IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 31 of 2013
G391/2012

BEFORE

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Sir George Newman, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
BETWEEN

CAYMAN ISLANDS TAX INFORMATION AUTHORITY

Appellants

- and –

M H INVESTMENTS

J A INVESTMENTS LIMITED

Respondents

Mr Mark Summers QC and **Ms Dawn Lewis**, Crown Counsel, instructed by the Attorney General, for the Appellants, Cayman Islands Tax Information Authority
Mr Thomas Lowe QC with **Mr Sam Dawson** of Solomon Harris for the Respondents, M H Investments and J A Investments Limited

Hearing: 22 April 2015
Judgment: 23 April 2015

JUDGMENT
Revised from transcript and Approved released 31 July 2015

Sir John Chadwick, President:

1 By section 4 of the Tax Information Authority Law (Law No. 1 of 2005) ("the Law") the Financial Secretary was designated as the Tax Information Authority with the role and functions set out in Part II of that Law. Section 5(2) of the Law provided that the principal functions of the Authority should include (a) executing requests and (b) ensuring compliance with the scheduled Agreements. In that context "scheduled Agreement" meant "an agreement for the provision of information in taxation matters, being in agreement which has legal effect in the Islands and which is more particularly set out in a relevant Schedule to this Law"; and "request" included "a request made by one of the Parties to the other Party under a scheduled Agreement . . .". Section 3(1) provided that the Law should apply for the purpose (*inter alia*) of

giving effect to the terms of a scheduled Agreement as to the provision of information in taxation matters; section 3(3) provided that a scheduled Agreement should have legal effect in the Cayman Islands for such period as was specified in that agreement; and section 3(5) enabled the Governor, by order subject to affirmative resolution, to add a schedule to the Law "for the purpose of setting out and giving effect to an agreement for the provision of information in taxation matters."

2 Part III of the Law ("Execution of Requests") comprised sections 7 and 8. In the 2009 Revision, those sections were in these terms (so far as for material):

> "7(1) Upon receipt of a request, and subject to sections 6(2) and 17(1), the Authority shall determine whether the request is in compliance with the relevant scheduled Agreement . . . and, if it is determined that there is compliance, the Authority shall execute the request in accordance with, but subject to, the provisions of the relevant scheduled Agreement . . .
>
> . . .
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> 8(4) Where, under a request, the Authority considers it necessary to obtain specified information or information of a specified description from any person the Authority shall -
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> (a) in the case of information required for proceedings in the territory of the requesting Party or related investigations, apply to a Judge for an order to produce such information; or
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> (b) in the case other than that referred to in paragraph (a), issue a notice in writing requiring the production of such information as may be specified in the notice; and such notice may require the information -
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> (i) to be provided within a specified time;
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> (ii) to be provided in such form as the Authority may require; and
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> (iii) to be verified or authenticated in such manner as the Authority may require.
>
> . . .
>
> (6) . . . a notice under subsection 4(b) shall have effect notwithstanding any obligation as to confidentiality or other restriction upon the disclosure of information whether imposed by the Confidential Relationships (Preservation) Law 2009 (Revision), any other law or the common law."

3 In summary, the steps which Part III of the Law required (so far as material in the present context) were these: (i) upon receipt of a request from a party to a scheduled Agreement (defined in section 2 of the Law as the "requesting Party") the Authority was required to determine whether or not the request was in compliance with the terms of that agreement; (ii) if the Authority determined that the request was in compliance with the scheduled Agreement, it was required to decide whether it was

necessary to obtain specified information or information of a specified description "from any person"; (iii) if the Authority decided that it was necessary to obtain such information, it was required to decide whether that the information to be obtained was information "required for proceedings in the territory of the requesting Party or related investigations" and so within paragraph (a) of section 8(4) of the Law; (iv) if the Authority decided that it was necessary to obtain specified information from a person and that that information was within paragraph (a) of section 8(4), then it was required to apply to a judge for an order for the production of that information; (v) if the Authority decided that it was necessary to obtain specified information from any person, but that that information did not fall within paragraph (a) of section 8(4), then, *prima facie*, it was required by paragraph (b) of that section to issue – and serve upon the person from whom that information was to be obtained - a notice in writing requiring the production of such information as might be specified in the notice.

4 It is important, however, to have in mind the qualifying words "subject to Sections 6(2) and 17(1)" at the commencement of section 7(1). Section 6(2) is not in point in the present case. Section 17(1) of the Law - which is in point - was in these terms (so far as material):

> "17(1) Subject to subsection (2), a person who is the subject of a request for information solely in relation to a matter which is not a criminal matter or an alleged criminal matter, shall if his whereabouts or address is made known to the Authority, be served with a notice by the Authority advising of the existence of a request specifying that person, the jurisdiction making the request and the general nature of the information sought; and any person so notified may within fifteen days from the date of receipt of the notice, make a written submission to the Authority specifying any grounds which he wishes the Authority to consider in making its determination as to whether or not the request is in compliance with the provisions of the relevant scheduled Agreement . . . , including any assertions that the information requested is subject to legal privilege."

Section 17(2) of the Law required that the Authority should consider any written submission made in compliance with section 17(1); but should not be obliged to permit or consider any oral submission by or on behalf of any person who was the subject of a request for information. Further, section 17(4) provided that nothing in the Law required the Authority to search for or conduct inquiries into the address or whereabouts of any person who was the subject of a request in order to serve a notice to that person pursuant to section 17(1).

5 The effect of those provisions was that the obligation on the Authority to serve on a person who was the subject of a request a notice advising of the existence of the request arose if, but only if, the request was for information solely in relation to a matter which was not a criminal matter or an alleged criminal matter and the whereabouts or address of the person who was the subject of the request had been made known to the Authority. But in circumstances where the obligation to serve a notice did arise under section 17(1) of the Law: (i) the notice must advise (a) of the existence of the request, (b) of the requesting Party and (c) of the general nature of the information sought; (ii) the person notified under section 17(1) had 15 days in which to make a written submission to the Authority "specifying any grounds which he wishes the Authority to consider in making its determination as to whether or not the request is in compliance with the relevant scheduled Agreement,"; and (iii) the Authority was required to consider any written submission made in compliance with the provisions of that section. I should add that, although it is clear that section 17(1) required the Authority to consider written representations made by a person who was the subject of a request for information when determining, for the purposes of section 7(1) of the Law, whether the request is in compliance with the relevant scheduled Agreement, it might be said that section 17 left open the question whether the person on whom a section 17(1) notice had been served was entitled to make representations in relation to the further question which the Authority would need to address if it did determine that the request was in compliance with the relevant scheduled Agreement: that is to say, the question whether the information which the Authority considered it necessary to obtain was required "for the proceedings in the territory of the requesting party" (and so fell within section 8(4)(a) of the Law) or was not so required (and so fell within section 8(4)(b)).

6 Section 20(1) of the Law was in these terms:

> "20(1) Without prejudice to section 8(13), if so instructed by the Authority, the particulars of and all matters relating to a request shall be treated as confidential, and no person who is notified of a request, or is required to take any action, or produce any document or supply any information in response to or in relation to any matter to which a request relates, shall disclose the fact of the receipt of such request or any of the particulars required or documents produced or information supplied to any other person, except that person's attorney-at-law and such other persons as the Authority may authorize, for such period as he may be notified by the Authority."

The effect of that provision was that both a person (if any) on whom a notice under section 17(1) of the Law and a person on whom a notice to produce under section 8(4)(b) had been served could be instructed by the Authority not to disclose to anyone else – including, in particular the relevant taxpayer - the fact that there had been a request or the fact that a notice to produce had been issued.

7 Before turning from the provisions in the Law - as they were before amendment in 2012 and 2014 - I should mention (for completeness) the restriction on the use of information provided under the Law which was imposed by section 21(1) and the provisions in section 24(1) relating to enforcement. Those sections provided that:

> "21(1) The requesting Party shall not, without prior written consent of the Authority, transmit or use information or evidence provided under this law for purposes, investigations or proceedings other than those stated in the request."

> "24(1) Whoever, having been required under this Law to produce any information which is in his possession or under his control –
> (a) without lawful excuse fails so to do within such time specified by a Judge by order, or by the Authority by notice; or
> (b) alters, destroys, mutilates, defaces hides or removes any information,
> is guilty of an offence and liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years."

As I have pointed out, section 8(6) of the Law provided that a notice under section 8(4)(b) would have effect notwithstanding any obligations on the person to whom the notice was addressed as to confidentiality or other restrictions as to disclosure of the information.

8 By the Tax Information Authority (Tax Information Agreement) (No. 2) Order 2010, made in Cabinet on 26 October 2010, affirmed by the Legislative Assembly on 4 November 2010 and published as a supplement to the Gazette on 7 December 2010, five further schedules – each containing a tax information exchange agreement - were added to the Law. Those included - as the 16th schedule - an agreement between the government of the Cayman Islands and the government of Australia on the exchange of information with respect to taxes. For convenience I shall refer to that agreement as "the Australian Tax Information Exchange Agreement".

9 The Australian Tax Information Exchange Agreement had been made on 30 March 2010. We were informed in the course of the oral hearing of the appeal – and it has not been in dispute - that that agreement is substantially in the form of the Model

Agreement on Exchange of Information of Tax Matters ("the Model Agreement") developed by the OECD Global Forum Working Group on the Effective Exchange of Information. The working group comprised, in addition to representatives from OECD member countries, delegates from (*inter alia*) the Cayman Islands. The introduction to the Model Agreement contained, at paragraph 7, a provision in the following terms:

> "For each Article in the Agreement there is a detailed commentary intended to illustrate or interpret its provisions. The relevance of the Commentary for the interpretation of the Agreement is determined by principles of international law. In the bilateral context, parties wishing to ensure that the Commentary is an authoritative interpretation might insert a specific reference to the Commentary in the text of the exchange instrument, for instance in the provision equivalent to Article 4, paragraph 2."

Article 4, paragraph 2 of the Model Agreement is in these terms:

> "As regards the application of this Agreement at any time by a Contracting Party, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of that Party."

The Australian Tax Information Exchange Agreement does contain an article in those terms. Insofar as it were necessary to construe that agreement, the Court must have regard to that article and to paragraph 7 of the introduction to the Model Agreement; although I confess that I remain puzzled as to how it can be said that article has the effect that the Commentary is an authoritative interpretation of the agreement.

10 The object and scope of the Australian Tax Information Exchange Agreement appears from Article 1 of that agreement.

> "The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of those Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be provided in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided by in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the Requested Party remain applicable. The Requested Party shall use its best endeavours to ensure that any such rights and safeguards are not applied in a manner that unduly prevents or delays effective exchange of information."

Article 2 of the Agreement limits the obligations on the Requested Party to information which is held by its authorities or is in the possession or control of persons within its territories or jurisdiction.

11 The obligations of the requested Party are set out in paragraphs 1 and 2 of Article 5 of the Agreement. They are in these terms:

> "1 The competent authority of the Requested Party shall provide upon request information for the purposes referred to in Article 1. Such information shall be provided without regard to whether the conduct being investigated would constitute a crime under the laws of the Requested Party if such conduct occurred in the Requested Party.
>
> 2 Where the information in the possession of the competent authority of the Requested Party is not sufficient to enable it to comply with the request for information, that party shall use all relevant information gathering measures to provide the Applicant Party with the information requested, notwithstanding that the Requested Party may not need such information for its own tax purposes."

The information to be provided by the requesting (or Applicant) Party in a request is set out at paragraph 5 of Article 5 of the Agreement. That paragraph is in these terms:

> "5 The competent authority of the Applicant Party shall provide the following information to the competent authority of the Requested Party when making a request for information under this Agreement to demonstrate the foreseeable relevance of the information to the request."

There then follow seven subparagraphs, each describing information which is to be included in the request. They are:

> "(a) the identity of the person under examination or investigation;
> (b) a statement of the information sought including its nature and the form in which the Applicant Party wishes to receive the information from the Requested Party;
> (c) the tax purpose for which the information is sought;
> (d) the grounds for believing that the information requested is held in the Requested Party or is in the possession or control of a person within the jurisdiction of the Requested Party;
> (e) to the extent known, the name and address of any person believed to be in possession of the requested information;
> (f) a statement that the request is in conformity with the law and administrative practices of the Applicant Party, that if the requested information was within the jurisdiction of the Applicant Party then the competent authority of the Applicant Party would be able to obtain the information under the laws of the Applicant Party or in the normal course of administrative practice and that the information request is in conformity with this Agreement; and
> (g) a statement that the Applicant Party has pursued all means available in its own territory to obtain the information, except those

that would give rise to disproportionate difficulties."

12 Article 6 of the Agreement requires the requested Party to forward the requested information as soon as possible to the Applicant Party. Article 7 permits the Requested Party to decline to assist where the request is not made in conformity with the Agreement. Article 8 is concerned with confidentiality. It provides that:

> "Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. The information may not be disclosed to any other person or entity or authority or any other jurisdiction without the express written consent of the competent authority of the Requested Party."

Article 12 provides that the Agreement shall come into force for criminal tax matters from 1 July 2010 and for all other matters covered in Article 1 from 1 July 2010, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

13 On 23 February 2011, the Australian Tax Office, ("the ATO") made a request of the Cayman Islands Tax Information Authority for information pursuant to Article 5 of the Australian Tax Information Exchange Agreement. That request, to which I shall refer as "the first request", is contained in a letter from the Australian Commissioner of Taxation to the Director of the Cayman Islands Tax Information Authority. The letter is headed with the names of a number of individuals and entities, grouped under seven separate jurisdictions: Australia, Cayman Islands, Bahamas, British Virgin Islands, Switzerland, United Kingdom and Vanuatu. Those in the Australian grouping include Mr. Vanda Russell Gould and Mr. John Scott Leaver. Those in the Cayman Islands grouping are J.A. Investments Limited, M.H. Investments Limited, FCM Limited, Offshore Nominees Limited and Offshore Secretaries Limited.

14 It was said in the letter of request, by way of introduction, that:

> "This request for information is made in accordance with Article 5 of the Australia/Cayman Islands Tax Information Exchange Agreement, and is in connection with an active investigation into the Australian taxation affairs of Mr. Vanda Russell Gould (Mr. Gould) and Mr. John Scott Leaver (Mr. Leaver), who are located in Australia."

That introduction was followed by a section, headed "Background", which included the following paragraphs:

> "The Australian Taxation Office (ATO) has identified that Mr. Gould and Mr. Leaver and their respective associated entities have made multiple transactions with offshore entities, including entities registered in the Cayman Islands. These identified Cayman Island entities are J.A. Investments Limited and M.H. Investments Limited. Specifically, entities associated with Mr. Gould and/or Mr. Leaver are engaged in transactions involving:
>
> 1. Purported loan transactions with United Kingdom companies who have J.A. Investments Limited and M.H. Investments Limited as their parent companies;
> 2. Profit sharing arrangements with a United Kingdom company who has J.A. Investments Limited and M.H. Investments Limited as its controlling companies and;
> 3. Loaning personal life insurance policy funds to companies located in the United Kingdom and British Virgin Islands who have J.A. Investments Limited and M.H. Investments Limited as their ultimate beneficial owners."

There followed a section headed "J.A. Investments Limited and M.H. Investments Limited arrangements", in which it was said:

> "J.A. Investments Limited and M.H. Investments Limited are both incorporated in the Cayman Islands, and are the controlling parties of Derrin Brothers Properties Limited . . . [and a number of other companies which are then listed]."

There were then set out a number of arrangements or transactions which were said to have been entered into by J.A. Investments Limited or M.H. Investments (as were there described). The section concluded with these paragraphs:

> "The ATO has concerns that these transactions represent attempts by the Australian residents to evade tax properly payable in Australia by establishing offshore arrangements.
>
> The ATO believes that Mr. Gould and/or Mr. Leaver are the ultimate beneficial owners and controllers of the Cayman Island entities, J.A. Investments Limited and M.H. Investments Limited and have omitted income and/or over claimed deductions in their Australian tax returns."

15 The next seven sections of the letter of 23 February 2011 were plainly written with the requirements of paragraph 5 of Article 5 of the Australian Tax Information Exchange Agreement in mind: in that the headings under (a) to (g) of the letter reflect the seven sub-paragraphs of that paragraph, set out above. So far as material those seven sections are in these terms:

> "(a) The identity of the persons under examination or investigation.
>
> [Mr Gould and Mr Leaver, with their addresses in Australia]
>
> (b) A statement of the information sought including its nature and the form

in which the Applicant Party wishes to receive the information from the Requested Party.

In order to ascertain whether the Cayman Island companies specified below are associated with Mr. Gould and Mr. Leaver, I would appreciate it if you would provide the following information for the period commencing 1 July 2010.

(1) Are the following entities known to you?
(a) J.A Investments Limited; and
(b) M.H. Investments Limited.

(2) If yes, can you advise what the registration dates are for each company?

(3) For each of the companies listed in 1(a) and (b), can you provide the names and addresses of the following:
(a) the client who requested the company to be incorporated;
(b) the owners (shareholders/principals) of each company, including any beneficial owners . . .
(c) directors for each company;
(d) the current business address and registered office for each company;
(e) the subscribers to the Memorandum of Association; and
(f) the custodian of any bearer shares . . .

(4) For each of the companies listed in 1(a) and 1(b) above, can you provide copies of the following documents:
(a) application(s) for incorporation;
(b) certificate of incorporation;
(c) register of members
(d) application for company name;
(e) annual returns lodged since 1 July . . .
(f) minutes of all meetings and resolutions;
(g) memorandum of association;
(h) statements of solvency . .
(i) documents containing the ultimate beneficial owner. . .

(5) If not provided in response to question (3)(b) above, can you advise the following:
(a) The name and address of the person(s) on whose behalf Offshore Nominees Limited hold their shares in M.H. Investments Limited and the ultimate beneficial owner of these shares.
(b) The name and address of the person(s) on whose behalf Mr. Peter Borgas holds his shares in J.A. Investments Limited and the ultimate beneficial owner of these shares.

(6) For each of the companies listed in (1) above, can you provide details of all Cayman Island companies that they have a beneficial interest including:
(a) name of company;
(b) registered address of the company;
(c) country of incorporation;

(d) nature of their interest; and
(e) percentage of ownership or control."

(c) The tax purpose for which the information is sought

. . . there is an active investigation of Mr. Gould and Mr. Leaver over a number of years.

The Cayman Islands Information requested:
(1) in respect of the ultimate beneficial owners of J.A. Investments Limited and M.H. Investments Limited is required to assist the ATO to determine the Australian income tax payable by Mr. Gould, Mr. Leaver and/or their associated entities for the taxable period commencing 1 July 2010; and

(2) will be relevant to the consideration of the behaviour of the taxpayers, and the determination of the appropriate shortfall penalty.

(d) The grounds for believing that the information requested is held in the Requested party or is in the possession or control of a person within the jurisdiction of the Requested Party.

. . .
It is known that J.A. Investments Limited and M.H. Investments Limited are incorporated in the Cayman Islands and the requested information is obtainable by a person within the jurisdiction of the Cayman Islands.

The Cayman Islands Competent Authority is in a position to obtain the information requested.

(e) To the extent known, the name and address of any person believed to be in the possession of the requested information.

The Cayman Islands General Registry has information on all Cayman Islands registered companies . . . [with contact details].

FCM Limited is the registered agent for J.A. Investments Limited and M.H. Investments Limited. . . [with contact details].

Offshore Secretaries Limited as secretary for J.A. Investments Limited and M.H. Investments Limited may hold relevant information.

Offshore Nominees Limited as shareholder of M.H. Investments Limited may hold information concerning the ultimate beneficial owner.

It is believed that Offshore Secretaries Limited and Offshore Nominees Limited can be contacted at FCM Ltd."

Section (f) is in the same terms as sub-paragraph (f) of paragraph 5 of Article 5 of the Agreement. It confirms that the request conforms to the laws and administrative practices of Australia. Section (g) confirms that the Commissioner of Taxation had pursued all means available in Australia to obtain the information in Australia, except those that would give rise to disproportionate difficulties. It is said that "At present

we have no way of confirming company details by any other means, hence this request for information to the Cayman Islands". And it is said that:

> "We are requesting information in relation to the ultimate beneficial owner, or in other words, the end user client in the ownership chain from the Cayman Islands under this Agreement for J.A. Investments Limited and M.H. Investments Limited."

The letter of request includes, at Appendix 1 and Appendix 2, diagrammatic representations of arrangements said to involve J.A. Investments Limited and M.H. Investments respectively.

16 On 14 April 2011, following the first request - which had been received by the Authority on 28 March 2011 - the Authority issued and served on FCM Limited a notice to produce information. As I have explained, FCM Limited had been described in the first request as the registered agent for the two Cayman Islands entities, J.A. Investments Limited and M.H. Investments. In order to take that step the Authority must be taken to have determined (i) that the first request was in compliance with the Australian Tax Information Exchange Agreement and (ii) that the information was not required for proceedings in Australia or for related investigations (so as to conclude that this case fell within paragraph (b) and not paragraph within paragraph (a) of section 8(4) of the Law). There is no record in the papers before this Court as to when, or by whom, those determinations were made. Nevertheless, the service of a notice to produce on 20 March 2011 is consistent only with the premise that they had been made; and the Authority has not suggested that that premise is false.

17 The Authority made those determinations without having served notice under section 17(1) of the Law on any person. It follows that the Authority made those determinations without having taken into consideration whatever written submissions the person who was the subject of the request for information might have wished the Authority to consider in making its determination as to whether or not the request was in compliance with the Australian Tax Information Exchange Agreement.

18 On 4 May 2011, FCM Limited provided the information which it was required to provide under the notice to produce. On the following day, 5 May 2011, the Authority transmitted that information to the ATO.

19 On 27 May 2011 the ATO made a second request for information. After setting out the same list of names in the same grouping as in the 23 February 2011 letter and stating that:

> "This further request for information is made in accordance of Article 5 of the Australia/Cayman Islands Tax Information Exchange Agreement and is in connection with an active investigation into the Australian taxation affairs of Mr. Vanda Russell Gould and Mr. John Scott Leaver who are located in Australia."

the letter continued, in a section headed "Background", in these terms:

> "I refer to our letter dated 23 February 2011 regarding the above mentioned entities and to your response dated 5 May 2011. The information and documents provided has been considered by our auditors who are very appreciative of your assistance with this matter thus far.
>
> However, we seek your further assistance to clarify some of the information and documents provided in your response, and to provide some additional information."

Then following seven sections which, again, correspond to the seven paragraphs comprised in paragraph 5 of Article 5 of the Agreement. Section (a) identified the persons under examination or investigation: Mr. Gould and Mr. Leaver, giving their addresses. Section (b) – "A statement of the information sought including its nature and the form in which the Applicant Party wishes to receive the information" - contained the following:

> "In order to ascertain the ultimate beneficial owner of J.A. Investments Limited, I would appreciate it if you could provide the following information."

The first three paragraphs of section (c) – "The tax purpose for which the information is sought" - were in the same terms as in the first request. The section continued:

> "Although the information requested relates to a period prior to 1 July 2010, the historical information is necessary to determine the true beneficial ownership of J.A. Investments Limited for taxation matters arising after 1 July 2010."

and an explanation for that statement was given. It went on:

> "It is clear from the Nominee Agreement provided with your response . . . that Offshore Nominees Limited acts as a nominee in relation to holding shares in Cayman Island incorporated companies. In the case of M.H. Investments Limited, they act as a nominee for Mr. Gould."

It said that the ATO believes that Offshore Nominees Limited may also have acted for Mr. Gould in relation to its previous shareholding in J.A. Investments Limited. The paragraph continues:

> "In order to establish the current true beneficial ownership of J.A. Investments

Limited it is considered necessary to garner all the historical facts."

Section (d) is in the same terms as in the previous letter. Section (e) contains a reference to Offshore Nominees Limited as "a previous shareholder of J.A. Investments holding relevant information concerning the ultimate beneficial owner"; and a statement that FCM Limited, as registered agents for J.A. Investments Limited, would also hold documents relevant to the transfer of shares from Offshore Nominees Limited to Mr. Borgas.

20 On 16 August 2011, following the second request - which had been received by the Authority on 20 July 2011 - the Authority sent to FCM Limited two further notices to provide information. FCM Limited complied with those notices. On 20 September 2011 the Authority sent that information produced by FCM Limited to the ATO.

21 Two further requests were made. On 19 October 2011, the ATO sent a third request seeking the Authority's consent to disclose documents obtained from FCM Limited relating to the Cayman Island entities to HMRC in the United Kingdom. On 13 February 2012 the ATO sent a fourth request, seeking consent to use documents obtained from FCM relating to the Cayman Islands entities in proceedings before the Australian Federal Court. Those consents were forthcoming.

22 On 18 September 2012, having discovered that information relating to their affairs had been provided by the Authority to ATO in response to the first and second request and that consents to the disclosure to HMRC pursuant to the third request and to use of the documents obtained from the FCM Limited in Australian Federal Court proceedings pursuant to the fourth request had been given, the two Cayman Island companies applied to the Grand Court for leave to bring proceedings for judicial review of the decisions of the Authority to accede to the requests which had been made by the ATO. The relief to be sought by that application was (i) a declaration that the decisions were *ultra vires* of the powers granted to the Authority by the Law (ii) an order for *certiorari*, quashing the decisions; and (iii) an order that the Authority provide the Cayman Island companies with copies of all documents which it held relating to the requests. Leave to apply for judicial review, including leave to do so out of time, was granted by the Grand Court on 2 November 2012.

23 The judicial review proceedings came before Justice Quin on 29 and 30 August 2013. The judge, for reasons which he set out in a substantial judgment dated 13 September 2013, made the following orders:

(1) An order for *certiorari* quashing the decisions of the Authority defined in the Appendix to the Order ("the Decisions") collectively or individually on the basis that the Decisions were outwith the powers invested in the Authority by the Law.

(2) A declaration that the Decisions to comply with the first and second requests were unlawful because the Authority failed to apply to the Grand Court, under section 8(4)(a) of the Law, prior to issuing production notices.

(3) A declaration that the Decisions pursuant to the third and fourth requests to consent to the use of the information previously obtained by the ATO was unlawful because the Authority failed to apply to the Grand Court under Section 21(2) of the Law prior to giving consent.

(4) A declaration that the Cayman Island companies were entitled to receive notices pursuant to section 17(1) of the Law; and that the Authority was in breach of its obligations to provide notices of the requests to them.

(5) A declaration that the Cayman Island companies were entitled to attend at any hearing under sections 8(4)(a) or 21 of the Law.

(6) A declaration that the information which had been produced to the ATO and was the subject of the third and fourth requests was and remained confidential to the Cayman Island companies pursuant to section 21(1) of the Law.

(7) A direction that the Authority should forthwith write to the ATO (i) formally revoking its consent to the divulging of the Cayman Island companies' documents, or any part thereof, in court proceedings in Australia or otherwise; (ii) seeking an undertaking from the ATO that it would not divulge those' documents or any part thereof in Court proceedings in Australia or otherwise; and (iii) demanding immediate return and/or destruction of all copies of the Cayman Island companies' documents.

24 Notice of Appeal from that Order, with grounds of appeal, was filed on 7 October 2013. The appeal was listed for hearing in the August 2014 session. It was adjourned on the application of the Authority: on the basis that, as the Court was informed, the appeal was of such importance that the Attorney General wished to appear himself as counsel for the Authority, as he had done in the court below, but his

public duties prevented him from doing so in the August session. Nor could the appeal be accommodated in the November 2014 session, the list for which included two substantial criminal appeals to which the Attorney General was also party. So it is that the appeal comes before this Court some nine months after it was first listed for hearing. That delay, in a judicial review case, is a matter of concern: not least in the circumstances that, in the event and despite the basis upon which the adjournment had been sought and granted, the Attorney General did not appear as counsel before this Court at this appeal. As matters have turned out, there was no good reason why this appeal should not have been heard last August; when it was listed and the Court was ready to hear it.

25 The Notice of Appeal seeks orders that the appeal be set aside. It was explained to us by counsel now appearing for the Authority that the Authority challenged each of the paragraphs of the Order of 26 September 2013. The judge, counsel submitted in opening, had made nine "core errors".

26 Ground 22 in the grounds of appeal is in these terms:

> "The Learned Judge erred in finding that the Respondents were subjects of the First, Second and Third Requests and should consequently have been served by the Appellant with notices under section 17(1) of the TIA Law."

That ground was, of course, the foundation of the Authority's challenge to paragraph (4) of the judge's order of 26 September 2013: by which it was declared that the Cayman Island companies were entitled to receive notices pursuant to section 17(1) of the Law and that the Authority was in breach of its obligation to serve notices of the requests on the Cayman Island companies.

27 At the oral hearing of the appeal, counsel for the Authority began by developing his challenge under ground 22. Having done so – and sensing, perhaps, that the Court might not be persuaded by the arguments which he had advanced - counsel informed the Court that he took the view that, if that point were decided against him, the other challenges in his grounds of appeal would become academic or would simply fall away; and that, in those circumstances, he thought it appropriate to invite the Court to determine the section 17(1) notices point before hearing argument on the other points. Accordingly, the Court invited counsel for the Cayman Island companies to address it on that point only; so that it could be determined, at the conclusion of argument upon that point, whether paragraph (4) of the judge's order should be upheld or set aside.

28 At the conclusion of the argument on that point the Court was satisfied that the challenge to paragraph (4) of the judge's order failed. Counsel for the Authority stated that there was no other point that he wished to advance in support of the appeal. Accordingly, the appeal was dismissed. We indicated that we would give our judgments setting out the reasons for our conclusion that the Authority had failed in its challenge to paragraph (4) of the judge's order; and we now do so.

29 The judge addressed the section 17(1) notices point in paragraphs 231 to 236 of his judgment of 13 September 2013. He said this:

> "231. I find that the Applicants are the subject of all four Requests in a matter which is not a criminal matter or an alleged criminal matter, and, further, I find that the Applicants' 'whereabouts or address' is well known to the Respondent. Accordingly, it was incumbent upon the Respondent to serve Notices to the Applicants of the existence of all four Requests - specifying 'that person, the jurisdiction making the Request, and the general nature of the information sought'.
>
> 232. The Applicants would then have had the opportunity and the right to make written submissions to the Respondent within 15 days from receipt of the notice - specifying any grounds which they wish the Respondent to consider in making its determination as to whether or not the Requests were in compliance with the provisions of the relevant scheduled Agreement . . . including any assertions of whether the information requested is subject to legal privilege.
>
> 233. The Applicants were denied this right and this opportunity.
>
> 234. Furthermore, in Part III, regarding the execution of Requests, Section 7(1) reads:
>
> > 'Upon receipt of a Request, and subject to Section 6(2) and Section 17(1), the Authority should determine whether the Request is in compliance with the relevant scheduled Agreement . . . '
>
> 235. Before the Respondent could make any determination, it was incumbent upon the Respondent to serve both Applicants with Section 17(1) Notices and, consequently, its failure to serve Section 17(1) Notices was in breach of the TIA Law.
>
> 236. Furthermore, based on the foregoing, I find that the Respondent's failure to serve Section 17 Notices infringed the Applicants' rights under Articles 9 and 7 of the Bill of Rights."

Put shortly, once the judge had reached the conclusion that the Applicants were the subjects of the requests - which is the language of section 17(1) of the Law - he was bound to find that decisions to execute the requests without having served section 17(1) notices were necessarily *ultra vires*; because the Authority could not comply with the obligation under section 7(1) of the Law to take account of representations

made, or which might have been made, by those on whom notice of the requests should have been served.

30 The only point that appeared to me to be open to any debate in relation to the section 17(1) Notices was what meaning is to be given to the phrase “subject of the request”: because it is the meaning to be given to that phrase that identifies those on whom notice of the requests should have been served. That point might be thought to be a relatively short one; but it has attracted submissions under seventeen paragraphs (paragraphs 119 to 136) in a document described - inappropriately, in that it extends over 57 pages and 182 paragraphs - as a skeleton argument. The submission made on behalf of the Authority, put shortly, is that there is legislative ambiguity as to whom section 17(1) of the Law requires that notice of the request be given.

31 It was submitted on behalf of the Authority that the person “subject to the request” for the purposes of section 17(1) of the Law is the foreign taxpayer under investigation by the requesting Party. I accept that there may be – indeed, often will be - circumstances in which the foreign taxpayer under investigation is a person “subject to the request”; but I do not accept that section 17(1) should be construed so as to restrict the meaning of that phrase to the foreign taxpayer under investigation. I have found nothing in the skeleton argument submitted on behalf of the Authority – or in the arguments advanced on its behalf in the course of the oral hearing of the appeal – which leads to that conclusion.

32 I should add that it is plain that the Authority could not have thought that the phrase had that meaning in 2011; for, if it had thought that, it would have been obliged to serve section 17(1) notices on the two taxpayers, Mr. Gould and Mr. Leaver, whose addresses had been set out in the requests. There was nothing in the Law – as it stood in 2011 - which provided that the Authority was not required to serve a section 17(1) notice on a person who was outside the Cayman Islands. If the Authority had really taken the view, in 2011, which it now professes, there was no good reason why section 17(1) notices should not have been served on Mr Gould and Mr Leaver at the relevant time. Nevertheless, in order to ensure that the view which the Authority now professes shall prevail in the future, the Minister of Finance has procured the enactment of an amendment to the Law; which declares that the phrase “person

subject to the request" means what the Authority now professes that it understood that phrase to mean in 2011.

33 The task of this Court, on this appeal, is to decide the true meaning of the phrase "person subject to the request" at the relevant time: that is to say, at the time when the requests were received by the Authority. In approaching that task, the Court must disregard subsequent amendments to the Law; which were not, in terms, retrospective and which are not said to have been intended to have retrospective effect.

34 In approaching that task it is important to keep in mind that section 17(1) of the Law required a notice to be served on the person (say, A) who was the subject of the request for information; it did not require a notice to be served on the person (say, B) from whom the information requested might be obtained. And it is important, also, to keep in mind that, once the Authority had determined that the request was made in compliance with the scheduled Agreement and had served a notice to produce on B pursuant to section 8(4)(b), A's rights (if any) to confidentiality in the information sought by that notice would be overridden by section 8(6); and, further, that A would not know that his rights to confidentiality had been overridden under that section if B had been given a direction by the Authority under section 20(1). The obvious purpose of the section 17(1) notice was to enable A to make representations as to the validity of the request before the Authority - having determined that the request was valid - acted in response to it by taking steps under section 8(4) to obtain the information requested from B. That that was the purpose of the legislature in enacting section 17(1) of the Law in the terms that it did is consistent with the requirement – derived from the Model Agreement and set out in Article 1 of the Australian Tax Information Exchange Agreement – that "the rights and safeguards secured to persons by the laws or administrative practice of the Requested Party remain applicable". It is to be expected that the legislature would have regard to what were the rights then applicable in these Islands pursuant to the European Convention on Human Rights and Freedoms and which are now conferred by the Bill of Rights under the Constitution.

35 With those considerations in mind, it seems to me that – as the Law stood at the relevant time - a person was "the subject of the request" if the information which was sought by the request was information which related to him. Given the obvious legislative purpose, the legislature must be taken to have recognized that a person had

a legitimate expectation that whatever rights he might have to preserve confidentiality in information which related to him would not be overridden by steps taken under section 8(4) of the Law, save in response to a request properly made under a scheduled Agreement; and that, accordingly, it was appropriate that he should have an opportunity to make representations as to the validity of the request before steps to obtain that information were taken under that section. In order to answer the question who is "the subject of the request", the Court was required – under the Law as it stood at the relevant time - to examine the request and ask itself "in relation to whom is information sought".

36 In order to ascertain the person or persons in relation to whom information was sought by the requesting Party it is necessary – and sufficient - to read the letters of request: in particular, to read the letter of 23 February 2011. By that letter the ATO sought information about the affairs of J.A. Investments Limited and M.H. Investments. The letter is replete with references to those companies, the ownership of those companies and the arrangements said to have been made by those companies. In my view it is impossible to escape the conclusion that J.A. Investments Limited and M.H. Investments were persons subject to the first request (whether or not re other persons , including the taxpayers under investigation, were also persons subject to that request); and that, accordingly, those two companies should have received section 17(1) notices. I take the same view in respect of the second request (made in the letter of 27 May 2011). It is not in dispute that the third and fourth requests are ancillary to the first and second requests.

37 There can be no doubt that the Authority was required to ask itself whether there were persons subject to the requests whose whereabouts were known to it. Nor can there be any doubt that the Authority failed to do so. In failing to do so; and in failing to serve notices under section 17(1) on either J.A. Investments Limited or on M.H. Investments, the Authority failed to afford to those companies the opportunities to challenge the validity of the requests which, under the Law, they were intended to have. In those circumstances the Authority reached the conclusion that the requests were in accordance with the Australian Tax Information Exchange Agreement without taking into account whatever representations those companies might have wished to make. It must follow that the decisions to serve notices under section

8(4)(b) of the Law, requiring FCM Limited to provide information, were made without taking into account material which the Law required that the Authority should take into account; and that the judge was correct to conclude that those decisions should be set aside.

38 It was for those reasons that, at the conclusion of the oral argument on the section 17(1) notices point, I took the view that the appeal against paragraph (4) of the judge's order should be dismissed; and that, given that counsel for the Authority did not seek to advance submissions on any other of the points advanced in the grounds of appeal, the appeal itself should be dismissed.

39 We were invited to go on to decide a number of questions which, it is accepted, no longer arise on this appeal; but which, it is said, may arise in the future and on which the views of this Court would be of some value. We declined that invitation. For my part, I declined it for two reasons. First, I think it is dangerous for an appellate court below the level of the final court of appeal – in this context, the Privy Council - to venture opinions on matters which it does not need to decide. In any future litigation about those matters, it will be said by one party or the other that the opinions – being *obiter* - are not binding and carry little or no weight. Second, as the history of this matter demonstrates, where the Authority obtains a decision from the courts with which it finds unacceptable, it is open to the Minister of Finance to procure the enactment of an amendment to the Law to reverse the effect of that decision. In those circumstances, it does not seem to me to be a sensible use of this Court's time for it to hear and determine issues which it does not need to decide in order the dispose of the appeal which is before it; or to impose upon the respondents the potential costs of that exercise.

Elliott Mottley, Justice of Appeal:

40 I agree with the decision on the substance of matter and I share the views expressed in relation to not continuing to hear the other matters, other aspects of the appeal.

Sir George Newman, Justice of Appeal:

41 I agree with the judgment entirely and there is nothing I can usefully add.