

UPDATE

## Taxing Times

Update prepared by Justin Harvey-Hills (Partner, Litigation, Jersey), Luke Olivier (Counsel, Litigation, Jersey) and Ben Thorp (Associate, Litigation, Jersey)

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The Royal Court has handed down judgment in *Ariel –v- Halabi* [2018] JRC 006A where a UK based trustee-in-bankruptcy (the Trustee) sought a variation of an earlier order to allow him to disclose to HMRC documents that he had obtained from Jersey institutions in the course of administering the bankruptcy. In a judgment likely to prove controversial, the Jersey court held that it had power to grant permission and did in fact do so. Justin Harvey-Hills (Partner), Luke Olivier (Senior Associate) and Ben Thorp (Associate) are acting for the parties resisting disclosure.

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1. The Trustee had had his appointment recognised in Jersey under Article 49 of the Bankruptcy (Désastre) (Jersey) Law 1990 which allows the court to assist a foreign court in all matters relating to the insolvency of a person. The court had ordered that various Jersey institutions disclose documents to him that might be relevant to the bankruptcy. This was subject to a restriction that the documents could only be used for the purposes of insolvency (the Restriction). Some of the documents had been obtained at an in-private trustee directions hearing under Article 51 of the Trusts (Jersey) Law 1984. Subsequently, HMRC issued a Schedule 36 Notice requiring the Trustee to disclose the documents.
2. Having found that compliance with the Schedule 36 Notice would have been a breach of the Restriction, the Jersey court considered whether it had power to allow the documents to be disclosed for the purpose of a tax investigation.
3. The court accepted that if an application had been made under Article 49 for disclosure for a tax investigation, there would have been no power to grant it. However, it then went on to find that it could vary the Restriction to allow the disclosure. This appears to have been on the basis that the Restriction was a matter for the court and that it must therefore be able to vary it. The court said that it could have made the order without the Restriction and that, if it had done so, there would have been no need for the Trustee to return to the Jersey court. It also commented that Article 49 was not so restrictive as to deny the court the ability to allow material disclosed under it to be used for another purpose if necessary.
4. Article 49 is clearly a limited power for a limited purpose. The central question would therefore seem to be the scope of the Article 49 power which is clearly limited to insolvencies. It is difficult to see how that power becomes wider on a variation than it was when the original order was made or from where the court might derive an inherent jurisdiction to vary the Restriction. The court's analysis leads to the difficult conclusion that the court has power to do in two steps what it does not have power to do in one.
5. The court then considered the 'Revenue Rule' by which the courts of one country do not enforce the revenue, penal or public laws of another country. Notwithstanding that there was English authority that Schedule 36 is an enforcement jurisdiction, the Jersey court declined to treat it as such and instead found that it was 'investigatory' as it did not involve the enforcement of a tax liability. However, the Revenue Rule is not restricted to enforcement of revenue laws or tax liabilities. Failure to comply with a Schedule 36 Notice carries penal consequences.
6. The court then considered whether it should vary the Restriction. The court acknowledged that the proper way for HMRC to request tax information was through the TIEA and that this was the route that

should normally be followed. The court would not normally accede to a request such as this. However, it went on to find, that this case was exceptional because HMRC could not obtain all the documents it wanted under the TIEA and because the Trustee was at risk of penalty.

7. As a matter of general legal principle, a wide discretion cannot be used as a means of circumventing specific legislation drawn by the legislature in a particular area. In this case, the TIEA and its supporting legislation govern the area of mutual assistance in the disclosure of tax information. In any event, it is not clear what was so exceptional about this case. If a foreign trustee's appointment is recognised, he is likely to obtain documents from Jersey and hold them outside Jersey. The First Tier Tax Tribunal had also made it clear that it was unlikely to enforce any penalties if the Jersey court refused to vary the Restriction. The fact that the TIEA did not allow for the extensive disclosure that HMRC wanted would seem to be a questionable reason for varying the Restriction. Furthermore, some of the documents were derived from a trustee directions hearing under Article 51 of the Trusts (Jersey) Law 1984. The Jersey court has previously said that it should be very slow to disclose documents submitted in support of such an application to a party who is hostile to a trust.
8. Although the court tried to limit them, there are potentially serious repercussions for international mutual assistance in the field of insolvency and calls into question whether any overseas insolvency practitioner should ever be permitted to remove documents from the jurisdiction or even be appointed at all.

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[Document Reference]