

[2006 JLR 112]**DURANT INTERNATIONAL CORPORATION, SUN DIAMOND LIMITED, KILDARE FINANCE LIMITED and MACDOEL INVESTMENTS LIMITED v. ATTORNEY GENERAL and FEDERAL REPUBLIC OF BRAZIL**

COURT OF APPEAL (Sumption, Steel and Vos, JJ.A.): March 17th, 2006

Evidence—assistance in foreign proceedings—letters of request—not required for investigation under Investigation of Fraud (Jersey) Law 1991, art. 2—lawfulness of letter of request irrelevant to proposed disclosure of information to assist foreign criminal investigation if obtained by Attorney General under 1991 Law—lawful letter of request relevant under Criminal Justice (International Co-operation) (Jersey) Law 2001

Administrative Law—judicial review—Attorney General—judicial review proceedings are “civil cause or matter” within Court of Appeal (Jersey) Law 1961, art. 12 regardless of subject matter of administrative decision under review—Court of Appeal may hear appeal from decision of Royal Court on judicial review of Attorney General’s exercise of powers to assist foreign criminal investigation under Investigation of Fraud (Jersey) Law 1991

The appellants sought judicial review of the Attorney General’s refusal to disclose two letters of request from the Federal Republic of Brazil.

The appellants were companies incorporated in the British Virgin Islands which had bank accounts and other assets in Jersey. They were allegedly connected with M who was a prominent figure in Brazil and a successful businessman. He was the subject of criminal investigations in Brazil concerning allegations of corruption, embezzlement of public funds and money laundering in connection with public works contracts. Some of the investigations had led to criminal charges whilst others remained at the investigatory stage and some had already been dropped.

The Attorney General received several requests for assistance from Brazil, including requests from two state prosecutors who did not have the authority to make them. The appellants claimed that the allegations were part of a political campaign to discredit M and that the letters of request were mere fishing expeditions. The Attorney General began his own investigation, under the Investigation of Fraud (Jersey) Law 1991,

2006 JLR 113

concerning assets in Jersey. Article 2(1) of that Law provided that he could obtain documents and information if it appeared to him that there was a suspected offence of serious or complex fraud wherever committed, and he could disclose them under art. 3(3)(a). In addition, the later Criminal Justice (International Co-operation) (Jersey) Law 2001, art. 5 provided that, if he received a request for assistance, the Attorney General could order that evidence be obtained concerning any suspected offence and disclose it to the requesting authority.

The Attorney General considered the confidential material which he obtained under the 1991 Law to be relevant to the Brazilian investigations and also to possible further offences. He received a formal letter of request from Brazil in 2003, which issued from the Federal Criminal Court and was forwarded to Jersey by the Brazilian National Justice Secretary, via the Brazilian Embassy. The Federal Republic subsequently produced an opinion, endorsed by the Brazilian Attorney General, which confirmed that the request had been lawfully made. A further, similar request was received in 2005.

The Attorney General informed the appellants that he was minded to disclose the information he had obtained to the Brazilian authorities under the Investigation of Fraud (Jersey) Law 1991, art. 3(3) but sought representations from them before making a final decision. He refused to disclose the letters of request but provided a summary of the allegations and the dates and source of the letters. The appellants claimed that they needed to see the letters of request as they might not be lawful under Brazilian law. In addition, they wished to argue that the allegations under investigation were unfounded. They applied to the Royal Court seeking judicial review of the Attorney General’s refusal to disclose the letters.

The Royal Court (Birt, Deputy Bailiff and Jurats Allo and Newcombe) held that the Attorney General was entitled to withhold the letters of request and that his decision was not procedurally unfair or irrational. Letters of request would generally be regarded as confidential and would not be disclosed to the persons they concerned. Although the Attorney General had obtained the information pursuant to the 1991 Law rather than the 2001 Law, the lawfulness and terms of the letters of request from Brazil might have been relevant considerations for him in deciding whether or not to disclose the information to the Brazilian authorities, as the earlier, unlawful requests had prompted his investigation. The court held that it was sufficient that he had obtained an opinion on the lawfulness of the letters of request from the Federal Republic and did not order disclosure of the letters to the appellants. Those proceedings are reported at [2006 JLR 31](#).

The appellants appealed against the Royal Court’s decision. The Attorney General submitted, however, that the court did not have jurisdiction to hear the appeal, as judicial review of a decision concerning the provision of information to a foreign prosecuting authority for the purpose of a criminal investigation was a criminal matter. The court’s jurisdiction in criminal matters was limited, under the Court of Appeal

2006 JLR 114

(Jersey) Law 1961, art. 24, to hearing appeals from persons convicted in the Royal Court against their conviction or sentence. The case did not fall under the court's jurisdiction in civil matters, under art. 12 of the Law, to hear appeals "in any civil cause or matter."

Held, dismissing the appeal:

(1) The Royal Court had correctly held that the Attorney General was entitled to withhold the letters of request because the appellants had not suggested any plausible grounds on which it could be said that they needed to see them and their appeal would therefore be dismissed. As the Attorney General was proposing to disclose the confidential information in his possession to the Brazilian authorities pursuant to his powers under the Investigation of Fraud (Jersey) Law 1991, art. 3, for which a lawful letter of request from a foreign prosecuting authority was not a requirement, the lawfulness of the letters under Brazilian law was largely irrelevant and the appellants did not need to see them to make further representations as to their lawfulness. The Attorney General had, however, to act rationally and could only disclose the information under the 1991 Law to someone authorized to receive it and for the purpose of the criminal investigation in Brazil. The letters of request might therefore have been relevant to the extent that such a person might be the same person or body entitled to authorize the letter of request or receive information pursuant to it. In the present case, however, the Attorney General was proposing to disclose the information to the National Justice Secretary and the Ministry of Justice in Brazil, via the Brazilian Embassy to the United Kingdom, and he was obviously entitled to proceed on the basis that those bodies were authorized agents of the Brazilian state for the purpose of receiving the information and identifying the persons to whom it should be transmitted. The lawfulness of the letters would have been relevant had the disclosure been proposed under art. 5 of the Criminal Justice (International Co-operation) (Jersey) Law 2001, which would have required a lawful request for assistance ([paras. 37–38](#); [para. 43](#)).

(2) Nor was it desirable that the letters of request should be disclosed to the appellants to enable them to argue that the Brazilian allegations against M were unfounded. It would be for the Brazilian authorities and ultimately the Brazilian courts to determine whether or not the allegations were well founded, not the Attorney General. Unless there was reason to think otherwise, he and the Jersey courts were bound to proceed on the basis that M and others under investigation could challenge the allegations against them in Brazil ([para. 40](#)).

(3) In general, letters of request issued in respect of current criminal investigations were confidential and they would not usually be disclosed. Disclosure to the persons under investigation merely of information concerning the nature of the criminal investigation would generally be sufficient. As letters of request often contain information concerning the

2006 JLR 115

current state of the investigation, foreign prosecuting authorities have a legitimate interest in withholding them from the persons under investigation until the investigation is complete, or even longer if, *e.g.* there is a danger that sources might be compromised or potential witnesses intimidated. It would be desirable for foreign authorities to supply such information with proper safeguards against the disclosure of any confidential matters ([para. 34](#)).

(4) The court had jurisdiction to hear the appeal as the judicial review proceedings in the Royal Court concerning the Attorney General's exercise of his powers under the Investigation of Fraud (Jersey) Law 1991 constituted a "civil cause or matter" for the purposes of art. 12 of the Court of Appeal (Jersey) Law 1961. The court had jurisdiction under the 1961 Law to hear appeals in two categories of case, which together were intended to cover all decisions of the Royal Court, subject to certain express exclusions. One category, under art. 24 of the Law, comprised appeals by convicted persons from decisions in criminal trials. The other category, under art. 12, comprised appeals "in any civil cause or matter" and covered all other decisions irrespective of subject matter or purpose. Decisions in judicial review proceedings in the Royal Court, whatever the subject matter of the administrative decision under review, would therefore be proceedings in a "civil cause or matter" for the purposes of the 1961 Law and this court could hear appeals against decisions made in those proceedings. It was therefore irrelevant that the subject matter of the judicial review in the present case was the Attorney General's refusal to disclose letters of request concerning criminal investigations in Brazil ([para. 29](#); [paras. 31–32](#)).

Cases cited:

- (1) *Amand v. Home Secy.*, [1943] A.C. 147; [1942] 2 All E.R. 381; (1942), 58 T.L.R. 382, referred to.
- (2) *Bassington v. H.M. Procureur*, Guernsey C.A., December 2nd, 1998, unreported, applied.
- (3) *Bonalumi v. Home Secy.*, [1985] Q.B. 675; [1985] 1 All E.R. 797; (1984), 129 Sol. Jo. 223, distinguished.
- (4) *Carr v. Atkins*, [1987] Q.B. 963; [1987] 3 All E.R. 684; (1987), 85 Cr. App. R. 343, distinguished.
- (5) *Harbours & Airports Cttee., In re*, 1991 JLR 316, referred to.
- (6) *McMahon v. Att. Gen.*, 1993 JLR 108, overruled.
- (7) *R. v. Home Secy., ex p. Zardari*, [1998] EWHC 305 (Admin.), *dicta* of Lord Bingham, C.J. applied.
- (8) *R. (Evans) v. Serious Fraud Office Director*, [2003] 1 W.L.R. 299; [2002] EWHC 2304 (Admin.); (2002), 99(45) L.S. Gaz. 34, referred to.

- (9) *Renouf v. Att. Gen.*, [1936] A.C. 445; [1936] 1 All E.R. 936; (1936), 52 T.L.R. 455; 80 Sol. Jo. 304, referred to.

2006 JLR 116

Legislation construed:

Court of Appeal (Jersey) Law 1961 (Revised Edition, ch.07.245, 2006 ed.), art. 12: The relevant terms of this article are set out at [para. 19](#).

art. 22: The relevant terms of this article are set out at [para. 23](#).

art. 24(1): The relevant terms of this paragraph are set out at [para. 21](#).

Criminal Justice (International Co-operation) (Jersey) Law 2001 (Revised Edition, ch.08.300), art. 5(1): The relevant terms of this paragraph are set out at [para. 4](#).

Investigation of Fraud (Jersey) Law 1991 (Revised Edition, ch.08.640), art. 2(1): The relevant terms of this paragraph are set out at [para. 2](#).

art. 3(3): The relevant terms of this paragraph are set out at [para. 3](#).

Text cited:

Jones & Doobay on Extradition & Mutual Assistance, para. 20–057, at 424 (2005).

G. Robinson for the appellants;

S. Baker, Crown Advocate, for the Attorney General;

P.D. James for the Federal Republic of Brazil.

1 **SUMPTION, J.A.**, delivering the judgment of the court:

Introduction

This appeal relates to the provision of assistance by the authorities in Jersey to foreign prosecutors. In particular, it relates to the provision of information about balances in Jersey bank accounts which may originate in criminal acts committed overseas. This is a matter of considerable and growing importance. Over the last half-century, Jersey has become a major financial centre, providing trust and banking facilities for an extensive international clientele. Customers of Jersey banks and trust companies are entitled to have the confidentiality of their legitimate affairs respected. But that protection is limited to their legitimate affairs. 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.

2 One of the main legislative instruments of this policy is the Investigation of Fraud (Jersey) Law 1991, which confers extensive powers of investigation and disclosure on the Attorney General. Article 2(1) of the Law empowers him to carry out investigations where—

“(a) there is a suspected offence involving serious or complex fraud, wherever committed; and

“(b) there is good reason to do so for the purpose of investigating the affairs, or any aspect of the affairs, of any person.”

2006 JLR 117

3 If these conditions are satisfied, the Attorney General may require any person to disclose information, answer questions or produce documents. Article 2(10) empowers him to delegate his investigatory functions to any Crown Advocate or (subject to limited exceptions) to any other person authorized for that purpose. Under art. 3(3) of the Law, information obtained by the Attorney General or his delegate in the course of an investigation under art. 2 may be disclosed—

“(a) to any person or body for the purposes of any investigation of an offence or prosecution in Jersey or elsewhere; and

“(b) to any competent authority.”

4 These are not the only statutory powers which enable the Jersey authorities to assist the investigation or prosecution of offences or suspected offences outside Jersey. Article 5 of the Criminal Justice (International Co-operation) (Jersey) Law 2001, which is in a form common to many European jurisdictions, empowers the Attorney General to act on foreign letters of request. Article 5(1) of that Law provides:

“(1) This Article applies where the Attorney General receives—

(a) from a court or tribunal exercising criminal jurisdiction in a country or territory outside Jersey or a prosecuting authority in such a country or territory; or

(b) from any other authority in such a country . . . which appears to the Attorney General to have the function of making requests of the kind to which this Article applies,

a request for assistance in obtaining evidence in Jersey in connection with criminal proceedings which have been instituted, or a criminal investigation that is being carried on, in that country or territory and the Attorney General is satisfied—

- i(i) that an offence under the law of the country or territory in question has been committed or that there are reasonable grounds for suspecting that such an offence has been committed, and
- (ii) that proceedings in respect of that offence have been instituted in that country or territory or that an investigation into that offence is being carried on there.”

Where these conditions are satisfied, the Attorney General is empowered to nominate a court or the Viscount to receive the evidence and transmit it to the foreign court or other authority.

Paolo Maluf

5 Mr. Maluf is a prominent Brazilian businessman and politician who

2006 JLR 118

was Mayor of the City of São Paulo between 1993 and 1996. The present dispute arises out of investigations into his affairs and those of his family by prosecutors in Brazil and the Attorney General’s office in Jersey. The facts are very fully set out in the careful judgment of the Royal Court. I will therefore content myself with a brief summary here.

6 The investigations relate to allegations of corruption, embezzlement of public funds and money laundering in connection with two major public works contracts for the construction of the Ayrton Senna Tunnel and the Avenue Agua Espraida in São Paulo while Mr. Maluf was Mayor. In each case, it is alleged that the cost price of the works was fraudulently inflated and that the excess, amounting to some hundreds of millions of US dollars, was diverted into the hands of Mr. Maluf and his family, via bank accounts in Switzerland and Jersey. These matters are still at the investigatory stage in Brazil. In addition, Mr. Maluf faces allegations in Brazil relating to the embezzlement of part of the proceeds of a municipal bonds issue. Indictments charging criminal misrepresentation in relation to the bonds issue were issued against Mr. Maluf and two officials of the municipality in 1997. These have been quashed by the Brazilian courts as against Mr. Maluf on the ground that the limitation period had expired, but criminal proceedings continue as against the two officials to whom a different limitation period applies. Finally, in November 2004, indictments were issued against Mr. Maluf and members of his family alleging breaches of Brazilian exchange control and tax laws.

7 The four appellants in these proceedings are all companies incorporated in the British Virgin Islands, which maintain accounts in Jersey. Mr. Maluf, who has sworn an affidavit in these proceedings, says that he is not a director or shareholder of these companies and that he is not a signatory on the accounts. He has also made public statements in Brazil denying that he has assets in Jersey. It is, however, implicitly conceded by the terms of the application that he has some interest in the balances on these accounts. The evidence which the Attorney General put before the Royal Court leaves little doubt that the appellants act in relation to the accounts on the directions of Mr. Maluf, that the funds originated from him, and that subject to any prior interests the beneficial owners are members of his family.

8 The matter first came to the attention of the Jersey authorities in 1999, when the Brazilian Financial Intelligence Unit established contact with the Jersey police. The Jersey police supplied them in 2000 (it is said, unlawfully) with some information that had come into their hands about the accounts and about the transfer into them of assets originating from accounts in Switzerland. In 2000 and 2001, the matter was taken up in Brazil by the various prosecuting authorities of the State of São Paulo. They made more formal requests for assistance, with a view to obtaining

2006 JLR 119

further and more specific information. These efforts came to an end in October 2001 when Brazil’s highest Federal court, the Superior Tribunal of Justice, held at the instance of the Federal public prosecutor’s office that only Federal prosecutors had power under Brazilian law to investigate assets held outside Brazil.

9 At some stage, it seems in early 2001, the Attorney General resolved to carry out his own investigation into the question of whether the funds in the Jersey accounts represented the proceeds of fraudulent transactions. According to evidence sworn on his behalf by an advocate employed in his office, he did this at least in part because of representations made to him by advocates acting for Mr. Maluf, suggesting that the allegations against him in Brazil were insubstantial and politically motivated. A notice was accordingly served on the account-holding banks under art. 2 of the Investigation of Fraud Law, requiring the production of specified information. In addition, the Attorney General applied for assistance under mutual cooperation arrangements with the United States, whose authorities supplied a substantial volume of additional information. The result is that the Attorney General has concluded that the material in his possession is highly relevant to the current criminal proceedings and investigations in Brazil, and that some of it indicates that Mr. Maluf may have committed further criminal offences as yet unknown to the Brazilian authorities.

10 On July 4th, 2002, the Attorney General wrote to the Brazilian ambassador to the United Kingdom informing him that he would be in a position to disclose the information acquired in the course of his

investigation if he received from them a letter of request identifying the allegations the subject of the investigation, a sworn statement that the request was made by a person authorized in Brazilian law to do so, and an undertaking that any information received in response to the letter would be used only for the purpose of the investigation. In response to that invitation, on April 9th, 2003, the Federal Criminal Court of Brazil and the Federal prosecution authority issued letters of request which were forwarded to Jersey under the authority of the National Justice Secretary and the Ministry of Justice, via the Brazilian embassy to the United Kingdom. These letters identified the allegations made against Mr. Maluf and his family and sought assistance in the form of information about the Jersey accounts. A further letter of request, in somewhat broader terms, was issued on February 28th, 2005 and delivered in person by the Attorney General of Brazil. The evidence is that these letters contained, or were accompanied by, information about the current state of the investigation in Brazil, including information obtained by the Brazilian authorities from witnesses and from documents already in their possession.

2006 JLR 120

11 On May 12th, 2005, the Attorney General wrote to Bailhache Labesse, the advocates representing Mr. Maluf, reporting that he had made his own investigation into Mr. Maluf's affairs and those of other people named in the letter of request of April 9th, 2003. That investigation, he said, was now complete. He summarized certain of his conclusions. Among other things, he told them that material obtained in the course of his investigation demonstrated a "clear link" between the method by which the proceeds of the Avenue Agua Espraida fraud were transmitted out of Brazil (according to information supplied to him by the Brazilian authorities) and credits into the accounts at Deutsche Bank in Jersey. He said that in these circumstances he was "minded to accede to" the Brazilian request of April 9th, 2005. He added:

"Even in the absence of a letter of request from the Brazilian authorities, having regard to what his own investigation has revealed, the Attorney General is of the provisional view that this is a case where his powers of disclosure pursuant to art. 3(3) of the Investigation of Fraud Law 1991 should be exercised to provide material to the Federal investigators in Brazil."

Bailhache Labesse were invited to make any representations within 30 days.

12 The request of February 28th, 2005 was not mentioned in the Attorney General's letter because it had been misfiled and had not yet come to the attention of the advocate in his department dealing with the matter. Its existence was, however, reported to Bailhache Labesse shortly afterwards.

13 On June 2nd, 2005, Bailhache Labesse asked to see the letters of request, in order that they could consider whether they were lawful as a matter of Brazilian law. They said that without seeing them they would not be able to make effective representations. This gave rise to a further correspondence with the Attorney General's office. In the course of that correspondence, the Attorney General wrote to Bailhache Labesse on July 5th, 2005, a letter which sought to supply them with as much information as they needed to make representations about the disclosure of information concerning the accounts but without disclosing further matters which were or might be confidential. In particular, he disclosed—

- "(i) the nature of the allegations against Mr. Maluf which were under investigation in Brazil, to which the information was relevant, and
- (ii) the authorities in Brazil by whose authority the letters of request had been transmitted."

14 This letter concluded:

2006 JLR 121

"In those circumstances, irrespective of the Brazilian letters of request, the Attorney General is minded to disclose the information he has obtained to the Ministry of Justice in Brazil for the purposes of a criminal investigation in Brazil as to the source of the funds . . . The basis for the disclosure is art. 3(3)(a) of the 1991 Law. You will therefore appreciate that the exercise of this power is not itself dependent on letters of request from Brazil, other than that the information disclosed in the request (whether it is authorized or unauthorized) may be the trigger for the opening of the investigation by the Attorney General."

15 The correspondence came to an end in July with the Attorney General's refusal to supply the letters. On July 11th, 2005, the applicants issued their application for leave to apply for judicial review of the Attorney General's refusal to disclose the letters of request. The relief sought was an order for disclosure and an extension of time in which to make representations. Leave was granted by the Royal Court on September 28th, 2005. The substantive application was heard on November 30th. The Royal Court (Samedi Division) dismissed it on January 19th, 2006.

Jurisdiction

16 In this court, an important preliminary question arises as to whether there is jurisdiction to entertain the appeal. It is submitted on behalf of the Attorney General that there is not. The case advanced is that an application for the judicial review of a decision relating to the provision of information for the purposes of a criminal investigation is a criminal matter. What is said is that the Court of Appeal has no jurisdiction to

entertain an appeal in a criminal matter, other than an appeal by a person convicted of an offence against his conviction or sentence. There is Court of Appeal authority to support these propositions. In *McMahon v. Att. Gen.* (6), this court held that there was no jurisdiction to entertain an appeal from the Royal Court in proceedings by way of judicial review of the Attorney General's exercise of his powers of investigation under the Investigation of Fraud Law. We are not bound by previous decisions of this court. However, by long-standing practice, this court will not depart from a previous decision on the same point unless it is convinced that the earlier decision was wrong. I approach the question of jurisdiction on that footing.

17 The jurisdiction of the Court of Appeal is wholly statutory. It is derived from the Court of Appeal (Jersey) Law 1961, which came into force in 1964.

18 Before then, all cases were heard by the Inferior Number of the Royal Court, consisting of the Bailiff or other presiding judge and two

2006 JLR 122

jurats. There was a right of appeal from all judgments of the Inferior Number, whether civil or criminal, to the Superior Number. This consisted of the Bailiff or other presiding judge and at least seven (now five) jurats, none of whom had been party to the judgment under appeal. There was, however, no Court of Appeal distinct from the Royal Court. The only avenue of appeal from the Royal Court was to Her Majesty in Council, subject to the requirement for leave imposed by the Judicial Committee Rules. This was not a wholly satisfactory substitute for a right of rehearing before a court of general appellate jurisdiction. The Judicial Committee of the Privy Council had, on a number of occasions, expressed its reluctance to serve as a general court of appeal, especially in criminal matters (see *Renouf v. Att. Gen.* (9)). Even in civil matters, the practice of the Judicial Committee involved significant limitations, which still exist, on its willingness to rehear generally the issues in the lower courts. These difficulties were pointed out in the *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands* (1947), which is the ultimate origin of the legislation creating the Courts of Appeal of both Jersey and Guernsey.

19 Civil appeals were dealt with in Part 2 of the Court of Appeal Law and criminal appeals in Part 3. The jurisdiction of the Court of Appeal in civil matters derives from art. 12, which provides:

“(1) There shall be vested in the Court of Appeal all jurisdiction and powers hitherto vested in the Superior Number of the Royal Court when exercising appellate jurisdiction in any civil cause or matter.

(2) Subject as otherwise provided in this Law and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the Superior Number of the Royal Court when exercising original jurisdiction in any civil cause or matter.”

20 Article 13 provides for a number of limitations on the jurisdiction of the Court of Appeal, some of which impose a requirement for leave, and some of which wholly exclude certain categories of appeal, for example from decisions which by virtue of any enactment are final (see art. 13(a)).

21 The jurisdiction of the Court of Appeal in criminal matters is derived primarily from arts. 24 and 25 of the Law. Article 24(1) provides:

“A person convicted on indictment by the Royal Court, whether sitting with or without a jury, may appeal under this Part to the Court of Appeal—

(a) against the person's conviction, on any ground of appeal which involves a question of law alone;

2006 JLR 123

(b) with the leave of the Court of Appeal, or upon the certificate of the judge who presided at the person's trial that it is a fit case for appeal, against the person's conviction, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) with the leave of the Court of Appeal, against the sentence passed on the person's conviction, unless the sentence is one fixed by law.”

22 There is a proviso, which preserves the right of the Superior Number to hear certain appeals from sentencing decisions of the Inferior Number. Article 25 makes separate provision for appeals in cases where the appellant has been convicted otherwise than on indictment but has been dealt with by the Royal Court.

23 The Court of Appeal Law, without wholly abolishing the appellate jurisdiction of the Superior Number, has severely curtailed it. The appellate jurisdiction in civil matters “hitherto vested in the Superior Number” has been transferred to the Court of Appeal. Article 22 of the Law provides that the appellate jurisdiction of the Superior Number of the Royal Court “shall be that conferred upon it by this Part.” The only appellate jurisdiction of the Superior Number conferred by Part 3 is its jurisdiction under the proviso to art. 24 to hear certain appeals against sentence. There is, however, another procedure available by way of petition of *doléance* which enables certain complaints against judicial decisions to be brought before the Superior Number of the Royal Court. The procedure is rarely used and the grounds available to a petitioner are narrow and somewhat obscure. They had once been thought to be limited to improper conduct on the part of the judge, generally

bias, excess of jurisdiction or perverse disregard of the law. In modern times, this principle has been developed to embrace any "manifest judicial error." In *In re Harbours & Airports Cttee.* (5), the role of the Superior Number in the hearing of petitions of *doléance* was likened to that of a court of judicial review but—

- (i) limited to receiving complaints of error of law on the face of the record, and
- (ii) having power to substitute its own decision for that of the Inferior Number if such an error were established.

24 The question of jurisdiction in this case depends on whether proceedings by way of judicial review of a decision of the Attorney General in the exercise of his powers under the Investigation of Fraud Law are a "civil cause or matter." It is not being suggested that public law

2006 JLR 124

proceedings belong to some special category, neither civil nor criminal. What is said is that proceedings by way of judicial review may be civil or criminal. Their classification in any particular case depends on the subject matter of the administrative decision which is being reviewed. Thus, where the administrative decision is to assist a criminal investigation or criminal prosecution, proceedings by way of judicial review of that decision are a criminal matter. Because an appeal from a decision on such a matter is not an appeal from a conviction or sentence, it does not fall within the only provision of the Law which confers jurisdiction on this court in criminal matters. The alternative view, which is equally consistent with the words themselves, is that a decision made in a "civil cause or matter" means a decision made in the exercise of the civil jurisdiction of the Royal Court, irrespective of its subject matter, and therefore includes all decisions in proceedings by way of judicial review. Which of these meanings should be ascribed to the phrase as it appears in the Court of Appeal Law must depend on the statutory context in which the expression is used and on the construction of the Law as a whole.

25 With the exception of *McMahon* (6), all the authorities on the classification of proceedings as civil or criminal are decisions of the English courts. All of them, moreover, are decisions on the successive enactments since 1873 which have restricted the jurisdiction of the English Court of Appeal to hear appeals from "any judgment of the High Court in any criminal cause or matter." From these decisions, it is clear that any judicial proceedings in which the direct result of granting or refusing the relief sought will be the detention, prosecution or punishment of a person for a criminal offence, whether by a British or foreign authority, will be classified as criminal proceedings (*Amand v. Home Secy.* (1)). More difficult questions arise in the case of ancillary proceedings in a civil court, relating to the provision of information or evidence for use in a criminal court or a criminal investigation. In such cases, the English courts have applied what can conveniently be called the "subject-matter test." The decisions which are most directly in point are *Bonalumi v. Home Secy.* (3) and *Carr v. Atkins* (4), both of which are decisions of the Court of Appeal in England. They are authority for the following propositions:

- (i) The classification of proceedings by way of judicial review depends on the character of the decision sought to be reviewed and not on the character of the order which the court makes on that review.
- (ii) A decision to obtain or supply evidence or information for use at a criminal trial is a decision in a criminal matter.
- (iii) The same is true of a decision to supply evidence or information for the purposes of a criminal investigation, before any criminal proceedings, properly so-called, have been commenced.

2006 JLR 125

(iv) For the purposes of (ii) and (iii), it makes no difference whether the proceedings or investigation are in England or abroad.

26 If the statutory context in Jersey were the same, it would follow that proceedings by way of judicial review of a decision by the Attorney General to exercise his powers to investigate fraud or to disclose the fruits of his investigation to foreign authorities would be proceedings in a criminal matter. The present application is somewhat more remote from the investigation or prosecution of a crime, because it concerns only the Attorney General's refusal to disclose material to assist the appellants in making representations about such a decision. But if the statutory context in Jersey were the same, that too would be a decision in a criminal matter. It would be unsatisfactory to distinguish between the successive decisions that might be made in the course of what are, in reality, the same proceedings.

27 However, the statutory context in Jersey is not the same. The English authorities are concerned with an express exclusion from the jurisdiction of the Court of Appeal of appeals in any "criminal cause or matter," in most cases because jurisdiction to deal with those has been assigned, subject to carefully drawn exceptions, to other appellate courts. Before 1964, the Superior Number of the Royal Court of Jersey had an unlimited jurisdiction to receive appeals from all decisions of the Inferior Number. As the Jersey Court of Appeal pointed

out in *McMahon* (6), the framers of the Court of Appeal Law believed that they were creating a comprehensive scheme of appeal in which the entire appellate jurisdiction formerly exercised by the Superior Number would be transferred to the new Court of Appeal, subject to the proviso to art. 24 and express exclusions in art. 13.

28 The present difficulty has arisen not from any express exclusion but from the unintended effect of two factors. The first is the decision of the draftsman to deal in different parts of the Law with civil and criminal appeals, a decision which was due entirely to his desire to make different ancillary provisions for each category of appeal. The second is the creation, since 1961, of a substantial body of statute law providing for administrative assistance to domestic and foreign criminal tribunals and authorities, all of which operates within a framework of administrative law enforced by judicial review, which barely existed when the Court of Appeal Law was enacted. It is one thing to give effect, as the courts have done in England, to a deliberate exception from the jurisdiction of the Court of Appeal of a class of appeals in "criminal causes or matters" which has been defined far more widely than appeals from convictions and sentences. It is another thing altogether to hold that the same result has been accidentally achieved, without any express exception, by the manner in which the categories of appeal which existed in 1961 have

2006 JLR 126

been distributed about the text of the Law. In principle, if the legislature wishes to exclude certain categories of appeal from the jurisdiction of a court to which it is transferring a previously unlimited appellate jurisdiction, one would expect it to say so in terms as, in very limited respects, the legislature did do in enacting art. 13. These considerations seem to me to derive additional weight from the fact that the exclusion of a right of appeal to the Court of Appeal will not prevent an appeal, subject to leave, to Her Majesty in Council. It has been suggested to us that the right to bring a petition of *doléance* before the Superior Number may be regarded as an adequate alternative to a right of appeal to the Court of Appeal. The limitations on that right make it, in my judgment, a wholly inadequate alternative. But, in any event, I am sure that it is not what the legislature in 1961 had in mind.

29 In my judgment, the historical background against which the Court of Appeal Law was passed and the way that its articles are framed, show that it was intended to create two categories of appeal which between them would cover all decisions of the Royal Court, other than decisions from which it was expressly provided that there should be no right of appeal. One category comprised appeals from decisions of the Royal Court in criminal trials. In this category, there was a right of appeal, subject to leave, against conviction and sentence. The other category comprised appeals from all decisions of the Royal Court other than decisions in criminal trials, irrespective of the subject matter or purpose of the decision. The scheme of the Law is not consistent with its having been intended to apply the "subject-matter test" so as to distinguish between different decisions of the Royal Court in the exercise of its civil jurisdiction. It is, of course, open to the legislature to make special provision for excluding any category of appeal from the jurisdiction of the Court of Appeal, but it has not done so save in limited respects which have no bearing on the present appeal.

30 Substantially the same construction has been given by the Court of Appeal of Guernsey to the Court of Appeal (Guernsey) Law 1961, which was passed against a very similar background and is in similar but not identical terms. Before that Law came into force, there was in Guernsey a right of appeal in all civil matters from the Ordinary Court to the Royal Court sitting as a *Cour des Jugements et Records*. By art. 13 of the Guernsey Law that jurisdiction was transferred to the newly created Court of Appeal of Guernsey. There was no right of appeal in criminal matters before 1964, except by special leave to Her Majesty in Council. A right of appeal to the Court of Appeal against conviction or sentence was therefore created by art. 24 of the Guernsey Law, in terms very similar to those of art. 24 of the Jersey Law.

31 Initially, the courts of Guernsey, including the Court of Appeal, followed the decision in the Jersey Court of Appeal in *McMahon* (6).

2006 JLR 127

However, in the Court of Appeal (Guernsey) Law 1961 this approach was challenged in a case where objection was taken in proceedings for the judicial review of notices issued by H.M. Procureur under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law 1991, an enactment which is very similar to the Investigation of Fraud (Jersey) Law. The Guernsey Court of Appeal considered that administrative remedies would have fallen within the civil jurisdiction of the Ordinary Court before the Court of Appeal Law came into force. They held, departing from previous Guernsey case law, that the intention was to confer on the Court of Appeal in civil matters a jurisdiction coextensive with the jurisdiction in civil matters formerly enjoyed by the *Cour des Jugements et Records*. They held that the purpose of the Court of Appeal Law and the background against which it was passed made it inappropriate to apply the "subject-matter test" derived from the English statutes. It is right to say that there are some differences between the Jersey Law and its Guernsey equivalent, but none of them affects the central feature of the reasoning in *Bassington v. H.M. Procureur* (2), which seems to me to be wholly convincing and equally applicable to the Jersey Law.

32 I have given very careful thought to the question whether it is right to depart from *McMahon*. It has stood for some 13 years. It rejected substantially the same arguments as we have heard were advanced on this appeal. I am, however, satisfied that it was wrongly decided. In my judgment, this court should hold, as the Guernsey Court of Appeal has held, that proceedings in the Royal Court by way of judicial review are

proceedings in a civil cause or matter for the purpose of the Court of Appeal (Jersey) Law, and that an appeal lies from orders made in such proceedings to this court.

The current appeals

33 The only issue before the court is whether the Attorney General acted unlawfully in refusing to disclose the two Brazilian letters of request. We are not therefore directly concerned with the propriety of disclosing the material to the Brazilian authorities. We are, however, indirectly concerned with that, because we have to consider what representations might be properly made about the disclosure of the information to Brazil, in order to decide how far the appellants may be hindered in making them by the refusal to disclose the letters of request.

34 The general principles are not, I think, in doubt. The Attorney General, having invited the appellants to make representations about whether he should disclose information in his possession to the Brazilian authorities, fairness may require him to disclose to the appellants information which they reasonably require in order to respond to that invitation. If the information is confidential to a third party, the public

2006 JLR 128

interest in protecting that confidence has to be balanced against the requirements of fairness to the appellants. In drawing that balance, the confidential character of letters of request issued in respect of current criminal investigations is entitled to substantial weight. International practice is that they are kept confidential (see *Jones & Doobay on Extradition & Mutual Assistance*, para. 20–057, at 424 (2005)). They commonly contain, or are accompanied by, information about the current state of the investigation. Such information may have an important bearing on the Attorney General's decision whether to supply otherwise confidential financial information in response to the letters and it is clearly desirable that foreign courts and prosecuting authorities should be able to transmit it with proper safeguards against the disclosure of those parts of it which are confidential. Those authorities have a legitimate interest in withholding that material from the parties under investigation until the investigation is complete. They may have a legitimate interest in withholding it for longer if there is, for example, a danger that sources will be compromised or potential witnesses intimidated. Persons under investigation are, in many cases, ruthless and powerful criminals. It has been said by the Divisional Court in England that the court will ordinarily start from the position that the letter of request relating to a current criminal investigation is not a disclosable document, and that disclosure to the person under investigation of information about the nature of the criminal investigation will generally be enough (see Kennedy, L.J.'s judgment in *R. (Evans) v. Serious Fraud Office Director* (8)).

35 However, before one reaches the stage of balancing the competing requirements of disclosure and confidentiality, the appellants must suggest some plausible ground on which it can be said that they may need to see the letters of request in order to make their representations. This question has to be considered in the light of the fact that the Attorney General has told them by whose authority the letters of request were issued and what in summary are the allegations against Mr. Maluf and his family to which the letters relate. The appellants say that this is not enough. They offer three reasons. First, they say that they wish to make representations about the lawfulness of the letters of request as a matter of Brazilian law. They point out that the earlier Brazilian requests for assistance were not lawful as a matter of Brazilian law because they came from provincial rather than Federal prosecutors. They contend that a letter of request from a relevant Brazilian authority must be approved by a judge and placed on the court file in Brazil, and that inspection of the court file in Brazil shows that this has not happened. They say that, in these circumstances, they must be allowed to see the "structure, layout, signatures, stamps and headings" on the letters of request, so that they can demonstrate in their representations to the Attorney General that their issue has not been properly authorized. Secondly, they say that they must be given fuller information about the

2006 JLR 129

details of the allegations against them, so that they can make representations about their lack of substance. They cite the allegations relating to the municipal bonds as an example of an allegation which has no substance because of the time limit and assert that the Attorney General was misled by the Brazilian authorities about this. Finally, they say that they need to see the letters of request in order to satisfy themselves that proper assurances have been given that the Brazilian authorities will not improperly disclose the material which they receive.

36 I will deal first with the arguments based on the appellants' alleged desire to challenge the authenticity of the letters of request or the authority under which they were issued. This is the appellants' main point but, in my judgment, there is nothing in it. What the Attorney General may appropriately do with the information that he has gathered must depend on the statutory powers vested in him as a matter of Jersey law and on the manner in which he proposes to exercise them, which must be both rational and fair.

37 If the Attorney General were proposing to exercise his power to nominate a court or the Viscount to receive and transmit the information under art. 5 of the International Co-operation Law, that article would require him to be satisfied that a lawful request for assistance had been received from a court or prosecuting authority in Brazil or from some other authority appearing to him to have the function of making such requests. It would then be relevant for the applicants to make representations arguing that the letter of request had not come

from such a body. But the Attorney General does not propose to proceed under the International Co-operation Law. This being a case of suspected fraud, he has said that he is minded to disclose the information under art. 3 of the Investigation of Fraud Law. That provision empowers him to disclose the information of his own motion to "any person or body for the purposes of any investigation of an offence or prosecution in Jersey or elsewhere." It is not a requirement for the exercise of that power that there should have been a letter of request. It is therefore completely irrelevant, subject to one point, whether the two letters of request that he has received are valid as a matter of Brazilian law. Before the Royal Court, it was contended that once a letter of request had been received, the Attorney General was bound to act under the International Co-operation Law and that his powers under the Investigation of Fraud Law were, so to speak, displaced. That point is now abandoned, rightly in my judgment. But, once it is accepted that the Attorney General is entitled to act under the Investigation of Fraud Law, the point based on the possible unlawfulness of the letters of request as a matter of Brazilian law falls away.

38 The proviso is that the Attorney General must act rationally and for the purposes for which the power exists. He must disclose the information

2006 JLR 130

only to a person or body who appears to him to be authorized to receive it for the purpose of the criminal investigation in Brazil. That may or may not be the same as the person or body who would be entitled to authorize the issue of a letter of request or to receive information pursuant to it. In fact, the Attorney General proposes to disclose the information to the National Justice Secretary and the Ministry of Justice in Brazil, via the Brazilian embassy to the United Kingdom. He is plainly entitled to proceed upon the basis that these bodies are the authorized agents of the Brazilian state for the purpose of receiving such material and identifying the persons in Brazil to whom it should be transmitted. One can conceive of cases in which it might be relevant to make representations about the authority of the person seeking the information. But this is not one of them.

39 It is right to add that even if it were relevant to enquire into the authority by which the letters of request were issued, the appellants already have all the information that they need for that purpose. They know which bodies the Attorney General believes to have authorized the letters. They have been supplied by the Attorney General with two legal opinions received from the authorities in Brazil explaining the basis on which they believe that the request was lawfully made as a matter of Brazilian law. They have their own Brazilian lawyers to advise them on whether that is a sufficient basis. If it is relevant whether the letter is on the court file, they can check that for themselves and indeed claim to have done so. It is true that none of this material will enable them to check whether the documents or the signatures are forgeries, which appears to be the implication of their demand to know the "structure, layout, signatures, stamps and headings" of the letters. But the appellants have not suggested a single reason why it should be regarded as a possibility worthy of consideration.

40 The second argument advanced by the appellants is based on their desire to argue that the allegations which the Brazilian authorities wish to investigate are unfounded. I have the strongest possible misgivings about the value of such representations, since it is not for the Attorney General to decide whether the allegations are well founded, but for the Brazilian authorities and ultimately for the Brazilian courts. The Attorney General, and indeed the courts in this jurisdiction, are bound unless there is good reason to think otherwise to proceed on the footing that Mr. Maluf and the other persons under investigation will be entitled to challenge the allegations in Brazil. In *R. v. Home Secy. ex p. Zardari (7)*, a case about the transmission of evidence pursuant to a letter of request, Lord Bingham, C.J. observed ([1998] EWHC 305 (Admin.), at para. 14):

"It is . . . quite plain that the process envisaged by section 4 is not a trial; it is a process of gathering evidence. The use to be made of

2006 JLR 131

evidence so gathered is a matter for the requesting state. If the evidence taken in an English court is to be used as primary evidence in the requesting state, then one would ordinarily expect, if the requesting state's legal system is at all analogous to our own, that the requesting state would . . . have a full and fair opportunity to contest the evidence either here or in its own court."

41 The highest that the appellants' case can be put is that it might be relevant to the Attorney General's decision whether the investigations and criminal proceedings in Brazil were being carried on in good faith, and that representations might be made on that issue. The appellants have in fact made this point to the Attorney General in the past, which is one reason why he decided to undertake his own investigation. Having done so, he is not wholly dependent on the Brazilian authorities in order to be able to assess the *bona fides* of the allegations against Mr. Maluf. He can draw his own conclusions from the material in his hands and has done so. It has not been suggested that the Attorney General's view on this point is irrational or perverse in the light of the material now available to him. But such as it is, the appellants are in a position to make representations on this point with the information that they have. They have received a summary of the allegations which the Brazilian authorities have been investigating. They have been told in a confidential affidavit (the relevant parts of which have not been disclosed to the Brazilian Government's representatives) what has emerged from the Attorney General's investigations in Jersey and the United States. They have received copious information

about the Brazilian investigations from documents disclosed by the court in Switzerland, where similar letters of request were received and acted on. If there is some reason to suppose that Mr. Maluf will not be treated fairly in Brazil, he can put those reasons before the Attorney General without needing to see a copy of the letters of request.

42 Turning to the third argument, it is acknowledged that there have in the past been indiscretions by Brazilian officials which have resulted in the disclosure to the press of confidential material disclosed pursuant to letters of request by the authorities in Switzerland. The evidence is that the Attorney General has informed the Brazilian authorities of the importance that he attaches to the proper use of the material supplied and has received firm assurances on the subject. The appellants may well wish to make representations to the Attorney General about whether he should be satisfied with these assurances but they do not need to see the letters of request in order to do so.

Conclusion

43 I would dismiss the appellants' appeal and affirm the decision of the Royal Court that the Attorney General was entitled to withhold the letters

2006 JLR 132

of request and was under no obligation to extend the time available to the appellants for making representations. They could have made those representations long ago if they had anything worthwhile to say.

44 In my judgment, the objections which the appellants have taken to the course followed by the Attorney General to date are not only unfounded. They are, and always were, unarguable. The evidence which has been put before the court in the affidavits sworn by Mr. Whelan, on behalf of the Attorney General, suggests that there is a *prima case* against Mr. Maluf of embezzlement and money laundering on a large scale. Mr. Maluf is entitled by reason of his age (he is 74) to the benefit of a shorter period of limitation than younger suspected offenders. Delay is a significant advantage to him. Advocate Robinson has made a highly creditable attempt to defend the indefensible but there is every sign that delay has been the main object of her clients in these proceedings. I am not surprised that leave to apply for judicial review was granted in this case, because the length and complexity of the story makes it easy to create a spurious impression of merit. However, any further applications in this matter for leave to apply for judicial review should be scrutinized extremely carefully before leave is granted.

Appeal dismissed.