. He argued that this is not enough. In his view such matters do not have the effect of imposing a duty on the First Respondent to take further steps to satisfy himself that the Request was properly made under the substantive law of Russia. Counsel urged the Court to rely on a line of judicial authorities from the Jersey Courts starting with **Durant International Corporation v Attorney General**⁷ in which

⁶ [1998] AC 786 at 800

⁷ [2006] JLR 31

Deputy Bailiff Birt held that the fact that the Request comes from the central authority of the requesting state will be sufficient to establish that the request is lawful. Counsel relied on the following excerpt from that first instance judgment.

“47 The Attorney General argues that it is not for him or this court to determine whether or not as a matter of Brazilian law, the letters of request are lawful. He prays in aid not only the emphasized comments of the Divisional Court in *Abacha* (7) ([2001] EWHC 787 (Admin.), at paras. 18 and 27) (see para. 30 above) but also the doctrine of Act of State, whereby the courts of one country will not generally adjudicate upon the validity of the acts of a foreign government carried out in its territory (see *Buttes Gas & Oil Co. v. Hammer* (Nos. 2 & 3) (2), applied in *Jersey in re Yaheeb Trust* (11)).

48 In our judgment, the Attorney General is correct. We agree with the comments of the Divisional Court in *Abacha* that the Attorney General is not required to determine disputed questions of foreign law; indeed, as a matter of practicality, he cannot possibly be expected to resolve such matters. It is for the courts of the requesting country to adjudicate upon such matters if necessary. It is clear that in this case it is open to Mr. Maluf to raise the question of the lawfulness of the letters of request in the criminal proceedings in Brazil and that the Brazilian courts have jurisdiction to exclude any material obtained if the letters of request are unlawful. That is not to say, however, that the Attorney General can simply ignore altogether questions of lawfulness. In our judgment, in order for his decision not to be challengeable on the ground of *Wednesbury* unreasonableness, he must act in a way that a reasonable Attorney General would act in order to satisfy himself as to the lawfulness of the request. In most cases, the fact that the request comes from the central authority of the requesting country will of itself be sufficient and no further step need be taken. On other occasions, particularly if doubts have been raised, the Attorney General may need to do more. What he will need to do in any given case will of course depend upon the particular circumstances. We emphasize that all he has to do is to take reasonable steps to ascertain that the request is lawful; he most certainly does not have to determine that it is.”

- [28] Counsel for the Defendant also relied on the appellate judgment in **Durant International Corporation v Attorney General** reported at [2006] JLR 112. At paragraph 40 Sumption JA held:

“I have the strongest possible misgivings about the value of such representations, since it is not for the Attorney General to decide whether the allegations are well founded, but for the Brazilian authorities and ultimately for the Brazilian courts. The Attorney General, and indeed the courts in this jurisdiction, are bound unless there is good reasons to think otherwise to proceed on the footing that Mr. Maluf and the other persons under investigation will be entitled to challenge the allegations in Brazil.”

- [29] Counsel for the Defendant argued that these judgments clearly described the proper roles of the requested and requesting states when it comes to challenges to the good faith of the request and appropriately identifies workable presumptions that can be made.

[30] The First Respondent also relies on the Act of State doctrine which was recently considered in **Belhaj v Straw**⁸ in which Lord Mance identified three types of foreign acts of state. The first is a rule of private international law, whereby a foreign state's legislation will normally be recognized and treated as valid, so far as it affects movable or immovable property within that state's jurisdiction the second rule goes no further than to preclude a domestic court from questioning the validity of a foreign state's sovereign act in respect of property within its jurisdiction, at least in times of civil disorder. Thirdly, a domestic court will treat as non-justiciable – or will refrain from adjudicating on or questioning – certain categories of sovereign act by a foreign state abroad, even if outside the jurisdiction of that state. Counsel argued that if the Defendant was required to do all that the Claimants contend that he should have done in this case; this would have resulted in a breach of the Act of State doctrine.

[31] The Defendant also submitted that it cannot be argued that it was unlawful for him to seek the warrant on an ex parte basis because the nature of the crime investigated involved an allegation of embezzlement of the sum of over USD\$3Billion. Counsel submitted that it would be highly unorthodox to seek the voluntarily compliance with a disclosure from the very entities under investigation. Counsel argued that there may be adverse implications in adopting such a route. Counsel suggested that the operating rules of evidence in the Requesting State may preclude the admissibility of the evidence which was volunteered in a different jurisdiction. Counsel provided no cogent proof to support this, but he relied on the case of **Gohil v Gohil**⁹ where Lord Dyson held:

“16 Since 2001 the United Kingdom has become party to an increasing number of Conventions and bilateral and multi-lateral treaties which provide for international mutual legal assistance in criminal matters. These all contain provisions which restrict the use of evidence by the requesting state to the purpose specified in the request for assistance. Although these instruments post-date the decision in the *BOC* case, they illustrate the importance attached by the international community to such provisions for the effective working of these schemes for mutual assistance.

17 ... Provisions such as those referred to above provide the necessary guarantee that the material supplied will (i) only be used in criminal investigations and proceedings and (ii) only in the criminal investigations and proceedings specified in the request, unless the requested party consents to some wider use. Requests for assistance may involve the requested state using its powers of compulsion to gather and then forward sensitive or

⁸ [2017] UKSC 3

⁹ [2013] Fam 276 applied in *Tchenguiz v Serious Fraud Office* [2014] EWHC 2597

confidential information to the foreign requesting state. These provisions enable the requested state to retain an element of control over the material that it provides.

18 Restrictions on use ensure that states are not deterred from assisting each other in the prosecution of crime by the fear that material that they supply for one or more specified purposes might be used for other unrelated purposes. There may be legal issues under the national laws of the requested state (for example, relating to obligations of confidence) which would discourage or prevent the disclosure of material for the purposes of a criminal investigation, if it might then be used for other purposes, including civil litigation.”

[32] Counsel argued that there are inherent advantages in applying the *ex parte* procedure. They include the confidentiality of the process and the speed with which the warrant can be obtained. He further submitted that the international regime for mutual assistance is designed to operate expeditiously and so the *ex parte* procedure is the appropriate course in the circumstances.

[33] Counsel further submitted that notwithstanding that an *ex parte* application was not requested in express terms, it was applied in furtherance of an international criminal investigation which means that the court should be loath to intervene with close scrutiny. Counsel relied on the case of **R (Unaenergy Group Holding Pte Ltd) v Director of Serious Fraud Office**.¹⁰ In that case, the court had to consider the question whether the common law duty of disclosure or candour attaching to an applicant for a domestic search warrant is applicable, in modified form, to an authority requesting assistance by way of a letter of request from a foreign authority pursuant to the provisions of s.7 of the Crime (International Co-operation) Act 2003. The English Division Court held that:

“(1) that the Serious Fraud Office was not under a heightened procedural obligation of candour when issuing a letter of request pursuant to section 7(5) of the Crime (International Co-operation) Act 2003 which sought the making of intrusive searches; that this was so since, among other things, (i) the nature of the disclosure obligation when a law enforcement agency sought a domestic search warrant on an *ex parte* application was wholly unsuitable for adoption in the context of making a letter of request to a foreign authority, (ii) the superimposition of a heightened obligation of candour would introduce unwarranted complexity and likely slow down the working of the international scheme rather than assist its expeditious operation and (iii) the protections which were available served to strike a satisfactory balance between the public interest in international co-operation in investigating and prosecuting serious crime and the rights of the individual; and that, accordingly, the Serious Fraud Office had not been under a heightened obligation of candour when issuing its letter of request.”

¹⁰ [2017] EWHC 600

[34] Counsel for the First Respondent argued that in any event, the Claimants were not in any way prejudiced because they are able to make interlocutory applications after the ex parte hearing similar to the extant action. As it is clear that the Claimants received a copy of the Request pursuant to a court order and obtained an injunction to prevent the onward transfer of the documents obtained, no prejudice arises. He further submitted that in any event, the Claimants have failed to demonstrate that a different procedure would have made a difference.

[35] In response to the Claimants' contention that the statutory preconditions under section 6 had not been satisfied, Counsel for the First Respondent submitted that the analysis of the steps taken by the Attorney General and the lack of the common law duty of full and frank disclosure on the Russian entity when setting out its Request are determinative. Counsel urged the Court to conclude that the statutory preconditions were satisfied to the level required to accord with the purpose and function of the Palermo Convention and the CJICA.

DECISION TO ISSUE THE WARRANT

[36] The Claimants submit that there was a failure to make full and frank disclosure to the Magistrate and non-compliance with the duty of candour in relation to the information provided to her when she made the decision to issue the warrant. They contend that it is firmly established that in instances where a search warrant is sought on an ex parte basis, there is a duty to disclose information which may militate against the grant of the warrant. **Energy Financing Team Limited v the Director of the Serious Fraud Office**¹¹.

[37] Counsel for the Claimants submitted that the evidence filed in support of the application for the warrant reveals the following aspects of non-disclosure:

- i. The documents placed before the Magistrate did not include any information about the previous request made by the FIA for the same documents in November 2015 which had been provided. The Claimants stated that the fact that there was previous cooperation with a request for the same documents is a factor which would have militated against the ex parte application and order.

¹¹ [2005] EWHC 1626 (Admin)

- ii. The Magistrate did not receive highly relevant information about previous and current corporate raids against ToAZ, its officers and other entities connected with the Claimants. Counsel also submitted that the learned Magistrate was not told that these corporate raids included an unjustified extradition request against one of the Persons under Investigation. This extradition request was dismissed by the English Court which also found that the evidence in support of the allegations against this individual were naïve and superficial and politically motivated.¹² Counsel for the Claimants submitted that the Russian Authority on whose behalf the warrant was sought had an obligation to disclose this information to the Attorney General. Counsel relied on the judgment of Quin J in **MH Investments v JA Investments v CITIA** in which the learned judge stated; *"There should always be a duty on the foreign revenue authority of the requesting party to ensure that disclosure to the CITIA is full and frank."*
- iii. The Magistrate was also misled as to the identity of the persons or entity alleged to have committed the relevant offence. Counsel referred to paragraph 6 of the Affidavit of Dale Francis which recounts his explanation to the Magistrate that there was a request for assistance in relation to "a criminal offence, swindling...being committed by two (2) British Virgin Islands registered Business Companies". This was confirmed by the Learned Magistrate in her own evidence where she stated that Dale Francis had explained that there had been a request for assistance "into a criminal offence, swindling being committed by an entity"¹³ Counsel submitted that the evidence upon which the Magistrate based her decision was therefore materially incorrect because the Request clearly contended that the offence of swindling had been committed by the persons or individuals under investigation and not by the Claimants or indeed any entity.

[38] Counsel submitted that the material non-disclosure and misrepresentations are inconsistent with the standard required in ex parte applications. She relied on the case of **R (Chatwani) v The National Crime Agency, Birmingham Magistrates' Court**¹⁴ in which Hickinbottom J set out the following principles:

- "i) On an application for a search warrant, the court is not simply reviewing the reasonableness of the decision of the constable that the statutory criteria are met: before a warrant is issued, the court itself must be satisfied that the statutory requirements have been established. That is clear from the wording of section 8 itself, but was confirmed in R (Bright) v Central Criminal Court [2001] 1 WLR 662 at page 677 per Judge LJ and regularly since.
- ii) The court itself must therefore be satisfied that there are reasonable grounds for believing that (a) an offence has been committed, (b) there is material on the relevant premises which is likely to be of substantial value to the investigation of the offence,

¹² Government of the Russian Federation v Alexander Makarov and Vladimir Makhlay, City of Westminster Magistrate's Court 8th May 2009.

¹³ Affidavit dated 26th February 2016 at paragraph 6

¹⁴ [2015] EXHC 1203

and (c) the material is likely to be relevant evidence etc. That requires "careful consideration and rigorous and critical analysis by the [court]" (Tchenguiz at [89]), which involves particularly "detailed, anxious and intense scrutiny" in cases with a complex background such as those involving financial markets (Tchenguiz at [86]).

- iii) The applicant therefore has a duty to put before the court the necessary material to enable the court to satisfy itself that the statutory conditions for the warrant are met.
- iv) However, that is not the full extent of the applicant's duty. When applications are made without notice – particularly those that involve the potentially serious infringement of the liberty and rights of the subject, inherent in the grant and execution of a warrant to search and seize – there is a duty of candour. There must be full and accurate disclosure to the court, including disclosure of anything that might militate against the grant (Energy Financing Team Limited v The Director of the Serious Fraud Office¹⁵; see also, to the same effect, Golfrate at [27] per Lord Thomas). In Golfrate (at [24]), Lord Thomas quoted with approval from [191] of the judgment of Hughes LJ (as he then was) in In re Stanford International Bank Limited¹⁶, a case concerning a restraint order in support of confiscation proceedings under sections 42 – 47 of POCA, that full paragraph reading as follows:

"... [It] is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge. That duty applies to an applicant for a restraint order under POCA in exactly the same way as to any other applicant for an order without notice. Even in relatively small value cases, the potential of a restraint order to disrupt other commercial or personal dealings is considerable. The prosecutor may believe that the Respondent is a criminal, and he may turn out to be right, but that has yet to be proved. An application for a restraint order is emphatically not a routine matter of form, with the expectation that it will routinely be granted. The fact that the initial application is likely to be forced into a busy list, with very limited time for the judge to deal with it, is a yet further reason for the obligation of disclosure to be taken very seriously. In effect a prosecutor seeking an ex parte order must put on his defence hat and ask himself what, if he were representing the Respondent or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge. This application is a clear example of the duty either being ignored, or at least simply not being understood. This application came close to being treated as routine and to taking the court for granted. It may well not be the only example."

Those comments apply equally to the duty of an applicant for a search warrant. That obligation was described by the President in Tchenguiz (at [88]) as "a very heavy duty... to ensure that what is put before the [court] is clear and comprehensive so that

¹⁵ [2005] EWHC 1626 (Admin) ("Energy Financing")

¹⁶ [2010] EWCA Civ 137 ("Stanford") (at [191])

the [court] can rely on it and form [its] judgment on the basis of a presentation in which [it] has complete trust and confidence as to its accuracy and completeness". The duty extends to all known information that may be material to the court's decision i.e. that might affect the court's decision. In a case involving complex financial matters, that presentation requires particular skill and experience (Tchenguz at [88]). Legal advice should be sought at an appropriate level in every case of financial complexity (Golfrate at [28]).

- v) The written application should be comprehensive. If an applicant supplements the written application orally – for example, in response to questions from the court – then the proceedings should be tape-recorded or, if that facility is not available, the party applying for the warrant should take a note and submit it to the court for approval (Energy Financing at [24(7)])."

[39] After applying these principles, Counsel for the Claimants submitted that any material which might have informed a decision as to whether the statutory preconditions of section 6(2) and 6(8) of the CJICA 1993 were met should have been disclosed to the Magistrate. Counsel further submitted that even if such preconditions were met, the Magistrate should have been provided with information and material which would have assisted her in exercising her discretion to issue the warrant.

[40] Within this context, Counsel argued that the existence of bad faith on the part of the foreign prosecuting authority may have been a valid basis for exercising her discretion to refuse to grant the warrant. Counsel relied on the authorities of **R v Secretary of State for the Home Department and others ex parte Fininvest SPA and Ors.**¹⁷ and **Ismail v Secretary of State for the Home Department.**¹⁸

[41] The Claimants contend that the failure to be full and frank dictates that the search warrant should be quashed on the basis of material non-disclosure and they argued that such non-disclosure must be viewed within the context of the decision of the First Respondent to apply for the warrant on an ex parte basis. Counsel for the Claimants reiterated that there was no justification for doing so because there is no reason to suggest that had the application been made on notice, there would have been any risk of the documents not being found or produced. Counsel argued that if the

¹⁷ [1997] 1 WLR 743 at 758

¹⁸ [2013] EWHC 663 (Admin) at paragraphs 39 – 66

learned Magistrate had properly addressed her mind to the question of whether an *ex parte* application for a search warrant was necessary, the only rational conclusion would have been that it was not. She maintained her submission that the decision to employ an *ex parte* procedure in circumstances where there was no such risk, had the unfair effect of depriving the Claimants of sight of the evidence upon which the search warrant application was based which would have been supplied to them had the application been made *inter partes* and which would have informed their representations before the learned Magistrate.

[42] Counsel for the Claimant also submitted that the evidence reveals that the Magistrate did not independently satisfy herself of the statutory requirements. Instead, she relied on the fact that the First Respondent was satisfied that there were reasonable grounds for suspecting that an offence had been committed. Counsel submitted that there were no reasonable grounds for believing that the documents sought by the warrant related to the alleged offence of swindling said to have been committed by the persons under investigation. According to the Claimants, the Request establishes no connection between the alleged stealing of products from ToAZ by those persons during the requisite period and the subsequent transfer to ToAZ shares to the Claimants one year later in December 2012. They state further that there were no reasonable grounds for suspecting that the registered offices of the Claimants in the Virgin Islands would have contained evidence relevant to the alleged theft some five years prior to the date when the warrant was sought.

[43] The Claimants also state that in any event the search warrant went further than was reasonably required for the purpose of discovering the relevant evidence contrary to section 6(9) of the CJICA. They contend that the warrant provides for the seizure of documents containing details concerning all transactions in relation to the Claimants which is even broader than the documents and information specified in the Request.

[44] Counsel for the Claimant also submitted that the Respondents ought to have considered whether a warrant was strictly necessary in all of the circumstances of the case given that fact that the documents had been provided by the Claimants to the FIA in November, 2015. Counsel relied on

the judgment in **Energy Financing Team Limited v the Director of the Serious Fraud Office**¹⁹ where, at paragraph 24, the Divisional Court noted:

“From the authorities I am able to derive some general conclusions which are relevant to the facts of this case –

(1) The grant and execution of a warrant to search and seize is a serious infringement of the liberty of the subject, which needs to be clearly justified, and before seeking or granting a warrant it is always necessary to consider whether some lesser measure, such as a notice under section 2(3) of the 1987 Act will suffice.”

[45] The Claimants contend that if the Respondents had addressed their minds to whether a lesser measure would suffice, the only appropriate conclusion would have been the denial of the application.

[46] Finally, Counsel for the Claimants submitted that it is well established as a matter of law that the exercise of a court’s draconian jurisdiction to grant search and seizure warrants requires the giving of reasons. Counsel referred to the Magistrate’s evidence before this Court which confirms that no reasons for her decision were recorded in writing or were orally rendered.²⁰ Counsel submitted that the warrant should be quashed on the basis that the Magistrate acted unfairly and unlawfully in her failure to give reasons for her decision to issue the warrant and she relied on paragraph 26 of **R (Mills & Mills) v Sussex**²¹ in which the English Court stated:

“v) The judge ought to give reasons for his decision. They need not be elaborate but they ought to be sufficient to enable the subject of the warrant to understand why the judge was satisfied that the evidence justified issuing it: see **R v Lewes Crown Court ex parte Weller**, unreported 12 May 1999 per Kennedy LJ, para 6; and more recently, **R (Wood) v North Avon Magistrates’ Court** ²².”

[47] Again, the challenge to the validity of the search warrant was trenchantly opposed by the Respondents. First, Counsel for the Respondents pointed out that the classic English authority concerning a judicial review challenge to a search warrant on the basis of material non-disclosure is **R (Tchenguiz) v Director of Serious Fraud Office**²³. In that case, Eder J granted declarations that the warrants and searched were unlawful on that basis. Counsel for the Respondent submitted

¹⁹ [2005] EWHC 1626 (Admin)

²⁰ Magistrate’s First Affidavit 26/02/16 paragraph 6 and Second Affidavit 17/05/16 at paragraph 6

²¹ [2014] 2 Cr. App. Rep 34

²² [2009] EWHC 3614 (Admin) paragraphs 26, 174 JP 157, and *Rawlinson*, paragraph 89

²³ [2012] EWHC 2254 (Admin)

that factual background and statutory framework in the case at bar distinguishes it from the **Tchenguiz** decision. He submitted in contrast to the English Criminal Justice Act 1987, or the Police and Criminal Evidence Act 1984, section 6(8) of the CJICA 1993 does not impose a requirement that the person seeking the warrant establish that it will not be practicable to get access to the evidence unless the warrant is granted. Instead, Counsel submitted that the Magistrate need only be satisfied that there are reasonable grounds for suspecting that there is on premises, evidence relating to an offence referred to in subsection 2 of the CJICA.

[48] He further argued that the power of search under section 6(8) of the CJICA is qualified only “*to the extent that it is reasonably required for the purpose of discovering such evidence as is there mentioned.*” Given that a warrant can be granted under section 6(8) without it being the only practicable means to obtain the evidence, Counsel submitted that any single instance of non-disclosure would not be material.

[49] The Respondents concede that the information concerning the previous Request for the same documents was not disclosed. However, they contend that the Request sought “information” and not “documents”. They posit that it was not immediately apparent that the warrant to search and seize was limited in scope to matters already the subject of disclosure to the FIA. Moreover, they argue that the previously disclosed documents were provided in wholly different proceedings. According to Counsel for the Respondent, under English procedural law²⁴, the collateral use of documents disclosed pursuant to an investigation in other proceedings is generally not permitted. They submit that it is not apparent that the previous disclosure was relevant to the grant of this search warrant.

[50] With respect to the information about the previous and current corporate raids against ToAZ, Counsel for the Respondent submitted that this is essentially a complaint levied against the Russian Authority which contends that they should have disclosed these matters in the Request which would then have obliged the Attorney General to disclose the same to the learned Magistrate when applying for the warrant. Counsel argued that as a matter of law, the Russian Authority was not under any duty to make full and frank disclosure in the manner contended. Counsel relied on

²⁴ Tchenguiz v Serious Fraud Office

the decision of Gross LJ in **R (Unaenergy Group Holding Pte Ltd and Others) v Director of The Serious Fraud Office**²⁵ in which he determine that the common law duty of disclosure or candour attaching to an applicant for a domestic search warrant applies, in modified form, to an authority requesting assistance by way of a letter of request from a foreign authority, pursuant to the provisions of s.7 of the Crime (International Co-operation) Act 2003.

- [51] The learned Judge referenced the judgment of Hughes LJ (as he then was) in **Re Stanford International Bank Ltd**²⁶ in which the following authoritative statement of the relevant duty of candour is recorded:

“...it is essential that the duty of candour laid upon any applicant for an order without notice is fully understood and complied with. It is not limited to an obligation not to misrepresent. It consists in a duty to consider what any other interested person would, if present, wish to adduce by way of fact, or to say in answer to the application, and to place that material before the judge..... In effect a prosecutor seeking an *ex parte* order must put on his defence hat and ask himself what if he were representing the Respondent or a third party with a relevant interest, he would be saying to the judge, and, having answered that question, that is what he must tell the judge.....”

- [52] Gross LJ then concluded that:

“The likely colloquial response from the requested state would be an invitation to the UK judicial or designated prosecuting authority making the request to resolve its own doubts or difficulties and to re-issue the LOR if, or when, it had done so. At the very least, a LOR couched in such terms would be likely to cause real confusion to the requested state. In short, this duty only needs spelling out to demonstrate that it is wholly unsuitable for adoption in the context of making a LOR to a foreign authority.”

- [53] The Respondents also do not dispute the misrepresentation alleged by the Claimants. Instead, they assert that notwithstanding that the evidence levied in support of the application referred to “entity” or “entities” the actual Request which identified the persons in respect of whom assistance was sought was before the Magistrate. Because the correct information was before the Magistrate, they contend that this purported non-disclosure/misrepresentation was not material so as to warrant the setting aside of the warrant. Counsel again relied on **R (Mills and Anor) v Sussex Police and Anor**²⁷ as authority for the contention that unlawful error will ordinarily lead to a search warrant being set aside only if the error is material.

²⁵ [2017] Lloyd's Rep. Fc Plus 26; [2017] EWHC 600 (Admin) at paragraph 32

²⁶ [2010] EWCA Civ. 137 per Hughes LJ

²⁷ [2014] EWHC 2523 Admin

- [54] In regard to the Claimants' contention that the learned Magistrate failed to satisfy herself that the relevant statutory preconditions had been met, the Respondents largely focused their submissions on the actions taken by the Attorney General rather than to the Magistrate. Save to say that the Court should conclude that the statutory preconditions were satisfied to the level required to accord with the purpose and function of the Palermo Convention and the CJICA, the Respondents failed to address the specific challenge raised in regard to the Second Respondent. They submitted that an analysis of the steps taken by the Attorney General following receipt of the Request, coupled with the fact that there is no common law duty imposed on the Russian Authority to make full and frank disclosure are determinative of this ground of challenge.
- [55] In regard to the Claimants' submission that the search warrant went further than the request, the Respondents asserts that when one compares that Request with the terms of the search warrant it is clear that the documents solicited are directly relevant to the Request. Counsel pointed to subparagraph 2 of the Request in which it is clear that what was sought was evidence or details of the beneficial ownership of the companies.
- [56] With regard to the Magistrate's failure to provide reasons, the Respondents assert that reasons were in fact provided. Counsel referenced the affidavit evidence of the learned Magistrate which although brief, makes it clear that she was satisfied that the relevant test for the grant of the warrant had been met. Counsel further argued that in any event, the failure to provide adequate reasons would not render the warrant unlawful.

DECISION TO TRANSMIT THE DOCUMENTS RETRIEVED TO THE RUSSIAN AUTHORITY

- [57] The Claimants challenge under this Ground hinges on learned Solicitor General's representations to the Court during the hearing of 10th February 2016 in which she stated that in deciding to transmit the documents retrieved during the search to the Russian Authority, the First Respondent took the view that he was entitled to ignore the Claimants' representations. These representations were set out in pre-action correspondence sent on 21st, 26th and 27th January 2016 and detailed the potential misuse of the documents by the Russian Authority.

[58] Counsel for the Claimants submitted that it is a general principle of law that before a statutory power can be exercised, any person who would foreseeably be detrimentally affected by the exercise of such power should be given an opportunity to make representations. Counsel relied on the case of **Bank Mellat v HM Treasury**²⁸ where at paragraphs 28 – 32, the Supreme Court held:

29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180 143 ER 414, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application and founded upon the plainest principles of justice."

30. In *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

"My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made. Some directions that

²⁸ [2013] UKSC 39

might be made under Schedule 7 of the Act could not reasonably give rise to an obligation on the Treasury's part to consult the targeted entity, for example because there was a real problem about the implicit or explicit disclosure of secret intelligence or because prior consultation might frustrate the object of the direction by enabling the targeted entity to evade its operation, notably in a case involving money-laundering or terrorism. In this case, the Treasury has raised only two practical difficulties about consulting the Bank in advance of the direction. The first was the difficulty raised by Mr. Robertson that "it would not have been appropriate to have notified Bank Mellat of the Treasury's intention to make the direction contained in the 2009 Order before 12 October 2009, because this would have provided it with the opportunity to rearrange business relationships or transactions with the UK financial sector to ensure (for example) that they were indirect and so not caught by the prohibitions." The judge rejected this, pointing out that the Bank could just as easily do that after the direction as before. That conclusion, which seems inescapable, has not been challenged on appeal. The second practical difficulty was raised by way of submission in the Court of Appeal and dealt with in the judgment of Maurice Kay LJ, who thought that it had "some force". This was the supposed practical difficulty of permitting representations in a situation where there is closed material. I have to say that for my part I am not impressed by this difficulty. In justifying the direction in the course of these proceedings, the Treasury disclosed the gist of the closed material including the provision of banking facilities to Novin and Doostan and their alleged provision to Mr Taghizadeh and Mr Esbati. I cannot see why they should have had any greater difficulty in disclosing before the making of the direction the material that they were quite properly required to disclose afterwards.

32. In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations,

but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found.

33. In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the Act, is enough to satisfy any duty of fairness, or at least must have been intended by Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds.

[59] Counsel argued that it is plainly foreseeable that the transmission of the documents would have a detrimental impact on the Claimants because this was detailed in their correspondence. She argued that in light of this, the First Respondent was obliged to not only afford the Claimants the opportunity to make representations, but he was also obliged to take these representations into account when arriving at his decision to transmit the documents.

[60] The Claimants strenuously contradicted the evidence set out in the Seventh Affidavit of Sarah Potter in which she asserts that at the time when the documents were transmitted, the First Respondent were not on notice of the Claimants' concerns about the motives of the Requesting State. Counsel for the Claimants submitted that the Attorney General received ample and repeated notice of the Claimants' concerns regarding the motives of the Russian Authority prior to the 28th January 2016 and yet he persisted in his decision to transmit the documents. Counsel submitted that the Claimants' concerns as reflected in their letters of the 21st, 26th and 27th January were

relevant considerations which the Attorney General could not properly fail to take into account. They submitted that the failure of take such considerations into account must result in the decision being rendered ultra vires.²⁹

[61] Counsel further argued that in light of this information, the Attorney General was obliged to take reasonable steps to acquaint himself with the relevant information and to make further inquiries of the Requesting Authority before deciding to transmit the documents. Given that the search warrant had the potential to impact the Claimants' constitutional right to privacy and property, Counsel argued that the First Respondent was under a duty to ensure that their rights were not infringed. In support of this submission, Counsel relied on the judgment of Quin J in **MH Investments v Cayman Islands Tax Information Authority**.

[62] Counsel for the Defendant urged the Court to conclude that the imposition of an investigative duty would be impracticable in view of the number of the requests received annually and the number of companies incorporated in the Territory. This practical difficulty must be considered in the context of the Conventions which must be interpreted so as to give effect to a regime of expeditious mutual assistance. Counsel indicated that he was unable to identify a case under the Conventions in which a court has considered whether there is a duty on a requested state to consider relevant considerations afresh when releasing the documents after they have been obtained pursuant to a warrant.

[63] He further submitted that the relevant statutory framework in the Territory does not imply a duty to take into account relevant considerations. Instead, he submitted that the statutory language of section 6(10) of the CJICA appears to provide that transmission to the Russian Authority follows automatically once the documents have been obtained by the Attorney General.

[64] Counsel submitted that the international regime of mutual legal assistance should not be stymied by the imposition of a duty on the Attorney General to investigate the circumstances of the request when deciding to send the documents pursuant to a request. The Respondents contend that the

²⁹ R v London (Bishop) (1890) 24 QBD 213 at page 227

proper forum for any challenge to the Request is the Russian courts. Counsel further pointed out that Russia is a signatory to the European Convention on Human Rights and he submitted that for reasons of comity, the Court must assume that there are usual protections inherent in its trial process by which the Claimants will be safeguarded.

- [65] Counsel further argued that those who are the subject of a request are not without protections since it is open to them to dispute the lawfulness of a request before the courts of the requesting state. He relied extensively on the judgment in *Gross LJ in R (Unaenergy Group Holding Pte Ltd and Others) v Director Of The Serious Fraud Office* where a paragraph 35 he noted that:

“Fourthly, we have not at all overlooked the observation in *JP Morgan* (at [54]), which *per contra* we reiterate, that “...ordinarily, disputed points of foreign law or procedure are best left for resolution in the courts of the requesting State....” – i.e., rather than the courts of the requested state. It does not, however, follow that we must or should accede to the superimposition of the “heightened procedural obligation” in the requesting state contended for by the Claimants. Looking at the matter in the round, those who are the subject of a LOR are not without protections. That those protections are not as all-encompassing as Mr. Hall was minded to submit, is not a reason for introducing a domestic obligation cutting across the working of this international scheme. A balance must be struck between the public interest in international cooperation in investigating and prosecuting serious crime and the rights of the individual; in our judgment, the protections which are available serve to furnish a satisfactory balance.”

- [66] Finally, Counsel commended to the Court the judgment in *Durant International Corporation v Attorney General* in which the Jersey Court held that where doubts were cast on the lawfulness of the Request process, the Attorney General’s investigative obligations was limited to taking reasonable steps to ascertain that the request was lawful, he does not have to determine that it is.

COURT’S ANALYSIS AND CONCLUSION

- [67] It is common ground between the Parties that the Attorney General received the Request for assistance from the Russian Authority. Initially, both sides were also of the view that this Request had been processed pursuant to the **2003 United Nations Convention against Corruption**. Indeed, the terms of the Request set out quite clearly that it is a request for legal assistance

advanced “*in compliance with the UN Convention against Corruption of 31.10.2003.*”³⁰ This was then reiterated in the Affidavit filed by Crown Counsel, Sarah Potter filed on 8th February 2016.

- [68] However, in an apparent about-face, Counsel for the First Respondent, in legal submissions before this Court, placed great reliance on the mutual legal assistance obligations set out under the **2000 United Nations Convention against Transnational Organized Crime (Palermo Convention)**. This Convention was extended to the Virgin Islands on 17th May 2012 and Counsel for the Attorney General submitted that the Request in this case met all of the requirements under that Convention.
- [69] Inexplicably, notwithstanding that he relied extensively from Articles 18 of the Palermo Convention in his written submissions, Counsel then submitted to the Court in his oral arguments that he maintained his reliance on the **2003 United Nations Convention against Corruption**. In fact, he submitted that either Convention can be applied to the facts of this case because there is no real distinction between the wording of Article 46 of that 2003 Convention and Article 18 of the Palermo Convention.
- [70] This unfortunate vacillation was highlighted during the course of the trial when the Claimants sought to challenge the legitimacy of the application of either Convention to this case. This challenge could not be satisfactorily routed by the Counsel for the Respondents at the conclusion of the matter and so Counsel indicated that he would make further inquiries and revert. The Parties were therefore invited to provide supplemental written submissions on this issue.
- [71] Counsel for the Claimants submitted that the **United Nations Convention against Corruption** was signed by the United Kingdom on 9th December 2005 and extended to the Virgin Islands on 12th October 2006. However, she noted that there is no Order in Council or other legislation which has incorporated this Convention into BVI law.
- [72] Counsel relied on guidance issued by the United Kingdom Foreign and Commonwealth Office entitled “**Extension of Treaties to Overseas Territories**” which suggests that as a matter of practice, an overseas territory would be expected to demonstrate prior to the extension of a treaty, that the necessary domestic provisions are in place to support the extension of that treaty.

³⁰ Tab 30 page 603 of the Hearing Bundle

Counsel submitted that while parts of the Convention have been implemented in various pieces of domestic legislation, there is no express implementation of those specific provisions which deal with international cooperation.³¹ As such, she submitted that Article 46 of the 2003 Convention which was so heavily relied on by the Respondents has not been implemented into BVI law. In advancing this submission Counsel relied on the judgment in **A and Ors v Secretary of State for the Home Department No. 2**³²:

“The appellants' submission has a further, more international, dimension. **They accept, as they must, that a treaty, even if ratified by the United Kingdom, has no binding force in the domestic law of this country unless it is given effect by statute or expresses principles of customary international law: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696; *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976.** But they rely on the well-established principle that the words of a United Kingdom statute, passed after the date of a treaty and dealing with the same subject matter, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it: *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771. The courts are obliged under section 2 of the 1998 Act to take Strasbourg jurisprudence into account in connection with a Convention right, their obligation under section 3 is to interpret and give effect to primary and subordinate legislation in a way which is compatible with Convention rights so far as possible to do so and it is their duty under section 6 not to act incompatibly with a Convention right. If, and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them. I do not understand these principles to be contentious.”

[73] Counsel for the Claimants also relied on the judgment of Blenman J (as she then was) in **Lennox Linton v Attorney General of Antigua and Barbuda**,³³

“As a general rule, a litigant in domestic courts cannot rely upon an international treaty that has been accepted by the state but which has not been incorporated into domestic law by way of legislation. An unincorporated treaty has no effect on judicial decisions. In order for the national court to be able to exercise its referral power, it is essential that the RTC be incorporated into national law. Incorporation, as Professor Anderson points out, must include the bringing into force of the incorporating legislation as part of domestic law. The Court similarly agrees with Learned Deputy Solicitor General when she stated that unless the RTC has been incorporated into national law, it has no effect in relation to the rights of Mr. Linton to litigate matters in the local court.”

³¹ Chapter IV of the Convention, Article 46 et seq.

³² [2006] 2 AC 221 at para 27

³³ Claim ANUHCv2007/354 at para 79

- [74] Counsel for the Claimants submitted that there has been no incorporation of the Conventions' international cooperation provisions into domestic law and therefore they cannot be applied in this case. Counsel cited electronic searches of the website of the United Nations Office on Drugs and Crime (UNODC) which identifies the specific legislation by which certain parts of the 2003 Convention have been incorporated into BVI legislation. Unfortunately, no entries are recorded in respect of Chapter IV of the Convention headed "International Cooperation" and its inclusive Article 46.
- [75] The Court did not find this evidence to be particularly persuasive as the provenance and accuracy were unverified. But, in light of such serious and trenchant submissions, it would seem appropriate that a definitive rejoinder should be forthcoming from the First Respondent. Instead, Counsel for the Attorney General relied on the same guidance provided by the Foreign and Commonwealth Office and submitted that the extension of the Convention was preceded by necessary reforms to the Criminal Code in 2005/2006 to embrace the matters in the Convention that had not been fully covered under BVI law. He did not confirm that these matters included Chapter IV (International Cooperation) of the Convention. Instead, Counsel submitted that the legislation need not specify the treaty whose provisions are being enacted into domestic law. All that is required is that the provisions of the treaty are covered under BVI law and the specific treaty has been extended to the BVI. He then submitted that it matters not that the provisions of the treaty are embodied in different domestic legislation; it matters only that the provisions are in fact covered in domestic legislation.
- [76] Counsel's submissions appear to concede that incorporation into domestic law is a requirement in the circumstances of this case but other than a general reference to 2005/2006 legislative amendments of the Criminal Code, he neglected to supply the specific incorporating or enabling legislation which would give the provisions dealing with mutual legal assistance binding force in this Territory.
- [77] The Conventions in question make it clear that mutual legal assistance is to be afforded to the fullest extent possible under the laws, treaties, agreements and arrangements of the requested state party. It is therefore surprising that the Respondents were unable to advance the specific domestic legislation which is intended to give the force of law to Part IV (Article 46) of the **United**

Nations Convention against Corruption or Article 18 of the **Palermo Convention**. The Court accepts that indirect enactment (in which the particular convention or treaty may not be scheduled) may also afford the force of law. It may well be argued that the CJICA is the best attempt to do so but this was not argued by Counsel for the Attorney General. Given the critical role which international cooperation plays, it is hoped that the Legislature will take the necessary steps to clarify the law and to put the position beyond doubt.

[78] In the absence of more definitive assistance from the Respondents, the Court is unable to conclude that the mutual legal assistance provisions of these Conventions are expressly incorporated into BVI law. Nevertheless, it is clear that this Territory has for some time adhered to its international obligations by providing mutual legal assistance upon request. Initially, the Territory provided assistance in specified criminal matters by way of bilateral agreement. However, in 1992 a specific assistance regime was prescribed in relation to drug trafficking matters under the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988³⁴. Later in 1993, the CJICA was enacted to enable assistance in all criminal matters where a request was received from a competent foreign authority. In 1997³⁵ the Legislature enacted legislation to deal with money laundering offences and to facilitate foreign requests for assistance in such matters. Subsequently the mutual legal assistance regime was extended in 2000³⁶ to enable assistance in the area of financial regulation by providing a regulator to regulator assistance scheme and in 2003³⁷ a new assistance regime was established to render assistance in tax related matters.

[79] In construing these enactments, a court is obliged to apply the presumption that the Legislature does not intend to act in breach of public international law including any treaty obligations. So that if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred. In **Salomon v Customs and Excise Commissioners**³⁸ Diplock LJ observed as follows:

“The convention is one of those public acts of state of Her Majesty's Government of which Her Majesty's judges must take judicial notice if it be relevant to the determination of a

³⁴ Drug Trafficking Offences Act, 1992 (as amended)

³⁵ Proceeds of Criminal Conduct Act, 1997 (as amended)

³⁶ Financial Services Commission Act, 2001 (as amended)

³⁷ Mutual Legal Assistance (Tax Matters) Act, 2003

³⁸ *Salomon v Customs and Excise Commissioners* [1967] 2 QB 116 at 143

case before them, if necessary informing themselves of such acts by inquiry of the appropriate department of Her Majesty's Government. **Where, by a treaty, Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations.** Once the Government has legislated, which it may do in anticipation of the coming into effect of the treaty, as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines v. Murray*; *White Star Line and U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd. v. Comerford* 1, and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. **But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.**

It has been argued that the terms of an international convention cannot be consulted to resolve ambiguities or obscurities in a statute unless the statute itself contains either in the enacting part or in the preamble an express reference to the international convention which it is the purpose of the statute to implement.... Maugham J. in *Hogg v. Toye & Co. Ltd.*, 2 clearly took the view that it was unnecessary that there should be an express reference to the convention in the statute itself if it was apparent from a comparison of the subject-matter of the statutory provision and the convention that the former was enacted to carry out Her Majesty's Government's obligations in international law under the convention. I can see no reason in comity or common sense for imposing such a limitation upon the right and duty of the court to consult an international convention to resolve ambiguities and obscurities in a statutory enactment. **If from extrinsic evidence it is plain that the enactment was intended to fulfil Her Majesty's Government's obligations under a particular convention, it matters not that there is no express reference to the convention in the statute. One must not presume that Parliament intends to break an international convention merely because it does not say expressly that it is intending to observe it. Of course the court must not merely guess that the statute was intended to give effect to a particular international convention. The extrinsic evidence of the connection must be cogent.** Emphasis mine

- [80] Applying these legal principles to the facts of that case the learned Judge concluded that the inference that the statute was intended to embody the convention is irresistible, and so he elected

to refer to the convention to resolve ambiguities or obscurities of language in the section of and the Schedule to the statute.

[81] The Court is guided by this ratio and by the dictum of Denning MR who also stated:

“In 1950 there was a convention between many of the European countries...I think we are entitled to look at it, because it is an instrument which is binding in international law: and we ought always to interpret our statutes so as to be in conformity with international law. Our statute does not in terms incorporate the convention, nor refer to it. But that does not matter.”

THE DECISION TO PROCESS THE REQUEST

[82] It is now accepted law that in the context of mutual legal assistance, unless there are compelling reasons for not doing so, there is a presumption that requests for assistance will be processed where all the requirements of the investigative measures under legislative regime have been met. Counsel for the Defendants have advanced that a requested state's duty to provide assistance is informed by the policies and tenets of international cooperation which underlie the provisions of the CJICA. These tenets prescribe that requested states should afford the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings.

[83] However, it is also clear that the central authorities retain a discretion when considering whether to grant the assistance requested. In the Court's judgment, the remit of such discretion was ideally described in the judgment of Goff LJ in **R (JP Morgan Chase Bank National Association) v The Director of the Serious Fraud Office**:³⁹

“It follows that, in the overwhelming majority of cases, both as a matter of policy in fighting crime and the United Kingdom's international obligations, it can be expected that requests for mutual assistance under CICA 2003 will be acted upon – and as quickly as possible. The SSHD is not required to conduct a criminal trial on paper or decide disputed points of foreign law. The need to deal with such requests expeditiously will itself, at least in the vast generality of cases, tell against the SSHD becoming involved in, still less needing to determine, disputed questions of foreign law. These requirements of policy dovetail well with practical resource considerations which themselves strongly suggest that it would be unwise to impose some wider duty on the SSHD as to questions of foreign law for which she is simply ill-equipped. The good sense of this approach is underlined by the graphic

³⁹ [2012] EWHC 1674 (Admin) at paragraph 52

words of La Forest J in *United States of America v McVey* [1992] 3 SCR 475, at p 528 (an extradition case) remarking on the need otherwise to contemplate “the joys of translation and the entirely different structure of foreign systems of law” (cited in *Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 AC 920, at 89, [2008] 2 All ER 1103). No encouragement should be given to parties in such proceedings to embroil the SSHD in disputes as to foreign law – a course which would risk the system of mutual assistance failing to fulfil its important purpose. Accordingly, as Tuckey LJ observed (*Abacha*, at 17), the expectation must be that requests for assistance will be acted upon “unless there are compelling reasons for not doing so”.

- [84] The Court therefore accepts the Respondents’ submission that the reality of what a requested state is qualified and equipped to do is a factor which must also be considered when reviewing the exercise of its discretion. The ambit of a requested state’s discretion is tempered by the operating international obligations as well as by the relevant statutory framework and so the Court is satisfied that a competent authority would not, for instance, be required to resolve disputed issues of foreign law. The Court concurs that such matters are best resolved by the foreign court dealing with the criminal prosecution.
- [85] Counsel for the Respondents has also argued that it is not for the Attorney General to determine whether or not the letters of request are lawful. He relies on findings in **Durant** and in **R (Abacha) v Secretary of State for the Home Department**⁴⁰ which are persuasive. He contends that once a request meets all of the requirements set out in the relevant convention, (and he submits that the Request in the case at bar has done so) then there is no basis for delaying to provide the co-operation which the requesting state is entitled to receive and the Territory is obliged to provide. The Court finds that there is some force to this argument.
- [86] However, while a competent authority must be cognizant of the relevant context, such content cannot operate to fetter its statutory discretion under domestic law and it should not result in the authority becoming nothing more than a rubber stamp. It is recognized law that whenever a public function is being performed, there is an inference, that in the absence of an express indication to the contrary, the function is required to be performed reasonably, in good faith and on correct grounds. A competent authority within a requested state is obliged to bear in mind that in exercising its statutory power, it is concerned with acts which have the capacity to produce serious

⁴⁰ [2001] EWHC 787

legal consequences and in that regard, a competent authority is under a duty to act lawfully and rationally and in a procedurally fair manner.

[87] The Claimants have submitted that the fact that the Request originated from the Russian Federation should have given some pause because of its well-known disregard for the rule of law. Counsel for the Respondents on the other hand, has submitted that the Attorney General is entitled to presume that the Request is submitted in good faith if it is issued by the relevant competent authority. He submitted that there is no duty in law which demands that a requested state skeptically regard a properly issued request for assistance. He further argued that the fact that the Request originated from Russia is of no moment because the rules of comity demand that Russia be treated in the same way as any other country. Counsel went further to state that the matters complained of do not have the effect of imposing a duty on the First Respondent to take further steps to satisfy himself that the Request was properly made under the laws of Russia. He urged the Court to rely on a line of judicial authorities which say that there is no duty on the requested state to make further enquiries. Indeed, he suggested that there would be practical considerations (identifying appropriate personnel and funding) which would make the fulfillment of such a duty particularly difficult.

[88] In the context of the international cooperation and the principle of comity, this Court is not inclined to prescribe the heightened scrutiny of a request solely on the basis of the purported reputation of the country of origin. However, it is clear that a request may be declined if, for example, it relates to an investigation or prosecution which is politically motivated; or it relates to a person who, if proceeded against for the offence for which assistance is requested, would be entitled to be discharged on the grounds of a previous acquittal or conviction (double jeopardy); or if the request is for a coercive or intrusive measure for which the Territory requires dual criminality and in respect of which there is no equivalent local offence or if there is cogent evidence that the request is made in bad faith.

[89] The Court in **JP Morgan Chase Bank National Association v Director of the Serious Fraud Office** recognized that each case must be considered on its own particular facts. In fact the Court recognized that there may be cases where there are *compelling reasons* which would militate against the grant of assistance. At paragraph 53 of the judgment, the Court observed:

“What then might those "compelling reasons" encompass? Here, as elsewhere, discretionary powers are to be exercised having regard to the facts of the individual case. For this reason and, more generally, because it would be unwise and inappropriate to do so, I do not think that there can be any exhaustive categories or list of cases where the SSHD would be entitled or obliged to exercise her discretion against acting on a request for assistance. As already observed, statutory discretions should not readily be fettered. That said, first, the existence of cases where the SSHD may or should exercise her discretion to refuse to accede to a request underlines that her role is not that of a "rubber stamp". Mutual assistance should not be equated to a blank cheque. Secondly, cases of refusal to accede to a request must be rare or exceptional, for reasons already canvassed and if international mutual assistance is to function. Thirdly, I do not think that the SSHD's discretion to refuse to act on a request is confined to those instances enumerated in the Convention; as will be recollected, the Convention does not have direct effect in English domestic law. Fourthly and confining myself to the context of the present case, I see much force in the approach advocated by Mr. Giffin: namely, that it would (at least generally) be wrong for the SSHD to exercise her discretion in favour of answering a request when it was obviously unlawful – thus where it was undisputed or incapable of being properly disputed that the request was made unlawfully. For my part, I do not think it is necessary to demonstrate that the requesting authority was acting in bad faith and, indeed, a debate of such a nature might well be invidious; if, however, it was obvious that a requesting authority was acting in bad faith there would plainly be a most powerful case for the SSHD refusing to exercise her discretion.”

[90] In considering the arguments advanced by the Claimants, the Court has to consider the relevant timeline. The evidence discloses that when the Request was received, it was vetted and found to have been in compliance with the Convention. At that time, the Attorney General was not in possession of any of the representations which were later advanced by the Claimants and which alleges obvious bad faith and puts into question the propriety of the Request. It is therefore arguable that at that stage there would have been no reason to make further enquiries into such matters and there could be no compelling reason which would support a refusal to exercise his discretion.

[91] At some point in their submissions, the Claimants appear to have transposed the duty of disclosure, suggesting that the Requesting Authority was obliged to disclose such matters to the First Respondent (and consequently to the Second Respondent) and that the failure to do so vitiates the actions taken to process the Request. The Court is persuaded on the authoritative

reasoning of the 2017 judgment in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office** that this argument cannot be sustained.⁴¹

[92] The Court in that case also applied the reasoning in **R (on the application of Soma Oil and Gas Ltd) v Director of the SFO**⁴² in which the English Divisional Court held that a claimant faced a “*very high hurdle*” in asking a court to judicially review the discretionary decision of the Serious Fraud Office in conducting an investigation in good faith into serious criminality. It was noted that while the courts have not precluded a challenge to the discretion to investigate serious fraud, they lent no encouragement to the bringing of any such challenges and to the contrary, they have spoken with a consistent voice in that regard.

[93] However, the Claimants have gone further. They submitted that the receipt of a request imposes an obligation on the Attorney General to exercise his discretion under the CJICA. Counsel submitted that it is a matter of common sense that anyone seeking to engage the powers prescribed under section 6 of the CJICA would need to make an informed and considered decision. Moreover, she submitted that this would oblige the Attorney General to *inter alia* take relevant considerations into account and to make appropriate inquiries where necessary.

[94] In deciding to process the Request, the relevant statutory framework applied by the Attorney General is the CJICA. This statutory regime was promulgated to enable the Virgin Islands to co-operate with other countries in criminal proceedings and investigations and to enable the Virgin Islands to join with other countries in implementing the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Section 6 of the Criminal Justice (International Cooperation) (Amendment) Act 2004 regulates the procedure where the Attorney General receives either directly or through the Governor, a request for assistance in conducting an investigation and obtaining statements and other relevant evidence for the purposes of criminal proceedings or a criminal investigation.

⁴¹ [2017] 1 WLR 3302 at paragraphs 32 – 38 and see paragraphs 155 – 159 herein

⁴² [2016] EWHC 2471, esp. at [21]

[95] Subsection 6(3) empowers the Attorney General to direct an investigating officer to give effect to the request by conducting an investigation, interrogating and taking statements from such persons as may appear appropriate or making copies of such documents, taking extracts or samples and receiving such other evidence as may appear to be appropriate. Further, under subsection 6(7) where there are reasonable grounds for suspecting that there is on premises relevant evidence, the Attorney General may, in writing, direct a police officer to apply to a judge or magistrate for a warrant authorizing the officer to enter, search and seize such evidence.

[96] Subsection 6(2) prescribes that:

“(2) The Attorney General shall not exercise his powers under this section unless he is satisfied that:

- (a) an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed;
- (b) criminal proceedings in respect of that offence have been instituted in the country or territory in question or that an investigation into that offence is being carried on there; and
- (c) either
 - (i) the conduct constituting the offence which is the subject of the proceedings or investigation would constitute an offence if it had occurred in any part of the Virgin Islands; or
 - (ii) there is in force, in relation to the Virgin Islands and the country or territory in question, a treaty that provides that the rendering of assistance for the purposes of criminal proceedings or investigations –
 - (A) by the Virgin Islands to that country or territory shall not be subject to the condition that the conduct constituting an offence in that country or territory shall constitute an offence if it had occurred in any part of the Virgin Islands; and
 - (B) by that country or territory to the Virgin Islands shall not be subject to the condition that the conduct constituting an offence in the Virgin Islands shall constitute an offence if it had occurred in any part of that country or territory.”

[97] The Claimants contend that the decision to process this Request pursuant to the powers under section 6 of the CJICA is ultra vires because the relevant statutory pre-conditions were not satisfied. Counsel for the Claimants argued that Request provided no information save for the bare

assertion that an offence of swindling involving ToAZ had been committed in Russia. They assert that other than the bare assertion that the Persons under Investigation allegedly stole ammonia and carbamide valued at USD\$3Billion between 1st January 2008 and 31st December 2011, the Request fails to reveal any foundation for the allegations raised in the Request.

- [98] They contend that as the Request does not go on to demonstrate that the information sought was important to the investigation into the alleged offence, there could be no reasonable grounds for suspecting that such offence had been committed under the laws of Russia. According to Counsel, the Request establishes no connection between the alleged stealing of products from ToAZ by the individuals during the relevant period and the subsequent transfer of ToAZ shares to the Claimants one year later in December 2012. She submitted that there are no reasonable grounds for suspecting that the registered office of the Claimants in the BVI would have contained evidence relevant to the alleged theft of these products from a site located in Russia some five years prior to the date when the warrant was sought.
- [99] The Claimants submitted that the Attorney General was obliged to discover details which would demonstrate that the Claimants' information would be relevant to the Request. Instead, Counsel contends that the Attorney General has simply accepted the bare, unsupported assertions of the Requesting Authority, electing to apply his powers under section 6(7) without satisfying himself of the factors prescribed under section 6.
- [100] Counsel for the Claimants also submitted that fact that the Requesting Authority relied on the **2003 United Nations Convention against Corruption** instead of the **2000 Palermo Convention** which the Attorney General clearly relied on in his legal submissions should have made further inquiries inevitable. However, Counsel for the First Respondent dismissed this suggestion and instead urged the Court to conclude that the Request complied with both the **2003 United Nations Convention against Corruption** and the **2000 Palermo Convention** whose provisions are essentially interchangeable.
- [101] Counsel for the First Respondent further urged the Court to conclude that the statutory preconditions were in fact satisfied to the level required to accord with the purpose and function

and the CJICA. He referred the Court to the Fifth Affidavit of Crown Counsel Sarah Potter, filed on 20th June 2016 where at paragraph 3 she sets out the process and the analysis and conclusions drawn by the Attorney following receipt of the Request. She avers that the Attorney General had regard to the fact that there was an open criminal investigation (Case No. 201/837064-14 – 12th December 2012) involving the Persons under Investigation. These Persons under Investigation managed ToAZ via foreign entities under their control including Thornton Ventures Limited and A.S. Industries. After the criminal investigation had commenced, the shares in ToAZ which were owned by these companies were transferred to the Claimant companies. She states that timing of the transfers raised an element of suspicious activity and so the need arose to investigate the new companies to whom the shares were transferred. In Ms Potter's words, "*the requesting Country deemed it necessary to seek information as to how the [the Claimant Companies] were set up, the purchase by the shares of ToAZ by the said companies and the further management of the shares*".

- [102] On this basis it was determined that there were reasonable grounds for suspecting that there is within the companies evidence relating to the offence of obtaining property by deception by the Persons under Investigation and having found that the principle of dual criminality was fulfilled, she concludes at paragraph 3 (xvii):

"Having regard to the above, the Letter of Request was properly examined taking into account the statutory conditions pursuant to the CJIC, as amended. The Attorney General had no reason to query the correctness of the Letter of Request and was satisfied that the Request was in compliance with the said legislation. As a result, the Request was submitted for execution and the direction was made to apply for the search warrant before the sitting magistrate to facilitate execution."

- [103] A competent authority within a requested state is not at liberty to ignore the relevant statutory requirements, neither can they ignore the statutory grounds upon which they may decline to render assistance.⁴³ In order to successfully resist a challenge on the ground of *Wednesbury* unreasonableness, the First Respondent must act in the way that a reasonable Attorney General would act in order to satisfy himself that the relevant preconditions had been met. In the case at bar, the evidence demonstrates the factors considered and the steps taken in order to satisfy the

⁴³ Section 6(2) of the CJICA

First Respondent that the Request met the requirements of the Convention and the provisions of the CJICA.

[104] However, having considered the totality of the evidence in this case, the Court is not satisfied that the particular facts of this case disclosed any pressing need to solicit further information when it is clear that on the basis of the matters revealed in the Request (which included the fact that there was an active and ongoing investigation involving the Persons under Investigation in regard to the offence and the investigating authority had already obtained a verdict of detention in absentia under the Russian Criminal Code against the Persons under investigation who have been declared internationally wanted persons), the Attorney General was able to properly conclude that the statutory conditions had been fulfilled.

[105] The Court accepts that a competent authority must also consider that there are collateral implied duties which must be considered. The rationale for this collateral duty was described by Lord Diplock in **Secretary of State for Education and Science v Tameside MBC** in the following excerpts,⁴⁴

“It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his, **but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the Council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider; see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223 at p. 229 per Lord Greene M.R.** Or, put more compendiously, the question for the Court is, **did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?**” Emphasis mine

[106] In the Court’s view the proper approach was set out in the judgment in **Acturus Properties Limited and Others v Attorney General**⁴⁵. In **Acturus**, the Attorney General 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

⁴⁴ [1976] UKHL 6

⁴⁵ [2001] JLR 43

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.

[107] The Court (Birt, Deputy Bailiff, and Jurats) rejected this submission and said the following:

“We do not accept that the Attorney General is under any such duty. The whole point of the 1991 Law is that it is usually dealing with a criminal investigation rather than a prosecution. It is not necessarily known at that stage whether a crime has been committed and, if so, what crime and by whom. There is only a reasonable suspicion of a serious or complex fraud and evidence to justify or nullify that suspicion is sought. In Bertoli-v-Malone [1992 – 93 CILR N-1], the Judicial Committee of the Privy Council approved the judgment of Georges, J.A. in the Court of Appeal of the Cayman Islands. That case concerned a request for assistance made by criminal investigative authorities of the United States to the Cayman Mutual Legal Assistance Authority. In considering the duty of the Cayman Authority in relation to such a request for assistance from a foreign jurisdiction, the Court of Appeal said this (1990 – 91 CILR at 71):-

“The Authority, with the assistance of the Attorney General if needed, can no doubt decide whether the request is in conformity with the provisions of the Treaty or whether it is for a political offence or a purely military offence. In deciding whether there are reasonable grounds for believing that an offence has been committed and that the information sought relates to the offence, the Authority must assume the correctness of the information laid before him in the request. Clearly he cannot receive evidence to raise doubt as to this. Again these are matters of analysis and inference on which the Authority can competently and accurately arrive at a decision on the documents placed before him.”

In our judgment, the position of the Attorney General is the same. He is entitled to assume the correctness of the information set out in the letter of request. It would not normally be appropriate for him to go back and query information given to him by a prosecuting authority of a friendly jurisdiction. That is not to say that the Attorney General, in order to ensure that orders made under the 1991 Law are not in terms which are wider than is required for the purposes of the investigation, cannot seek clarification or elaboration. For example, it may be that the alleged connection with a particular company in Jersey is not sufficiently spelt out in the letter of request. But that is a matter of judgment for him when holding the balance between the need to investigate serious or complex fraud, wherever committed, and the need to limit forced disclosure of confidential information to what is necessary for the purposes of the investigation. He is entitled, as a matter of law, to assume the correctness of what he is told and is under no

duty to request sight of the evidence upon which the information in the letter of request is based. Reverting therefore to the presumption of regularity, no evidence has been produced by the representors which cannot be reconciled with a reasonable decision on the Attorney General's part that there was a suspected offence involving serious or complex fraud." paras 51 – 52 (Our emphasis)

[108] The reasoning in that case was also 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**. As in the case at bar, the Court of Appeal had to consider a similar statutory threshold as in **Acturus** which prescribes that the decision maker must consider whether there are reasonable grounds for the belief required. A critical factor for the Court was that the request made is in relation to *investigation* and not *determination* so that the full facts are unlikely to be known at the time when the request for assistance is made.

[109] After assessing the evidence, the Court of Appeal concluded that:

"While it is certainly right that any request should be carefully considered by the Comptroller with the criteria of Regulation 3 in mind, it is not for him, or for this Court, to devise additional hurdles for a requesting party to jump before any request can be met. The presumption of regularity (R -v- IRC ex p Rossminster 1980 AC 952 per Lord Diplock at p.100) at least applies to how he has discharged his duty, although it does not dilute the duty itself.

For present purposes it appears to us that the principles applicable to the question whether the Regulation 3 paragraph (1) threshold is satisfied, that is whether the Comptroller has reasonable grounds for believing the matters described in (a) and (b) of that paragraph, may be summarised as follows:-

- (ii) the Comptroller is entitled and bound to have regard to the totality of the information made available to him and its sources or lack of sources;
- (iii) there is no requirement that such information must be verified by affidavit or otherwise take any particular form;
- (iv) for the purposes of deciding whether to act on a request the Comptroller is at liberty to ask the requesting state authorities for clarification or further information but is under no obligation to do so; nor is he under any obligation to require the production of evidence in support of facts of which he is informed in order to verify them for himself;
- (v) where, as here, the Comptroller is faced with conflicting assertions as between the requesting authority (Norway) and those affected by the request (Mr

Larsen) it is not for him to reach any final conclusion on where the truth lies: his role is not to act as final adjudicator on these issues which may or may not in the fullness of time fall for adjudication by Courts in Norway but simply to decide, having regard to the material before him, whether there are “*reasonable grounds for believing*” the two matters prescribed by the first paragraph of Regulation 3 and whether he can properly say that in his “*reasonable opinion*” the documents of which production is sought may contain information relevant to one or more of the matters listed in the second paragraph of that regulation.

[110] The Court is guided by this dictum.

[111] Ultimately, every case must be decided on its particular facts. There may well be cases where the facts reveal questions or lacunas which warrant that a decision maker take reasonable steps to acquaint himself with the relevant information to enable him to answer such questions or to fill such lacunas. Certainly this appears to have been the case in **MH Investments and Another v Cayman Islands Tax Information Authority**⁴⁶ where under the principles set out in the Tax Information Authority Law, a Respondent who ordered the production of information in relation to taxes for the years prior to 1st July 2010 would have acted in contravention of the law as read with the relevant Tax Information Treaty. In that case the Applicants contended that all for requests related in art or in whole to the enforcement of liabilities for tax years prior to July 2010 so that the purpose of the requests objectively determined on a balance of probabilities was to assist in collecting tax for the proscribe period. It is therefore not surprising that Quin J found that Cayman Islands Authority had been under a duty to seek clarification and make further enquiry as to whether the information sought related to tax years and taxable periods after 1 July 2010.⁴⁷ At paragraphs 176 of the judgment, the Court adopted Lord Diplock's words in **Tameside** and paraphrased that “*the question for this court is did the respondent ask itself the right questions and take reasonable steps to acquaint itself with the relevant information to enable it to answer whether the request from the ATO complied with the TIA Law as read with the Tax Information Agreement.*”

[112] In the Court's judgment the case at bar presents a much different scenario. In this case, the First Respondent clearly had a discretion and prior to making a decision to process the Request he

⁴⁶ Cause No G391/2012

⁴⁷ Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 ALL ER 665 and Rio Tinto Zinc Corp v Westinghouse Electric Corp.

considered the information provided, and determined that *without more* it provided a sufficient basis upon which he could properly act. No doubt with the benefit of hindsight, there may well have been several avenues of inquiry which could be plumbed⁴⁸, but at the time when the Attorney General was exercising his discretion, there was on a strict reading of the statute, nothing which could objectively have formed a basis for delaying the co-operation which the Requesting Authority was entitled to receive.

- [113] The same conclusions would clearly not apply in the case where the First Respondent was in fact aware of the details of the Claimants' concerns. This is evident in the next decision under challenge.

THE DECISION TO TRANSMIT THE DOCUMENTS

- [114] Under this head of challenge, the case for the Claimants is premised on the fact that the First Respondent took a decision to transmit the documents which were obtained following the execution of the search warrant. The Claimants say that this decision was irrational because it failed to take into account information which had been provided and which was plainly relevant.
- [115] The warrant in question was granted on 12th January 2016 and that the documents were voluntarily delivered to the FIA by the registered agents on 22nd January 2016. Thereafter, the relevant chronology as disclosed from the written and oral evidence of Crown Counsel Sarah Potter becomes critical.
- [116] At paragraphs 7 and 8 of her Affidavit filed on 27th July 2016, Ms. Potter asserts that by the time the Claimants' objections were received, the decision to execute the Request had been taken and transmission of the documents was in process. However, when she was cross examined under oath, it became clear that the documents were sent to the Governor's Office on 28th January 2016. By that time, the Claimants had, through their attorneys delivered a letter dated 21st January 2016 which set out a number of matters were plainly relevant.

⁴⁸ Details of the Claimants' concerns were set out in correspondence which would have been delivered on 21st January 2016 several days after the Request had been auctioned by the Attorney General on 8th January 2016.

[117] It became clear that this correspondence would have been received by the Attorney General because it was referenced in a letter dated 25th January 2016 from the Acting Principal Crown Counsel Kaidia Edwards-Alister in which she acknowledged receipt of the letter and maintained that:

“The Attorney General is not currently in a position to confirm that the documents will not be transmitted to the requesting authority until your judicial review application is determined. As you are aware, this matter concerns international relations and would require the relevant local Governmental and international bodies have proper notice of any stay to transmit the documents.”

[118] Thereafter, it appears that the Attorney General proceeded to transmit the documents. This step was only averted by the interlocutory injunctive relief granted on 3rd February 2016 in which the High Court ordered the First Respondent to abort the transmission pending an *inter partes* hearing.

[119] It therefore could not be said that the First Respondent was unaware or was not put on notice of the Claimants’ concerns prior to deciding to transmit the documents. The rationale for this election was later made clear during the course of interlocutory proceedings before the Court on 10th February 2016. At that hearing, Counsel for the Attorney General made it clear that he was entitled to ignore and had in fact ignored the Claimants’ representations.

[120] In support of this position, Counsel for the First Respondent submitted that the Claimants have provided no authority to support the contention that there is a duty on a requested state to consider relevant considerations afresh when releasing documents after they have been obtained pursuant to a warrant. He relied on the dictum in **Unaenergy** where at paragraph 35, Gross LJ reiterated that disputes as to the lawfulness of a request are best resolved in the courts of the requesting state. He argued that the section 6(10) of the CJICA contemplates an automatic transmission once the documents have been retrieved.

[121] In the Court’s judgment, this position is not maintainable. It prescribes a fetter on the competent authority’s discretion which is clearly not contemplated under the CJICA. It cannot be that an authority’s discretion terminates once it is put in possession of documents which are responsive to a request. In the Court’s judgment, the decision to transmit the documents is clearly bound up in the decision to grant assistance. If, in the statute conferring the discretion, there is to be found

expressly or by implication, matters which the authority exercising the discretion ought to have regard to, then in exercising its discretion it must have regard to those matters at every stage. It follows that the Attorney General was still obliged even at the point of transmission, to consider all of the relevant factors which should inform his decision and consequently he is still obliged to “ask himself the right questions and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly.”

[122] The Claimants contend that in transmitting the documents, the Attorney General may unwittingly be assisting in a clear abuse of process. The relevant evidence is set out in the affidavit of Mr. Menno Jordan filed on behalf of the Claimants on 1st February 2016. By way of background, the Claimants state that the Russian company, ToAZ is one of Russia’s most successful mineral fertilizer production companies. The Applicants have an interest in ToAZ whose main business activity is the production and sale of mineral based fertilizers, including ammonia, carbamide (often known as urea) and carbamide-formaldehyde concentrate..

[123] The Claimant state that over recent years, entities connected with the Claimants including ToAZ have been the subject of various corporate raiding attacks which include unjustified criminal and regulatory proceedings against ToAZ and its officers instigated by high profile businessmen with links to the Kremlin. They claim that a Russian oligarch, Mr. Mazepin currently owns a minority stake in ToAZ through OJSC United Chemical Company Uralchem (“Uralchem”), a commercial rival to ToAZ. The Claimants state that Mr. Mazepin is the controller and guiding force behind the most recent unlawful acts being brought against the directors and shareholders to ToAZ as part of his attempted “raid”.

[124] The Claimants referred to various experts on the subject of “reidversto” or corporate raiding, a now well-known practice which has been documented in the press, in academic texts and in judicial judgments. This practice typically involves some or all of the following features:

- a. The raider begins by acquiring a minority stake in a company;
- b. Frivolous lawsuits are launched against a company (some of them made possible by the minority shareholding), which often involve allegations of irregular pricing behavior;
- c. Lawsuits are combined with simultaneous public relations campaigns to damage the reputation of the companies and individuals involved;

- d. Allegations of criminal wrongdoing or tax evasion can be used (sometimes in conjunction with corrupt officials) to launch searches of the target companies and affiliates or trading partners in order to gain information, which is then used to bring further lawsuits against, or place pressure on, the target company;
- e. These repeated attacks may be assisted by judicial pressure or bribes; and
- f. The lawsuits (combined with the use of fraudulently procured documents and/or judicial pressure and/or bribes) can result in the arrest or freezing of the target company's shares, or arrest of the company's owners and officers.

[125] The Claimants state that the phenomenon of "*reiderstvo*" has been recognized in the English judgments including that of **SC Mezhdunarodniy Promyshlenniy Bank v Pugachev** [2014] EWHC 4336 where at paragraph 109 Justice Mann notes the following:

"Mr Pugachev's case on disclosure does not, however, rest just on his particular evidence about threats of intervention and the like. He makes a case about what he says is the known position in relation to the way some business is done in Russia. Mr Michaelson exhibits a number of publications which refer to the process of *reiderstvo*, or raiding, pursuant to which a rival will use illegitimate means, and/or proceedings which are capable of being legitimate but which are used corruptly, to get control and ownership of another's business. One is a work by Ms Ledeneva ("*Can Russia Modernise*", Cambridge University Press, 2013). This process is said sometimes to involve influencing (improperly) public officials such as the police and even the judiciary. Where raiders bribe officials Ms. Ledeneva proposes the term "*sistema*". Much of the discussion in this and the other works cited before me involves the oppression of one private owner by another. It tends not to focus on state-driven raids. However, there is no doubt that the writers consider that the state can and will indulge in similar activities if it suits it. Thus Richard Sakwa, writing the Russian Analytical Digest No 105, 5th December 2011, says that the Yukos affair, in which an oil company was forcibly broken up and its owner (Mikhail Khodorkovsky) was arrested for alleged unpaid taxes, "demonstrated the ability of the regime ... to influence judicial outcomes [as] desired." Again, in an article published by Chatham House, Philip Hanson of the University of Birmingham writes of the complicity of judicial authorities in *reiderstvo*. A US Department of Trade publication "*Doing Business in Russia 2013*" refers to numerous reports of corruption in the judicial system and says: "Courts are sometimes subject to political pressure". There is also the decision of Christopher Clarke J in *Cherney v Deripaska* [2008] EWHC 1530 in which it was acknowledged by the judge that there was a risk that a fair trial would not be possible in Russia in that case because of the interest of the state and state pressure on the courts (see in particular paragraphs 218 and 248)."

[126] The Claimants state that this type of action has been called "lawfare" and relies upon the system of mutual legal assistance to "[abuse]" Western laws and judicial process, to achieve political ends". They rely on the learning of Dr. Andrew Foxall, the director of the Russia and Eurasia Studies Centre at the Henry Jackson Society who observed that:

“The MLAT is a way for the Kremlin to gain control over an individual outside or its jurisdiction. Through the MLAT system, Russia is able to issue warrants, obtain testimony, freeze bank accounts or repatriate seized assets. Russia, in most of its MLATs is under no obligations to provide any substantive information about the underlying criminal allegations and the evidence it has compiled to justify the request to the country from which it is requesting assistance. This means, in short, that the Kremlin is able to freely fabricate court cases in Russia and then request the cooperation of Western Countries in those cases.”

- [127] The Claimants also state that since 2005, ToAZ has been the subject of corporate raids initiated by the minority shareholder called Tringal Entities (“Tringal”). Pursuant to the raid, politically motivated and unjustified criminal, civil and tax cases were brought against ToAZ and its officers (including Mr. V Makhlay, at that time the Chairman of ToAZ). Part of the raid tactics involved the abuse of foreign court proceedings in order to put pressure on ToAZ officers abroad. In February 2008, the Russian government made extradition requests to the English Courts for Mr. V Makhlay and a Mr. Makarov (both of whom were by that time living in London). In a judgment of the City of Westminster Magistrates’ Court, Senior District Judge Workman found that the evidence supporting the criminal allegations were “naïve” and “superficial” (paragraph 12); that there was “overwhelming” evidence of judicial interference (paragraph 18); and that the charges were politically motivated. As a result, he dismissed the application for extradition (paragraph 20).⁴⁹
- [128] The judgment of Judge Workman was cited with approval by Chief Magistrate Emma Arbuthnot in **Russian Federation v Evgeniy Korolev**⁵⁰. In that case, Magistrate Arbuthnot denied Russia’s extradition request for then ToAZ executive Mr. Korolev and found as a matter of fact that ToAZ was the subject of an attempted corporate raid (paragraphs 105 – 106). Magistrate Arbuthnot found further that given the weaknesses in Russia’s criminal justice system, there was “no sense that the courts will protect ToAZ from an unscrupulous raider such as Mazepin” (paragraph 127).
- [129] Unusually, Tringal’s raid was unsuccessful. Its minority stake was sold to OJSC United Chemical Company Uralchem (“Uralchem”), a commercial rival to ToAZ owned and controlled by Russian oligarch Dmitri Mazepin, who has links to the Kremlin. Since then, Mr. Mazepin (through Uralchem) has orchestrated another attempted raid (widely reported in the press) employing

⁴⁹ Russian Federation v Makarov and Vladimir Makhlay (Westminster Magistrates’ Court, 8th May 2009) [AB/Tab 2].

⁵⁰ Westminster Magistrates’ Court, 8 December 2016

substantially the same tactics, instigating a further series of unjustified criminal and regulatory proceedings against ToAZ and its officers and directors. This has resulted in a number of unjustified sanctions imposed against ToAZ and its shareholders, officers and directors, including the arrest of shares owned by the main shareholders of ToAZ, purportedly to secure a claim brought by Uralchem⁵¹

[130] The Claimants cite as another example of Russia's misuse of the MLAT process, the Government's pursuit of Yukos which was then Russia's largest oil company with a value of USD\$60Billion and owned by Mikhail Khodorkovsky. Having sentenced Mr. Khodorkovsky to 9 years imprisonment for fraud and tax evasion, Russia set about targeting assets connected to Yukos by sending mutual legal assistance requests to a number of countries including Switzerland. Having received numerous mutual legal assistance requests to search and seize documents related to various Yukos-related entities, the Swiss Federal Tribunal eventually ruled that the case against Mr. Khodorkovsky was politically motivated and that Switzerland must not comply with Russia's requests.

[131] The Claimants assert that the most recent criminal and regulatory proceedings, and the related sanctions imposed upon ToAZ and its officers, directors and shareholders, are simply the latest unlawful acts in the current attempted raid of ToAZ. Those acts are designed to place pressure on ToAZ, and its shareholders and trading partners, in order to reduce the value of ToAZ, and encourage those holding shares in ToAZ to sell those shares, quickly, and at a low price, or alternatively to procure the forced sale of those shares, in satisfaction of lawfully procured judgments.

[132] Notably, the learned Judge in **SC Mezhdunarodniy Promyshlenniy Bank v Pugachev** went on to state:

"It is not necessary to set out further details appearing in those works. It is sufficient for present purposes to note and to find (as I do), that there is an apparently respectable body of opinion which considers that the state and individuals are capable of manipulating the system in a corrupt fashion. That gives a plausibility to a large part of Mr Pugachev's case that it might otherwise lack. However, more than

⁵¹In *Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2014] EWHC 4336 (Ch); Mann J at [109] – [110] confirmed that the concept of 'reiderstvo' is well-known and recognized by a "respectable body of opinion." See also Richard Sakwa, "Systemic Stalemate: Reiderstvo and the Dual State"

that, it has a significance for the scope of disclosure. It means that Mr. Pugachev's case that there has been state interference in the process, and even in the judicial process, cannot be dismissed as the sort of thing he would say and which is totally unsupported by anything other than his own carefully chosen evidence. If influence is far-reaching, then it might extend into the DIA and the CBR (which are essentially state bodies for these purposes). It is also plausible that it extends into the judiciary and judicial processes. The duty of disclosure must be fulfilled with that in mind, because it must be assumed that, like it or not, the claimants must be aware of the points of view encapsulated in the works to which I have referred. The existence of a respectable view which would support what might otherwise be wild allegations means that a more careful eye must be kept on material which might be said to support that view.” Emphasis mine

- [133] When the Court has regard to these purported representations and the ambit of the powers sought to be exercised under the CJICA, the Court is forced to the conclusion that the Attorney General could not merely rely on the bare compliance with the statutory requirements. The representations which the Claimants sought to advance would clearly have a bearing on the matters with which the Attorney must be satisfied before he can exercise his powers under section 6 of the CJICA. They place in doubt the question of whether there was in fact an offence committed or indeed whether there are reasonable grounds to suspect that an offence had been committed under Russian law. Moreover, they point to a serious misuse or abuse of process and bad faith on the part of the Requesting Authority. The representations also speak to the potential for misuse of the documents by the Requesting Authority.
- [134] None of the cases cited by the Respondents support the view that a Requesting Authority can ignore the representations which ground compelling reasons why a request should not be processed. In the Court’s judgment these matters fall within the rare “compelling reasons” referred to in **JP Morgan Chase Bank National Association v Director of the Serious Fraud Office**.
- [135] In circumstances where the First Respondent clearly felt bound by Article 46(19) of the Convention, it is surprising that he would chose to ignore the Claimants’ concerns that the documents would be used for improper purposes. Moreover, when it is considered that in exercising his powers under section 6(7) of the CJICA, the Attorney General has invoked constitutional protections afforded to Claimants under section 19 of the BVI Constitution, this Court is satisfied that while he has a duty to assist the Russian Authority in a timely manner, he also has a duty to ensure that the Claimants’ rights are not unduly infringed and that he is not abetting such infringement.

[136] In order to defeat a challenge on the ground of **Wednesbury** unreasonableness, the Attorney General must act in a way that a reasonable Attorney General would act in order to satisfy himself as to the lawfulness of the request. Usually, the fact that the request comes from the central authority of the requesting country will of itself be sufficient and no further step need be taken. However, if credible or plausible doubts have been raised, the Attorney General will need to do more depending on the circumstances. At the very least, he should discharge his **Tameside** duty and consider appropriate representations.

[137] The facts of this case reveal that not only did the Attorney General ignore the Claimants' representations, he also failed to investigate fully the allegations and evidence produced by the Claimants which may present compelling reasons why a request should not be processed, and in doing so he failed to take into account relevant considerations.

THE DECISION TO APPLY FOR THE WARRANT

[138] The Claimants contend that in deciding to apply for the warrant on an *ex parte* basis, the First Respondent breached the principles of procedural fairness. In considering the ambit of powers prescribed in section 6(7) – (9) of the CJICA, the Court is obliged to bear in mind the peculiar context of this case. For that reason, the Court is guided by the dictum in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office** ⁵² in which Kennedy LJ summarized the relevant principles in relation to warrants issued in the context of mutual legal assistance.

[139] In that case, the claimants sought to set aside warrants and executions under them to provide assistance to a foreign court investigating alleged unlawful assistance to companies in Bosnia Herzegovina. At paragraph 24 of the judgment Kennedy LJ noted:

“From the authorities I am able to derive some general conclusions which are relevant to the facts of this case –

- (1) **The grant and execution of a warrant to search and seize is a serious infringement of the liberty of the subject, which needs to be clearly justified, and before seeking or granting a warrant it is always**

⁵² [2005] EWHC 1626 Admin

necessary to consider whether some lesser measure, such as a notice under section 2(3) of the 1987 Act, will suffice.

- (2) If such a notice will not suffice, for example because the documents may be destroyed, consideration should be given to the possibility of obtaining the documents from an alternative untainted source, such as a bank, but where, that would involve many enquiries of many institutions which might or might not be willing and able to produce the information required, the need to assist the investigating authority to make progress with its overall investigation may well, as in this case, render resort to alternative sources impracticable.
- (3) If an application is to be made for a warrant it is the duty of the applicant to give full assistance to the District Judge, and that includes drawing to 'his or her attention' anything that militates against the issue of a warrant. On the material now before us, and bearing in mind the experience of the District Judge, which is clear from the authorities, I see no reason to conclude that the matter was not properly presented in this case.
- (4) It is clear from the terms of the 1990 Act and the 1987 Act that when the Director of the SFO is seeking a warrant pursuant to a request for mutual legal assistance the warrant does not need to reflect precisely the wording of the letter or letters of request. The Director has a duty to decide for himself how best to give effect to the request in furtherance of the overall investigation, and if that means going further than the letter of request he is entitled to do so, despite Mr. Beaumont's submission to the contrary.
- (5) When there is an ongoing investigation into, for example, the affairs of a company such as EPRS, which appears to have been at the centre of a fraud, it will always be difficult to say precisely what documentation of value to the inquiry may be recovered from those who are justifiably suspected of being in contact with the main target company, but nevertheless the warrant needs to be drafted with sufficient precision to enable both those who execute it and those whose property is affected by it to know whether any individual document or class of documents falls within it. If that is done it seems to me that the specificity required will be no less than would be required for a notice under section 2(3) were it practicable to serve such a notice, and although the terms of the warrant may be wide it will not simply be fishing if it is directed to support an investigation which has apparent merit.
- (6) For practical reasons, to make the best use of court time, it is obviously desirable to give a District Judge from whom a warrant is being sought time to pre-read the material relied upon, namely the sworn information, usually supported by the letter(s) of request and the draft warrant. It is important for the purposes of any subsequent review for the Director or his representative to be able, as in this case, to say whether that was done.

- (7) If there has been an opportunity for pre-reading the hearing itself may be very short. If the applicant supplements the material already provided, possibly in response to questions from the District Judge, that should be noted, and the same applies to the decision of the District Judge, which should be briefly reasoned. It seems that sometimes proceedings before the District Judge are tape-recorded, and if that can be arranged that is clearly the best form of record, but if that is impracticable the party applying for a warrant must prepare a note which can be submitted to the judge for approval if any issue arises as to the way in which the warrant was obtained. That is what seems to have happened in this case, save that the file note, which was circulated to Bow Street Magistrates Court ends with the brief assertion that "the judge granted the warrants and initialled the schedules attached." If he gave reasons they are not spelt out.
- (8) Mr. Downes submitted that where a warrant is granted it should be upon the basis that the party affected by it can go to the District Judge, after it has been executed and after the property has been secured, to invite the District Judge to reconsider his decision to grant the warrant either at all or in that form. No one suggested that a District Judge has any statutory jurisdiction to reconsider his decision to grant an application for a warrant after the warrant has been executed, and I am not persuaded of the existence of any inherent jurisdiction to that effect. Whether such a jurisdiction should now be granted to a District Judge by statute is a matter for parliament not for this court. There are plainly arguments in favour of a further hearing at that level rather than by seeking relief in the High Court.
- (9) The remedy which is available to a person or persons affected by a warrant is to seek judicial review. It is an adequate remedy because the statutory provisions have to be read in the light of those Articles of the European Convention which are now part of English law. In fact, as was said by the Lord Chief Justice in the Kent case if the statutory provisions are satisfied the requirements of Article 8 of the Convention will also be satisfied, and at least since the implementation of the Human Rights Act an application for judicial review is not bound to fail if, for example, the applicant cannot show that the Director's decision to seek a warrant in a particular form was irrational, but in deciding whether to grant permission to apply for judicial review the High Court will always bear in mind that the seizure of documents pursuant to a warrant is an investigative step, perhaps best reconsidered either at or even after the trial.
- (10) **Often it may not be appropriate even after the warrant has been executed, to disclose to the person affected or his legal representatives all of the material laid before the District Judge because to do so might alert others or frustrate the purposes of the overall enquiry, but the person affected has a right to be satisfied as to the legality of the procedure which led to the execution of the warrant, and if he or his representatives do ask to see what was laid before the**

District Judge and to be told about what happened at the hearing, there should, so far as possible, be an accommodating response to that request. It is not sufficient to say that the applicant has been adequately protected because discretion has been exercised first by the Director and then by the District Judge. In order to respond to the request of an applicant it may be that permission for disclosure has to be sought from an investigating authority abroad, and/or that what was produced or said to the District Judge can only be disclosed in an edited form, but judicial control by way of judicial review cannot operate effectively unless the person or persons affected are put in a position to take meaningful advice, 'and if so advised to seek relief from the court. Furthermore it is no answer to say that there is no general duty of disclosure in proceedings for judicial review.' Emphasis mine

- [140] The case law recognizes that while a requested state is bound to do everything it could to assist the foreign authority, it has to ensure that the rights of the persons affected are not infringed. The grant of such assistance through a compulsory search and seizure warrant invokes constitutionally protected rights under section 19 of the BVI Constitution which secures protection of private and family life and privacy of home and other property.
- [141] In the Court's view, the Attorney General was obliged to act in a manner which is compatible with the fundamental rights of any person who is likely to be affected by the grant of assistance. Having reviewed the evidence filed on behalf of the Respondents, as well as the submissions of Counsel it is readily apparent that the First Respondent failed to consider the principles adumbrated by Kennedy LJ. Given the serious risk of infringement of the Claimants' fundamental rights, the First Respondent was obliged to consider whether this draconian measure was necessary in all the circumstances.
- [142] In that regard, the Court finds that evidence of Mr. Errol George, Director of the Financial Investigation Agency (FIA) and Crown Counsel Sarah Potter Washington to be compelling. Piecing together their separate recounts, it became clear that the Request was initially executed in November 2015, when the FIA using its powers under section 4 (2) (d) wrote to the Corporate Agents (BVI) Limited (the Claimants' registered agents in the Territory) seeking the identity of the ultimate beneficial owners of the Claimant companies. Mr. George recounts that this action was taken as part of the FIA's preliminary investigations into the Russian Request which had been received by the Attorney General and forwarded to the FIA for action. Remarkably, the

documentation evidencing such referral by the Attorney General to the FIA was not disclosed to the Court.

[143] The relevant documents were duly delivered by Corporate Agents (BVI) Limited. Mr. George's evidence is that the documents were used to confirm certain information in the Request and only for investigative purposes prior to making a formal application to the Magistrate's Court to obtain a search warrant. These documents were not delivered to the Attorney General because according to Mr. George, the FIA Act and procedures precluded him from doing so. His evidence is that in order for the documents to be disclosed and thus transmitted to the Requesting Authority, they would have to be obtained pursuant to a search warrant. This explains why Mr. Dale Francis, an officer of the FIA later approached the Attorney General with a draft Direction to obtain such a search warrant.

[144] The Direction having been duly signed, Mr. Francis then proceeded to obtain the search warrant. This circuitous procedure discloses the apparent misdirection of the relevant actors. The terms of the Request were clear. The Requesting Authority wished to have certified extracts of the trade registers commencing from the date of incorporation. In addition, they wished to have interrogatories conducted in which the directors and other managers of the Claimants were to be taxed on specifically identified issues.

[145] In these premises and given the plenary of powers vested in the Attorney General under the CJICA, the Court has some difficulty in discerning why this tortuous procedure (in which the FIA obtained a search warrant to retrieve documents which were already in its possession) was adopted. Section 6(3) of the CJICA clearly permitted the Attorney General to:

“(3) The Attorney General may direct, in writing, a police officer (“an Investigating Officer”) to do any of the following for the purpose of giving effect to a request:

- (a) to conduct an investigation;
- (b) to interrogate and take statements from such persons as may appear to the Attorney General to be appropriate;
- (c) to make copies of such documents, to take such extracts or samples and to receive such other evidence as may appear to the Attorney General or the Investigating Officer to be appropriate.”

- [146] Section 6(5) provides that the investigating officer does not have the power to compel an individual to answer any question or to produce any document or thing but it clearly contemplates that cooperation may be obtained on a voluntary basis. Indeed, it is only where the investigating officer is satisfied that compulsion is necessary that the search warrant procedure should be considered. Moreover, it is only when an officer is satisfied that an *inter partes* application would not be appropriate because it is impractical to serve notice or because documents may be removed, damaged or destroyed or because it would prejudice an ongoing investigation that he should elect to proceed *ex parte* or without notice.
- [147] At paragraph 5 of his Affidavit, Errol George discloses that the *ex parte* procedure was adopted because “*the application concerned a request for assistance from a foreign jurisdiction which clearly indicated that the information contained in the said request is confidential. Further the subject of the request was at an investigative/preliminary stage and to have an inter partes hearing at that stage, could have run the risk of the foreign investigation being potentially jeopardized and undermined.*” It is clear to the Court the application for the search warrant was seen as a first and only resort, ignoring the alternative and lesser measures available under the CJICA and ignoring the actual terms of the Request which did not solicit this militant procedure and acknowledged that the Claimants officers or agents would be made aware of the inquiries. It is also evident to the Court that the purported risk of prejudice to the investigation would have been based on mere conjecture rather than actual evidence as there is no evidence of actual consultation between the Requesting Authority and the Attorney General.
- [148] This Court is guided by case of **R v Central Criminal Court ex parte Propend Finance Property Ltd. and Anor**⁵³ where before the English Divisional Court, the Australian authorities consented to an order of certiorari quashing the issue of certain warrants on the basis that they were sought on an *ex parte* basis without any evidence that the solicitors or accountants would have destroyed or removed the documents. The court found that there was no material placed before the judge which was capable of demonstrating that there was any risk that if served with an *inter partes* notice either the solicitors or the accountants would have so misbehaved as to destroy the documents.

⁵³ [1996] 2 Cr. App. R 26 at page 30

- [149] In the case at bar, it is not lost on this Court that the custodian of the documents is a registered agent who is fully regulated under the laws of this Territory. It is clear that the registered agents had fully cooperated on a previous occasion and in regard to the same documents. This willingness to cooperate is further evidenced by the fact that after the warrant was granted the documents were delivered by the registered agent without the need for any actual search. In the Court's judgment these are critical factors which should have been weighed in the balance in deciding whether a warrant was necessary in the circumstances and if so whether the application should proceed on an *ex parte* basis. It is apparent that the First Respondent only considered his obligation to swiftly execute the Request and in doing so he neglected to investigate or inquire of the Requesting Authority whether on the facts of this case, there were any grounds for making an *ex parte* application.⁵⁴
- [150] Given the circumstances of the previous disclosure to the FIA, there was no objective justification for doing so because there is no reason to suggest that had the application been made on notice, there would have been any risk of the documents not being found or produced. In the Court's view, had the Respondents properly addressed their minds to the question of whether an *ex parte* application for a search warrant was necessary, the only rational conclusion would have been that it was not.
- [151] Counsel for the Attorney General has argued that within the context of mutual legal assistance, there are inherent advantages in applying the *ex parte* process including the confidentiality of the process and the speed with which the warrant can be obtained. He submitted that the mutual legal assistance regime is designed to operate expeditiously and so the *ex parte* procedure was appropriate course in the circumstances. However, it was not represented to the Court that the First Respondent would have taken into consideration or weighed in the balance, the protections afforded to the Claimants under section 19 of the BVI Constitution.
- [152] Counsel for the Defendants also submitted that in any event, the Claimants were not in any way prejudiced because they were always protected by the ability to make interlocutory applications after the *ex parte* hearing, similar to the action herein. Counsel for the Respondents argued that as

⁵⁴ R v Central Criminal Court *ex parte* Propend Finance Property Ltd. and Anor

it is clear that the Claimants obtained an injunction to prevent the onward transfer of the documents which were obtained, no prejudice arises. This Court is not persuaded by this submission. It should have been clear to the First Respondent that proceeding *ex parte* would have placed the Claimants at a distinct disadvantage of having their personal information disclosed to the Requesting Authority when their representations to the Magistrate may well have militated against the grant of the warrant.

- [153] In the Court's judgment the decision to employ an *ex parte* procedure in circumstances where there was no real risk, had the effect of depriving the Claimants of sight of the evidence upon which the search warrant application was based which would have been supplied to them had the application been made *inter partes* and which would have informed their representations before the learned Magistrate.

Duty of Full and Frank Disclosure

- [154] Having determined to pursue a search warrant on an *ex parte* basis, the Claimants contend that the Attorney General was under a duty of full and frank disclosure to the magistrate. This duty encompasses an obligation to draw all material facts to the attention of the magistrate whether they weigh for or against the making of the order. Counsel relied on the guidance of Kennedy LJ in the 2005 judgment in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office**⁵⁵. Counsel also relied on the following dicta in **R (Rawlinson and Hunter Trustees) v Central Criminal Court**⁵⁶ where the obligation was described in the following terms:

"It is common ground that the Director must put before the judge not only all the necessary material so that the judge can satisfy himself that the statutory conditions for the grant of the warrant are fulfilled, but there must be full and complete disclosure to the judge, including disclosure of anything that might militate against the grant: see Bingham LJ in *R v Lewes Crown Court ex p Hill* (1991) 93 Cr App R 60 at 69 and Kennedy LJ in *R (Energy Financing Team) v Bow Street Magistrates Court* [2006] 1WLR 1316 at 1325. The last obligation was elegantly phrased by Hughes LJ in *Re Stanford* [2010] 1 WLR 941 at paragraph 191 in stating that the advocate must -

"put on his defence hat and ask himself, what, if he was representing the defendant or a party with a relevant interest, he would be saying to the judge."

⁵⁵ Ibid

⁵⁶ [2012] EWHC 2254 Admin at paragraph 81

[155] However, in a 2017 judgment from the English Divisional Court, the duty of disclosure in the mutual legal assistance context was clarified. Gross LJ in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office**⁵⁷ dismissed a claim for judicial review concerning a letter of request sent by the Serious Fraud Office (SFO) to the authorities in Monaco seeking their assistance in relation to a criminal investigation. In that case, the SFO commenced an investigation into offences of corruption, conspiracy to corrupt, conspiracy to enter into corrupt transactions outside the UK and bribery on 22nd March 2016. On the following day, the SFO sent a letter of request to the authorities in Monaco, requesting that various premises be searched and business records obtained. The Monegasque authorities acted on the letter of request and, amongst other things, raided the Claimants' homes and offices and arrested and interviewed the Third to Fifth Claimants. The Claimants challenged the legality of the letter of request and argued that it was unlawful because *inter alia*, it failed to disclose key information. The Claimants contended that the SFO was under a 'heightened procedural obligation' when issuing letters of request, such obligation being akin to the obligations on parties making *ex parte* applications.

[156] The Divisional Court rejected the Claimants' arguments. The Court held that no such obligation existed because letters of request exist in a field of high public interest and international comity. The Court concluded that "a heightened procedural obligation" would introduce unwarranted complexity and it would be much more likely to slow down the working of the international scheme rather than assist its expeditious operation. At paragraphs 32 and 34 Gross LJ observed:

First, the nature of the disclosure obligation when a law enforcement agency seeks a domestic search warrant on an *ex parte* application is such as to render it peculiarly inappropriate to a LOR to a foreign authority. ...

We are not persuaded that it would be right to read in or superimpose a domestic common law duty of disclosure or candour, or procedural requirement, in an area covered by a comprehensive international scheme which CICA seeks to implement in, as Mr. Hall rightly submitted, "a field of high public interest and international comity". We do not think that there *is* any such obligation as contended for by the Claimants and we see no attraction in developing the law in the direction urged by them, even assuming it to be open to us to do so.

⁵⁷ [2017] EWHC 600 (Admin)

[157] The Court notes that the focus of that case was not in fact a search warrant but rather, the Claimants sought to have the letter of request issued by the SFO quashed on the basis that it failed to disclose key information and was impermissibly wide in scope. However, the legal principles distilled here are compelling. Although, the court in that case did not specifically grapple with the dictum of Kennedy LJ in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office** and that of Sir Roger John Thomas P in **R (Rawlinson and Hunter Trustees) v Central Criminal Court**, it recognized the impact of the mutual legal assistance context. The Court cited the decision in **R (Omar) v Foreign Secretary [2013] EWCA Civ 118** as a reminder of the difficulty of introducing common law obligations or remedies into the international treaty regime sought to be implemented by CICA and noted the following:

“The object of the international scheme is that as between friendly states with whom there are treaty obligations of mutual cooperation, requests for MLA will be acted upon – and as quickly as possible, at least unless there are compelling reasons for not doing so: *R v Secretary of State for the Home Department, ex parte Abacha* [2001] EWHC (Admin) 787, at [17]; *JP Morgan v SFO* [2012] EWHC 1674 (Admin), at [52] – [54]. As Tuckey LJ observed in *Abacha (loc cit)*, any requirements of procedural fairness “...must be fashioned with those considerations firmly in mind”. As it seems to us, the introduction of the suggested “heightened procedural obligation” would introduce unwarranted complexity and would not assist in this regard; it would be much more likely to slow down the working of the international scheme rather than assist its expeditious operation. In particular, the statutory and treaty regime focuses on a statement of the facts and matters upon which the LOR is based, justifying its issue and calling for it to be acted upon. By contrast, the essence of the heightened procedural obligation goes to setting out the reasons casting doubt on the issue of the LOR and, hence, why it should *not* be acted upon.”

[158] For the reasons indicated, this Court accepts that the duty of candour in framing a letter of request is not comparable to that prescribed on an application for a domestic search warrant. Supplementing the requirements of a mutual legal assistance request with a so called “heightened procedural obligation” presents a complexity which is inconsistent in international cooperation. However, where a requested authority in executing a request chooses to engage an *ex parte* judicial process aimed at securing a domestic search warrant, it is impossible to argue that full and frank disclosure would not be warranted. In the Court’s judgment, the principles adumbrated by Kennedy LJ in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office** have not been disapproved and are still relevant. At paragraphs 8 – 23 of that judgment, the Court helpfully distilled the relevant authorities, many of which involved requests for mutual legal

assistance and it is readily apparent that this dicta has been considered and applied in numerous cases including in the 2015 judgment in **Chatwani and Others v National Crime Agency**⁵⁸:

“It is common ground that in making their application the Respondent was under a duty of candour. The relevant authorities are referred to in paragraph 106 of the Judgment of the Divisional Court, basing itself upon authorities such as **Energy Financing Team Limited v The Director of the Serious Fraud Office**⁵⁹, **R (Rawlinson & Hunter Trustees) v Central Criminal Court**⁶⁰ (“Tchenguz”) (“and **R (Golfrate Property Management Limited) v Southwark Crown Court**⁶¹”). The applicant for authorisation (just as an applicant for a warrant) has a duty to include in it the necessary material to enable the authorising officer (and where appropriate the Commissioner) to be satisfied that the statutory conditions are met, but must also make full and accurate disclosure to them, including disclosure of anything that might militate against the grant.”

[159] With that in mind the Court must now consider whether the Claimants could be said to have breach this duty. Counsel for the Claimants contend that the Requesting Authority was obliged to disclose the previous and current corporate raids against ToAZ, its officers and other entities connected with the Claimants. In the Court’s judgment this would import the heightened procedural obligation which was roundly rejected in **R (Energy Financing Team Limited) v Director of the Serious Fraud Office**. This Court is persuaded by the reasoning there and so finds that there was no relevant duty and thus no question of breach of duty.

[160] In treating with this authority, Counsel for the Claimants argued that this case did not address a case where the requesting authority acted in bad faith or for an improper purpose in issuing the letter of request. In the circumstances of this case it is clear to the Court that the allegations of bad faith could not be imputed to the Respondents who at the time of applying for and processing the warrant would not have been aware of these allegations. If there are allegations of bad faith, they could only be levied as against the Requesting Authority who is not a party to this Claim and was not represented before this Court.

[161] The Claimants also contend that the Attorney General ought to have disclosed the fact that the registered agents had previously cooperated and disclosed the same documents sought in the

⁵⁸[2015] Lloyd’s Rep FC 659 at paragraph 15; see also *R (on the application of A and another) v Central Criminal Court and another*; *C and another v Central Criminal Court and another* [2017] EWHC 70 and *R (on the application of Haralambous) v Crown Court at St Albans and another* [2018] UKSC 1

⁵⁹ [2005] EWHC 1626 (Admin)

⁶⁰ [2012] EWHC 2254 (Admin)

⁶¹ [2014] EWHC 840 (Admin)

warrant. They argue that the Second Respondent was obliged to consider whether this draconian measure was necessary in all the circumstances and she could only do so if it had been disclosed to her that the documents which he sought to have retrieved are the same documents which had been requested and provided to the FIA earlier in November 2015. Without this information, the learned Magistrate would “*have no inkling of the nature and quality of the past dealings*”⁶² between the Claimants’ registered agents and the FIA. In the Court’s judgment; this was a relevant matter which ought to have been disclosed.

[162] In **R (Mills) v Sussex Police** the court considered the appropriate test to apply in circumstances where a judge may well have declined to issue the warrant had he been in full possession of the facts. The principle was noted as correctly stated by Stanley Burnton LJ in **R (Dulai) v Chelmsford Magistrates’ Court** [2012] in these terms:

"The question for this court, in judicial review proceedings, is whether the information that is alleged should have been given to the magistrate might reasonably have led him to refuse to issue the warrant."

[163] The warrant should be set aside because there was material non-disclosure which may well have led the judge to issue a warrant which, had there been full candour, he would have refused to issue. In the Court’s judgment it is impossible to say that full disclosure would have made no difference to the outcome.

[164] Finally, the Claimants contend that the learned Magistrate would have been misled as to the identity of the persons alleged to have committed the offence. They contend that information laid before her alleged that “a criminal offence, swindling...being committed by two (2) British Virgin Islands registered business companies.” However, the request levies no such allegation. Instead, it contends that the offence had been committed by the named Persons under Investigation. What is clear however, is that despite the obvious misrepresentation, the actual Request was placed before the Magistrate affording her an opportunity to review and assess its full import.⁶³ In these premises, the Court cannot conclude that this misrepresentation would have been fatal.

⁶² R (Mills) v Sussex Police

⁶³First Affidavit of Magistrate Dabreo at paragraph 6 and Second Affidavit of Magistrate Dabreo at paragraph 5

THE DECISION TO ISSUE THE WARRANT

- [165] The Claimants challenge the decision of the Second Respondent to grant the warrant on both procedural and substantive grounds. First, they allege that the Second Respondent provided no reasons for her decision. This is conceded by the Second Respondent who asserts that her decision was based on her consideration of the information orally presented to her by Officer Dale Francis. She also relies on the *ex post facto* reasons set out in her First Affidavit.
- [166] Counsel for the Claimants submitted that it is well established as a matter of law that the exercise of a court's draconian jurisdiction to grant search and seizure warrants requires the giving of reasons. This appears to be conceded by the Respondents however, they assert that while there were no oral or written reasons given, brief reasons were provided in the Magistrate's affidavit evidence before the Court.
- [167] There can be no doubt that that a magistrate making a decision leading to the issue of a search warrant must give reasons for either granting or refusing the same. Although the CJICA does not mandate the giving of reasons, the rationale for this requirement has been repeated in numerous judicial authorities. It was explained by Watkins LJ in **R v Southampton Crown Court, ex parte J [1993] Crim LR 962** and applied by Kennedy LJ in **R v Crown Court at Lewes, ex parte Nigel Weller & Co (unreported) 12 May 1999** in the following terms:
- "The [1984] Act does not require a circuit judge to give reasons when making an order inter partes or issuing a warrant ex parte for access to special procedure material . . .
- However, challenges to decisions of circuit judges which have come before this Court demonstrate, in my opinion especially as to ex parte applications, the need for this to be done. Reasons need not be elaborate, but they should be recorded and be sufficient to identify the substance of any relevant information or representation put before the judge in addition to the written information. They should set out what inferences he has drawn from the material relevant to the statutory conditions governing the content and form of the order. Where he has considered the question of legal privilege he should explain why, if he does, he has included in the order or warrant material which is prima facie privileged, or why he has excluded material as subject to privilege."⁶⁴

⁶⁴ Applied in *R (S) v Chief Constable of British Transport Police (DC)* [2014] 1 WLR 1647 and in *R (Mills & Mills) v Sussex*

[168] At the time of granting the warrant, the learned Magistrate gave no reasons for doing so. In the Court's judgment she should have done so. If she had, and had such reasons met the requisite standard, the current challenge might well have been avoided. Instead, she now relies on the reasons set out in paragraph 6 of her Affidavit filed on 26th February 2016.

[169] The Court accepts that in certain circumstances it has the jurisdiction to accept late reasons.⁶⁵ However it is clear that some level of caution is required. The approach was summarized in **R (Nash) v Chelsea College of Art Design**:

"Where there was a statutory duty to provide reasons, a court should accept late reasons only in the most exceptional of circumstances. However **where, as in the instant case, there existed no such express duty, the court had to be cautious in accepting subsequent evidence of reasons, and had to consider whether the additional reasons were consistent with the original reasons provided and were the reasons of the entire committee, the delay in providing the later reasons, the circumstances surrounding the provision of late reasons, and the risk of ex post fact reasoning, R. v Westminster City Council Ex p. Ermakov [1996] 2 ALL E.R. 302, R. v Northamptonshire CC Ex p. D [1998] Ed. C.R. 14 considered. Moreover, the level of scrutiny required was dependent upon the seriousness of the subject matter of the decision in question. The court had to also take into consideration the qualifications and experience of the administrative tribunal when considering the clarity of the reasons provided."** Emphasis mine

[170] The Court is guided by this dictum and by the dictum in **South Bucks District Council v Porter (No 2)**⁶⁶ where the House of Lords observed:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such an adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration..."

[171] Applying this guidance in the present context, it is clear that a magistrate's reasons need not be elaborate but they should be recorded and ought to be sufficient to enable the subject of the

⁶⁵ R (Nash) v Chelsea College of Art and Design [2001] EWHC 538 (Admin)

⁶⁶ [2004] 1 WLR 1953, HL, para 36 *per* Lord Brown

warrant to understand why (having considered all the relevant requirements of section 6 of the CJICA) she would have been satisfied that the evidence justified its issue. They must be sufficient to identify the substance of any relevant information or representation put before the magistrate in addition to the written information. They should set out what inferences she has drawn from the material relevant to the statutory conditions governing the content and form of the warrant. Also, where she has considered the question of legal privilege she should explain why, she has included in the order or warrant, material which is prima facie privileged, or why she has excluded material as subject to privilege.⁶⁷

[172] In the Court's judgment the evidence proffered by the Second Respondent in response to this Claim plainly does not meet the standard of adequate reasons since it only sets out the conclusions drawn without the analysis applied.

[173] The Claimants have also challenged the grant of the warrant on substantive grounds. This Court is therefore obliged to consider the extent of the reasons provided within the context of the relevant statutory framework. This prescribes that before a Magistrate could properly grant the warrant, she must have satisfied herself of the statutory factors prescribed at section 6(2)⁶⁸ and 6(8) of the CJICA. Under subsection 6(2), the magistrate must be satisfied that an offence under the laws of Russia has been committed or that there are reasonable grounds for suspecting that such an offence has been committed; that criminal proceedings in respect of that offence have been instituted in Russia or that an investigation into that offence is being carried on there and either the conduct constituting the offence which is the subject of the proceedings or investigation would constitute an offence if it had occurred in any part of the Virgin Islands; or there is in force, in relation to the Virgin Islands and Russia, a treaty that provides that the rendering of assistance for the purposes of criminal proceedings or investigations. Under subsection 6(8) the Magistrate must also be satisfied that there are reasonable grounds for suspecting that there is on premises in the Virgin Islands, evidence relating to such an offence.

⁶⁷ R v Southampton Crown Court, ex parte

⁶⁸ Subsection 6(8) (a) of the CJICA

[174] At paragraph 5 of her First Affidavit, the learned Magistrate asserts that she was assured by the applying officer that the Attorney General was satisfied of the factors set out in subsection 6(2). She states that this assurance was substantiated by the document evidencing the proof that the Attorney General had authorized the officer to make the application for the search warrant.

[175] At paragraph 6 of the said Affidavit, she states the basis of her decision under section 6(8):

“Based on what was explained by the said Officer, my satisfaction of the Attorney General’s vetting procedure as aforesaid, the Attorney General being the Chief Advisor for the Territory in all governmental affairs and my own independent review and consideration of the information and documents presented to me in support of the application, I was satisfied that there were reasonable grounds for suspecting that there was on a certain premises in the Virgin islands evidence relating to the said offence.”

[176] In the Court’s judgment, the fact that the Attorney General had satisfied himself of the factors in subsection 6(2) cannot suffice. The rationale for the requirement that a search warrant be issued by a magistrate or a judge is *“to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorize a police officer to enter upon a person’s premises, search his belongings and seize his goods, the function of the judicial officer is satisfy himself that the prescribed circumstances exist. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing a police officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met.”*⁶⁹

[177] In **R. v. Ebanks, ex parte Henderson**⁷⁰ the Cayman Islands Grand Court explained the relevant duty in the following terms:

“It is for the court or justice to identify the prescribed circumstances and to satisfy itself/himself that they exist. It is elementary that the identification of the prescribed circumstances will turn on the true construction of the particular statutory provision in question.

⁶⁹ Attorney General of Jamaica v Williams [1998] A.C. at 358 per Lord Hoffman

⁷⁰ [2009] CILR 57

[178] Relying on the dictum of Lord Hoffman in **Att.-Gen. (Jamaica) v. Williams**, Cresswell J quoted:

“Section 203 is clear as to the matters upon which the justice must be satisfied. It must appear to him from information on oath that the officer has reasonable cause to suspect one or more of the matters there specified. **It is not sufficient that the justice is satisfied by the officer’s oath that he suspects; it must appear to the justice that his cause for suspicion is reasonable. The test is an objective one. Emphasis mine**

[179] And in **R v. Inland Revenue Commissioners, Ex parte Rossminster Ltd**⁷¹ Lord Wilberforce said, at p. 998:

‘If the judge does his duty... he must carefully consider for himself the grounds put forward by the revenue officer and judicially satisfy himself, in relation to each of the premises concerned, that these amount to reasonable grounds for suspecting, etc. It would be quite wrong to suppose that he acts simply as a rubber stamp on the revenue’s application.’

[180] It follows that the Magistrate must herself be satisfied. It is not enough that the applying officer should state that *he* is satisfied. As the issue of the warrant is a judicial act, it must be preceded by a judicial inquiry which satisfies the magistrate that the requirements for its issue have been met. The evidence before the Court does not disclose an independent inquiry into the statutory preconditions in subsection 6(2).

[181] The Court is also unable discern the basis for the conclusions drawn in respect of the subsection 6(8) preconditions because of the paucity of the reasons provided. Moreover, the Second Respondent is not assisted by the terms of the Attorney General’s Authorization which seeks a warrant for the purpose of investigations into the offence of swindling in respect of the Claimant companies because the Request makes no such allegation. This obvious misrepresentation is not acknowledged by her and raised doubts as to whether the import was fully appreciated. The difficulty is compounded by the fact that the warrant is inexplicably couched in much wider terms than was sought by the Requesting State. It authorized the police officer to enter and search the premises and to seize “*all original files, documents accounts and all other records kept in the ordinary business whether those records are in written form or kept in microfilm, magnetic tape or mechanical or electrical data retrieval mechanism, paid cheques, inter account transfers, telegraphic transfers and all correspondence and notes, including all office notes made concerning the company formation. All details concerning changes of the company name and all changes of*

⁷¹ [1980] A.C. 952

registered agent, together with all transactions in relation to the Claimant companies and any other company trust of bank accounts concerned with the claimant companies which is alleged to be connected to a case of swindling.”

[182] The Court has some difficulty in discerning the justification for this broad ambit bearing in mind the matters alleged in the Request and the actual documents and information solicited therein. The learned Magistrate was clearly entitled to seek clarification or elaboration in order to ensure that the warrant was not in terms which were wider than is required for the purposes of the investigation, but there is no evidence that she did so. This raises doubt as to whether the Magistrate satisfied herself that it was appropriate and proportionate in all the circumstances to authorize the search warrant in the terms sought.

[183] Counsel for the Claimants submitted that the warrant should be quashed on the basis that the Magistrate acted unfairly and unlawfully in her failure to give reasons for her decision to issue the warrant.⁷² The Respondents on the other hand contend that the failure to provide reasons does not render the warrant unlawful. The Court is satisfied that if no collateral unlawfulness is established, in the case where no or inadequate reasons are provided, a court has a discretion to simply quash the substantive decision as procedurally flawed or to afford relief in the form of an order of mandamus to give reasons. This is not the case here.

[184] For the reasons set out herein, the Court is satisfied that the decision to seek the warrant, the decision to grant the warrant and the decision to transmit the documents must be quashed. CPR 56.14(2) provides as follows:

“If the claim is for an order or writ of certiorari, the judge may if satisfied that there are reasons for quashing the decision to which the claim relates-

- a) direct that the proceedings be quashed on their removal to the High Court; and
- b) may in addition remit the matter to the court, tribunal or authority with a direction to reconsider it in accordance with the findings of the High Court.

⁷² R (Propend) v Central Criminal Court at paragraph 29 c

[185] Given that these decisions involve binding international obligations of mutual legal assistance in criminal matters, the Court will remit the matter to the decision-maker and direct him to reconsider and reach a decision in accordance with the judgment of this Court. The Court will also grant the order prohibiting the First Respondent (his servants or agents) from transmitting the documents to any third party pending the reconsideration of the Request.

[186] **The Court's order is therefore as follows:**

1. **Judgment for the Claimants on the Amended Fixed Date Claim Form filed herein.**
2. **The First Defendant's decision to apply for the warrant is quashed.**
3. **The Second Respondent's decision to grant the warrant is quashed.**
4. **The First Respondent's decision to transmit the documents is quashed.**
5. **The matter is remitted to the First Respondent for reconsideration in accordance with the judgment of this Court.**
6. **The First Respondent (his servants or agents) is prohibited from transmitting the documents to any third party pending the reconsideration of the Request.**
7. **The Court will hear the Parties on Costs.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar