



Neutral Citation Number: [2019] EWCA Civ 51

Case No: C1/2017/3133

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Charles J
[2017] EWHC 2585 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEGGATT
and
LADY JUSTICE NICOLA DAVIES

Between :

THE QUEEN ON THE APPLICATION OF TONY MICHAEL JIMENEZ	<u>Respondent/ Claimant</u>
- and -	
THE FIRST TIER TRIBUNAL (TAX CHAMBER)	<u>Defendant</u>
HER MAJESTY'S COMMISSIONERS FOR REVENUE AND CUSTOMS	<u>Appellant</u>

Sir James Eadie QC, Jessica Wells and James Rivett (instructed by General Counsel and Solicitor to
HMRC) for the Appellants
Rory Mullan and Paul Luckhurst (instructed by Excello Law) for the Respondent

Hearing date : 18 December 2018

Approved Judgment

Lord Justice Patten :

1. The Respondent, Mr Jimenez, is a UK national who now resides in Dubai. He also has a Spanish passport. For a number of years he resided in the UK with his former wife and children before moving first to Cyprus and then to the UAE. It is common ground that he has been a UK taxpayer for some of this time although the precise period is in dispute. But both his past and present tax position is currently under investigation by HMRC. The principal issue is one of residency.
2. As part of this investigation an authorised officer of HMRC, on 18 May 2016, issued a notice under paragraph 1 of Schedule 36 to the Finance Act 2008 (“FA 2008”) directed to the Respondent at his address in Dubai. Attached to the notice was a schedule of the information which the Respondent was asked to produce including details of bank and credit card accounts since 6 April 2004 and a schedule of his visits to the UK between that date and 5 April 2013.
3. Schedule 36 FA 2008 gives to HMRC a number of powers to obtain information (including documents) and to inspect premises for the purpose of checking a person’s tax position. Paragraph 1 gives an officer of HMRC power to give such an information notice to the taxpayer himself. Paragraph 2 authorises HMRC to serve notice on a third party requiring that person to provide information or documents which are reasonably required for the purpose of checking the tax position of the taxpayer. Paragraph 10 includes a power for an officer of HMRC to enter a person’s business premises and inspect them or any business assets or documents there for the same purpose.
4. In the present case information notices under paragraph 2 were also issued to HSBC plc, Bradford and Bingley TMB plc and Pennington Manches LLP seeking information about the Respondent’s tax position. But we are concerned on this appeal only with the notice issued under paragraph 1. That provides as follows:
 - “(1) An officer of Revenue and Customs may by notice in writing require a person (“the taxpayer”)—
 - (a) to provide information, or
 - (b) to produce a document,if the information or document is reasonably required by the officer for the purpose of checking the taxpayer’s tax position.
 - (2) In this Schedule, “taxpayer notice” means a notice under this paragraph.”
5. Compliance with the notice is governed by paragraph 7. “Information notice” includes both a taxpayer and a third party notice: see paragraph 6(1). Paragraph 7 states:
 - “(1) Where a person is required by an information notice to provide information or produce a document, the person must do so—

- (a) within such period, and
- (b) at such time, by such means and in such form (if any),

as is reasonably specified or described in the notice.

(2) Where an information notice requires a person to produce a document, it must be produced for inspection—

- (a) at a place agreed to by that person and an officer of Revenue and Customs, or
- (b) at such place as an officer of Revenue and Customs may reasonably specify.

(3) An officer of Revenue and Customs must not specify a place that is used solely as a dwelling.

(4) The production of a document in compliance with an information notice is not to be regarded as breaking any lien claimed on the document.”

6. “Tax position” is a defined term under paragraph 64(1) of Schedule 36 as follows:

“In this Schedule, except as otherwise provided, “tax position”, in relation to a person, means the person’s position as regards any tax, including the person’s position as regards—

- (a) past, present and future liability to pay any tax,
- (b) penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and
- (c) claims, elections, applications and notices that have been or may be made or given in connection with the person’s liability to pay any tax,

and references to a person’s position as regards a particular tax (however expressed) are to be interpreted accordingly.”

7. “Tax” means any of the taxes listed in paragraph 63. It is common ground that the taxpayer notice issued on 18 May 2016 did relate to the Respondent’s tax position as defined and there is no issue on this appeal about the scope of the information requested or whether it was reasonably required for the purpose of checking the Respondent’s tax position. The sole issue is whether, on its proper construction, paragraph 1 of Schedule 36 authorises a taxpayer notice to be issued and sent to a taxpayer who at the relevant time was resident outside the UK. On the hearing of the Respondent’s claim for judicial review Charles J held that the power could not be exercised extra-territorially and quashed the notice: see [2017] EWHC 2583 (Admin). HMRC now appeal.

8. Before I turn to this issue of statutory construction I need to refer to some of the other provisions in Schedule 36 which govern the procedure for issuing a taxpayer's notice and the consequences of non-compliance. A third party notice under paragraph 2 may not be given except with either the prior approval of the taxpayer or that of the First-tier Tribunal ("Ft-T"): see paragraph 3(1). But in the case of a taxpayer notice prior consent is unnecessary but is optional in the case of approval by the Ft-T: see paragraph 3(2). Approval by the Ft-T may only be given if the tribunal is satisfied that the notice is justified: see paragraph 3(3). In the present case HMRC sought and obtained the approval of the Ft-T to the taxpayer notice at a hearing on 18 May 2016. The application was made without notice as permitted under paragraph 3(2A). By this time the Respondent had already indicated and made representations that he was not resident in the UK and that HMRC had no jurisdiction over his affairs. But the Ft-T decided that the information was reasonably required for the purposes of HMRC's investigation and that the taxpayer's residence abroad did not exclude the power to give the notice.
9. Part 4 of Schedule 36 contains certain safeguards and restrictions on the scope of the powers conferred. An information notice is limited to documents in the possession or power of the recipient of the notice (paragraph 18); there is a saving for privileged documents and information (paragraph 23); and there are special provisions governing the position of auditors and tax advisers (paragraphs 25 and 26). The taxpayer has a statutory right of appeal against the giving of a taxpayer notice but only where the prior approval of the Ft-T has not been obtained: see paragraph 29(3). Where as in this case such approval has been given the remedy of the taxpayer is to seek permission to bring a claim for judicial review. That was given in the present case on the sole issue of whether the power to give a taxpayer notice under Schedule 36 had, as it was put, extra-territorial effect.
10. Part 7 of Schedule 36 sets out the penalties for non-compliance with an information notice which, as mentioned earlier, includes notices issued under both paragraphs 1 and 2. Paragraph 39 imposes a civil penalty of £300 for failure to comply with an information notice. If the failure continues after the date of the paragraph 39 penalty then the person becomes liable for a further penalty or penalties at a rate not exceeding £60 for each subsequent day of non-compliance: see paragraph 40. There is a defence to any liability for a penalty under paragraphs 39 or 40 based on reasonable excuse (see paragraph 45) and the assessment of the amount of the penalty by HMRC is subject to a right of appeal under paragraph 47. The penalties are recoverable as if they were income tax: see paragraph 49(2). Part 8 of Schedule 36 also imposes separate criminal penalties for the concealment or destruction of a document whose production is required under an information notice that was given with the approval of the Ft-T: see paragraph 53.
11. In considering the scope of the powers contained in Schedule 36 and in particular the intended territorial reach of those powers it is necessary to place them in context. The tax position of the taxpayer which HMRC is given power to investigate is now based on the taxpayer's self-assessment of his tax liabilities. Key to the proper operation of the self-assessment system is the ability of HMRC to investigate the correctness of the assessment and the powers granted to HMRC by FA 2008 replaced those contained in the Taxes Management Act and other legislation and are designed to enable HMRC, within the limits I have mentioned, to obtain the information necessary to check that

the tax position set out in the assessment is correct. Insofar as the powers contained in Schedule 36 engage the rights and freedoms of the taxpayer and third parties under Article 6 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), they have been held by this Court to be both justified and proportionate: see *R (on the application of Derrin Brother Properties Ltd and others) v First-tier Tribunal (Tax Chamber)* [2016] EWCA Civ 15. At [67]-[68] Sir Terence Etherton C said:

“67. As Ms Julie Anderson, for HMRC, said, schedule 36, like its predecessor scheme in section 20 of the TMA, represents a balance between the interests of individuals and the interests of the wider community. So far as concerns the interests of the wider community, the statutory scheme is intended to assist HMRC in its investigation of tax avoidance and tax evasion. Complex and sophisticated corporate and international arrangements are often the hallmark of schemes to avoid or evade tax and are often intended to throw a veil of obscurity over the reality of underlying transactions. Such complex arrangements feature in the present case, which concerns an investigation into suspected cross-border corporate tax avoidance and evasion under which tax has been wrongly claimed on interest on “loans” made through a web of onshore and offshore companies.

68. The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them.”

12. But the Respondent contends that the provisions of Schedule 36 must also be construed by reference to international law and in conformity with a presumption that Parliament would not have chosen to confer powers on HMRC which could be exercised in breach of international law. For present purposes that includes not conferring a power which will result in the UK exercising an enforcement jurisdiction within the territory of another sovereign state.
13. The principle that English legislation should be treated by implication as territorial is supported by a long line of authority. In *Ex parte Blain* (1879) 12 Ch.D. 522 at page 526 James LJ said that there is a:

“broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction ... But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation.”

14. But recognition of a principle that Parliament can generally be presumed not to have legislated in respect of persons resident or events occurring abroad does not prevent particular legislation from being construed as having some extra-territorial effect if such an interpretation can be derived from the language of the statute and its purpose. This point was made by Lord Scarman in his speech in *Clark v Oceanic Contractors Inc* [1983] 2 AC 130 which concerned the liability of a non-resident company for PAYE deductions from the salaries paid to employees working on oil pipelines in the North Sea. Under ss.38(4) and (6) of the Finance Act 1973 the company was deemed by reason of its activities there to be trading within the United Kingdom and the pay of their employees working there was made subject to Schedule E income tax. The House of Lords held that the company was liable to deduct PAYE. After referring to the earlier cases including *Ex parte Blain* Lord Scarman (at page 145) said this:

“Put into the language of today, the general principle being there stated is simply that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction. Two points would seem to be clear: first, that the principle is a rule of construction only, and secondly, that it contemplates mere presence within the jurisdiction as sufficient to attract the application of British legislation. Certainly there is no general principle that the legislation of the United Kingdom is applicable only to British subjects or persons resident here. Merely to state such a proposition is to manifest its absurdity. Presence, not residence, is the test.

But, of course, the Income Tax Acts impose their own territorial limits. Parliament recognises the almost universally accepted principle that fiscal legislation is not enforceable outside the limits of the territorial sovereignty of the kingdom. Fiscal legislation is, no doubt, drafted in the knowledge that it is the practice of nations not to enforce the fiscal legislation of other nations. But, in the absence of any clear indications to the contrary, it does not necessarily follow that Parliament has in its fiscal legislation intended any territorial limitation other than

that imposed by such unenforceability: see *Government of India v. Taylor* [1955] A.C. 491, 503. Indeed, British tax liability has never been exclusively limited to British subjects and foreigners resident within the jurisdiction. As long ago as 1889, Lord Herschell in the well-known case of *Colquhoun v. Brooks* (1889) 14 App. Cas. 493, 504, summarised the income tax position in one sentence (which received the approval of this House in *Westminster Bank Executor and Trustee Co. (Channel Islands) Ltd. v. National Bank of Greece S.A.* [1971] A.C. 945, 954):

“The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.””

15. We are not, of course, concerned on this appeal with the imposition of tax liabilities on persons who would (apart from the tax legislation itself) be regarded as resident or working outside the jurisdiction. Nor are we concerned with the provisions of a statute which make conduct a criminal offence. Although Part 8 of Schedule 36 imposes criminal penalties for the destruction or concealment of documents referred to in an information notice, the penalties imposed for non-compliance with the notice itself are only civil. The Respondent has an argument on construction based on what he says are inconsistencies of interpretation if some of the provisions of Schedule 36 are to be construed as having extra-territorial effect but others not. I will come to this argument later but, for the moment, I am concerned only to identify the principles of international law which are relied on as relevant to the construction of paragraph 1 and how they have operated in the decided cases to inform the construction of the statutory provisions there in question.
16. A case which was in some ways closer to the present one is the decision of the House of Lords in *Masri v Consolidated Contractors International (UK) Ltd (No. 4)* [2009] UKHL 43. It concerned the power of the court contained in CPR 71.2 to order an officer of a company against which a judgment had been obtained in England to be examined in court about the assets of the judgment debtor and its ability to satisfy the judgment. The judgment debtor in that case was domiciled in Greece but an order was obtained under CPR 71.2 for one of its officers to be examined in England about the company's foreign assets. The officer in question applied to discharge the order on the ground that CPR 71.2 had no application to an officer of a foreign judgment debtor in relation to its assets abroad. The House of Lords set aside the order. It held that although the rule making power contained in s.1 of the Civil Procedure Act 1997 was wide enough to include power to make rules relating to the examination of an officer abroad of a company against which a judgment had been obtained in the jurisdiction, CPR 71 should be construed as not extending to officers abroad.
17. The House of Lords was referred to two decisions of the Court of Appeal, one relating to s.25(1) of the Bankruptcy Act 1914 (*Re Tucker* [1990] Ch 148), the other concerning s.133 of the Insolvency Act 1986 (*Re Seagull Manufacturing Co Ltd* [1993] Ch 345) where the statutory provisions enabled the court to order a person to attend for examination in relation to the affairs of the insolvent debtor. Section 25(1)

of the Bankruptcy Act enabled such an order to be obtained against “any person whom the court may deem capable of giving information respecting the debtor, his dealings or property” and the origin of this power could be traced back to the Bankruptcy Act 1883. The Court of Appeal held in *Re Tucker* that the power did not extend to persons outside the jurisdiction. Dillon LJ (at pages 156-7) said that:

“in the light of the accepted practice of nations and comity in the field of international law and international relations, eyebrows might be raised at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court, which might well be a county court, to summon anyone in the world before it to be examined and produce documents.”

18. By contrast in *Re Seagull* the Court of Appeal upheld an order for the examination of a former director of the insolvent company who was living in the Channel Islands. Section 133 of the Insolvency Act applied to:

“any person who— (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager ... or (c) not being a person falling within paragraph (a) or

(b), is or has been concerned, or has taken part, in the promotion, formation or management of the company.”

19. In his judgment Peter Gibson LJ said (at page 354):

“Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself from the jurisdiction would suffice.”

20. In *Masri* Lord Mance analysed these two decisions in the following way:

“23. The present case stands between *In re Tucker* [1990] Ch 148 and *In re Seagull* [1993] Ch 345. The category of persons embraced by CPR Pt 71 is confined to "an officer" of the company or other corporation—on the face of it probably only a current officer at the time of the application or order, whereas section 133 extended (unsurprisingly since it deals with a company being wound up) to past officers and some other closely connected persons. There is in the context of CPR Pt 71 no equivalent of the provision in section 25(6) which was for Dillon LJ "conclusive" in *In re Tucker*. On the other hand, CPR

Pt 71 is concerned with obtaining information in aid of the enforcement of a private judgment. The public interest that "those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public" (*In re Seagull* [1993] Ch 345, 354) is absent. The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate, is also absent. Private civil litigation is different. A fair and efficient legal system is of course a cornerstone of the rule of law, and it can also be said that there is a public interest in a court getting to the bottom of litigation and ensuring that parties have the means of obtaining full information to enable it to do so. Yet the parties have no right to ask the court to summon witnesses from abroad for that purpose. While a judgment crystallises rights and establishes an unsuccessful defendant's liability, the court is still acting in aid of private rights after judgment, and it may be questioned whether, in terms of public interest, there is a very great difference between the importance of evidence for the trial of liability and quantum and for the enforcement of a judgment. A judgment which is mistaken because of a lack of full information or documentation could even be seen as a greater miscarriage of justice than a judgment which is not enforced because of the same lack.

24. In my view Dillon LJ's observation in *In re Tucker* [1990] Ch 148, 157 that "eyebrows might be raised" at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court to summon anyone in the world before it to be examined and produce documents has weight also in the context of CPR Pt 71. The historical origin of CPR Pt 71 consists in an amendment of the Rules in 1883 made in the light of the decision in *Dickson v Neath and Brecon Railway Co* LR 4 Ex 87 in 1869. The Court of Exchequer there held that the pre-existing power to order oral examination of a judgment debtor did not enable examination of the company's three directors, about whose presence within the jurisdiction there was clearly no doubt. The Rule Committee in 1883 is likely to have been focusing on domestic judgments and domestically based officers. If it thought at all about foreign judgments, which might be enforced in England, it is unlikely to have contemplated that a judgment creditor, having come here for that purpose, would then need assistance abroad to make the enforcement effective. The extreme informality of the process by which the rules enable an order for examination to be obtained continues to point towards a purely domestic focus. An application for an order may under CPR Pt 71 be made without notice, may be dealt with ministerially by a court officer and will lead to the automatic issue of an order (albeit with the general safeguard of the right to apply to set aside

which exists under CPR r 23.10 in the case of any order made without service of the relevant application notice). These considerations all tend to point against the application of CPR Pt 71 to company officers outside the jurisdiction.

25. Sir Anthony Clarke MR, with whose judgment the other members of the Court of Appeal in the present case agreed, said, ante, p 107, para 16 that it would "defeat its object" if CPR r 71.2 were restricted to persons within the jurisdiction. That is, I think, to put matters substantially too high. Small though the world may have become, relatively few officers of companies are likely to contemplate, let alone be able to undertake, emigration or flight to a different country in order to avoid giving information about their company's affairs. For the same reason, the deployment in *In re Seagull* [1993] Ch 345 of the possibility of "deliberate evasion" by an officer removing himself from the jurisdiction seems to me a factor of greater forensic than real weight, although such weight as it may have may be greater after the calamity of compulsory winding up (when something has evidently gone wrong and may require embarrassing or even potentially incriminating investigation) than in the context of an unpaid judgment debt.

26. In my view CPR Pt 71 was not conceived with officers abroad in mind, and, although it contains no express exclusion in respect of them, there are lacking critical considerations which enabled the Court of Appeal in *In re Seagull* to hold that the presumption of territoriality was displaced and that the relevant statutory provision there, on its true construction and having regard to the legislative grasp or intendment, embraced a foreign officer. Although CPR Pt 71 is limited to officers of the judgment debtor company, I regard the position of such officers as closer to that of ordinary witnesses than to that of officers of a company being compulsorily wound up by the court. I conclude that CPR Pt 71 does not contemplate an application and order in relation to an officer outside the jurisdiction."

21. Another case in the insolvency field which post-dates *Masri* is the decision of the Supreme Court in *Bilta (UK) Ltd v Nazir (No. 2)* [2015] UKSC 23. It concerned a VAT fraud carried out by the directors of an English company with the dishonest assistance of a Swiss company and its sole director. One of the issues was whether the liquidator of the English company (Bilta) could rely on s.213 of the Insolvency Act 1986 in its claim against the Swiss company and its director for the loss caused to Bilta as a result of the conspiracy. Section 213 provides:

“(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.”

22. The defendants argued that s.213 had no extra-territorial effect but this was rejected. In their judgment Lord Toulson and Lord Hodge JJSC said:

“[212] The appellants accept that the English courts have jurisdiction in personam. Their challenge is to the court's subject matter jurisdiction as discussed by Hoffmann J in *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp* [1986] 1 All ER 653 at 657, [1986] Ch 482 at 493 and Lawrence Collins LJ in *Masri v Consolidated Contractors International (UK) Ltd (No 2)* [2008] EWCA Civ 303, [2008] 2 All ER (Comm) 1099, [2009] QB 450 (at [30] and [31]). It relates to whether the court can regulate the appellants' conduct abroad. Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a UK statute applied only to UK subjects or foreigners present in and thus subjecting themselves to a UK jurisdiction unless the Act expressly or by necessary implication provided to the contrary (*Re Sawers, ex p Blain* (1879) 12 Ch D 522 at 526 per James LJ). That principle has evolved into a question of interpreting the particular statute (*Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 1 All ER 133 at 139 and 144, [1983] 2 AC 130 at 145 (Lord Scarman), 152 (Lord Wilberforce); *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 All ER (Comm) 220, [2010] 1 AC 90 (at [10]) (Lord Mance); and *Cox v Ergo Versicherung* [2014] UKSC 22, [2014] 2 All ER 926 at [27]–[29] (Lord Sumption)). In *Cox v Ergo* at [29] Lord Sumption suggested that an intention to give a statute extra-territorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect.

[213] In our view s 213 has extra-territorial effect. Its context is the winding up of a company registered in Great Britain. In theory at least the effect of such a winding-up order is worldwide (*Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41, [2015] 2 WLR 289 at [34] and [38]). The section provides a remedy against any person who has knowingly become a party to the carrying on of that company's business with a fraudulent purpose. The persons against whom the provision is directed are thus (a) parties to a fraud and (b) involved in the carrying on of the now-insolvent company's business. Many British companies, including Bilta, trade internationally. Modern communications enable people outside the United Kingdom to

exercise control over or involve themselves in the business of companies operating in this country. Money and intangible assets can be transferred into and out of a country with ease, as the occurrence of VAT carousel frauds demonstrates. We accept what HMRC stated in their written intervention: there is frequently an international dimension to contemporary fraud. The ease of modern travel means that people who have committed fraud in this country through the medium of a company (or otherwise) can readily abscond abroad. It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business.”

23. Section 213 differs of course from paragraph 1 of Schedule 36 FA 2008 and from the powers to request information and documents considered in the other cases I have referred to because it operates to enable the court to fix parties with liability to compensate the company for the losses caused rather than requiring them to carry out specified acts in response to the request for information. But the analysis at [212] quoted above confirms that there is in every case a question of construction to be considered having regard to the language and purpose of the statutory provision under consideration.
24. In *Masri* Lord Mance accepted that the issue as to whether CPR 71 applied to officers of the debtor company who were abroad was one of construction underpinned, as he put it, by considerations of international comity and law. He also referred to the passages in the speech of Lord Scarman in *Clark* quoted earlier and to Lord Wilberforce’s statement in the same case that the scope of the statute depended upon who was “within the legislative grasp, or intendment” of the relevant provision. But, as I have already indicated, the question whether either the statute itself or some power which it confers is intended to have some extra-territorial effect is likely to depend upon close examination of the interaction between any relevant principle of international law which would operate against giving the domestic legislation process some extra-territorial effect and the public interest considerations which favour a construction that involves the power being exercised in relation to persons outside the jurisdiction. *Re Seagull* is an example of a case where the latter prevailed but some of the policy considerations which underpin the presumption against giving the legislation extra-territorial effect are obviously more powerful than others.
25. Chief among these is the presumption that, absent clear words, a domestic statute will not be construed as making conduct which takes place abroad an offence which is triable in England: see *Air-India v Wiggins* [1980] 1 WLR 815 at page 819A-B. This principle can be seen in operation in the decision of the Supreme Court in *Serious Organised Crime Agency v Perry* [2013] 1 AC 182 where SOCA commenced proceedings against Mr Perry and members of his family for a civil recovery order under Part 5 of the Proceeds of Crime Act 2002 (“POCA 2002”). A civil recovery order may be made against “all property wherever situated”: see s.316(4). The purpose of such an order is to recover property which represents the proceeds of the

defendant's criminal activity. POCA 2002 also gives SOCA the power to seek and the court the power to make freezing and disclosure orders in support of the claim for a civil recovery order: see ss. 245A and 357.

26. Section 357(4)-(5) defines a disclosure order in these terms:

“(4) A disclosure order is an order authorising an appropriate officer to give to any person the appropriate officer considers has relevant information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following—

- (a) answer questions, either at a time specified in the notice or at once, at a place so specified;
- (b) provide information specified in the notice, by a time and in a manner so specified;
- (c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.

(5) Relevant information is information (whether or not contained in a document) which the appropriate officer concerned considers to be relevant to the investigation.”

27. If a person fails to comply with the requirements of a disclosure order then he commits a criminal offence: see s.359(1)-(2).

28. Mr Perry had been convicted in Israel in 2007 of a number of offences in relation to a pension scheme which he operated there and had been sentenced to a term of imprisonment. In 2008 SOCA discovered that he and his family had bank accounts in London with substantial deposits. It also obtained a disclosure order against the defendants, all of whom were outside the jurisdiction, and a worldwide property freezing order. The Supreme Court set aside the orders on the basis that s.357 did not give the court power to make a disclosure order against persons outside the jurisdiction and that, in conformity with international law, the definition of property in the context of s.245A should be construed as limited to property within the jurisdiction. The freezing order was therefore too widely drawn.

29. In his judgment Lord Phillips of Worth Matravers PSC said this about the territorial scope of the power to give a disclosure notice:

“91. Those notices were given to persons who were, and were known by SOCA to be, outside the jurisdiction of the United Kingdom. It was Mr Jones's submission, advanced before the Court of Appeal, that the authority given by a disclosure order to give disclosure notices only applies to notices given to persons within the jurisdiction. In making this submission Mr Jones relied particularly on the presumption that, unless it

clearly provides to the contrary, a statute will not have extraterritorial effect.

92. The majority of the Court of Appeal, Ward and Carnwath LJJ, rejected the defendants' attack on the validity of the notices; Richards LJ dissented. The gist of the reasoning of Carnwath LJ appears in the following short passage of his judgment, at paras 50-51:

“50. ... is there any reason why persons who are reasonably considered to have an interest in property validly subject to a disclosure order, and who have a sufficient presence within the jurisdiction for a notice to be effectively given to them, should be treated as outside the 'legislative grasp' of the statutory scheme?

51. As a matter of common sense, it is difficult to see why mere presence in or absence from the country at the time of sending or delivery of the notice is the critical factor. For example, a person normally resident at an address in this country could not sensibly seek to deny that the notice had been 'given' to him at that address, merely because he happened to be out of the country at the time (for example, on a business or holiday trip).”

93. Ward LJ proceeded on the premise that a recovery order could be made in respect of property outside the jurisdiction. He commented, at para 77, that the extraterritorial effect of Part 5 could not be denied and that he could not see why Part 8 should not act in the same way. For the reasons that I have given I consider that he proceeded on a false premise.

94. The point is a very short one. No authority is required under English law for a person to request information from another person anywhere in the world. But section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. Subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A. Section 357, read with section 359, does not simply make proscribed conduct a criminal offence. It confers on a United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone I consider it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction.”

30. The decision in *Perry* was distinguished by the Divisional Court in the recent case of *R (on the application of KBR Inc) v Director of the Serious Fraud Office* [2018] EWHC 2368 (Admin) which concerned the scope of the power contained in s.2(3) of the Criminal Justice Act 1987 for the Director of the Serious Fraud Office to serve a notice requiring a person to provide documents relevant to an investigation by the SFO of a suspected offence involving serious or complex fraud. The notice may be directed to “any person” and failure to comply without reasonable excuse is made a criminal offence under s.2(13).
31. The Director of the Serious Fraud Office issued a notice under s.2(3) requiring KBR Inc, a US company, to produce documents held by it outside the jurisdiction in connection with an SFO investigation into KBR Limited, an English subsidiary, and other companies within the KBR Group. The investigation related to various allegedly corrupt payments made by KBR’s UK subsidiaries to the Unaoil Group based in Monaco. Requests for documents were sent to KBR Limited but were then expanded to include a request addressed to KBR Inc for any relevant documents which it held including documents outside the jurisdiction. KBR Inc had no fixed place of business and did not carry on business within the UK.
32. The notice given to KBR Inc was challenged on the ground that the Director had no power under s.2(3) to make a request for documents to a foreign corporation and in respect of documents held outside the jurisdiction. After referring to all the relevant authorities including *Perry* and the first instance decision of Charles J in the present case, the Divisional Court held that s.2(3) did have an extra-territorial application to foreign companies if they had a sufficient connection to the jurisdiction. That was provided in the instant case by evidence that the payments made by the English subsidiaries to Unaoil Group required the approval of KBR Inc and that KBR Inc’s Executive Vice President was based at the Group’s UK office. This, the Divisional Court noted, was in contrast to the position in *Perry* where neither the members of the Perry family nor any companies connected to them had any connection to the jurisdiction beyond having money in a UK bank account. In his judgment Gross LJ emphasised the policy considerations underlying s.2(3). He said:

“68. However inconclusive the debate as to legislative history, the legislative purpose and the mischief at which s.2(3) is aimed permits of no such doubt. As already indicated, the SFO’s business is “...top end, well-heeled, well-lawyered crime...”. By their nature, most such investigations will have an international dimension, very often involving multinational groups conducting their business in multiple jurisdictions, whether through a branch or subsidiary structure (it should matter not). It follows that the documents relevant to the investigation of a UK subsidiary of such a group may well be spread between the UK and one or more overseas jurisdictions. The simplicity of document transfer and access has of course been massively enhanced by internet and web technology post-dating 1987 but, as already discussed, it cannot be suggested that the international dimension of the SFO’s mandate was unknown or not appreciated at the time of the enactment of s.2(3). For my part, putting to one side for the moment, any

questions of MLA, there would be a very real risk that the purpose of s.2(3) would be frustrated (*Bilta*) if, as a jurisdictional bar, the SFO was precluded from seeking documents held abroad from any foreign company.

69. The context here concerns the investigation and prosecution of top-end fraud. There is, accordingly, an extremely strong public interest in the extraterritorial ambit of s.2(3), which is anything but a private matter. That public interest extends to the UK's international obligations under instruments such as the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (2011). It is thus readily distinguishable from the private interest in civil litigation, with which *Masri* was concerned. S.2(3) is instead much more closely analogous to the other decisions in the insolvency field highlighted above, namely, *Paramount*, *Seagull* and *Bilta*. In all those decisions, much influenced by policy and public interest considerations, the provisions in question were treated as applying extraterritorially. There are of course differences between the regime of the Insolvency Act 1986 and that of the CJA 1987, as indeed Mr Kovalevsky contended. But those differences do not serve to displace the analogy or to obscure the very real similarities in terms of policy considerations. Put another way, it would be surprising if the law was more astute to assist inquiries into bankruptcy than investigations into and prosecutions of serious fraud on an international level.

70. In *Masri*, Lord Mance (at [24]) utilised the practical touchstone of whether “eyebrows might be raised” at the notion that Parliament had conferred the extraterritorial jurisdiction in issue. Applying that same touchstone here, I cannot see that eyebrows would be raised. Instead, a careful consideration of the context, the underlying policy considerations and the overwhelming case for s.2(3) having at least some extraterritorial application, would compel the answer that there was no jurisdictional bar precluding the SFO from giving a notice to *any* foreign companies in respect of *any* documents held abroad, regardless of their relevance to an investigation into a UK company, and regardless of the degree of connection between the foreign company, the UK and a UK company. Furthermore, it is to be appreciated that a s.2(3) notice seeks documents; it does not involve questioning individuals abroad, entering premises abroad, seizing foreign property (*cf.*, *R v Cuthbertson* [1981] AC 470, at p.485) or (certainly in this case) requiring the party to whom the notice is directed to take steps requiring permission from the US authorities.

71. Accordingly, I would conclude that the extraterritorial ambit of s.2(3) is capable of extending to some foreign

companies in respect of documents held abroad. For my part, however, I would not go further and say that the reach of s.2(3) extended to *all* foreign companies in respect of documents held abroad, subject only to the safeguards or limitations in ss. 1 and 2 of the CJA 1987. As it seems to me, the right answer (to adopt the expression used by Lord Mance, in *Masri*, at [10]) is a “nuanced answer”: s.2(3) extends extraterritorially to foreign companies in respect of documents held outside the jurisdiction when there is a sufficient connection between the company and the jurisdiction. It may be noted that the potential relevance of the documents to the investigation is not the basis of the challenge.”

33. Against this background, I can now return to the provisions of Schedule 36 which I summarised earlier. Mr Mullan stressed in argument that the Schedule needed to be construed as a whole. This is consistent with statements of established principle that the intention of Parliament is to be derived from the terms of the Act read as a whole and in its context: see *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [38]; *Bloomsbury International Ltd and others v DEFRA* [2011] 1 WLR 1546 at [10]. On this basis Mr Mullan submits that we should reject an interpretation of Schedule 36 which gives different powers a different territorial reach and instead assume that Parliament has taken a consistent approach to the question of territoriality. Given that HMRC concedes that the power, for example, contained in paragraph 10 for an officer to enter a person’s business premises to check his tax position cannot be construed as extending to premises abroad, it would be wrong to read the provisions of paragraph 1 as having any wider reach. Consistency of treatment would suggest that Parliament has intended Schedule 36 to provide a range of powers exercisable only domestically at least partly in recognition of the need to respect the norms of international law which I referred to earlier.
34. An argument of this kind was rejected by the Divisional Court in *KBR Inc* and the principle that the intention behind a provision in a statute needs to be ascertained by looking at the statute as a whole, whilst incontrovertible, does not in my view require one to assume that the scope of each provision was intended to be the same. Consistency of treatment depends upon a sufficient measure of identity between the provisions under consideration. It is therefore necessary, I think, to turn to the provisions of Schedule 36 and to examine their subject-matter and the relation between them.
35. The general purpose of Schedule 36 is not in dispute. It is apparent from the references in most of paragraphs 1-10 of the Schedule to “the purpose of checking the taxpayer’s tax position” that these are investigatory powers designed to verify the taxpayer’s self-assessment and are limited to that stated objective. This means that the powers are necessarily and only exercisable in relation to someone who is or may be liable for tax in the UK and, to that extent, has an identifiable relationship with the UK.
36. Earlier in this judgment I set out the definition of “tax position” contained in paragraph 64(1): see [6] above. The list of taxes in paragraph 63 contains a number which have the potential to affect persons resident outside the jurisdiction. By way of example, income tax is chargeable on the UK income of a non-resident; capital gains

tax can apply to a chargeable gain on a disposal of UK property by a non-resident as can stamp duty land tax; and inheritance tax applies to the worldwide property of someone domiciled in the UK regardless of where he is resident.

37. It seems to me unlikely that investigatory powers designed to verify a taxpayer's self-assessment in relation to the taxes listed under paragraph 63(1) would have been limited to operating within the UK except insofar as to give them extra-territorial effect would involve an obvious incursion upon the sovereignty of a foreign state which would be contrary to international law. Paragraph 10 is a good example of this. But the more nuanced approach advocated in decisions such as *Masri* and *KBR* suggests that the evident purpose of Schedule 36 and the public interest which underlies it will dictate a construction of the provisions of Schedule 36 which renders them effective in most foreseeable circumstances unless that would involve a breach of international law of the kind I have just described.
38. Neither paragraph 1 nor the associated definition of "tax position" in paragraph 64 impose any express or obvious restriction on the destination of a taxpayer's notice. Consistently with the types of tax which may be the subject of the investigation, the contrary is suggested. HMRC also point to the fact that paragraphs 18-28 include various restrictions on the exercise of these powers including those under paragraph 1 so that Parliament was clearly able to limit the scope of the powers if it wished to do so. But they do not include a restriction on the territorial scope of paragraph 1. That latter point is of some force as far as it goes but, as I have already acknowledged and HMRC themselves accept, Schedule 36 does contain some powers which by their very nature would infringe the sovereignty of a foreign state in a way which Parliament cannot reasonably be taken to have contemplated.
39. It seems to me that there are a number of factors which point towards HMRC being authorised by paragraph 1 to give a taxpayer's notice to someone outside the UK. The first is the subject-matter and purpose of the legislation. We are not concerned with provisions (as in *Masri*) designed to facilitate the conduct of private litigation or (as in *Re Tucker*) which relate to ordinary bankruptcy. Insofar as the insolvency cases provide an analogy, this is much closer to *Re Seagull* or *Bilta* where there is an obvious public interest in securing the purpose for which Parliament thought it necessary to confer the relevant powers. The prevention of tax evasion which will often have a cross-border aspect to it serves an important public purpose in maintaining public revenue. Coupled to this the subject-matter of the legislation also, as I have said, identifies a sufficient connection between the recipient and the jurisdiction. A paragraph 1 notice can only be given to someone who is or may be a UK taxpayer and it is this status rather than his place of residence which is key to availability and operation of the power.
40. The second reason is that the strong policy objectives of conferring on HMRC what one assumes were intended to be effective investigatory powers are bolstered by the language of Schedule 36 itself. As already noted, there is no overt or express restriction on the geographical operation of paragraph 1 and the list of taxes which are relevant to the assessment of the taxpayer's tax position strongly suggest that it was intended to be available to investigate the position of persons resident abroad. A taxpayer's notice may be sent to or delivered to the taxpayer at his usual or last known place of residence in accordance with s.115 TMA 1970 (see Schedule 36 paragraph 56(c)) and compliance with the notice requires the taxpayer to provide the information

by such means as is reasonably described in the notice (or in the case of documents) at a place that is agreed or reasonably specified by HMRC. In the case of taxpayers resident abroad HMRC can reasonably require production to take place in England unless an alternative is agreed. There is nothing in paragraph 56 which limits production to the territory where the taxpayer happens to be resident at the time of the notice so that an objection to the service of the notice abroad as a species of enforcement in that jurisdiction will be limited in practice to the fact that the notice is sent to an address in that country.

41. A construction of paragraph 1 which allows it to have this limited territorial effect is criticised on the basis that it would be ineffective. HMRC do not of course contend that the civil penalties for non-compliance with the notice could be directly enforced against the taxpayer in a foreign state but I decline to infer from this that to read paragraph 1 as entitling HMRC to serve the notice abroad would serve no useful purpose. In the case of a UK taxpayer with a residence abroad, there will in many cases be a real possibility that the taxpayer continues to hold assets within the jurisdiction which could be used to recover the civil penalties for non-compliance. Even if only enforceable domestically the civil penalties are likely in many cases to provide an incentive to comply with the notice.
42. The judge took the view that because under paragraph 63(4) the definition of “relevant foreign tax” in paragraph 63(1)(m) means the tax of a member state of the EU covered by the exchange of information arrangements under Council Directive 2011/16/EU of 15 February 2011 or a tax imposed by a foreign state which is covered by the international tax enforcement arrangements given effect by s.173 of the Finance Act 2006 that pointed to the conclusion that paragraph 1 was not intended to have extra-territorial reach and that if HMRC wanted to obtain information about the UK tax liability of persons resident abroad it should rely on the mutual assistance arrangements between the UK and that state: see [43]-[45].
43. But the existence of such arrangements does not in my view compel the conclusion that paragraph 1 is limited to its domestic application. As HMRC submit, it cannot be assumed that such arrangements exist and the addition of what is now sub-paragraph (m) to paragraph 63(1) indicates that it was intended to allow the UK tax authorities to use the machinery of paragraph 1 against persons resident abroad as part of an investigation into their liability for foreign tax pursuant to a request for mutual assistance by that foreign state. These provisions are more likely to have been intended to give HMRC additional powers than to have limited the scope of the powers under paragraph 1.
44. The neutrality and width of the language of Schedule 36 therefore require one to identify a strong policy reason in the form of a relevant principle of international law if paragraph 1 is to be construed as having no extra-territorial application. Non-compliance with the notice is not made a criminal offence and so the presumption that a statute should not be construed as making conduct abroad a criminal offence (which was so decisive in *Perry*) has no application. The argument based on international law is therefore reduced to the more general proposition that service of the notice on Mr Jimenez in Dubai would amount to the exercise of an enforcement jurisdiction in the UAE.

45. A state's enforcement jurisdiction includes its power to carry out its official functions if necessary by coercive means. In *Brownlie's Principles of Public International Law* (8th edition: OUP, 2012) at p.479 the editors state:

“The governing principle of enforcement jurisdiction is that a state cannot take measures on the territory of another state by way of enforcement of its laws without the consent of the latter. Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under the terms of a treaty or other consent given.”

46. In *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 (at [245]-[246]) Lord Collins said:

“245. As for enforcement jurisdiction, in the *Lotus* case (*France v Turkey*), the Permanent Court said (at 18-19):

“Now the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”

246. That is a statement about enforcement jurisdiction, namely the limits of the right of a state to act on the territory of another state or to take measures on its own territory which require compliance in another state. Thus a state cannot, without the consent of the territorial sovereign, perform official acts in a foreign state or carry out official investigations in the foreign state. The inability of a foreign state to claim, directly or indirectly, its taxes in England is sometimes put on the basis that it is an illegitimate extension of its territorial jurisdiction: see *Government of India v Taylor* [1955] AC 491.”

47. HMRC contend that the service of a taxpayer's notice on the Respondent in the UAE did not involve a breach of international law because it did not require the performance of any official act in that territory. Mr Jimenez was not required to do any more than to provide the information and documents to HMRC in the UK as part of their investigation of his self-assessment. Unlike the regime under ss.357-359 of POCA considered in *Perry*, the effect of the notice was not to impose on a foreign-based recipient obligations re-inforced by a criminal sanction if not complied with. If the information requested in a paragraph 1 notice is not forthcoming then before even a civil penalty is imposed there must be a further decision by HMRC under paragraph 46 of Schedule 36 including a determination of the amount of the penalty and any defence based on reasonable excuse under paragraph 45. So far as it goes this is a

purely domestic operation, although it does have consequences for the taxpayer whose non-compliance is under consideration.

48. The issue of the paragraph 1 notice is said to be an exercise of the UK's prescriptive jurisdiction which can be exercised extra-territorially and, in particular, in relation to its own nationals. Prescriptive (sometimes called legislative) jurisdiction is the power to make rules or issue instructions binding on the persons to whom they are directed. It is distinguishable from the enforcement of those rules by some type of coercive action which in the case of legislation or a direction affecting someone abroad may involve the legislating state taking positive action in the jurisdiction of another state.
49. Whether the legislation has such an extensive grasp is, as I have explained, a question of construction informed by the purpose of the legislation, the public interest which it serves, and the extent to which its application or enforcement abroad would cut across or offend against the territorial sovereignty of another state. But the resolution of that question in the present case does not, I think, require us to define with any precision where the prescriptive jurisdiction of the UK ends and its enforcement jurisdiction begins in relation to paragraph 1 of Schedule 36. It is sufficient that the sending of a taxpayer's notice to Mr Jimenez in Dubai has not been shown to contravene any international obligation of the UK. We are not concerned with a statutory regime which criminalises the conduct abroad of a foreign national or which authorises a course of action abroad for a purpose which does not justify paragraph 1 having such a territorial reach. The decision in *Seagull* (treated as correctly decided in *Masri*) and the more recent decision of the Supreme Court in *Bilta* and the Divisional Court in *KBR* confirm that the jurisdiction to serve a notice requiring the provision of information from a person resident abroad or even to impose liability on the recipient will not raise eyebrows where they serve to protect a sufficient national interest. In my view, the present case falls squarely within that category of case.
50. I would therefore allow the appeal.

Lord Justice Leggatt :

51. In circumstances where the FA 2008 is silent about the territorial reach of Schedule 36, the question whether its provisions apply outside the United Kingdom must be answered by asking what Parliament should reasonably be taken to have intended the territorial scope of those provisions to be, having regard to the content and policy of the legislation and to relevant interpretative presumptions. The analysis of Patten LJ – with which I entirely agree – leads me to conclude that Schedule 36 is intended to have the widest territorial reach that is consistent with international law.
52. The most substantial argument made on behalf of Mr Jimenez, which the judge accepted, is that interpreting paragraph 1 of Schedule 36 as having extra-territorial effect would be contrary to international law, as it would offend state sovereignty by violating the principle that a state must not enforce its laws on the territory of another state without that other state's consent. Counsel for Mr Jimenez submitted that sending a notice to him in Dubai requiring him to provide specified information and documents, backed by a threat of financial penalties if he did not, amounted to an impermissible exercise of such enforcement jurisdiction. They relied on a distinction drawn by FA Mann in his review "The Doctrine of Jurisdiction in International Law" (1964-I) 111 *Recueil des Cours*, 1 at 133-4, and adopted by the Tax Court of Canada

in *Oroville Reman & Reload Inc v R* (2016) 19 ITLR 259, between documents of notice that merely involve the supply of information with no threat of penalties in the event of non-compliance and documents involving a compulsory process or containing a command. They submitted that a document of the latter kind, such as the notice issued in this case which explicitly threatened penalties if Mr Jimenez did not comply with it, must be regarded as an unlawful exercise of enforcement jurisdiction.

53. Delineating the precise boundary between prescriptive (or legislative) and enforcement jurisdiction in international law is far from straightforward. But I do not accept that sending a notice by post to a person in a foreign state requiring him to produce information that is reasonably required for the purpose of checking his tax position in the UK violates the principle of state sovereignty. Such a measure does not involve the performance of any official act within the territory of another state – as would, for example, sending an officer of Revenue and Customs to enter the person’s business premises in a foreign state and inspect business documents that are on the premises pursuant to paragraph 10 of Schedule 36. Nor does it seem to me objectionable that the notice is expressed as a command rather than a mere request for the supply of information. It is, for example, commonplace when proceedings are validly brought in England against a foreign defendant for orders to be made requiring the defendant to disclose documents or information in connection with the proceedings. Such an order is routinely made, for instance, when a freezing injunction (which itself may have extra-territorial effect) is granted. Notice of such orders may be given to the defendant abroad, often now by email, and the defendant may face the prospect of committal for contempt if the order is not obeyed. The making and service of such an order is not regarded as infringing the territorial sovereignty of the state in which the defendant is situated. I cannot see any difference in principle between such an exercise of state power and the giving (with the approval of the Ft-T) of a taxpayer notice to a person situated abroad.
54. It is a further and separate question whether the imposition of a civil penalty under Part 7 of Schedule 36 for failure to comply with such a taxpayer notice would involve an exercise of enforcement jurisdiction. Again, however, I cannot see that it would, provided that no steps are taken to seek to enforce the penalty in a foreign state. It is a well-established principle, reflected in the domestic authority of *Government of India v Taylor* [1955] AC 491, that a state is not entitled to enforce its penal, revenue or other public laws in a foreign country. But that does not prevent the state from taking measures to enforce a financial penalty against assets of the debtor situated within its own territorial jurisdiction or against the debtor personally if he enters its territory.
55. An illustration is provided by the case of *Attorney-General v Prossor* [1938] 2 KB 531, mentioned by FA Mann in the review to which I have referred. In that case Mr Prossor, who had resided for many years in France, failed to make returns of income from English investments for the purposes of tax. Assessments were sent to him in France which he ignored. He was then served in France with a writ of subpoena which initiated proceedings against him in England. He entered no appearance and the Crown obtained a judgment against him. Later, Mr Prossor came on a short visit to England and was staying with a relation in the Cotswolds when two bailiffs came and took him into custody until his tax liability was paid. He applied to have the proceedings set aside on the ground that the service of the writ of subpoena on him out of the jurisdiction was not an effective service. The Court of Appeal rejected that

contention. It was not suggested that the exercise of the relevant powers was contrary to international law. (Nor for that matter does FA Mann in his reference to the case make such a suggestion.)

56. In the present case it is not asserted that sending a taxpayer notice to Mr Jimenez in the UAE is prohibited by any international treaty. The principles on which he relies are principles of customary international law. As Sir James Eadie QC rightly reminded the court, to establish the existence of a rule of customary international law it is necessary to demonstrate a general state practice that is accepted as law (*opinio juris*): see e.g. conclusion 2 of the draft conclusions on Identification of Customary International Law, adopted by the International Law Commission in 2018. The materials relied on by Mr Jimenez on this appeal come nowhere near to showing that this test is met in relation to the alleged rule against requiring a person situated in a foreign state to provide information and documents that are reasonably required to determine his tax position in the home state.
57. I would therefore reject the contention that giving a taxpayer notice to a person who is abroad offends the sovereignty of the state in which that person is located. In these circumstances, for the reasons given by Patten LJ, paragraph 1 of Schedule 36 is not in my view properly interpreted as subject to any territorial limit. Accordingly, I too would allow the appeal.

Lady Justice Nicola Davies:

58. I agree with both judgments.