Trinity Term
[2019] UKPC 29
Privy Council Appeals No 0001 of 2016 and 0091 of 2016

JUDGMENT

Volaw Trust and Corporate Services Ltd and its Directors and others (Appellants) *v* The Office of the Comptroller of Taxes and another (Respondents) (Jersey)
Volaw Trust and Corporate Services Ltd and its Directors and others (Appellants) *v* Her Majesty's Attorney General for Jersey (Respondent) (Jersey)

From the Royal Court of Jersey and the Court of Appeal of Jersey

before

Lord Reed
Lord Kerr
Lord Sumption
Lord Carnwath
Lord Hodge
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

17 June 2019

Heard on 7 and 8 November 2018

Appellants	*Respondent*
Paul Bowen QC Ashley Hoy	Robert MacRae QC, Her Majesty's Attorney General for Jersey Howard Sharp QC
Hugo Leith (Instructed by Simons Muirhead & Burton LLP)	(Instructed by Baker McKenzie LLP)

LORD REED:

1. These appeals from the Royal Court of Jersey and the Jersey Court of Appeal raise a number of questions about the scope and effect of the privilege against self-incrimination as it applies, first, under article 6 of the European Convention on Human Rights, and secondly, under the customary law of Jersey.

The parties to the appeals

2. There are two appeals before the Board. In the first, which can be referred to as the TIEA Notices appeal ("TIEA" standing for "tax information exchange agreement"), the first appellant is Volaw Trust and Corporate Services Ltd ("Volaw"), a company incorporated in Jersey and authorised to carry on trust company business by virtue of registration under the Financial Services (Jersey) Law 1998 ("the 1998 Law"). The second to seventh appellants are North East Oil Ltd (registered in the British Virgin Islands ("BVI")), Larsen Oil and Gas Drilling Ltd (registered in Jersey), Network Drilling Ltd (registered in the BVI), Independent Oilfield Rentals IOR Ltd (registered in Jersey), Petrolia Drilling Ltd (registered in the BVI), and OPS Personnel Services Ltd (registered in the BVI). They are companies to which Volaw provides services constituting trust company business. According to an affidavit sworn by Mr Mark Healey, a director of Volaw, that company administers the second to sixth appellants, provides secretarial services to the seventh appellant, and provided directors to all of the second to seventh appellants at all material times. The second to seventh appellants are associated with Mr Berge Gerdt Larsen, a Norwegian national who is resident in Norway and is also a client of Volaw. The directors and other officers of Volaw and the second to seventh appellants (so described: they are not identified by name) are additional appellants. The respondents are the Office of the Comptroller of Taxes, and the States of Jersey.

3. In the second appeal, which can be referred to as the 1991 Law Notice appeal, the appellants are Volaw and the second to sixth of the appellants in the TIEA Notices appeal. The directors and other officers of Volaw (but not those of the other companies) are additional appellants. The respondent is Her Majesty's Attorney General for Jersey.

The background to the proceedings

4. In 2012 the Norwegian tax authorities requested the Comptroller of Taxes to obtain information concerning a number of Jersey-registered companies and trusts administered by Volaw, which they suspected were being used by Mr Larsen to evade

tax that was payable in Norway. The requests were made under the Agreement between Jersey and the Kingdom of Norway for the Exchange of Information relating to Tax Matters, concluded on 28 October 2008 ("the Jersey/Norway TIEA"). In response, the Comptroller issued notices under the Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008 as amended ("the 2008 Regulations"), as they then stood. The notices were the subject of unsuccessful challenges before the Royal Court of Jersey and the Court of Appeal: *Volaw Trust and Corporate Services Ltd v Comptroller of Taxes* [2013] JCR 95; 2013 (2) JLR 40, and [2013] JCA 239; 2013 (2) JLR 499, respectively. Those courts proceeded on the basis that the information sought would be used solely to afford assistance in connection with Mr Larsen's tax affairs. A further petition for leave to appeal was refused by the Board. The material sought was then made available to the Norwegian tax authorities.

5. In 2013 Mr Larsen was convicted by a Norwegian court of tax offences relating to trusts and companies administered by Volaw, including the second, third, fifth and sixth appellants in the TIEA Notices appeal. The offences were classified as grave, and Mr Larsen received a sentence of five years' imprisonment.

6. Following Mr Larsen's conviction, the Comptroller of Taxes received nine further requests for information from the Norwegian authorities under the Jersey/Norway TIEA. The requests explained that the information was sought for the purpose of (1) the determination, assessment and collection of tax, and (2) the investigation or prosecution of criminal tax matters. They also referred to the fact that the information received in response to the earlier requests could only be used in connection with Mr Larsen's tax affairs, and explained that the Norwegian authorities now wished "to be able to use any information that may now be obtained in relation to each of the persons under investigation in sections 8(1) and 8(2)". The latter sections named the persons under investigation. The requests also sought confirmation "that all the documentation [recovered] may be used in relation to both Berge Gerdt Larsen and the companies identified in section 8 above".

7. The persons named in section 8 of the requests as being under investigation were the second to seventh appellants in the TIEA Notices appeal, together with the Blading Trust, Certified Oilfield Rentals Ltd (registered in the Bahamas), Certified Oilfield Rentals LLC (registered in Abu Dhabi), Dove Energy Inc (registered in the BVI), Dove Energy Ltd (registered in England), Dove Energy Group Ltd (registered in Dubai), Global Trading and Services Inc (registered in St Kitts and Nevis), Goodland Ventures Ltd (registered in the BVI), Increased Oil Recovery Ltd (registered in the BVI), IOT Singapore Pte Ltd (registered in Singapore), the Jova Trust, Maple Leaf Holdings Inc (registered in Liberia), Mujova Investments Ltd, Rexo Trading and Services Inc (registered in Panama), Mr Pal Svenheim, an individual with an address in Norway, and Mr Larsen. According to Mr Healey's affidavit, Volaw formerly administered several of these trusts and companies but does so no longer, either because they have been terminated or dissolved, or because they are now administered by third parties. Volaw

was not itself identified as one of the persons under investigation; nor were any of the directors and officers of any of the appellant companies. However, each of the requests also indicated that the failure of a company resident in Norway to report taxable income to the Norwegian tax authorities may amount to a criminal offence by the directors or those otherwise controlling the company, or by other persons involved in the company, as well as by the company itself. Section 16 of the request stated that "in making the request, the requesting competent authority states that … (c) the information would be obtainable under its laws and the normal course of its administrative practice in similar circumstances".

8. In compliance with the Jersey/Norway TIEA, on 24 October 2014 the Comptroller of Taxes issued nine notices ("the TIEA Notices") under the 2008 Regulations as further amended. Each of the notices was addressed to Volaw. Copies of the notices were also sent to the secretaries of the second to seventh appellants, and to the secretaries and trustees of the companies and trusts mentioned in para 7 above. The first notice explained that a request for information had been received from the Norwegian competent authority in accordance with the Jersey/Norway TIEA, and that the Comptroller had decided to respond to the request. It continued, in paragraph 3:

> "I require you to provide, within 30 days, the following tax information that I require for that purpose, from 1 January 1998 to the present:
>
> > a. All documents and records that Volaw Trust & Corporate Services Ltd ('Volaw') holds which relate to Berge Gerdt Larsen (including, but not limited to, financial statements, accounts, files and correspondence).
> >
> > b. All documents and records that Volaw holds which relate to North East Oil Ltd (including, but not limited to, financial statements, postings reports, general ledger, bank accounts, payment instructions, statutory records, minute books; file notes, correspondence and trust documents) concerning the company's incorporation, administration, activities and operations, management, principals and directors, shareholders and shareholdings and beneficial ownership (including any subsidiaries).
> >
> > c. All documents and records that Volaw holds relating to any trust, which has part or all of its assets held through any legal entity identified in the request, as an underlying company (including, but not limited to, the trust deed, trust

> accounts, letter(s) of wishes, details of beneficiaries and details of distributions made to beneficiaries).
>
> d. A copy of all documents and records that Volaw supplied in response to the notice issued by me on 28 May 2012 in respect of Berge Gerdt Larsen, to the extent that such documents and records are not included in sections a to c above."

The notice informed Volaw of its right to apply for judicial review, and warned that failure without reasonable excuse to comply with the notice was a criminal offence.

9. The other eight notices were in similar terms, except that paragraph 3(a) referred in some cases to Mr Svendheim as well as Mr Larsen, and paragraph 3(b) referred not to North East Oil Ltd but to one or more of the other companies or trusts mentioned in the letters of request.

10. For the purposes of the TIEA Notices appeal, the parties have agreed:

> "that the appellants were the subject of a criminal investigation in Norway and were 'charged' with a criminal offence for the purposes of article 6 [of the European Convention on Human Rights]; that the request for assistance under the Jersey/Norway TIEA was made for the purpose of obtaining evidence relevant to that criminal investigation; and that the TIEA Notices were issued to assist the Norwegian authorities for the purposes of that criminal investigation and that the documents sought were to be provided to the NTA [Norwegian tax authorities] for that purpose."

11. Mr Larsen appealed against his conviction. In the course of preparation for that appeal, and at Mr Larsen's request, in August 2015 the Office of the Public Prosecutor in Norway issued a letter of request to the Attorney General of Jersey, seeking assistance in obtaining further documents from Volaw relating to the second to sixth appellants in the TIEA Notices appeal.

12. In response to the request, on 19 August 2015 a Crown Advocate, acting with the authority of the Attorney General, issued a notice ("the 1991 Law Notice") under the Investigation of Fraud (Jersey) Law 1991 ("the 1991 Law"). The notice was addressed to Volaw. It named the person under investigation as Mr Larsen, and stated, so far as material:

"1. It appears to the Attorney General that there exists a suspected offence involving serious or complex fraud and that there is good reason for him to exercise the powers conferred upon him by the Investigation of Fraud (Jersey) Law, 1991.

…

3. I have reason to believe that you have relevant information about the affairs of the person under investigation and I therefore require you to answer questions and otherwise furnish information with respect to matters relevant to the investigation to myself and/or to any persons designated to assist in this investigation …

4. I also require you to produce within 21 days true copies of the following documents which appear to the Attorney General to relate to matters relevant to the investigation:-

(a) For each of the following companies:

Independent Oilfield Rentals Ltd;
Larsen Oil and Gas Drilling Ltd;
Network Drilling Ltd;
North East Oil Ltd (formerly Norden Oil Ltd);
Goodland Ventures Ltd;
OPS Personnel Services Ltd;
Dove Energy Inc;

(i) Documents relating to changes in the registered shareholders of the companies for the period from 1 January, 2009 to 1 June, 2015; and

(ii) Documents relating to the disbursement of funds to include, without prejudice to the generality of the foregoing, dividends, loans and other payments and disbursements paid to the registered shareholders for the period from 1 January, 2009 to 1 June, 2015.

> Documents required by sub-paragraph (i) should include (without prejudice to the generality of the foregoing) minutes of directors' and shareholders' meetings, file and telephone notes, statutory records, correspondence and contracts.
>
> Documents required by sub-paragraph (ii) above should include (without prejudice to the generality of the foregoing) minutes of directors' and shareholders' meetings, accounts, financial statements, payment instructions, file and telephone notes, statutory records, correspondence, disbursement vouchers, and payment authorisations.
>
> 5. You are further required to furnish information as to the existence of any accounts or assets held in relation to [Mr Larsen] which may not be specifically referred to in paragraph 4 above, identifying whether (and, if so, what) records are held concerning such person."

The notice warned that failure without reasonable excuse to comply with those requirements was a criminal offence.

13. Following representations by Volaw, the Attorney General enquired whether the Norwegian authorities could guarantee that documents disclosed in compliance with the 1991 Law Notice would not be used in criminal proceedings against Volaw or its employees, owners or board members. The Office of the Public Prosecutor responded on 26 October 2015 that such a guarantee could not be given:

> "Without knowing the contents of these documents, the prosecuting authority cannot, under such circumstances, endorse a statement specifying that the information collected and confiscated cannot be used to prosecute those responsible for unlawful acts."

14. The parties to the 1991 Notice appeal agree:

> "that at the time the 1991 Law Notice was issued the appellants were the subject of a criminal investigation in Norway and were 'charged' with a criminal offence for the purposes of article 6; that although the request for mutual assistance by the Norwegian Prosecutor was made for the purposes of obtaining evidence relevant to Mr Larsen's appeal, it was open to the Norwegian authorities to use that evidence for the purposes of a criminal

> investigation and prosecution of any of the appellants in Norway; and that the information and records sought under the 1991 Law Notice would be potentially relevant to those investigations and are potentially self-incriminating."

The history of the proceedings

15. On 7 November 2014 the appellants in the TIEA Notices appeal applied for leave to apply for judicial review of (1) the decision to issue the TIEA Notices and (2) the lawfulness of the 2008 Regulations, together with interim relief. In their application, the appellants challenged the vires of a number of amendments made to the 2008 Regulations by the Taxation (Exchange of Information with Third Countries) Amendment No 7 (Jersey) Regulations 2013 ("the 2013 Regulations"), and also challenged the lawfulness of the notices on the basis that they infringed the appellants' right not to incriminate themselves under Jersey customary law and under article 6 of the ECHR, given effect in Jersey by the Human Rights (Jersey) Law 2000. On 25 November 2014 Mr Michael Beloff QC, sitting as Commissioner in the Royal Court of Jersey, granted leave but refused interim relief.

16. On 27 November 2015 the Commissioner dismissed the application for judicial review: *Larsen v Comptroller of Taxes* [2015] JRC 244; [2015] (2) JLR 209. Put shortly, he held that (1) the right not to incriminate oneself did not apply in relation to pre-existing documents or materials, either as a matter of Jersey customary law or under article 6 of the ECHR; (2) it did not in any event apply where the risk of prosecution would arise in another jurisdiction; (3) the Taxation (Implementation) (Jersey) Law 2004 ("the 2004 Law") and/or the 2008 Regulations abrogated the privilege against self-incrimination under Jersey customary law; (4) since the right not to incriminate oneself would not have prevented the Norwegian authorities from obtaining the documents under Norwegian law, there was no need for the Comptroller to consider whether to refuse the requests under article 6(4) of the Jersey/Norway TIEA; (5) the Comptroller was not obliged to give the appellants an opportunity to make representations before issuing the TIEA Notices; and (6) the directors and other officers of Volaw and the other appellant companies were not entitled in principle to claim the right not to incriminate themselves. The TIEA Notices were stayed pending the determination of any appeal against the Commissioner's decision.

17. Under regulation 14A of the 2008 Regulations, an appeal lay to the Privy Council, rather than to the Court of Appeal, against the decision of the Royal Court. The appellants accordingly applied to the Board for leave to appeal. In their application, they gave notice that they would be inviting the Board to depart from its decision in *Brannigan v Davison* [1997] AC 238 and from the decision of the House of Lords in *R v Hertfordshire County Council, Ex p Green Environmental Industries Ltd* [2000] 2 AC 412.

18. On 17 September 2015 the appellants in the 1991 Law Notice appeal applied for leave to apply for judicial review of the 1991 Law Notice, on the ground that it infringed their privilege against self-incrimination. On 27 November 2015 Mr Beloff QC, again sitting as Commissioner, dismissed the application, it being conceded that the application was bound to fail before him in the light of his judgment in the proceedings concerning the TIEA Notices. The notice was stayed until any appeal had been finally determined.

19. An appeal against the Commissioner's decision was brought before the Court of Appeal of Jersey. On 15 August 2016 the court (Martin, McNeill and Pleming JJA), having treated the appeal as a renewed application for leave to apply for judicial review, granted leave to apply but dismissed the substantive application: *Volaw Trust & Corporate Services Ltd v HM Attorney General for Jersey* [2016] JCA 138. Agreeing with the Commissioner's reasoning in the TIEA Notices appeal, the court held that the privilege against self-incrimination did not apply to pre-existing documents. On 30 September 2016 the court stayed the notice until an application for leave to appeal was determined by the Board: *Larsen v Office of the Comptroller of Income Taxes* [2016] JCA 176A.

20. The appellants then applied to the Board for leave to appeal, again giving notice that they would be inviting the Board to depart from its decision in *Brannigan v Davison* and from the decision of the House of Lords in *Ex p Green Environmental Industries Ltd*. On 8 February 2018 the Board granted permission to appeal in both appeals.

Events since the hearing in the Court of Appeal

21. On 30 August 2016 the Norwegian Court of Appeal allowed Mr Larsen's appeal against his conviction. The Attorney General was notified that the Norwegian authorities no longer needed the documents sought in the 1991 Law Notice. On 26 January 2017 the Attorney General notified those acting on behalf of the appellants that he "has determined to open his own investigation into the case and therefore maintains the [1991 Law] Notice in order to progress his inquiry". The appellants have notified the Attorney General that they reserve their position in relation to bringing proceedings to challenge the lawfulness of his decision. Counsel for the Attorney General informed the Board that the person under investigation, for the purposes of the 1991 Law, is Volaw.

22. In these circumstances, the Attorney General accepts for the purposes of the 1991 Law Notice appeal that the appellants remain charged with a criminal offence within the meaning of article 6, but now under Jersey law rather than Norwegian law, and are required by the notice to provide potentially incriminating documents to the Jersey authorities. The appellants' submissions concern both the lawfulness of the 1991 Law

Notice at the time it was issued, when any risk of prosecution was under Norwegian law, and its lawfulness at the current time, when any such risk exists under Jersey law.

23. On 5 September 2018 the Comptroller notified the appellants that the Norwegian tax authorities had withdrawn their requests under the Jersey/Norway TIEA and that, in consequence, the Comptroller was withdrawing the TIEA Notices. The parties nevertheless have invited the Board to hear and determine the TIEA Notices appeal, having regard to the principles set out in *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450, on the basis that the issues raised are of general public importance.

International law: The Jersey/Norway TIEA

24. In recent times, international law has sought to respond to the increased possibilities of tax avoidance and evasion consequent on the development of the international movement of persons, capital, goods and services. That response has focused inter alia on improving mutual assistance between jurisdictions in relation to tax matters. Relevant developments have included the conclusion of the 1988 Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters, and the OECD Agreement on Exchange of Information on Tax Matters.

25. These developments have been a matter of particular importance for global financial centres such as Jersey. As Sumption JA explained in *Durant International Corpn v Attorney General* [2006] JLR 112, para 1:

> "Over the last half-century, Jersey has become a major financial centre, providing trust and banking facilities for an extensive international clientele … It has for some time been the policy of the legislature and of the executive agencies exercising statutory powers that the commercial facilities available in Jersey should not be used to launder money or mask criminal activities here or anywhere else."

The Jersey/Norway TIEA is one of a number of bilateral tax information exchange agreements that Jersey has entered into pursuant to that policy. It is modelled on the OECD Agreement on Exchange of Information on Tax Matters. The recitals narrate that Jersey entered into a political commitment in 2002 to the OECD's principles of effective exchange of information, and that the parties wish to enhance and facilitate the terms and conditions governing the exchange of information relating to taxes.

26. Article 1 defines the scope of the agreement, and provides:

> "The Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Parties concerning the taxes covered by this Agreement, including information that is foreseeably relevant to the determination, assessment, recovery and enforcement or collection of tax with respect to persons subject to such taxes, or to the investigation of tax matters or the criminal prosecution of tax matters in relation to such persons. A requested party is not obliged to provide information which is neither held by its authorities nor in the possession of nor obtainable by persons who are within its territorial jurisdiction. The rights and safeguards secured to persons by the laws or administrative practice of the requested party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information."

27. Article 4 deals with the exchange of information upon request. It provides, so far as material:

> "1. … The competent authority of the requesting party shall only make a request for information pursuant to this article when it is unable to obtain the requested information by other means, except where recourse to such means would give rise to disproportionate difficulty.
>
> 2. If 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, the requested party shall use at its own discretion all relevant information gathering measures necessary to provide the requesting party with the information requested …"

"Information" is defined by article 3(h) as meaning any fact, statement, document or record in whatever form.

28. Article 6(4) provides:

> "The requested party shall not be required to obtain and provide information which if the requested information was within the jurisdiction of the requesting party the competent authority of the requesting party would not be able to obtain under its laws or in the normal course of administrative practice."

The Investigation of Fraud (Jersey) Law 1991

29. Article 2 of the 1991 Law confers powers on the Attorney General which are exercisable in any case in which it appears to him that there is a suspected offence involving serious or complex fraud, wherever committed, and good reason to exercise the powers for the purpose of investigating the affairs of any person. Under article 2(2), the Attorney General may by notice require the person under investigation, or any other person whom he has reason to believe has relevant information, to answer questions or furnish information relevant to the investigation. Under article 2(4), a search warrant can be obtained in the event of a failure to comply with a notice under article 2(2) requiring the production of documents. Article 2(7) preserves the privilege against self-incrimination in respect of answers given during a compulsory interview, but not in respect of the production of documents. Article 2(13) makes it a criminal offence, punishable by a term of imprisonment not exceeding six months or a fine, or both, to fail to comply with a notice without reasonable excuse. It is a matter of agreement between the parties that article 2 has abrogated any privilege against self-incrimination, in respect of the production of documents, which might exist under Jersey customary law.

The Financial Services (Jersey) Law 1998

30. The 1998 Law prohibits the carrying on of financial service business in or from within Jersey, or the carrying on of such business in any part of the world by a company incorporated in Jersey, unless the person carrying on the business is registered under the 1998 Law and is acting in accordance with the terms of his or her registration: section 7(1). Financial service business is defined by section 2(1) as including trust company business. Section 2(3) contains a definition of trust company business. It includes the provision of company administration services, and acting as or arranging for another person to act as the director of a company.

The Taxation (Implementation) (Jersey) Law 2004

31. Jersey has given domestic effect to its international obligations under bilateral tax information exchange agreements, such as the Jersey/Norway TIEA, through the 2004 Law. Article 2 provides:

> "(1) The States may by Regulations make such provision as appears to them to be necessary or expedient for the purposes of -
>
> (a) implementing an approved agreement or approved obligation; and

(b) dealing with matters arising out of or related to such an agreement or obligation.

(2) Regulations made under paragraph (1) may -

(a) amend any other enactment; and

(b) make any other provision, of any extent, as might be made by a Law passed by the States.

(3) Without prejudice to the generality of paragraphs (1) and (2), Regulations made under paragraph (1) may contain such incidental, supplemental, transitional and saving provisions as the States consider expedient."

The expression "approved agreement" is defined by article 1 to mean "an agreement regarding or relating to taxation which the states have authorized to be signed on their behalf with the government of another country or territory". The Jersey/Norway TIEA is an approved agreement as so defined. Article 4(1) provides:

"No specific or general restriction on the disclosure of information imposed by any enactment or contract or otherwise shall prevent the disclosure of information to the competent authority of another country or territory pursuant to an approved agreement or approved obligation, or Regulations made under article 2."

The Taxation (Exchange of Information with Third Countries) (Jersey) Regulations 2008

32. Pursuant to article 2 of the 2004 Law, the States of Jersey made the 2008 Regulations, which were amended by, amongst others, the 2013 Regulations.

33. Regulation 3 provides, so far as material:

"(1) Where the competent authority for Jersey decides to respond to a request concerning a taxpayer, the competent authority for Jersey shall require a third party, being a person other than the taxpayer, to provide to the competent authority for Jersey

all such tax information that the competent authority for Jersey requires for that purpose.

(2) A requirement under paragraph (1) shall be made by notice in writing."

Regulation 10A provides, so far as material:

"(1) Nothing in these Regulations requires a person to provide to the competent authority for Jersey information that is subject to legal professional privilege.

(2) The answers given or a statement or deposition made by an individual in compliance with a notice given under regulation 2 or 3 may not be used in evidence against the individual in any criminal proceedings, except proceedings under regulation 15(2)."

There is no similar provision to regulation 10A(1) in relation to the privilege against self-incrimination, nor any provision similar to regulation 10A(2) in relation to documents produced in compliance with a notice given under regulation 3. Under regulation 12(1)(b), a search warrant can be issued in the event of failure to comply with a notice given under regulation 3.

34. Regulation 15 provides, so far as material:

"(2) An individual who, being required by notice under regulation 2 or 3 to provide information by answering questions or by making a statement or deposition -

(a) knowingly or recklessly gives an answer or makes a statement or deposition which is false, misleading or deceptive in a material particular; or

(b) knowingly or recklessly withholds any information the omission of which makes the information provided misleading or deceptive in a material particular,

is guilty of an offence.

(3) A person who knowingly and without reasonable excuse -

(a) fails to comply with a requirement imposed under regulation 2(1) or 3(1) …

is guilty of an offence …

(5) A person guilty of an offence against this article is liable to imprisonment for a term of 12 months and a fine."

35. Under regulation 16(1), a person who aids, abets, counsels or procures the commission of an offence under the Regulations is also guilty of the offence and liable to the penalty provided for that offence. Under regulation 16(2), if an offence under the Regulations by a body corporate is proved to have been committed with the consent or connivance of a director or other officer of the body corporate, or to be attributable to any neglect on their part, then that person is also guilty of the offence and is liable to the penalty provided for that offence. Similar provision is made by regulation 16(3) in respect of the members of a body corporate, in cases where the affairs of a body corporate are managed by its members.

The issues in the appeals

36. The issues arising in the appeals can be summarised as follows:

(1) Are the TIEA Notices and the 1991 Law Notice compatible with article 6 of the ECHR in so far as they require the production of pre-existing documents?

(2) Has the privilege against self-incrimination under Jersey customary law in respect of pre-existing documents been abrogated by the 2008 Regulations as amended by the 2013 Regulations? If not, are the TIEA Notices compatible with customary law in so far as they require the production of such documents?

(3) Should an opportunity to make representations before a notice is issued be read into the 2008 Regulations and the 1991 Law in order to ensure compatibility with the privilege against self-incrimination under article 6 of the ECHR or (in the case of the 2008 Regulations) under Jersey customary law? If so, are the notices invalid by reason of the Jersey authorities' failure to afford the appellants such an opportunity?

(4) Should the 2008 Regulations and the 1991 Law be construed as imposing a "use immunity" in relation to pre-existing documents provided in response to notices issued under those instruments, similar to that conferred by regulation 10A(2) of the 2008 Regulations in relation to information, in order to ensure compatibility with the privilege against self-incrimination under article 6 of the ECHR or (in the case of the 2008 Regulations) under Jersey customary law?

(5) Are the directors and officers of the appellant companies entitled to rely on the privilege against self-incrimination?

(6) In relation to the TIEA Notices Appeal, is the Comptroller obliged to consider whether the documents specified in the notices could be obtained under Norwegian law, and, if they could not be, to refuse a TIEA request under article 6(4) of the Jersey/Norway TIEA?

Issue (1): Compatibility with article 6 of the ECHR

37. As has been explained, the TIEA Notices required Volaw to produce pre-existing documents for the purposes of an investigation in Norway into suspected criminal offences under Norwegian law. The same was true of the 1991 Law Notice when it was served. The situation has changed since then, so far as the latter notice is concerned, in that the investigation is now being conducted in Jersey and concerns suspected offences under Jersey law. In these circumstances, the question arises whether the notices violate article 6. The appellants argue that they do, on the basis that the compulsory production of incriminating documents in the course of pre-trial investigations is in itself a violation of article 6, even in advance of, or in the absence of, any trial, whether in the jurisdiction in question or elsewhere. The respondents dispute this, arguing that the privilege has no application to pre-existing documents, and is in any event not violated in the absence of trial proceedings, or where such proceedings would take place in another jurisdiction.

38. The Commissioner observed that there were conflicting English authorities bearing on the application of the privilege under article 6 to pre-existing documents. In some cases the Court of Appeal had rejected (obiter, in some instances) the proposition that the compulsory production of pre-existing documents violated the privilege against self-incrimination either at common law or under the ECHR: see, for example, *Attorney General's Reference (No 7 of 2000)* [2001] EWCA Crim 888; [2001] 1 WLR 1879, paras 59-62, *R v Kearns* [2002] EWCA Crim 748; [2002] 1 WLR 2815, para 53, and *C plc v P (Attorney General intervening)* [2007] EWCA Civ 493; [2008] Ch 1, paras 28-34. In those cases, the court had focused on *Saunders v United Kingdom* (1996) 23 EHRR 313, where the European Court of Human Rights, stated at para 69:

> "The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent. As commonly understood in the legal systems of the Contracting Parties to the Convention and elsewhere, it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, inter alia, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."

Since documents obtained by the use of compulsory powers had "an existence independent of the will of the suspect", they were considered by the Court of Appeal in those cases to fall outside the scope of the privilege protected by article 6. Judgments of the European court which could not readily be reconciled with that approach, such as *Funke v France* (1993) 16 EHRR 297 and *JB v Switzerland* (Application No 31827/96) given 3 May 2001, were put to one side as being inconsistent with *Saunders.* As the Commissioner noted, however, there were other decisions of the Divisional Court and the Court of Appeal which supported a less categorical approach, such as *R (Malik) v Manchester Crown Court* [2008] EWHC 1362 (Admin); [2008] EMLR 19 and *R v S (F)* [2008] EWCA Crim 2177; [2009] 1 WLR 1489, as also did the dissenting judgment of Lawrence Collins LJ in *C plc v P*. Ultimately, the Commissioner preferred the preponderant view in the English cases, which (in his words) "distinguishes and (ultimately) discards *Funke* in favour of *Saunders*".

39. Article 6(1) of the ECHR provides, so far as material, that in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Under article 6(3)(c), everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing. The right not to incriminate oneself is treated by the European Court of Human Rights as implicit in the latter guarantee. It is conceded by the respondents that it applies to companies as well as to natural persons. Since the right to a fair trial is unqualified, determining whether there has been a violation of article 6 does not involve an assessment of the proportionality of an interference with the right, of the kind required by other articles of the Convention which guarantee qualified rights, such as article 8. Instead, it involves an assessment of the fairness of the proceedings as a whole, taking into account the rights listed in article 6(3). The approach which should be adopted in cases concerning the right not to incriminate oneself, in particular, has been considered by the European Court of Human Rights in a large number of cases, and has developed over time.

40. The best starting point is the most recent judgment of the Grand Chamber considering this topic, in *Ibrahim v United Kingdom* (Applications Nos 50541/08, 50571/08, 50573/08 and 40531/09) given 13 September 2016. Under the heading,

"General approach to article 6 in its criminal aspect", the court explained, at para 250, that although the right to a fair trial is unqualified, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case. The court referred in that connection to its judgment in *O'Halloran and Francis v United Kingdom* (2007) 46 EHRR 21, to which it will be necessary to return. Compliance with the requirements of a fair trial had to be examined having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect. In evaluating the overall fairness of the proceedings, the court would take into account the minimum rights listed in article 6(3), which were not aims in themselves, but exemplified the requirements of a fair trial in respect of typical procedural situations which arose in criminal cases. The court added, at para 252, that when determining whether the proceedings as a whole have been fair, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration, referring in that regard to *Jalloh v Germany* (2006) 44 EHRR 32, another case to which it will be necessary to return. However, public interest concerns could not justify measures which extinguished the very essence of an applicant's defence rights.

41. In relation to pre-trial proceedings, the court explained, at para 253, that the primary purpose of article 6 as far as criminal matters are concerned is to guarantee a fair trial. However, the guarantees of article 6 could be relevant during pre-trial proceedings "if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them". Complaints under article 6 about the investigation stage tended to crystallise at the trial itself when an application was made by the prosecution to admit evidence obtained during the pre-trial proceedings and the defence opposed the application. It was not the role of the European court to determine the admissibility of evidence: the question remained whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. There was one exception to that approach. The admission of confessions obtained as a result of torture or other ill-treatment in breach of article 3 rendered the proceedings unfair. The court referred in that connection to *Gäfgen v Germany* (Application No 22978/05) given 1 June 2010.

42. In relation to the privilege against self-incrimination, the court explained, at para 266, that "the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused", referring in that connection to *Saunders v United Kingdom* and *Jalloh v Germany*. The rationale of the right lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of article 6.

43. The court went on to explain, at para 267, that the privilege against self-incrimination does not protect against the making of an incriminating statement per se, but against "the obtaining of evidence by coercion or oppression". Since it is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected, the court must first consider the nature and degree of compulsion used to obtain the evidence. In that regard, the court stated (ibid):

> "The court, through its case law, has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence (see, for example, *Saunders*; and *Brusco v France* [(Application No 1466/07) given 14 October 2010]) or is sanctioned for refusing to testify (see, for example, *Heaney and McGuinness v Ireland* [(2000) 33 EHRR 12]; and *Weh v Austria* [(2004) 40 EHRR 37]). The second is where physical or psychological pressure, often in the form of treatment which breaches article 3 of the Convention, is applied to obtain real evidence or statements (see, for example, *Jalloh*, *Magee* [*v United Kingdom* (2001) 31 EHRR 35] and *Gäfgen* …). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (see *Allan v United Kingdom* [(2002) 36 EHRR 12])."

In another important passage, the court added, at para 269:

> "However, the right not to incriminate oneself is not absolute (see *Heaney and McGuinness*, para 47; *Weh*, para 46; and *O'Halloran and Francis*, para 53). The degree of compulsion applied will be incompatible with article 6 where it destroys the very essence of the privilege against self-incrimination (see *Murray* [*v United Kingdom* (1996) 22 EHRR 29], para 49). But not all direct compulsion will destroy the very essence of the privilege against self-incrimination and thus lead to a violation of article 6 (see *O'Halloran and Francis*, para 53). What is crucial in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial (see *Saunders*, para 71)."

44. It is apparent from the second situation described by the court in para 267 ("where physical or psychological pressure, often in the form of treatment which breaches article 3 of the Convention, is applied to obtain real evidence or statements") that the privilege can in principle apply not only to statements but also to real evidence, notwithstanding the statement in *Saunders* that "as commonly understood … it does not

extend to the use in criminal proceedings of material … which has an existence independent of the will of the suspect". In *Ibrahim,* the court cited a number of illustrations from its case law, which will be discussed shortly. The respondents' submission that the privilege protected by article 6 is not engaged by compulsion to produce pre-existing documents is therefore too categorically stated. In so far as the Court of Appeal favoured a similar view of the scope of the privilege in *Attorney General's Reference (No 7 of 2000), R v Kearns* and *C plc v P*, the more recent case law of the European court indicates that a more nuanced approach should be adopted.

45. There are nevertheless material differences between real evidence and statements which may be relevant to the application of article 6 in this context. In relation to the first purpose of the privilege, namely the avoidance of miscarriages of justice, real evidence is fundamentally different from statements. Unlike a statement obtained by imposing pressure on the suspect, real evidence, including pre-existing documents, has an existence independently of any compulsion placed on the suspect. Its reliability as evidence is therefore not affected by the use of compulsion in order to obtain it. It is unsurprising, therefore, that in cases concerned with real evidence the focus of the European court has been on the second purpose of the privilege, namely the protection of the suspect against improper compulsion by the authorities. The word to note is "improper": the court has accepted in its case law that the use at trial of incriminating real evidence obtained from suspects under compulsion may be compatible with article 6. Some examples were mentioned by the court in *Saunders*, at para 69: "documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing". These are examples of real evidence recovered by means of compulsion (usually in the form of a threatened sanction for non-compliance) imposed under judicial or legislative authority, but without oppressive conduct on the part of the authorities or an objectionable degree of coercion.

46. It is therefore understandable that in *Ibrahim*, at para 267, the Grand Chamber described the privilege generally as protecting against "the obtaining of evidence by coercion or oppression". The only situation applying to real evidence which the court mentioned in the same paragraph concerned "physical or psychological pressure, often in the form of treatment which breaches article 3". An example cited by the court is the case of *Jalloh v Germany*. So far as relating to article 6, it concerned the use in evidence at a trial of real evidence obtained from the defendant by treatment which contravened article 3 of the Convention. The other cases cited by the court in the relevant part of its *Ibrahim* judgment concerned statements obtained by means of coercion or oppression. *Magee v United Kingdom* (2000) 31 EHRR 35 concerned incriminating statements extracted from a suspect by subjecting him to conditions which were intended to be psychologically coercive, and by denying him access to a lawyer. The statements had been admitted at his trial, and had formed the sole basis of his conviction. The court observed, at para 41:

> "Article 6 - especially para 3 - may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions. The manner in which article 6(1) and (3)(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case."

The case of *Gäfgen v Germany,* so far as relating to article 6, concerned the use in evidence of incriminating statements extracted from a suspect by treatment which contravened article 3.

47. The 1993 case of *Funke v France,* on which reliance was placed by counsel for the appellants, is an early judgment in this area of Convention law. The applicant's house was searched by customs officers investigating possible offences under the customs code, and a number of foreign bank statements were found. The applicant was then required by the authorities to produce further bank statements, which he was in a position to obtain as the customer of the foreign banks, rather than the authorities themselves attempting to obtain them through international mutual assistance. When he declined to do so, a criminal prosecution was brought against him for his failure to co-operate. The court imposed a fine and ordered him to produce the documents, subject to a daily penalty for any delay. Other proceedings for the recovery of penalties continued, even after the applicant's death, for a further eight years. No civil proceedings for the recovery of unpaid taxes, or criminal proceedings for any offence (other than the failure to produce the documents), were ever brought. In these circumstances, the European court found that there had been a violation of the right not to incriminate oneself, contrary to article 6. It concluded, at para 44, that the fact that the authorities were "unable or unwilling to procure [the documents] by some other means" did not justify their attempting to compel Mr Funke himself to provide the evidence of offences he had allegedly committed.

48. One difficulty which British courts experienced in understanding this case was explained by Lord Hoffmann in *Ex p Green Environmental Industries Ltd*, at p 424:

> "What were the criminal proceedings in which Mr Funke was deprived of the right to a fair trial? They could not have been the prosecution for the offences suspected by the customs officers, since that was never brought. The only proceedings against him were for failure to produce his bank statements. In those proceedings, however, he was not obliged to incriminate himself. There was no need, because his guilt under French law was established by his failure to produce the bank statements."

The answer, as has become clear from the subsequent case law of the court, is that article 6 in its criminal aspect can be violated even in the absence of the determination of a criminal charge. In particular, the right not to incriminate oneself can be violated, contrary to article 6, by the prosecution and punishment of a person for his refusal to incriminate himself in pre-trial investigations. That that is the position under the Convention appears from a number of judgments of the court concerned with refusals to testify. Some examples were mentioned by the court in *Ibrahim*, para 269, in the second of the passages cited at para 43 above.

49. The second difficulty in understanding *Funke* has arisen from the statement made by the Grand Chamber in *Saunders*, at para 69, that "the right not to incriminate oneself … does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect". Since *Funke* concerned material which had an existence independent of the will of the suspect, giving those words their ordinary meaning, it was seemingly inconsistent with the judgment in *Saunders*, and was considered by some British courts to have been impliedly overruled by it. Later judgments of the European court have however made it clear, as explained in para 44 above, that notwithstanding what was said in *Saunders*, there may be a violation of article 6 where real evidence is obtained by means of what was described in *Ibrahim* as "physical or psychological pressure, often in the form of treatment which breaches article 3". In addition, as will be explained shortly, although the formulation in *Saunders*, at para 69, has continued to be repeated in its judgments, the court has also continued to find violations of article 6 in cases resembling *Funke*, where persons were prosecuted and punished for refusing to produce real evidence which would incriminate them.

50. The 2000 case of *Heaney and McGuinness v Ireland* (2000) 33 EHRR 12, on which the appellants also relied, concerned the prosecution and punishment of the applicants for refusing to answer questions after they had been arrested on suspicion of membership of the IRA and involvement in a bombing. There was held to have been a violation of article 6. The court reviewed a number of judgments concerned with the application of article 6 outside the context of criminal proceedings, including judgments concerning article 6(2), and suggested at paras 44-45 that *Funke* could similarly be viewed as an exception to the general requirement that article 6 involved the determination of a criminal charge: an exception which was necessary in order to ensure the effectiveness of the privilege against self-incrimination.

51. The 2001 case of *JB v Switzerland*, on which the appellants also relied, concerned similar facts to those of *Funke v France*. The Swiss tax authorities had instituted tax evasion proceedings against the applicant. He was then subjected to repeated demands for information and documents over a period of several years. When he failed to comply, he was repeatedly fined for non-compliance. No trial took place on the charges of tax evasion. The court found this course of conduct to constitute a breach

of the privilege against self-incrimination. It held, at para 68, that unlike the obligatory blood or urine tests considered in *Saunders*, the documents in the case before it were not material which "has an existence independent of the person concerned and is not, therefore, obtained by means of coercion and in defiance of the will of that person". This reasoning is puzzling. As Judge Power-Forde commented in her dissenting opinion in *Chambaz v Switzerland* (Application No 11663/04) given 5 April 2012:

> "Does not a document exist as independently as a blood sample? The obligation to produce a document plays on the will of the subject, but that is equally true of the obligation to take a blood test … I cannot see any valid reason for considering one as 'independent of the person's will' and the other not." (Unofficial translation)

52. The judgments in *Funke v France* and *JB v Switzerland* might be contrasted with the 2002 decision in *Allen v United Kingdom* (2002) 35 EHRR CD 289. The applicant failed to comply with a notice served on him by the Inland Revenue which required him to provide information about his financial affairs. The penalty for non-compliance was a penalty of up to £300. He subsequently provided false information, and was prosecuted and convicted of making a false declaration of his assets to the Inland Revenue. His complaint of a violation of article 6 was dismissed as being manifestly ill-founded. The court stated at p 291:

> "The right not to incriminate oneself … does not per se prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs (see the abovementioned *Saunders* judgment, where the procedure whereby the applicant was required to answer the questions of the Department of Trade Inspectors was not an issue). In the present case, therefore, the court finds that the requirement on the applicant to make a declaration of his assets to the Inland Revenue does not disclose any issue under article 6(1), even though a penalty was attached to a failure to do so. The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of contracting states and it would be difficult to envisage them functioning effectively without it."

The court distinguished *Funke v France*, *Heaney and McGuinness v Ireland* and *JB v Switzerland* on the basis that the applicant was not "prosecuted for failing to provide information which might incriminate him in pending or anticipated criminal proceedings". It added at p 292:

> "Furthermore, not every measure taken with a view to encouraging individuals to give the authorities information which may be of potential use in later criminal proceedings must be regarded as improper compulsion (see the above-mentioned *Murray v United Kingdom* [22 EHRR 29], para 46). The applicant faced the risk of imposition of a penalty of a maximum of £300 if he persisted in refusing to make a declaration of assets, which may be contrasted with the position in the *Saunders* case, where a two year prison sentence was the maximum penalty (abovementioned judgment, para 70)."

53. The 2005 case of *Shannon v United Kingdom* (2005) 42 EHRR 31, on which the appellants also relied, resembled *Heaney and McGuinness*. It concerned the prosecution and punishment of a person for declining to answer questions after he had been charged with criminal offences.

54. The 2006 judgment of the Grand Chamber in *Jalloh v Germany* is of greater significance in the present context. The case concerned the forcible administration of an emetic to a suspected drug dealer, so as to cause him to regurgitate a small bag of cocaine. Four policemen held him down while a tube was fed through his nose into his stomach and chemicals were administered, causing him to vomit. An objection to the admissibility of the evidence was rejected at his trial. The European court held that there had been a violation of article 3 of the Convention, and that the use of the drugs in evidence also rendered the trial unfair, in breach of article 6. In that regard, the court drew attention to the gravity of the inhuman and degrading treatment used to recover the drugs, the decisive importance of that evidence at the trial, and the absence of any compelling public interest in securing the conviction of a street-level dealer who received a suspended sentence and probation. The court added that it would also have been prepared to find that allowing the use of the evidence at trial infringed the applicant's right not to incriminate himself. In that regard, it observed that the privilege against self-incrimination was commonly understood as being primarily concerned with the right to remain silent, but explained that it had on occasion been given a broader meaning so as to encompass cases in which coercion to hand over real evidence was in issue, as in the *Funke* case and *JB v Switzerland*. Although the drugs could be considered to fall into the category of material having an existence independent of the will of the suspect, the use of which was generally not prohibited in criminal proceedings, as stated in *Saunders*, at para 69, the circumstances of their recovery (the administration of emetics, the degree of force used, and the violation of article 3) distinguished the case from the examples listed in *Saunders*. The court summarised the position, at para 117:

> "In order to determine whether the applicant's right not to incriminate himself has been violated, the court will have regard, in turn, to the following factors: the nature and degree of

> compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence at issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."

55. The importance of these factors was evident in the 2007 judgment of the Grand Chamber in *O'Halloran and Francis v United Kingdom*. The case concerned the requirement under UK road traffic law that where the driver of a vehicle is alleged to be guilty of an offence, the keeper of the vehicle should provide the police with information as to the driver's identity. In arguing that the requirement infringed the right against self-incrimination, the applicants contended that the right not to incriminate oneself was an absolute right, and that to apply any form of compulsion to require an accused person to make incriminatory statements against his will of itself destroyed the very essence of that right. The court disagreed, noting that it had identified in *Jalloh* the factors to which it would have regard in determining whether the privilege against self-incrimination had been violated.

56. Considering the first of those factors, namely the nature and degree of compulsion used, the court observed, at para 57:

> "Those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom, these responsibilities include the obligation, in the event of suspected commission of road traffic offences, to inform the authorities of the identity of the driver on that occasion."

The court also noted the limited nature of the inquiry which the police were authorised to undertake. In relation to the third factor, namely the existence of safeguards in the procedure, the court noted that the offence created by the relevant provision was not one of strict liability, and that the risk of unreliable admissions was negligible. In relation to the fourth factor, namely the use to which the material was put, the court noted that, notwithstanding the admission by one of the applicants that he was the driver at the material time, it remained for the prosecution to prove the commission of the offence, the identity of the driver being only one element. Having regard to all the circumstances, including the special nature of the regulatory regime at issue and the limited nature of the information sought, the court found that there had been no violation of article 6.

57. Finally, in relation to the Strasbourg case law, the appellants relied on the Chamber judgment in *Chambaz v Switzerland*. Like *Funke v France* and *JB v*

Switzerland, the case concerned the imposition of repeated fines on a taxpayer who failed to comply with requirements to produce documents relating to his tax affairs. For its part, the Board finds much that is compelling in the dissenting opinion of Judge Power-Forde.

58. Considering the present case in the light of this body of law, the first notable feature is that there has been no determination of any "criminal charge" against Volaw or any of the other appellants, whether by way of criminal prosecution or otherwise. The present challenges under article 6 have been brought at the stage of the gathering of documentary material as part of an investigation into the possible commission of offences. As the Grand Chamber explained in *Ibrahim*, at para 253, the guarantees of article 6 are applicable from the moment that a criminal charge exists, "and may therefore be relevant during pre-trial proceedings *if and in so far as the fairness of the trial is likely to be seriously prejudiced* by an initial failure to comply with them" (emphasis supplied). In principle, therefore (and subject to exceptions), an examination of the compatibility of pre-trial conduct with article 6 will normally focus upon its effect on the fairness of the trial. In particular, as the European court has often stated, the right not to incriminate oneself is primarily concerned with the proof of guilt at trial: it "presupposes that the prosecution in a criminal case seek to *prove their case* without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused" (*Ibrahim*, para 266; emphasis supplied). The privilege does not therefore act as a general prohibition on the use of compulsory powers to obtain documents or other forms of information at the stage of an investigation, even where a person has been charged with an offence within the meaning of article 6: "the right not to incriminate oneself is not absolute" (*Ibrahim*, para 269). As the court stated in *Ibrahim*, at para 269, "what is crucial in this context [ie in relation to compulsion to produce evidence] is the use to which evidence obtained under compulsion is put in the course of the criminal trial".

59. Secondly, although the reasoning and effect of the judgments in *Funke v France, JB v Switzerland* and *Chambaz v Switzerland* remain unclear, those judgments do not in any event appear to be germane to the present appeals. One would hesitate to conclude that the court intended in these cases to establish an absolute rule that the prosecution and punishment of a person who refuses to provide incriminating real evidence in pre-trial investigations will contravene article 6. Such a rule would fatally undermine the court's acceptance in *Saunders*, at para 69, that a suspect can properly be required to provide other types of real evidence, such as samples of breath, blood, urine and DNA: a requirement which is normally underpinned by the threat of a sanction in the event of non-compliance. It may be that these judgments should be understood, consistently with the general approach adopted by the Grand Chamber in such cases as *Jalloh v Germany, O'Halloran and Francis v United Kingdom* and *Ibrahim v United Kingdom*, as reflecting the nature and degree of the compulsion or coercion used in order to obtain documents and information from the applicants (documents which might, in *Funke* at least, have been obtained by other, unobjectionable, means). Understood in that way, these cases might be fitted into the general pattern of later cases

concerned with the use of oppressive methods of obtaining real evidence. Although that reasoning is not evident in the judgments in the *Funke* line of cases, it is nevertheless characteristic of the court to pay close attention to the facts of the cases coming before it, recognising differences of degree, and eschewing inflexible statements of principle. It is also characteristic of the court to recognise the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance it has described as being inherent in the whole of the Convention.

60. Whether or not that is how the *Funke* line of cases should be understood, they are in any event clearly distinguishable from the present appeals. They concerned situations in which the applicant was prosecuted and punished for his failure to produce self-incriminating evidence. That is not the situation in the present case.

61. In the light of the principles set out by the Grand Chamber in its *Jalloh, O'Halloran and Francis* and *Ibrahim* judgments, it is appropriate to consider the present appeals in the light of the four factors to which the European court has directed attention: the nature and degree of compulsion used to obtain the documents in question, the weight of the public interest in the investigation and punishment of the offences at issue, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained may be put.

62. Considering first the nature and degree of the compulsion used, Volaw (but none of the other corporate appellants, since they were not addressees of the notices) was subject to compulsion by virtue of the TIEA Notices and the 1991 Law Notice. The compulsion on Volaw consisted of the potential imposition of a fine for non-compliance. In the event that Volaw were to commit an offence under the 2008 Regulations, its officers might also be liable if they consented to, or connived at, the commission of the offence: regulation 16 (para 35 above). It is argued that the officers of Volaw were therefore also compelled to produce self-incriminating documents, although it has not been explained what role, if any, each of these unidentified individuals might have played in Volaw's provision of the documents in response to the notice. In the Board's view, however, none of them was compelled by the notices to produce the documents themselves, since (a) the notices were not addressed to them, and (b) the documents were not their documents, and were not in their possession. Nor were they compelled to participate in Volaw's production of the documents: that task could be delegated to other members of staff. Their only relevant obligation was not to consent to, or connive at, the commission of an offence by Volaw.

63. It is difficult to regard the compulsion arising from the service of the notices as falling within any of the three kinds of situations identified by the European court in para 267 of its *Ibrahim* judgment (para 43 above). In particular, the only situation mentioned there which concerned the obtaining of real evidence involved "physical or psychological pressure, often in the form of treatment which breaches article 3". It is

difficult to regard the service of the notices in the present case as constituting such pressure. It is not comparable in any respect with the conduct with which the cases cited by the court (*Jalloh*, *Magee* and *Gäfgen)* were concerned. Nor is it comparable with the oppressive conduct of the authorities in the cases of *Funke v France, JB v Switzerland* and *Chambaz v Switzerland*, even if those cases were of any relevance in a situation where no prosecution for failure to provide the documents has taken place.

64. Considering next the weight of the public interest in the investigation and punishment of the offences at issue, the TIEA Notices were issued in order to assist in the investigation of possible tax offences under Norwegian law, in accordance with Jersey's obligations under the Jersey/Norway TIEA. The weight of the public interest in effective international co-operation in the investigation of possible tax avoidance and evasion cannot be doubted. As was explained at paras 24-25 above, international law has sought to respond to the increased possibilities of tax evasion and fraud consequent on the development of the international movement of persons, capital, goods and services, by improving mutual assistance between jurisdictions in relation to tax matters. This is a matter of particular importance in relation to global financial centres such as Jersey. The present case, involving an individual taxpayer in Norway and numerous related companies and trusts based in a multitude of jurisdictions around the world, with their administration services provided by a financial services firm in Jersey, is an illustration of the circumstances which have led to the need for bilateral tax information exchange agreements such as the Jersey/Norway TIEA. It is only through the recovery of documentation from the financial services firm at the hub of the global network of companies and trusts that an effective investigation can be carried out. So far as the 1991 Law Notice is concerned, it was expressly issued in order to investigate "a suspected offence involving serious or complex fraud". The public interest in the investigation of offences of that character is a consideration of substantial weight.

65. It also has to be borne in mind that the notices were addressed to Volaw only because of its activities as a provider of administration services to the companies, trusts and individuals in question, and sought to recover documents containing factual information relating to the administration of those entities. Thus, each of the TIEA Notices relating to a company required Volaw to produce "all documents and records that Volaw holds which relate to [the company] (including, but not limited to, financial statements, postings reports, general ledger, bank accounts, payment instructions, statutory records, minute books; file notes, correspondence and trust documents) concerning the company's incorporation, administration, activities and operations, management, principals and directors, shareholders and shareholdings and beneficial ownership (including any subsidiaries)." The 1991 Law Notice required Volaw to produce documents relating to the internal affairs of the named companies: changes in the registered shareholders, records of dividends, loans and other payments to the registered shareholders, minutes of directors' and shareholders' meetings, and the like. There is a substantial public interest in maintaining the integrity of licensed providers of financial services. It is not unreasonable that they should be expected to cooperate

with responsible investigations into possible tax offences or fraud involving their clients by producing information in their possession relating to their clients' affairs.

66. That is not to imply that the public interest in the investigation and punishment of tax evasion and corporate fraud, and in ensuring the integrity of providers of financial services, outweighs the value of the right not to incriminate oneself when that right crystallises at a trial. The public interest in these matters, important though it is, does not justify depriving defendants of a fair trial, conducted in accordance with the basic principles of a fair criminal procedure, as the judgment in *Saunders* demonstrates. But it may be a strong justification for requiring the provision of information and documents at the stage of pre-trial investigations, depending on such matters as the nature and potential significance of the information or documents in question, the use to which they may be put, and the existence of any procedural safeguards. Whether any or all of the documents can subsequently be used as evidence in the event of a trial is a separate question.

67. Considering next the use to which the documents might be put, and the existence of any relevant safeguards in the procedure, it is again important to note that the present appeals concern pre-trial investigations. No documents have yet been produced, and it is impossible to predict what they might contain, or the use, if any, which the prosecution might seek (or, in relation to Norway, might have sought) to make of them at any trial. It has not been argued that the requirement to produce the documents specified in the notices would in itself prejudice the fairness of any trial which might subsequently be held (the argument, instead, is that a requirement to produce incriminating documents in the course of a criminal investigation prior to trial is sufficient in itself to violate article 6). Any documents produced to the Jersey authorities in compliance with the TIEA Notices would, until the Norwegian authorities abandoned their investigation, have been provided to them for their consideration, in accordance with the Jersey/Norway TIEA. In the event that any charges had subsequently been brought against Volaw in Norway and had proceeded to trial, and in the further event that the prosecution had sought to rely on any of the documents at such a trial, it would then have been open to Volaw to object to the admission of the evidence, on the ground that it had been obtained by the use of compulsory powers and its admission would violate their privilege against self-incrimination. The Norwegian courts would then have ruled on any such objection. Norway has ratified the ECHR. There is no reason why the courts of Jersey should seek to anticipate what might hypothetically occur in Norway following the production of the documents. The same considerations apply, mutatis mutandis, to the use at any trial in Jersey of documents produced in compliance with the 1991 Law Notice.

68. This is a convenient point at which to mention a point which the parties identified as one of the issues in the case: namely, the question whether the right not to incriminate oneself can apply in relation to pre-trial investigations in one jurisdiction where any trial would take place in another. So far as the privilege under article 6 is concerned, the

Board is doubtful whether the question can be answered in categorical terms. It may be, as in other situations involving the application of article 6 in relation to foreign proceedings, that the answer depends on whether the applicant risks suffering a flagrant denial of justice in the requesting country (see, for example, *Othman v United Kingdom (Abu Qatada)* (2012) 55 EHRR 1, para 258). But it is unnecessary to decide the point, which does not yet appear to have been considered by the European court. All that need be said in the present case, where (a) the only potential incriminatory use of the documents which is contemplated would occur in trial proceedings, (b) those proceedings would take place in either Norway or Jersey, and (c) both those jurisdictions adhere to the Convention, is that it cannot be said (in the language of *Ibrahim*, at para 253) that the fairness of any trial is or was likely to be seriously prejudiced by the production of the documents in question at the pre-trial stage.

69. It is also relevant to bear in mind that, at any trial, the onus would be on the prosecution to establish the commission of an offence: offences which, so far as they concern tax evasion or fraud, would require proof of a dishonest intent. The notices did not call for any admission of liability: they simply requested documents containing objective factual information about the affairs of certain of Volaw's clients. The risk of the notices resulting in unreliable admissions of guilt is negligible.

70. In the light of all these considerations, the Board sees no reason to find at the present stage, which has not yet progressed beyond the service of notices as part of an investigation into possible offences, that the requirements of article 6 will not be met in relation to any proceedings brought against any of the appellants in Jersey, or that those requirements would not have been met in relation to any proceedings brought against them in Norway. The notices do not in themselves deprive any of the appellants of their right to a fair trial. The complaint based on article 6 of the ECHR is therefore rejected.

71. Finally, in relation to this aspect of the appeals, the Board sees no reason to question the decision of the House of Lords in *Ex p Green Environmental Industries Ltd*, which was decided before the Human Rights Act 1998 had entered into force and did not directly concern the Convention. A question arose in that case as to whether a notice served by a local authority under the Environmental Protection Act 1990, requesting the provision of information about the handling of waste, was invalid because it unlawfully infringed the privilege against self-incrimination under common law or under EU law. The House held that it did not. Any right at common law to refuse to provide the information requested on grounds of self-incrimination was impliedly excluded by the legislation. It would be for the judge at the trial, in the event that evidence obtained through the service of the notice was sought to be admitted, to decide whether the evidence should be excluded. Nor was the investigatory procedure incompatible with EU law, having regard to the case law on article 6 of the ECHR.

72. There is however a dictum in Lord Hoffmann's speech which should not be taken out of context. Having treated the judgment in the then leading case of *Saunders* as establishing that the privilege against self-incrimination under article 6 of the ECHR might be violated by the use at trial of evidence which had been obtained compulsorily in a non-judicial investigation, Lord Hoffmann added at p 423 that "the European jurisprudence under article 6(1) is firmly anchored to the fairness of the trial and is not concerned with extrajudicial inquiries". That is true as a generalisation, but as the Board has explained, a breach of article 6 can also arise in consequence of the punishment of a person for refusing to incriminate himself in the course of extrajudicial inquiries (as in *Funke v France, Heaney and McGuinness v Ireland*, *JB v Switzerland*, *Shannon v United Kingdom* and *Chambaz v Switzerland*). It is also necessary to bear in mind that the nature of extrajudicial inquiries can itself prejudice the fairness of trial proceedings for the purposes of article 6. An example given in *Ibrahim*, at para 253, was where "national laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings". The case of *Ex p Green Environmental Industries Ltd* was not, however, concerned with a situation of that kind, or with the situation considered in the *Funke* or *Heaney and McGuinness* line of authorities.

Issue (2): Compatibility with Jersey customary law

73. The parties are in agreement that, even if the privilege against self-incrimination under Jersey customary law is capable of applying to pre-existing documents, it has in any event been impliedly abrogated by the 1991 Law, with the consequence that no such privilege applies in relation to the 1991 Law Notice. They are in dispute, on the other hand, as to whether such a privilege applies in relation to pre-existing documents falling within the scope of the TIEA Notices. The dispute raises three questions: (a) whether the privilege against self-incrimination under Jersey customary law applied in principle to the request in the TIEA Notices for the provision of pre-existing documents, bearing in mind that the contemplated criminal proceedings would have taken place in Norway; (b) whether, if so, it was (at least purportedly) abrogated by the 2008 Regulations as amended by the 2013 Regulations, and (c) whether, if so, the 2013 Regulations are to that extent ultra vires.

74. In relation to the first of these questions, the Board was invited by the respondent to hold that, whatever the position may be under the common law of England, the privilege against self-incrimination, as recognised under the customary law of Jersey, does not extend to the provision of documents. The Board does not find it necessary to determine that question. Even on the assumption that the privilege under Jersey customary law extends to documents, as the privilege under English common law has been held to do (see, for example, *Redfern v Redfern* [1891] P 139, *Rio Tinto Zinc Corpn v Westinghouse Electric Corpn* [1978] AC 547, and *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380), there remains the question whether the privilege is in principle (and subject to any question of its abrogation) infringed by the

requirement imposed by the TIEA Notices, that is to say by a requirement to produce documents as part of pre-trial investigations in Jersey into possible offences under Norwegian law.

75. There is no doubt that the privilege as it is understood in English law has in the past been extended to the production of documents at the pre-trial stage where it would tend to expose the person producing the documents to criminal sanctions. An example is *Rio Tinto Zinc,* where the privilege was successfully invoked to prevent the disclosure of documents for use in civil proceedings in the United States, where they were to be used to establish the existence of a cartel, on the ground that their entry into the public domain might result in the imposition of fines by the European Commission, under the domestic law of the UK, for breaches of competition law. The case of *Rank Film Distributors* is a further example, again involving the recovery of documents for use in civil proceedings, where their disclosure could result in the bringing of criminal proceedings. On the other hand, the privilege did not apply to criminal offences or penalties under the law of foreign jurisdictions: Civil Evidence Act 1968, section 14, reflecting the approach taken at common law in *King of the Two Sicilies v Willcox* (1851) 1 Sim NS 301, which was another case concerned with the production of documents.

76. In the case of *Brannigan v Davison,* the Board held on an appeal from New Zealand that the common law privilege has no application where the relevant criminal or penal sanctions arise under a foreign law. The Board's reasoning was explained by Lord Nicholls of Birkenhead at pp 249-250:

> "If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court ... This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings … Their Lordships' conclusion is that the common law privilege does not run where the criminal or penal sanctions arise under a foreign law."

77. The Board is not bound by its decision in a case originating from another jurisdiction when determining an appeal from Jersey. As counsel for the appellants submitted, under reference to the judgment of the Royal Court in *State of Qatar v Al*

Thani 1999 JLR 118, the degree of persuasiveness of such a decision may, in particular, depend upon considerations particular to Jersey. The submissions in the present case do not, however, lead the Board to question the decision in *Brannigan's* case, and no material differences between New Zealand and Jersey have been drawn to its attention which would diminish the persuasiveness of Lord Nicholls' reasoning.

78. In view of that conclusion, it is unnecessary for the Board to consider whether the privilege against self-incrimination under Jersey customary law, so far as it might encompass pre-existing documents, was abrogated by the 2008 Regulations as amended by the 2013 Regulations, and if so, whether the 2008 Regulations as so amended are ultra vires. On the assumption that the privilege under Jersey customary law extends to pre-existing documents, as was argued on behalf of the appellants, it nevertheless does not apply, following the reasoning in *Brannigan,* where the risk of prosecution arises under the law of another country.

Issue (3): An opportunity to make representations?

79. In view of the Board's conclusion that neither the privilege against self-incrimination under article 6 of the ECHR nor the privilege under Jersey customary law was engaged by the service of the TIEA Notices or the 1991 Law Notice, Issue (3) does not arise. The argument that an opportunity to make representations before a notice is issued is necessary to ensure compatibility with the privilege against self-incrimination is premised on the assumption that the privilege is applicable: a premise which the Board has rejected.

Issue (4): A "use immunity"?

80. Issue (4) is similarly superseded. The argument that the 2008 Regulations and the 1991 Law should be construed as imposing a "use immunity" in relation to pre-existing documents provided in response to notices issued under those instruments, in order to ensure compatibility with the privilege against self-incrimination, is similarly premised on the assumption that the privilege is applicable.

Issue (5) The directors and officers of the appellant companies

81. For the same reason, Issue (5) - whether the directors and officers of the appellant companies are entitled to rely on the privilege against self-incrimination - does not require separate consideration.

Issue (6): Article 6(4) of the Jersey/Norway TIEA

82. In relation to the TIEA Notices appeal, there remains the question whether the Comptroller is obliged to consider whether the documents specified in the notices could be obtained under Norwegian law, and, if they could not be, to refuse a TIEA request under article 6(4) of the Jersey/Norway TIEA. It is submitted on behalf of the appellants that such an obligation arises from article 6(4) of the Jersey/Norway TIEA, which provides:

> "The requested party shall not be required to obtain and provide information which if the requested information was within the jurisdiction of the requesting party the competent authority of the requesting party would not be able to obtain under its laws or in the normal course of administrative practice."

83. The short answer to this submission is that Jersey adopts a dualist approach to international law. The Jersey/Norway TIEA does not form part of the domestic law of Jersey, and article 6(4) does not, therefore, provide a basis for challenging the validity of the TIEA notices under Jersey law. The TIEA has been implemented in Jersey law by the 2008 Regulations, and it is not argued that those regulations impose an obligation of the kind for which the appellants contend. Furthermore, each of the TIEA requests by the Norwegian authorities stated expressly:

> "In making the request, the requesting competent authority states that: …
>
> > (c) the information would be obtainable under its laws and the normal course of its administrative practice in similar circumstances."

Even if the Comptroller had been obliged to satisfy himself that the request complied with article 6(4) of the TIEA, he would have been entitled to treat that statement as satisfactory evidence of compliance, at least in the absence of any circumstances casting doubt upon its accuracy.

Conclusion

84. For these reasons, the Board will humbly advise Her Majesty that the appeals should be dismissed. The parties have 21 days in which to make submissions on costs, failing which the Board will order that they should be borne by the appellants.