[1987-88 JLR 473]

IN THE MATTER OF TUCKER
On the application of his Trustee in Bankruptcy
ROYAL COURT (Crill, Bailiff): July 7th, 1988
Bankruptcy—reciprocal enforcement of orders—foreign revenue claims—petition by English trustee in bankruptcy to examine Jersey witness, pursuant to Bankruptcy Act 1914, s.122, subject to public policy of non-enforcement of foreign revenue laws—if UK Inland Revenue sole creditor seeking to enforce tax claim, petition barred as indirect attempt to enforce foreign revenue law

The trustee in bankruptcy sought an order from the Royal Court to act in aid of and be auxiliary to an English High Court order, made pursuant to the Bankruptcy Act 1914, s.122.

During the administration of a bankrupt's estate in England, most of the creditors were paid off by third parties or had their debts waived or withdrawn, leaving as remaining liabilities only those due to the Inland Revenue and one ordinary creditor. The trustee was funded in the administration by the Inland Revenue.

As information was required from the bankrupt's legal representative in Jersey, Advocate Clyde-Smith, concerning undisclosed assets of the bankrupt held in offshore trusts, the trustee in bankruptcy obtained an order from the English High Court requesting the Royal Court to act in aid of and be auxiliary to the English High Court, as provided by the Bankruptcy Act 1914, s.122, which extended to Jersey. The order sought a private examination of, and the production of documents by, the advocate.

Consequently the trustee applied to the Royal Court for an order in aid under s.122 but before the application was heard, the one ordinary creditor in the proceedings withdrew his claim.

Although both the trustee and the advocate made submissions, the Royal Court sought to resolve the application for the order on the basis of the contentions of the Attorney General as *amicus curiae*, who submitted that it was necessary to determine whether (i) in its application in Jersey, s.122 was subject to the public policy that courts will not enforce the revenue laws of a foreign state; (ii) the examination of the advocate with or without documents amounted to an indirect attempt to enforce a foreign revenue law contrary to that policy; and (iii) a request for such examination pursuant to s.122, when the sole creditor was the UK Inland Revenue, also amounted to such indirect enforcement.

Held, dismissing the application:

(1) In its application to Jersey, the Bankruptcy Act 1914, s.122, was subject to the public policy that courts will not enforce the revenue laws of a foreign state: the practice of the Royal Court to that effect was binding and although it was a British court within the terms of s.122, for tax purposes it was—within certain defined limits—the court of an independent state. Notwithstanding the mandatory wording of s.122, the section merely enabled the court to act in aid and where the sole object of seeking aid was to enforce a foreign revenue claim then the court could exercise its discretion to refuse such aid. In the present case, the Inland Revenue was the sole creditor and it was funding the trustee to the

extent that the bankrupt's funds were inadequate. The trustee's application was in effect a request to examine the Jersey advocate in a tax bankruptcy and it was therefore subject to the public policy binding the court (page 485, line 6 – page 486, line 25; page 494, lines 1–35; page 499, lines 11–26).

(2) The examination of the advocate with or without documents and a request for such examination pursuant to s.122, when the sole creditor was the UK Inland Revenue, amounted to an indirect attempt, contrary to public policy, to enforce a foreign revenue law. There was no valid distinction between enforcing a tax debt or attempting to do so by a collection of that debt (whether or not it was for the benefit of some other creditors in addition to the Revenue) and the seeking of information to assist in recovering the debt. In each case, the court had to scrutinise the substance of the claim and if the effect of making an order would be to enable the trustee to enforce, however indirectly, a revenue claim as a result of information so obtained, the application had to be rejected. In the present case, the trustee required the information in order to recover the bankrupt's assets, to settle the debts and to account for any balance to the bankrupt: the settlement of the debts would mean, in effect, the payment of the Revenue's claim. Consequently, the Royal Court had no jurisdiction to grant the request (page 500, line 15 – page 501, line 24).

Cases cited:

(1) *Att.-Gen. (New Zealand)* v. *Ortiz*, [1984] A.C. 1; [1982] 3 All E.R. 432; [1982] 2 Lloyd's Rep. 224; (1982), 126 Sol. Jo. 429; [1982] Com. L.R. 156; 79 L.S. Gaz. 919; on appeal, [1984] A.C. 1; [1983] 2 All E.R. 93; [1983] 2 Lloyd's Rep. 265; (1983), 127 Sol. Jo. 307, *dictum* of Lord Denning, M.R. applied.

(2) *Ayres* v. *Evans* (1981), 56 Fed. L.R. 235; 39 Aust LR 129, distinguished.

(3) *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140; [1934] All E.R. Rep. 555; (1934), 151 L.T. 499; 50 T.L.R. 284; 104 L.J.K.B. 46; 78 Sol. Jo. 224.

(4) *Buchanan (Peter) Ltd.* v. *McVey*, [1955] A.C. 516; [1954] I.R. 89; (1951), 90 I.L.T.R. 121, *dictum* of Kingsmill Moore, J. followed.

(5) *Debtor, Re a, ex p. Viscount of Royal Ct.*, [1981] Ch. 384; [1980] 3 All E.R. 665.

(6) *Le Marquand* v. *Chiltmead Ltd.*, 1987-88 JLR 86.

(7) *Madzimbamuto* v. *Lardner-Burke*, [1969] 1 A.C. 645; [1968] 3 All E.R. 561; (1968), 112 Sol. Jo. 1007.

(8) *Moore* v. *Mitchell* (1929), 30 F. (2d) 600.

(9) *Norway (State of) Application, In re*, [1987] Q.B. 433; [1989] 1 All E.R. 661; *sub nom. Re Jahre* v. *State of Norway*, [1986] 1 Lloyd's Rep. 496; on appeal, [1989] 1 All E.R. 745, *dicta* of Kerr, L.J. applied.

(10) *Norway (State of) Application (No. 2), In re*, [1989] 1 All E.R. 701; [1988] 1 FTLR 293; on appeal, [1989] 1 All E.R. 745, *dictum* of Woolf, L.J. followed.

(11) *Osborn, In re, ex p Trustee*, [1931-32] B. & C.R. 189.

(12) *Overseas Ins. Brokers Ltd., Re*, 1966 J.J. 547, *dictum* of Le Masurier, Bailiff followed.

(13) *Tax Commr. (Fedn. of Rhodesia)* v. *McFarland*, 1965 (1) S.A. 470, *dicta* of Vieyra, J. followed.

(14) *Tucker, In re, ex p. Tucker*, [1987] 1 W.L.R. 928; [1987] 2 All E.R. 23; (1987), 131 Sol. Jo. 938; on appeal, [1988] 2 W.L.R. 748; [1988] 1 All E.R. 603; [1988] 1 FTLR 137, observations of Dillon, L.J. followed.

(15) *Tucker (No. 2), In re*, [1988] 1 W.L.R. 497; [1988] 2 All E.R. 339; (1988), 132 Sol. Jo. 536.

(16) *Tucker, Re*, Royal Ct. of Guernsey, September 30th, 1987, unreported, applied.

(17) *Tucker, In re*, 1988 FLR 154 (Isle of Man), distinguished.
(18) *Walmsley, Re*, 1983 J.J. 35, *dicta* of Crill, Deputy Bailiff applied.
(19) *Williams & Humbert Ltd.* v. *W. & H. Trademarks (Jersey) Ltd.*, [1988] A.C. 368; [1986] 1 All E.R. 129; (1985), 130 Sol. Jo. 37, considered.

Additional cases cited by counsel:

Bolan (Marc) Charitable Trust, In re, 1981 J.J. 117.
Brokaw v. *Seatrain UK Ltd.*, [1971] 2 All E.R. 98.
Burchard v. *Macfarlane, ex p. Tindall*, [1891-4] All E.R. Rep. 137.
Debtor, In re a, ex p. Trustee v. *Clegg*, [1968] 1 W.L.R. 788.
Emery's Invs. Trusts, Re, Emery v. *Emery*, [1959] 1 All E.R. 577.
Gibbons, In re, ex p. Walter, [1960] Ir. Jur. Rep. 60.
Gold Co. Ltd., Re, [1874-80] All E.R. Rep. 957.
Greys Brewery Co., In re (1883), 25 Ch. D. 400.
International Power Indus. NV, Re, [1985] BCLC 128.
Jackson, In re, [1973] N.I. 67.
Jobas Ltd. v. *Anglo Coins Ltd.*, 1987-88 JLR 359.
Lotus, The, (1927) P.C.I.J. Reports, Series A, Judgt. No. 9.
Maundy Gregory, In re, ex p. Norton, [1935] Ch. 65.
Metropolitan Bank, In re, Heiron's Case (1880), 15 Ch. D. 139.
Morris, In re, Royal Ct. (1967), 256 Ex. 280, unreported.
Norwich Equit. Fire Ins. Co., In re, (1884), 27 Ch. D. 515.
Official Receiver v. *Clore*, 1983 J.J. 43.
Oklahoma (State of) v. *Rodgers* (1946), 165 ALR 785.
Priestly v. *Clegg*, 1985 (3) S.A. 955.
R. v. *Grossman* (1981), 73 Cr. App. R. 302.
Radio Corp. of America v. *Rauland Corp.*, [1956] 1 All E.R. 549.
Regazzoni v. *K.C. Sethia (1944) Ltd.*, [1956] 2 All E.R. 487.
Rolls Razor Ltd. (No. 2), Re, [1969] 3 All E.R. 1386.
Scharrer, In re, ex p. Tilley (1888), 20 Q.B.D. 518.
Tournier v. *National Provl. & Union Bank of England*, [1923] All E.R. Rep. 550.
Woodman v. *Viscount of Royal Ct.*, 1975 J.J. 263.
X AG v. *A Bank*, [1983] 2 All E.R. 464.

Legislation construed:

Bankruptcy Act 1914 (4 & 5 Geo. V. c.59), s.122:

"The High Court . . . and every British court elsewhere having jurisdiction in bankruptcy and insolvency . . . shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

This section has now been replaced by the Insolvency Act 1986 (c.45), s.426.

R.J. Michel for the trustee;
W.J. Bailhache for Advocate Clyde-Smith;
P.M. Bailhache, Attorney General, as *amicus curiae*.

CRILL, BAILIFF: This case arises from the bankruptcy in England of Roy Tucker ("the bankrupt"). An agreed statement of facts was prepared by counsel which is as follows:

"STATEMENT OF AGREED FACTS

1. On July 22nd, 1985 a receiving order was made in the High Court of England and Wales under the provisions of the Bankruptcy Act 1914 against ROY CLIFFORD TUCKER ('the bankrupt'). On September 2nd, 1985, Colin Graham Bird ('the trustee') was appointed the bankrupt's trustee in bankruptcy.

2. The petitioning creditors were four in number.

3. The bankrupt submitted a statement of affairs dated August 20th, 1985, which showed assets valued at about £362,000, unsecured liabilities of about £21,878 and a contingent liability to the Inland Revenue in excess of £18.5m., based on assessments to tax made by the Inland Revenue on the bankrupt prior to the presentation of the petition against him. The assets actually realised by the

trustee to date amount to £22,000. The difference between this sum and the value shown in the statement of affairs broadly reflects the bankrupt's estimate of the value of his claim against the Inland Revenue.

4. After the date of the appointment of the trustee, the petitioning creditors' debt was assigned to a third party which then released all its claims against the bankrupt's estate. Likewise all other liabilities which were shown in the statement of affairs or accepted by the bankrupt as owing by him (other than the liability to the Inland Revenue) have been paid off by third parties or released. However, it may be that the bankrupt has other substantial liabilities to persons, including one Harris, who entered into tax avoidance schemes on his advice, which liabilities have not been satisfied, waived or compounded. At the date of this hearing Harris is the only such person who has submitted a claim to the trustee and Harris and the Inland Revenue are the only

persons who have submitted claims which have not been satisfied, waived or compounded. Neither the Harris claim nor the Inland Revenue's claim has been admitted by the trustee.

5. The trustee has been advised that it is arguable that Harris has a provable claim and has applied to the High Court for directions as to whether the claim ought to be admitted. The bankrupt's advisers take the view the Harris claim is legally and factually without merit. The matter is expected to be argued in the High Court in the autumn or later.

6. The Inland Revenue have made assessments amounting to £18m., some of which are admittedly duplicated. The trustee believes that the Inland Revenue could strongly support a claim for tax but is not able to express any view as to the amount. The assessments which were the subject of their proof have been validly appealed within the prescribed time limits and the appeals have not been heard. In addition the Inland Revenue have made other assessments for some subsequent years and are in a position to make yet further assessments for later years. The bankrupt has admitted that on what he regards as his worst position his tax liabilities are in the region of £176,000.

The trustee considers that on the position most favourable

to the Inland Revenue, their claim would be approximately £10m. in respect of the assessments which were the subject of their proof in the bankruptcy, plus whatever is the established figure in respect of other assessments which have been and have yet to be made.

It is not known for what figure the Inland Revenue's claim might be preferential but it is believed that their preferential claim could not exceed £4m.

7. The Harris claim is for just under £32,000. If the Harris claim succeeds, other persons who entered into tax avoidance schemes on the advice of the bankrupt may have the

right to bring claims themselves amounting to anything up to £1.5m.

8. A trustee in an English bankruptcy is obliged to act independently of any creditors in the bankruptcy. The trustee in this case is being funded for his enquiries and investigations by the Inland Revenue and he does from time to time receive specific indemnities concerning the costs of third parties and certain contingent liabilities in damages to third parties but he does not have any general indemnity from the Inland Revenue. The trustee does from time to time give them such information as is necessary (but subject to constraints imposed by court orders and confidentiality undertakings where relevant) to enable them to take commercial decisions on whether to continue to fund the costs. These are both common practices in insolvencies where the readily realisable assets are insufficient to fund the costs.

9. The trustee applied to the Royal Court on March 27th, 1987 for an order in aid under s.122 of the Bankruptcy Act 1914 having previously obtained from Mr. Registrar Dewhurst in the High Court an order and a request to the Royal Court of Jersey to act in aid and be auxiliary to the High Court for the purpose of holding a private examination of and the production of documents by Advocate J. A. Clyde-Smith in respect of the matters listed in the application.

10. On March 5th, 1987 a summons was issued under s.25 of the 1914 Act for the private examination of and production of documents by Advocate J. A. Clyde-Smith in London in respect of the various matters listed in the

summons and leave was granted to serve the same on Advocate J. A. Clyde-Smith out of the jurisdiction.

11. The application under s.122 and the summons under s.25 are in corresponding terms.

12. On April 9th, 1987 Advocate J. A. Clyde-Smith

obtained from the Royal Court an order preventing him attending in London in compliance with the s.25 summons. On May 27th, 1987 his application in relation to the s.25 summons was stayed pending the determination of the trustee's application under s.122, the injunction continuing in the meanwhile.

13. Advocate Clyde-Smith has voluminous files in his possession of which the trustee seeks production and/or on which the trustee seeks to examine him. Advocate Clyde-Smith considers that much, if not all, of the information contained therein is subject to legal professional privilege on the part of, or is confidential to, persons (other than the bankrupt) to whom he owes duties.

14. The trustee believes that Advocate Clyde-Smith has in Jersey information which will assist him in deciding whether a claim, that assets (believed by the trustee to have a value of between £6m. and £7m.) held or purportedly held by trusts established or purportedly established offshore (probably not in Jersey) are in reality part of the property of the bankrupt, which claim the trustee has been advised is a good *prima facie* claim, is likely to be successful and is worth pursuing. It is not thought that any such assets are situate in Jersey. It is common ground that Advocate Clyde-Smith is not holding or in possession of any assets forming or allegedly forming part of the property of the bankrupt. It is also common ground that the costs incurred by the trustee in connection with the bankruptcy are a first charge on the bankrupt's estate."

As will be seen from para. 9 of the statement, the court is sitting today to decide whether it should grant the application of the trustee pursuant to s.122 of the Bankruptcy Act 1914 to act in aid of and be auxiliary to the High Court for the purpose of holding a private examination of, and the production of documents by, Advocate J. A. Clyde-Smith, in respect of the matters listed in the application. The wording of the representation

seeking the Royal Court's aid is not identical with that of the

order made by Mr. Registrar Dewhurst, as it is in rather more general terms, but for the purposes of this application all counsel agreed that the court may proceed as if the application in Jersey were in identical terms to that of the request of the High Court.

The reasons for the application are to be found in paras. 13 and 14 of the agreed statement. It is interesting to note that the application is not opposed by the bankrupt himself.

Before counsel began their submissions I was told that Mr. Harris had now withdrawn his claim in the bankruptcy and two letters were produced to me. The first was from a firm of solicitors, Dickinson Dees, acting on behalf of Mr. Harris, to the trustee, of May 13th, 1988 and was as follows:

> "As solicitors for Michael Harris we are instructed to withdraw the proof of debt submitted by him and also to withdraw the revised proof of debt submitted by him under cover of a letter dated December 14th, 1980 together with all letters relating thereto. Our client makes no claim whatsoever in Mr. Tucker's bankruptcy."

That letter, and another one of May 17th, 1988, were admitted without formal proof. The letter of May 17th, 1988, was from Stephenson Harwood, on behalf of the trustee, to Advocate Bailhache, which I now quote:

> "Thank you for your fax concerning the letter of May 13th from Dickinson Dees to Mr. Bird. I confirm that a copy of the letter may be placed before the court without formal proof (provided that you also place this letter before the court) and I also confirm that the trustee acknowledges that the Harris claim has now been withdrawn. He also acknowledges that the only creditor who has submitted a proof in this bankruptcy which is still outstanding is the Inland Revenue. The trustee does not, however, admit that the Inland Revenue is either the only creditor or the only person who is or may be entitled to prove.
>
> The trustee is investigating, because he does not at present

know the answer, why Harris has withdrawn his claim. Several possibilities suggest themselves, but the obvious inference is that he has been bought out, directly or indirectly, by parties friendly to the bankrupt. If so, that would suggest that those parties considered that Harris did indeed have a good claim.

The trustee's investigations into Harris's claim have

indicated that there may anything [*sic*] up to 165 other persons who may have a claim and his duty is now to contact all those persons in order to inform them that his investigations indicate that they may have a claim and asking them whether in the circumstances they wish to make any claim or not. He intends to carry out that duty shortly.

Put another way, the point may be explained as follows. If the Inland Revenue had not claimed and the question was whether all the debts of the bankrupt had been paid, the trustee would have to answer that he was not at present in a position to give that confirmation as his enquiries had indicated that there were a number of people who might have claims and before being able to answer the question definitely one way or the other he would have to make further enquiries to establish whether or not they did in fact have claims. Those enquiries will now be pursued.

By similar reasoning he cannot now say that the Revenue is either the only creditor or the only person who has a claim, because all these other persons may have a claim."

The effect of the withdrawal of Mr. Harris's claim is that there are no other creditors who have submitted claims which have not been satisfied, waived or compounded, as appears from the agreed statement, and even the Inland Revenue's claim has not been admitted by the trustee but, for the purposes of the arguments before me, I have assumed that, as matters now stand, the Inland Revenue is the sole creditor of the bankrupt. The most that can be said about the 165 other persons mentioned in the third paragraph of Stephenson Harwood's letter of May 17th,

1988, is that they are merely, at this stage, putative creditors, although the trustee may well have a duty to enquire from these persons whether they wish to pursue their claims.

There was some suggestion that because the Inland Revenue was not one of the petitioning creditors, and the possible claims of these creditors might be substantiated later, the bankruptcy cannot be described as a tax bankruptcy. I disagree; it is apparent to me that, looking at the substance of the application and the earlier events that led up to it, and to which I refer below, I have little difficulty in finding myself in agreement with Dillon, L.J. in *In re Tucker, ex p. Tucker* (14) where he says ([1988] 2 W.L.R. at 752–553):

"The receiving order in bankruptcy was made against the

debtor on 22 July 1985 and he was adjudicated bankrupt on 9 August 1985. His trustee in bankruptcy, a partner in a well-known firm of accountants, was appointed in September 1985. Because of the dates, the bankruptcy is governed by the Act of 1914, and not by the Insolvency Act 1986. The bankruptcy is now effectively a tax bankruptcy; the petitioning creditor's debt, founded on a judgment in the Queen's Bench Division for U.S. $412,176, has been assigned to a Panamanian company and been released, and virtually all other claims in the bankruptcy have been paid off by relatives of the debtor or been released, except for a claim by the Inland Revenue, not yet admitted for proof, for tax in excess of £18.5 million, which is the subject of assessments which are subject to appeal."

I assume that the words "virtually all other claims" refer to Mr. Harris's claim, which was presumably at the time of the hearing in October 1987 still in being. It certainly was a significant matter which operated on the mind of Deemster Luft in the Isle of Man High Court when he gave his judgment on May 5th, 1987 in *In re Tucker* (17) to which I shall refer later. Thus the position is that, first, the Inland Revenue is the sole creditor; secondly, it is funding the trustee to the extent that the funds of the debtor are

inadequate; thirdly, I must deal with the state of affairs as I find it; and fourthly, there is the opinion which I have just mentioned of Dillon, L.J. So this application now becomes a request to examine Advocate Clyde-Smith (for the reasons set out in paras. 13 and 14 of the agreed statement) in a tax bankruptcy.

The relationship between a bankruptcy, *stricto sensu*, and our procedure of a *désastre* has received the consideration of the Royal Court in *Re Overseas Ins. Brokers Ltd.* (12) where the court said (1966 J.J. at 551–552):

> "We conclude that whereas it may well have been the case that in its original form the 'désastre' was invented to consolidate the claims of numerous creditors and to preserve a status of equality between them, its scope has been enlarged over the years and may now be defined as follows.
>
> A désastre is a declaration of bankruptcy, the effect of which is to deprive an insolvent debtor of the possession of his moveable estate and to vest that possession in Her Majesty's Viscount whose duty it is to get in and liquidate that estate for the benefit of the creditors who prove their claims."

Re a Debtor, ex p. Viscount of Royal Ct. (5) is the other side of the coin, that is the English High Court concluding that our *désastre* procedure may be equated with a bankruptcy within s. 122. Accordingly there is no doubt in my mind that the Royal Court is a bankruptcy court and has proper jurisdiction in bankruptcy or insolvency within the meaning of the section. That it is also a British court is beyond doubt.

At the beginning of his address on behalf of the trustee, Mr. Michel proposed to refer to an affidavit of the trustee. Mr. Bailhache objected because, he said, the agreed statement was sufficient for the purposes of counsel's submissions and the decision of the court, and that if Mr. Michel was going to rely on facts deposed to in the trustee's affidavit he, Mr. Bailhache, would wish to challenge some of the matters contained in it, and cross examine the trustee upon them. Accordingly, I have not examined Mr. Bird's affidavit more fully than is necessary.

But, it is clear to me, however (without going through it in detail), from the decision, in the first instance, of Scott, J. in *In re Tucker, ex p. Tucker* (14) that the trustee has been endeavouring to unravel the affairs of the bankrupt. As Scott, J. says ([1987] 1 W.L.R. at 931):

> "It has proved a tortuous process. There are, it seems, a number of inter-related companies, entities, and trusts, some incorporated or set up in the Channel Islands, others elsewhere, which control or appear to control assets of which de facto enjoyment seems to be had by the debtor. The trustee in bankruptcy has reason to suspect that control of these companies, entities, and trusts is exercised by persons who are nominees or trustees for the debtor and that the debtor is in reality the beneficial owner of the underlying assets."

He may have had good cause for his suspicions which have not been allayed in this court by the fact, as disclosed in a further case concerning the bankrupt, *In re Tucker (No. 2)* (15) heard before Millett, J. in the Chancery Division, where it stated ([1988] 1 W.L.R. at 499) that the bankrupt lives at "an Elizabethan manor house with some five acres of gardens and grounds and some acres of adjoining farmland near Maidstone in Kent. . ." In the same judgment (*ibid.*, at 504) the judge refers to the arrangements of the bankrupt with a Mr. Plummer in setting up the Rossminster group of companies ". . . which specialised in

providing clients with prepackaged artificial tax avoidance schemes and the banking and other financial services which such schemes ostensibly required." There is claimed to be a link between such schemes for UK residents with their satellite Jersey companies and trusts, and the information which, it is said in the agreed statements of facts, Advocate Clyde-Smith might be able to produce if I make an order under s. 122. I have reached the conclusion that the bankrupt used this Island's financial position and its fiscal independence to set up schemes for the avoidance of tax by UK residents.

Tax avoidance by using companies incorporated in Jersey was the reason why in 1927, as the Attorney General pointed out, the States agreed to a number of restrictions upon the registration of companies. Because each company is granted an Act of Registration by the Royal Court the control of this aspect of company registration lies with the Royal Court. Certain limitations on the formation of companies were introduced by the requirement of the court that in cases where the beneficial owners of companies were not *bona fide* Jersey residents the company's memorandum of association had to include what came to be called "the Bailiff's clause," which prevented the company from being used for the purposes of avoiding English taxation by persons subject to the control of the Inland Revenue in the United Kingdom. That requirement appears to have lapsed in the mid-1970s and was replaced by administrative controls which were strengthened as far as concerns the United Kingdom by developing anti-avoidance legislation.

It could well be, for example, that the "deemed domicile" section in the relevant Finance Acts meant that, from the point of view of the United Kingdom, the undertakings were to be treated as spent, although I express no firm opinion on this matter as it is not germane to the main questions I have to decide.

I have mentioned these matters because I have been urged that I should consider the public policy aspect of this case, that is to say, even if the court has jurisdiction I should not make an order as sought by the trustee because to do so would be to run counter to the practice of the Royal Court as a matter of public policy in not enforcing tax legislation of the United Kingdom (or for that matter of other countries). On the other hand, as a matter of public policy, the undertaking given by the States to which I have referred may equally be considered in balancing the non enforcement by the Royal Court of other countries' tax legislation against the States' undertaking. But trusts are not subject to any administrative controls by the Royal Court so far as concerns their creation. Nor was any similar undertaking sought when the

Trusts (Jersey) Law, 1984 was enacted.

Whilst, therefore, it has been a matter of public policy for many years that the courts of the Island have refused to enforce English tax laws, it must equally be a matter of public policy that the courts of the Island must take account of the undertakings given to Her Majesty's Government as regards company registration and not formally renegotiated or fallen into disuse. Is then this practice of the Royal Court as regards the non enforcement of foreign fiscal laws binding on the court or is it merely a convention which the court has adopted and which, in individual cases, the court has a discretion to enforce or not? It is apparent from the Privy Council case of *Madzimbamuto* v. *Lardner-Burke* (7) that there is a clear distinction between a convention and a rule of law but looking no further than art. 3(2)(*b*) of the Judgments (Reciprocal Enforcement) (Jersey) Law, 1960 and even without taking account of the number of cases in which the Jersey courts have indeed refused to enforce the claims of the Inland Revenue, whether made directly or indirectly and to which I shall refer, I have come to the conclusion that the practice, which may have originated as such, has now become a rule of law and is binding upon me sitting alone as the Inferior Number. I am confirmed in this view by the judgment of this court in the case of *Re Walmsley* (18), where the court said this as to the second submission—that a claim by the Inland Revenue against the executor of a testator who died domiciled in Jersey was unenforceable (1983 J.J. at 37):

> "As to the second submission, it is said, quite rightly, that in private international law, countries do not enforce the fiscal or tax legislation of other countries (see Dicey and Morris, The Conflict of Laws (10th Edition) at page 89). That is a well accepted fact in the Royal Court and I need not enlarge on it. I should, however, say this. That convention applies between States who are, properly speaking, Sovereign States. This Island, of course, is a dependency of the Crown and cannot rank as a Sovereign Independent State. Never-

theless, it has its own independent judicial system and the convention of private international law to which I have

referred was recognised, implicitly, when the Judgements [*sic*] (Reciprocal Enforcement) (Jersey) Law, 1960, was enacted and sanctioned by the Privy Council. Under that Law the Royal Court can register judgements [*sic*] obtained in the United Kingdom unless those judgements [*sic*] are in respect of taxes. I am quite satisfied, therefore, that the Royal Court has no power to enforce in Jersey a claim by the Inland Revenue for taxes in respect of United Kingdom legislation."

That case was mentioned in *Le Marquand* v. *Chiltmead Ltd.* (6), where the court, having examined a number of English cases, said (1987-88 JLR at 92): "The inference I draw from all the cases is that Jersey, like England, will not enforce a revenue claim, even if it is made indirectly."

So far as concerns the extract from the *Walmsley* case (18), I should like to add this: I intend no discourtesy to the United Kingdom by calling it directly, or by inference, a foreign state. It is not—its sovereign is our sovereign and we are after all a part of the British Isles although not within the United Kingdom but for the purpose of this and similar cases and because, as the court said in *Walmsley*, we have our own independent judicial system, the UK courts, in this context, may properly be called courts of a foreign jurisdiction. Notwithstanding, as I have already said, that the Royal Court is a British court within the section, for tax purposes it is the court of an independent state (within the limits the court referred to in *Walmsley*). Nevertheless, since the instant case is important to the Island because it is the first time, as far as the court is aware, that an application of this nature has been made, I think it right to refer in more detail to the rule and the reasons for it. I consider that one of the closest and fullest expositions of the rule is to be found in the South African case of *Tax Commr. (Fedn. of Rhodesia)* v. *McFarland* (13), a case decided in the Witwatersrand Local Division in 1964. Vieyra, J. set out the history and justification of the rule as follows (1965 (1)

S.A. at 471–474):

"As will appear below there appears to be a wide-spread view that the Courts of one State have no jurisdiction to entertain legal proceedings involving the enforcement of the revenue laws of another State. So far there has been no decision on the matter in our Courts and it is therefore necessary to examine the basis for the view referred to and to determine whether this accords with our own law. Dicey in

his *Conflict of Laws*, 7th ed. at p. 159 (Rule 21), puts the matter thus:

'The Court has no jurisdiction at Common Law to entertain an action (i) for the enforcement, either directly or indirectly of a penal, revenue or other public law of a foreign State.'

See also Rule 191 at pp. 1033-4.

There is no doubt that *Dicey's* statement is a correct reflection of the law as found expressed in a line of cases starting with *Holman* v. *Johnson* . . . wherein appears Lord MANSFIELD'S *dictum* 'for no country ever takes notice of the revenue laws of another'. The most recent English cases are *Re Delhi Electric Supply & Traction Co. Ltd.* . . . approved by the House of Lords *sub nom. Government of India* v. *Taylor* . . . *Rossano* v. *Manufacturers Life Insurance Co. Ltd.* . . . These were cases dealing with income tax imposed by foreign countries. The Scotch Courts [*sic*] take the same view. In *Attorney-General for Canada* v. *William Schulze & Co.* . . . the Court refused to enforce a Canadian judgment ordering the defendant to pay the costs of an unsuccessful appeal against the seizure of his goods by the Controller of Customs. For the law of Ireland see *Peter Buchanan Ltd. and Macharg v. McVey* . . . in which the matter is put as follows by KINGSWILL MOORE, J. [*sic*], as reported in the *Rossano* case, *supra* at (1962) 2 All E.R. at p.229B:

'It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its

revenue authority. In every case the substance of the claim must be scrutinised and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected.'

It is clear too that this attitude to the revenue laws of foreign States is by no means confined to the British Isles: see Dr. F.A. Mann in his article 'Prerogative Rights of Foreign States' in (1955)40 *Transactions of the Grotius Society* 25 at p. 28. LORD SOMERWELL [*sic*] in the *Government of India case, supra,* in the All E.R. at p. 301F says:

'The appellant was therefore in a difficulty from the outset in that, after considerable research, no case of any country could be found in which taxes due to State A had been enforced in the Courts of State B.'

LORD SOMERWELL'S [*sic*] assertion requires qualification in regard to the constitutive States of the United States of America and of Australia where recognition has in several instances been afforded to tax judgments in sister States arising out of the constitutional provision that full faith and credit must be given to judicial decisions in sister States, but this qualification, dependent as it is on the interpretation of the constitutions of the countries concerned, can hardly be considered to be an exception to the doctrine. The most recent case on the point seems to be a decision of the Supreme Court of Canada, viz. *United States of America* v. *Harden* . . . to which my attention has been drawn by Prof. Ellison Kahn of the University of the Witwatersrand, and to whom I am indebted too for placing at my disposal various items of legal literature relating to the matter under consideration. In that case the Court refused to enforce a judgment of the United States District Court of California amounting to 602,919 dollars in respect of taxes owing.

It may well be, and there is justification for this view in the judgments in earlier cases, that the origin of the matter was closely interwoven with questions of freedom of trade but

that, as was said by LORD EVERSHED, M.R., in the Court of Appeal in the *Delhi Electric Supply* case, *supra*, was no more than an accident of birth. In its developed form the rule was stated to be that the Courts are not to be used as a means of collecting revenue of a foreign country: see e.g. *per* TOMLIN, J., in *Re Visser* . . . and the passage above set out from the Irish case. But the proposition so stated does not bear its own justification for the question still remains as to why a foreign State should not be permitted to collect lawful revenue in a foreign country. Various reasons are to be found in the cases. LORD EVERSHED, M.R., in the *Delhi Electric Supply* case, *supra*, after an analysis of various English and American cases adopted a submission made by LORD SIMON at the Bar in one of those cases, viz.:

> 'International comity does not extend to the recognition of liabilities imposed by a State on its subjects for its own domestic management and regulation.'

JENKINS, L.J., in the same case said the rule was based on cogent considerations of convenience, international comity and public policy. Another view given by the American

Judge LEARNED HAND in *Moore* v. *Mitchell* . . . and referred to by LORD KEITH in the *Government of India* case, *supra* at p. 299 of the All E.R., is that to allow recovery of revenue by foreign States would always involve an enquiry into whether the foreign law was in accord with the policy of the domestic State. Prof. Ellison Kahn in an article in the 1954 *S.A. Law Journal* at p. 277, has an enumeration of views expressed by various text-writers as to the reasons for the rule. These are that tax laws are akin to penal laws, that recognition would be against public policy and that the Courts might be reluctant to enforce an intricate foreign tax system. As said in *State of Oklahoma* v. *Rodgers*, 165 A.L.R. 785 at p. 793,

> 'revenue laws are similar to penal laws only in the sense that they are both State regulations of a civic duty, but intrinsically they are different. A penal law is punitive in

nature, while a revenue law defines the extent of the citizen's pecuniary obligation to the State, and provides a remedy for its collection'.

As to public policy one finds it difficult to see how non-recognition of foreign revenue laws is to be founded on this 'unruly horse'. One would have thought that it is public policy that persons should pay their taxes and not evade such payment by escaping the country which imposed them. There may be difficulty in interpreting foreign revenue laws but such difficulties are met with in relation to other foreign laws with which the Courts have on occasion to grapple.

Of recent years there have been some critics of the rule and in so far as they have attacked the sort of reasons above referred to I am of the view that the criticisms are justified: see A. R. Albrecht on 'The Enforcement of Taxation under International Law' in *British Year Book of International Law*, (1953) at p. 454; *State of Oklahoma* v. *Rodgers, supra*.

But there is one explanation for the rule which seems to me to be fundamental and unexceptionable. It is referred to by LORD KEITH in *Government of India* (1955) 1 All E.R. at p. 299) where he says:

'One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes and that an assertion of authority by one State within the territory of another, as distinct from a patri-

monial claim by a foreign Sovereign is (treaty or convention apart) contrary to all concepts of independent sovereignties.'

It is on the above basis that one can draw an analogy between penal and revenue laws. An independent State is entitled to exercise supreme authority over all persons and things within its territory. That right must be recognised as existing in other independent States. This involves reciprocal obligations not to carry out acts of sovereignty in the

territory of another State; see Oppenheim on *International Law*, vol. 1 pp. 286,295, sec. 144(a) pp. 327–8.

In the well-known *Lotus* case (1927), decided in the Permanent Court of International Justice, is to be found the following passage:

> '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 powers in any form in the territory of another State. In this sense jurisdiction is territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention.'

The imposition of tax creates a duty that is not to be likened to any other debt. The fiscal power is an attribute to sovereignty. Prof. Edgar Allix says in the 'Receuil des Cours' of the Académie de Droit International, (1937)111(61) at p. 559:

> 'Le premier droit et le premier devoir de l'Etat est d'assurer son existence et son fonetionnement [*sic*] et, à cet effet, d'exiger de ceux qui vivent sans sa lois [*sic*] les moyens necessaires. Le fondement de l'impôt est dans la souverainete de l'Etat laquelle implique l'autorité, dont le pouvoir fiscal est un des attributs.'

As *Oppenheim* says:

> 'to enforce revenue laws would in effect mean to assist States in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy'. Pp. 329–30.

Just as one State cannot send its police force into another State so also it cannot send its tax-gatherers.

To allow a foreign State, whether directly or indirectly, to

> obtain a judgment for taxes imposed on all those who in its eyes share in the economic or social life of that State, in the Courts of another country, would be a judicial intervention

in direct derogation of that country's territorial supremacy. As the passage cited from the *Lotus* case indicates such an inroad can only be justified by custom or by some special agreement. The latter is the function of the Executive power.

The above considerations are in my view decisive. Nor do they allow of a distinction to be made between an action brought directly based on the tax laws or one in respect of a judgment already obtained in the domestic State. Moreover they have the same validity for the Republic of South Africa as they have for all sovereign States. There is no contrary custom and no legislation governing the point. Accordingly our Courts have no jurisdiction because permissive powers are not part of the judicial function. If it is in the modern world desirable that the tax-gatherer be permitted to pursue his claims beyond the domestic confines, upon which subject I venture no opinion, such must be sought by way of conventions and treaties.

In the result the application is refused."

The rule is perhaps most pithily expressed in *Att. Gen (New Zealand)* v. *Ortiz* (1) in the words of Lord Denning, M.R. ([1984] A.C. at 20):

"No one has ever doubted that our courts will not entertain a suit brought by a foreign sovereign, directly or indirectly, to enforce the penal or revenue laws of that foreign state. We do not sit to collect taxes for another country or to inflict punishments for it."

Counsel for the trustee and for Advocate Clyde-Smith were kind enough to provide the court with a list of questions which, they submitted, could assist it. I am grateful for these suggestions but I have preferred to follow the approach of the Attorney General who was convened to assist the court on the constitutional issues involved in the application under s. 122 where an assumption could be that the court might be required to assist in a tax bankruptcy. By agreement of the parties, Advocate Bailhache was allowed to add a further paragraph to Advocate Clyde-

Smith's representation in which the powers of the Royal Court in a *désastre*, to order the examination of a witness by the Viscount, were questioned. As will become apparent from my judgment, I

have not thought it necessary to rule on this interesting submission. Nevertheless I feel constrained to observe that the suggestion that the Royal Court has no power to order examination by the Viscount of a witness, who may have important information bearing upon the whereabouts of the assets of a bankrupt, is startling. As I have already said, *Re a Debtor, ex p. Viscount of Royal Ct.* (5) is a case which, taken with our Jersey customary law, has enabled me to find, or rather to confirm, that a *désastre* may be equated with a bankruptcy for the purposes of the Bankruptcy Act. I am bound to say that the suggestion that the court would be powerless to intervene in the absence of express statutory authority in a *désastre* at the request of the Viscount, when faced with a recalcitrant witness, is not one that appeals to me. But, as I have said, my judgment on the other submissions of counsel makes it unnecessary to rule on this point.

I had the advantage of reading the judgments of the Deputy Bailiff of Guernsey and the First Deemster of the Isle of Man, who were faced with the same application by the trustee; it is in those judgments rather than the English authorities, persuasive as they are, and in the cases decided in the Royal Court, that I should look to see what are the principles which should guide me in coming to my decision. Nevertheless, I have had full regard to a number of English and Commonwealth cases which are relevant in attempting to answer the questions posed by the Attorney General in his submissions to me.

The questions I ought to ask myself were put by the Attorney General as follows:

1. Is s.122 of the Bankruptcy Act 1914 subject to the rule in its application to Jersey?

2. Can examination of witnesses with or without documents amount to an indirect attempt to enforce a foreign revenue law contrary to the rule?

3. Does a request for the examination of witnesses pursuant to s.122 when the sole creditor is the UK Revenue amount to an indirect attempt to enforce a foreign revenue law?

Before attempting to answer the questions I wish to say that if I do not refer to all the cases and authorities compiled so fully and painstakingly by all counsel, it is not because I have ignored them but rather because some repeat well-known principles.

I start with Question 1: The Deputy Bailiff of Guernsey in *Re Tucker* (16), rejected jurisdiction even with Mr. Harris still in

position as a creditor, whereas Deemster Luft in *In re Tucker* (17) in the Isle of Man High Court, left the position open in the case where the Inland Revenue was the only remaining creditor. He said that in such a case the court would have been required to determine whether, notwithstanding the mandatory nature of s.122, there was a discretion to refuse aid. The rule is, as I have said, now part of the law of Jersey and, in my view, it is important that it should not be reduced to a mere formality. Thus in the *Buchanan case* (4) Kingsmill Moore, J. said ([1955] A.C. at 528):

> "Judge Learned Hand is well known as an authority on the conflict of laws in a country where the existence of so many co-ordinate State jurisdictions has given to this branch of law a special importance and has caused it to be studied extensively. Whatever be the origin of the rule, the judge's statement of the practical basis which lead to its adoption in the courts of common law and his reasons for its observance seem to me convincing and illuminating."

The judge was referring to that part of Judge Learned Hand's judgment in *Moore* v. *Mitchell* (8) where he says, *inter alia* (30 F. (2d) at 604): "Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws." Kingsmill Moore, J. continued ([1955] A.C. at 528): "Moreover, they suggest the importance of guarding against any attempt to evade the rule or to whittle away the scope of its application."

Further support for this approach is to be found in Woolf, L.J.'s judgment in *In re State of Norway Application (No. 2)* (10)

([1988] 3 W.L.R. at 658):

"I have reservations as to whether our approach to the question of tax gathering should be the same today as it has been in the past. Having regard to the scale of international tax avoidance and the undesirable manifestations which are associated with it, a powerful argument could be advanced for saying it is very much in the interests of this country and the majority of the other countries in the world that there should be co-operation in this field. However, it would be wholly inappropriate in this appeal to seek to undermine the well established policy identified in the speech of Lord Somervell of Harrow in *Government of India* v. *Taylor*. . ."

There may be straws in the wind but it is not for me, sitting as the Inferior Number of the Royal Court, to increase the Beaufort scale.

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As to the meaning of s.122, I cite a passage from the judgment of Deemster Luft in the Isle of Man *Tucker* case (17) (1988 FLR at 163):

"It has therefore been held in other countries, having Acts with similar mandatory wording to that of s.122, that such an enactment merely 'enables' the court of the country in which aid is sought to act and where the sole object of seeking aid is to enforce a revenue claim then the court may exercise its discretion to refuse such aid. At the same time the courts in other countries where there have been other creditors, apart from the Revenue, have granted aid to the trustee in bankruptcy of another country. Indeed the opinion has been expressed that the statutory provision must overrule the public policy convention. I consider that the principles set out in *Priestley* v. *Clegg* apply in the Isle of Man. In that case 94% of all the claims in the bankruptcy were revenue claims but because the money which the trustee was seeking to get in would in due course benefit some ordinary creditors, the rule which required the court to refuse to lend its aid in support of the claims of the Revenue of another country had

no application.

So that even if it is assumed that s.122 allows a discretion where the sole object of the bankruptcy is to enforce a revenue claim, the court is bound to act in aid subject to conditions where some ordinary creditors as well as the Revenue are likely to benefit. I go so far as to say that if one ordinary creditor apart from the Revenue has a claim in the bankruptcy then the court should act in aid under the terms of this section, particularly where, as in this case, the bankruptcy proceedings were not instigated by the revenue authority."

That seems to me, with respect, to set out concisely the position which I believe applies here in this jurisdiction. It is not necessary, I believe, for me to set out in further detail the large number of cases where the rule has been applied. They have been dealt with in the South African, Isle of Man and Guernsey cases. Nevertheless there is one case which requires some further examination. It is that of *Ayres* v. *Evans* (2). That case, according to the Attorney General and Mr. Bailhache, is out of line with the other authorities but is the one upon which Mr. Michel relies principally. It was referred to by this court with approval in the

Chiltmead case (6) but Mr. Bailhache said that the reference to it was *obiter*. In the opinion of the Deputy Bailiff of Guernsey, *Ayres* v. *Evans* was decided because of special considerations which existed between Australia and New Zealand. Turning to the case itself, the headnote in the *Federal Law Reports* reads (56 Fed. L.R. at 235–236):

"The appellant was a resident of New Zealand where he had been declared bankrupt. He was entitled to the unadministered residuary estate of his father, which was being administered in New South Wales. The High Court of New Zealand by letter of request sought the aid of the Federal Court in getting in the appellant's interest in his father's estate and remitting the proceeds to the official assignee in New Zealand to be administered in accordance

with New Zealand law.

More than half of the appellant's debts still outstanding were due to the New Zealand revenue authorities; and the appellant argued that the court should not lend its aid in obtaining moneys for the payment of revenue debts owed to another State.

The Federal Court made an order that the official receiver be appointed receiver of the appellant's interest in his father's residuary estate, with power to sell it and directed him to pay the proceeds to the Official Assignee in Bankruptcy in New Zealand. The appellant appealed from this decision.

Held: (1) Per curiam—The rule that the courts will not act to enforce a revenue claim by another State does not apply where a liquidator or official assignee seeks to get in property which will in due course benefit ordinary creditors as well as the revenue.

. . .

(2) Per Northrop and McGregor JJ.—The mandatory provisions of s.29(2)(*a*) of the Bankruptcy Act prevented the application of the rule of public policy that a court will not assist the revenue claim of another State.

. . .

(3) Per Northrop J.—A request made pursuant to s.29(2)(*a*) of the *Bankruptcy Act* differs from an action seeking to enforce a claim based upon a cause of action. The subsection confers a jurisdiction which the court is bound to

exercise when the two requirements it contains, namely that a court of an external territory or of a prescribed country has jurisdiction in bankruptcy, and that that court has requested a court referred to in s.27 to act in its aid, are satisfied.

(4) Per Fox J.—The nature, extent and terms of the aid which the court might, pursuant to s.29 of the *Bankruptcy Act*, extend to the courts of other countries exercising jurisdiction in bankruptcy is a matter for the discretion of the

court; but extended here to the transfer of the appellant's interest in his father's estate to the official assignee, or the appointment of a receiver of it for the official assignee.

. . .

(5) The appeal would be dismissed."

Referring to the rule, in a manner very similar to that of Deemster Luft, Fox, J. said (*ibid.*, at 237):

"The general rule relied upon is well established (see Dicey and Morris, *The Conflict of Laws* (10th ed.), pp. 89–90; *Cheshire and North's Private International Law* (10th ed.), pp. 131 et seq.; Nygh, *Conflict of Laws in Australia* (3rd ed.), pp. 198 et seq.). So far as the researches of counsel, and of myself, have disclosed there is no case which decides that when a person in a representative position comparable to that of an official assignee, or liquidator, being a person who is appointed in a foreign State, claims property or moneys part only of which will go to satisfy foreign revenue claims, the claim, if otherwise competent, should be denied. The farthest the cases have gone is to deny a claim where it is apparent that the whole of the amount sought to be recovered by a liquidator, or by an official assignee, in a foreign country will go to satisfy a revenue claim (*Peter Buchanan Ltd. v. McVey* . . . reported as a footnote to *Government of India v. Taylor* . . .; *Re Gibbons; Ex parte Walter* . . .)."

The judge also mentioned the arrangements between British courts in insolvency cases in the following words (*ibid.*, at 239):

"There has long existed an arrangement in British courts whereby countries act in aid and are auxiliary to each other in connexion with bankruptcy and insolvency administration (see s.74 of the *Bankruptcy Act*, 1869 (Eng.); s.118 of the *Bankruptcy Act*, 1883 (Eng.) and s.122 of the Imperial *Bankruptcy Act*, 1914). A similar provision, s.71 of the

Bankruptcy (Ireland) Amendment Act, 1872 was considered by Walsh J. in *Re Gibbons; Ex parte Walter* . . . and he

exercised a discretion against giving aid."

The relevant statute which governed the Australian court was s.29 of the Bankruptcy Act 1966 as amended by the Act of 1980. Sub-sections 29(1) and (2) of the Act (as amended) now read:

"29. (1) All Courts having jurisdiction under this Act, the Judges of those Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.

(2) In all matters of bankruptcy, the Court—

(*a*) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

(*b*) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy."

Referring to s.29(2), Fox, J. says (*ibid.*, at 240):

"The relevant jurisdiction of a court exercising federal jurisdiction in bankruptcy can however only stem from s.29, and it is from that source that this Court derives jurisdiction. It seems to me that there is no doubt that the aid which can be provided includes transfer of the appellant's interest to the official assignee, or the appointment of a receiver of it for the official assignee. The form of relief granted in this case is not challenged, and this includes an order for the appointment of a receiver."

Northrop, J. considered that the words of s.29(2) prevented the application of the rule. He said (*ibid.*, at 249):

"In my opinion, a request under s.29(2)(*a*) is different in nature from an action seeking to enforce a claim based upon a cause of action and leaves no room for the application of the policy. Different considerations may well arise in the application of s.29(2)(*b*)."

He continued (*ibid.*):

"Counsel for the appellant relied strongly upon *Gibbons* case . . . in which Walsh J. held that under s.71 of the *Bankruptcy Act* 1972 [*sic*] (Ireland) which is in similar form

to s.122 of the Imperial *Bankruptcy Act* 1914 in that it used the word 'shall', the court was not bound to act in aid and that in the exercise of its discretion it refused to act in aid since the aid was invoked to assist the English revenue

authorities to recover moneys. I do not find the reasons of Walsh J. persuasive. He made no reference to *Re Osborn*; *Ex parte Trustee* . . . nor to the use of the word 'shall.'"

Lastly, he agreed with Fox, J. "on the facts of this case" i.e., that ordinary creditors might benefit from the liquidator getting in the property of the applicant.

Ayres v. *Evans* (2) seems to go beyond the established English and Irish cases but, in my opinion, the above judgments in this case are not totally supportive of each other. For example, McGregor, J. says (*ibid.*, at 253):

> "As to the specific public policy relied on, it is to be noted that the leading authorities are really concerned with an action which sought recovery of revenue funds *only*. We are not concerned with such a situation. Here the action is by one whose function is to implement the laws of bankruptcy in New Zealand to get in the bankrupt's estate (see *Insolvency Act* 1967 (N.Z.), s.71) for distribution amongst creditors, and not to enforce revenue laws; even if in the process the revenue should benefit." [Emphasis supplied.]

Since I have found that there are no creditors apart from the unadmitted claim of the Inland Revenue, the latter paragraph of this excerpt cannot apply. It is not clear to me, therefore, that the court was extending the exception to the rule; but even if it were, I am not prepared to follow it in this court.

I therefore answer the first question of the Attorney General in the affirmative.

I now turn to the other two questions of the Attorney General, which I shall consider together. Let me examine what might happen if I answered the two questions in the negative, in which case I would have to give assistance subject to conditions (*In re Osborn, ex p. Tree.* (11)). The information obtained from

Advocate Clyde-Smith might be used to ascertain the beneficial ownership of companies and/or trusts. If the bankrupt were found to be the beneficial owner of some or all of such companies and/or trusts, then if the assets of those companies and/or trusts were within the English jurisdiction, and I do not know if they are, the trustee could, quite properly, take steps to get possession of them. If on the other hand any of those assets, contrary to the present belief of the trustee, were in Jersey, he would undoubtedly be faced, if he attempted to obtain possession of them, with the application of the rule.

Mr. Michel relied on *In re State of Norway Application* (9), the relevant part of the headnote of which in the *Law Reports* reads ([1987] Q.B. at 433):

> "(2) That, although as a matter of public policy the English courts would not assist in the direct or indirect enforcement of a revenue law of a foreign state, it was not contrary to comity or public policy to accede to a request for evidence in foreign proceedings relating to a foreign taxpayer's liability to tax where the request was supported by the taxpayer (the estate) and the state. . ."
>
> *Government of India v. Taylor* . . . and *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd* . . . considered."

It is interesting to see that the court referred to the question of international assistance in revenue matters, when Kerr, L.J. said (ibid., at 473):

> "(iv) International assistance in revenue matters is generally given by Double Tax Conventions, which normally provide for 'exchange of information': see, for example, article 30 of the Convention between the United Kingdom and Norway of 22 January 1969(S.1. 1970 No. 154). As already mentioned, there appears to be no reported instance of an ordinary international Convention—whether multi or bilateral—for evidential judicial assistance being used for this purpose."

There is, as the Attorney General pointed out, a Double Taxation Agreement in force between the United Kingdom and Jersey and much of the exchange of information between the revenue authorities of each jurisdiction is an administrative and not a judicial matter. The same judge said later (*ibid.*, at 479):

"However, it is clearly open to argument whether a request for evidential assistance pursuant to section 2 of the Act of 1975, relating to proceedings in a foreign court concerning a foreign resident's tax liability, is properly describable as an action for the enforcement, directly or indirectly, of a revenue law of a foreign state. The recent decision of the House of Lords in *Williams and Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd.* . . . suggests that the principle stated in *Dicey* is to be construed narrowly. It is also important to note that by section 5 of the Act of 1975, evidence may be obtained, albeit to a more limited extent, in

relation to criminal, that is, penal, proceedings in foreign countries. Accordingly, despite the references to the various stages of the process of 'tax gathering' which Lord Somervell of Harrow mentioned, it must be doubtful whether the English courts would be wholly debarred from considering a request such as the present as a matter of public policy. Nevertheless, if this issue had arisen in the present case in a different form—that is, if a foreign state had sought to enlist the assistance of the English courts in order to obtain evidence against one of its taxpayers in opposition to the taxpayer—then I would have regarded such a request as part of the foreign 'tax gathering' process to which the English courts

should not lend their assistance as a matter of public policy, in keeping with principles which are internationally accepted."

In the instant case it is open to the bankrupt to complain to the High Court of any action of the trustee but he is not a party to the application and does not oppose it, although Mr. Michel has said that the trustee represents the taxpayer, i.e. the bankrupt. Nor is Mr. Clyde-Smith really a party to the action but like the Deputy Bailiff in the Guernsey *Tucker* case (16), I am prepared to give him the benefit of the doubt and he has opposed the application; the Attorney General likewise (as *amicus curiae*) and, of course, the present application is not that of a foreign state. Mr. Michel has urged me to take a narrow view of the rule, relying on the citation in *Williams & Humbert Ltd.* v. *W. & H. Trademarks (Jersey) Ltd.* (19) mentioned in the above passage. Should I do so? Is there a valid distinction between enforcing a tax debt, or attempting to do so, that is to say, a true collection of a debt, whether it be for the benefit of some other creditors in addition to the Inland Revenue or not, and the seeking of information as here? Mr. Bailhache asked why does the trustee require the information? The answer, he said, must be (as I have suggested already) to get in the bankrupt's assets, to settle the debts and to account for any balance (which would be unlikely) to the bankrupt. But, of course, the settlement of the debts, in effect, would mean the payment of the Inland Revenue's claim; always assuming it will finally be agreed. As regards Mr. Michel's submission that the trustee is the *alter ego* of the bankrupt, Mr. Bailhache doubted whether the trustee would appeal against the

assessments of the Inland Revenue; at the moment the gap is considerable to say the least.

I do not think I should attach much importance to the form of the aid if the effect would be to enable the trustee to enforce, however indirectly, a revenue debt as a result of information obtained in this jurisdiction. To cite Kingsmill Moore, J. again in the *Buchanan* case (4) ([1955] A.C. at 529):

> "If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected."

See also *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria* (3).

I have come to the conclusion that, looking at the facts and what is asked for in these particular circumstances, I am justified in answering the second and third questions of the Attorney General in the affirmative. I find, therefore, that I have no jurisdiction to grant the request of the trustee, although in so ruling, I am acting with some reluctance as I have no sympathy whatsoever with the bankrupt. Accordingly, I reject the representation.

25 I wish to add that, had Mr. Harris still been a creditor, I should have inclined more to the opinion of Deemster Luft rather than to that of the Deputy Bailiff of Guernsey.

Application dismissed.