Litigation News, Q1 2017

A warm welcome to the latest edition of Mourant Ozannes' litigation newsletter.

It has been another relatively busy quarter across our jurisdictions, with continued developments to law and regulation, and decisions made in the Courts that may well have an impact on companies, trusts, trustees and other clients we work with on a regular basis.

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Recoverability of foreign lawyers' fees

Update prepared by Eleanor Morgan (Partner, BVI), Nicholas Fox (Partner, BVI), Shaun Folpp (Partner, Hong Kong), Jeremy Gill (Associate, Hong Kong)
March 2017

// In *Shrimpton*, the Court of Appeal considered and upheld its earlier decision in *Garkusha* that overseas lawyers' fees are not generally recoverable in the BVI. It did so on the basis that the *Garkusha* decision was not decided *per incuriam*, because that decision could have been reached on the basis of section 18(3) of the LPA (which was and remains in force) alone.

This update looks at the recent BVI Court of Appeal decision in *John Shrimpton & Anor v Dominic Scriven & Ors* BHIHCMAP 2016/0031, which provides some further clarity on the subject of recoverability of foreign lawyers' fees following the decisions in *Garkusha,* as analysed in our September 2016 update*.*

Garkusha

As a reminder, the Court of Appeal in *Garkusha* held that the Legal Profession Act 2015 (**LPA**) had abrogated the practice of recovering the fees of overseas lawyers as disbursements in BVI Proceedings and rendered those overseas lawyers' fees irrecoverable.

As pointed out in our previous update, some commentators had correctly observed that, in *Garkusha*, the Court of Appeal's attention had not been drawn to the fact that section 2(2) of the LPA (which states that 'practising law' includes a reference to 'practising Virgin Islands law outside the Virgin Islands') was never brought into force and was subsequently repealed. Therefore the Court of Appeal, which had partly based its decision on section 2(2), had inadvertently overlooked the important factor that this section was not and had never been in force.

Those commentators suggested that this oversight called into question the correctness of the *Garkusha* decision that the LPA renders overseas lawyers' fees irrecoverable.

We had argued that the position was probably more nuanced and that the overlooked status of section 2(2) of the LPA:

'… throws considerable doubt upon the correctness of the Court of Appeal's conclusion that an oversees lawyer who assists BVI lawyers with the advice and conduct in a BVI matter must be regarded as having committed an unlawful act under section 18 of the Act. Indeed, it was precisely those types of extra-territoriality concerns that led to section 2(2) not being brought into force.

It is less clear that the absence of section 2(2) should impact on the recoverability of overseas lawyers' fees (as has been suggested by other commentators). Section 18(3) of the Act deals with recoverability. It was in force when *Garkusha* was decided and it still remains in force.'

Shrimpton

The impact of the overlooked status of section 2(2) of the LPA has now been considered, by the Court of Appeal, in *Shrimpton*.

Shrimpton concerned an appeal against a costs order at first instance whereby the Judge (Eder J) disallowed the fees of overseas lawyers in a summary assessment. In reaching this decision, he considered himself bound by the decision of the Court of Appeal in *Garkusha*.

On appeal, the question for the Court of Appeal in *Shrimpton* was whether foreign lawyers' costs (those of Herbert Smith Freehills – who were assisting a BVI law firm) could be recovered as a disbursement, or whether that common law right had been abrogated by the LPA, as decided in *Garkusha*.

In answering this question, the Court of Appeal also had to consider whether the *Garkusha* judgment had been decided *per incuriam* [literally translated as 'through lack of care'], given that the Court had not realised that section 2(2) of the LPA was not in force.

The Court of Appeal also had to consider, if the *Garkusha* decision had been made *per incuriam*, whether that meant the first instance judge in *Shrimpton* had properly, or mistakenly, regarded himself as being bound by the *Garkusha* decision

Shrimpton - The Court of Appeal's Judgment

The Court of Appeal dismissed the appeal, and upheld the Commercial Court's ruling that the overseas lawyers' fees were irrecoverable in this case.

In reaching this conclusion, the Court of Appeal held as follows:

1. Whether or not a Court of Appeal judgment was decided *per incuriam*, the lower court remained bound by it. The *per incuriam* principle is relevant only to the right of an appellate court to decline to follow one of its previous decisions.[1]

2. In any event, before the Court of Appeal could be satisfied that the *Garkusha* decision was decided *per incuriam* (such that the Court of Appeal was therefore not bound to follow it) it would need to be persuaded both that:

    2.1. the Court of Appeal in *Garkusha* was not aware that section 2(2) of the LPA was not in force; and, crucially

    2.2. that if the Court of Appeal in *Garkusha* has been so aware, it would have been <u>compelled</u> to reach a different decision on the recoverability of overseas lawyers' fees.

3. It was clear that the Court of Appeal in *Garkusha* had regarded section 2(2) of the LPA as essential to its decision. However, this did not mean that if the Court of Appeal had appreciated that section 2(2) was not in force, it would have been <u>compelled</u> to reach a different decision.

    Section 18(3) of the LPA, which contains a prohibition on recovery of fees for anyone acting as a legal practitioner, but whose name is not on the Roll (of BVI legal practitioners) was in force at the time *Garkusha* was decided and remains in force now.[2] It, on its own, provides a basis for supporting the Court of Appeal's decision in *Garkusha* that overseas lawyers' fees are irrecoverable.

    Therefore, although the Court of Appeal in *Garkusha* <u>might</u> have reached a different decision if it had appreciated the correct position regarding section 2(2) of the LPA, it would not have been <u>compelled</u> to do so. Therefore the judgment in *Garkusha* was not decided *per incuriam* and the Court of Appeal in *Shrimpton* was bound to follow it.

Notwithstanding this conclusion, the Court of Appeal in *Shrimpton* commented that the Court of Appeal in *Garkusha* had adopted a wide definition of 'acting as a legal practitioner' under section 18(3) of the LPA. It stated:

'This Court is not entitled to interfere with that finding even if it considers that the phrase "acting as a legal practitioner" could have been narrowly defined so as to admit an approach that might have required an examination of the particular work carried out by the foreign lawyer to determine what parts if any constituted carrying on activities that could or could not have been carried out by a BVI lawyer, that is, activities that were reasonable and necessary for a foreign lawyer to have carried on.'

In making this observation, the Court of Appeal in *Shrimpton* appears to indicate that, if it had not been bound by the *Garkusha* decision, it may well have arrived at a narrower definition of 'acting as a legal practitioner'. If that narrower definition had been adopted, it is more likely that some overseas lawyers' fees would now be recoverable in BVI proceedings.

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[1] *Cassell & Co Ltd v Broome and Another* [1972] AC 1027 at 1131 per Lord Diplock.
[2] Section 18(3) of the LPA provides: 'No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subjection (2) relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person.'

Conclusion

The *Shrimpton* decision confirms the correctness of the *Garkusha* decision and underlines that, as matters stand, overseas lawyers' fees are generally not recoverable in BVI proceedings.

One rather narrow exception to this rule is, as stated in *Garkusha*, where the overseas lawyer is not practising BVI law, but instead provided expert evidence of foreign law to the BVI Court.

Notwithstanding that the Court of Appeal in *Shrimpton* regarded itself as bound by the previous Court of Appeal decision in *Garkusha* on this issue, it also highlighted that the phrase 'acting as a legal practitioner' in section 18(3) of the LPA might have been more narrowly defined than it was in *Garkusha*. It will be interesting to see what the Privy Council makes of this point, if this issue ever makes its way that far.

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Cayman's beneficial ownership register

Update prepared by Simon Dickson (Partner, Cayman Islands), Andrew Peedom (Counsel, Cayman Islands) and Nicosia Lawson (Associate, Cayman Islands)
March 2017

// **The Cayman Islands' government has recently approved legislation to establish a beneficial ownership register for companies. The register will not be publicly accessible; it may only be inspected by the relevant authorities. This article sets out what this means for Cayman companies and what steps they should take to avoid being penalised for non-compliance.**

Introduction

The Cayman Islands' government has recently approved amendments to the Companies Law (2016 Revision) (the **Companies Law**), the Limited Liability Companies Law, 2016 (the **LLC Law**) and the Companies Management Law (2003 Revision) (together the **Laws**), which require companies incorporated or registered in the Cayman Islands to maintain a register of information about their beneficial owners.

The amendments to the Laws follow a request from the United Kingdom to develop and implement a public, central register for the automatic exchange of beneficial ownership information. The Cayman government has instead agreed to enhance its existing beneficial ownership regime, by establishing a centralised electronic beneficial ownership registration platform (the **Platform**). The Platform will facilitate the unrestricted mutual exchange of beneficial ownership information between the two countries' respective law enforcement and tax authorities. The goal is to allow authorities in either country to be able to easily identify a company's owners.

The legislation sets out the following amendments to the Laws.

Who must establish a beneficial ownership register?

All companies incorporated in Cayman, save for those identified below, are required to establish and maintain an electronic beneficial ownership register which contains particulars of its beneficial owners (the **Register**). The Laws provide that a company is required to engage either its corporate services provider or the Registrar of Companies (the **Registrar**) to establish and maintain the Register (the **Administrator**). This has resulted in an amendment to the definition of 'business of company management' in the Companies Management Law (2003 Revision), to include this role.

A company must take reasonable steps to identify all of its beneficial owners. To complete that exercise, a company must first give notice to anyone that it knows or has reasonable cause to believe is a beneficial owner. There is no prescribed form of notice. However, notice by a letter from the company, which (i) identifies the addressee's particulars, (ii) invites the addressee to state whether or not it is a beneficial owner, and (iii) if it is, to confirm or correct its particulars included in the notice, will be appropriate. The company may also give notice to a shareholder, legal entity or other person it knows, or has reasonable cause to believe knows the identity of a beneficial owner. This may occur in circumstances where a company is unable to ascertain the identity of a beneficial owner. The notice must be responded to 'within one month of the date of receipt', failing which certain penalties may apply (see below).

A company must provide details of its beneficial owners to its Administrator once those particulars have been confirmed.

Where a company fails to provide details of its beneficial owners or any updated details to its Administrator, the Administrator may issue a notice to the company seeking that information. Unless the company responds within one month from the date of receipt of the notice, the Administrator may issue a restrictions notice to the beneficial owner and send a copy of the restrictions notice to Cayman's Minister with responsibility for financial services (the **Competent Authority**) within two weeks of issuing it. A beneficial owner may apply to the Court to set aside the restriction.

A beneficial owner who knows that it has not been added to the Register and/or has not received a notice from the company must provide its particulars to the company within one month of the date it became aware of that omission. As discussed further below, a failure to inform the company may result in imprisonment or a fine, or both.

A company does not have to maintain a beneficial ownership register if it is a company which is:

- listed on the Cayman Islands Stock Exchange or an approved stock exchange;
- registered or holds a licence under a regulatory law as defined in section 2 of the Monetary Authority Law (2016 Revision); and/or
- managed, arranged, administered or promoted by a regulated or listed person in Cayman or in an approved jurisdiction listed in Schedule 3 of the Money Laundering Regulations (2015 Revision) and is a special purpose company, a private equity or collective investment scheme or an investment fund (or the general partner of the fund, if the fund is an exempted limited partnership), or if it is exempted by the applicable Regulations.

Who must be registered?

All beneficial owners are required to provide their particulars to the company for entry into the Register, except where the Competent Authority is satisfied, having considered an undertaking provided by a beneficial owner, that there are special reasons for an exemption from compliance with a notice. Special reasons are not identified in the Laws, and appear to be discretionary.

A beneficial owner is a person for whose benefit the company was established and who has ultimate control over the company. A beneficial owner may be an individual (a natural person), or a legal entity, that is, a body corporate, firm or other body which has legal personality under the law by which it is governed. More specifically, the Laws define a beneficial owner as someone who:

- holds, directly or indirectly, more than 25 per cent of the shares or interests in a company with a right to share in more than 25 per cent of the capital, and holding more than 25 per cent of the voting rights;
- has the right to appoint or remove a majority of the board of directors or the board of managers of the company;
- has the absolute and unconditional right to exercise, or actually exercises, significant influence or control over the company; and/or
- has the absolute and unconditional right to exercise, or actually exercises, significant influence or control over the trust or firm owned by the company, other than in a professional advisory capacity, and the trustees of the trust or the members of the firm are not legal persons who fall within one of the aforementioned categories of beneficial owners.

The following information must be provided to the company by its beneficial owners (as applicable):

- the name of the individual or legal entity;
- the individual's date of birth;
- its registered or principal office, its residential address or an address for service of notices;
- a certified copy of their passport, driver's licence or other government-issued identification;
- what type of entity it is and its governing law;
- the date on which the individual or legal entity became or ceased to be a beneficial owner of the company.

No information will be entered in the Register unless the information (a) has been confirmed by the relevant person or legal entity, or (b) was included in any statement identifying beneficial owners which was delivered to

the Registrar at the time the company was incorporated. The information will remain on the Register until the expiration of five years from the date on which the person ceased to be a beneficial owner.

Any beneficial owner, whose name has been entered in or omitted from the Register without sufficient cause, or where there is a default or delay in removing their name from the Register, may apply to the Court for an order for rectification of the Register. The Court has discretion to refuse the application or order the rectification of the Register and payment by the company of any damages sustained by the applicant.

Who can access the Register?

Each Register will be connected to the Platform established by the Cayman government. The Platform may only be inspected by the Competent Authority or its assigns, in relation to any matters incidental or connected to the company.

Searches of the Register will only be executed by the Competent Authority at the request of one of the following bodies specified in the Companies Law:

- the Financial Intelligence Unit and the Financial Reporting Authority, as defined in the Proceeds of Crime Law (2016 Revision);
- the Cayman Islands Monetary Authority;[1]
- the Department of International Tax Cooperation, which has responsibility for the Tax Information Authority;
- the Financial Crime Unit of the Royal Cayman Islands Police Service; and
- any other body which is assigned responsibility for monitoring compliance with money laundering regulations under section 4(9) of the Proceeds of Crime Law (2016 Revision).

The body requesting the search must certify to the Competent Authority that the search is proper, lawful and in compliance with the legislation governing the affairs or responsibilities of the body requesting the search; or that it is made in response to a request from a jurisdiction which the Cayman government has entered into an agreement with for the sharing of beneficial ownership information, as identified in Schedule 6 to the Companies Law. At the time of writing, only the UK is identified in Schedule 6, but it is highly likely that more countries will seek to have access to the platform in the near future.

The Laws provide that information contained in a Register is deemed to be confidential for the purposes of the Confidential Information Disclosure Law, 2016 (the **CIDL**) and it may only be disclosed in accordance with the CIDL. The fact that a search has been requested or carried out must not be made known to a company, its beneficial owner, or the public, unless the Competent Authority expressly communicates that fact.

The Companies Law provides that a person who unlawfully conducts a search or unlawfully discloses beneficial ownership information commits an offence and is liable on summary conviction to a fine of CI$5,000 or imprisonment for twelve months, or both. Under the LLC Law the fine is CI$10,000 or imprisonment for twelve months, or both.

Failure to comply with the Law

The Laws impose certain penalties on companies and beneficial owners who fail to comply with the requirements to establish and maintain a Register. In some instances, non-compliance may result in criminal proceedings and financial penalties. Directors, managers and officers of the company may also be liable to the same penalty as the company or beneficial owner.

Where a beneficial owner, without a sufficiently valid reason, fails to respond to a notice requesting information within one month from the date of receipt, the company may issue a restriction notice to the beneficial owner. A restriction notice prevents the valid transfer of the beneficial owner's interest, and the ability to exercise any rights in relation to that interest. It also prohibits the payment of any sums due to that owner in respect of its interest, except in a liquidation. A person who breaches a restrictions notice commits an offence and is liable on summary conviction to a fine of CI$5,000.

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[1] The Bill amending the Companies Management Law expands the purpose for which the Monetary Authority may seek a search warrant to include searches pursuant to Part XVIIA of the Companies Law, which deals with beneficial ownership registers.

A company which fails to take steps to identify a beneficial owner, or fails to issue a notice, or fails to establish or maintain a beneficial ownership register, is liable on summary conviction to a fine of CI$25,000. If the offence is a continuing one, further fines of CI$500 per day up to a maximum of CI$25,000 may apply.

A beneficial owner who (a) knowingly and willfully fails to comply with a notice, (b) in complying with the notice knowingly or recklessly makes a false statement, or (c) knowingly and willfully fails to update their particulars within the required timeframe, is liable on conviction to two years imprisonment or a fine of CI$10,000, or both, and on summary conviction to 12 months imprisonment or a fine of CI$5,000, or both.

Conclusion

The Platform is expected to be implemented by 30 June 2017. However, there will be a transition period of one year from the date the amendments to the Laws are enacted, during which time companies will not be prosecuted for failing to comply with the Laws.

Compared to the public central register proposed by the UK, the Platform appears to be an appropriate compromise by the Cayman government. It not only meets the UK's request for the sharing of information, but also keeps the jurisdiction in line with the global push by authorities for greater transparency. As the Platform will not be publicly accessible, companies and beneficial owners should take comfort from the fact that their details will remain private and secure.

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Royal Court refuses to sanction a scheme of arrangement compelling a share buy-back

Update prepared by Abel Lyall (Partner, Guernsey), John Rochester (Partner, Guernsey) and Alex Davies (Counsel, Guernsey)
March 2017

// The Royal Court of Guernsey has refused to sanction a scheme of arrangement that sought to impose a compulsory buy-back of shares on minority shareholders.

In a judgment issued on 24 February 2017, Sir Richard Collas, Bailiff, found there was no jurisdiction to sanction the proposed scheme of arrangement (**Scheme**) under Part VIII of the Companies (Guernsey) Law, 2008 (the **Companies Law**) as the Scheme failed to comply with the statutory share buy-back provisions. Those provisions require the company to obtain the consent of shareholders whose shares are to be acquired. The Bailiff also decided that even if he had jurisdiction, he would not have sanctioned the Scheme in the exercise of his discretion as he was not satisfied that the majority of shareholders were acting bona fide in the best interest of the class they represented as a whole.

The decision is the first time a scheme of arrangement has been contested in the Royal Court, and is a rare example of a scheme of arrangement failing on both jurisdictional and discretionary grounds. It confirms that while the meaning of 'arrangement' for the purposes of Part VIII of the Companies Law is broad, any proposed arrangement must still comply with any applicable specific statutory provisions before the Royal Court will approve it.

Background

The Scheme was proposed by Puma Brandenburg Limited (**Puma**), a Guernsey unlisted company incorporated in 2006 for the purposes of raising capital to invest in German real estate. Puma had previously been involved in two restructurings, firstly in 2009 when it was amalgamated with Shore Capital Group Limited (**Shore Capital**) and then in 2012 with its demerger from Shore Capital.

Puma's year-on-year financial performance had been very good and the board considered it had a 'strong future' specifically advising shareholders in the Scheme document that it 'intended to pursue long term growth by holding and improving investment assets whilst at the same time seeking to take advantage of cheap long term finance'. They had however identified a 'divergence' of interests between the majority shareholders (Mr Howard Shore (who is also a director of Puma) and his wife) (**Majority Shareholders**) who wanted to continue and expand the investments of Puma, and most of the various minority shareholders, who they said had not intended to invest in a real estate company, having acquired their shares via the demerger in 2012. As an unlisted investment company, there was no liquid market for the shares, and the board said it was looking at means to provide a 'liquidity event' to those shareholders who were not aligned with the long-term interests of the company.

The Scheme of Arrangement

The proposal by the board of Puma was to undertake a selective buy-back of its shares from all shareholders other than the Majority Shareholders.

The structure of the proposed Scheme was relatively simple. Puma would acquire all shares in issue other than those held by the Majority Shareholders. The consideration to be paid to shareholders by Puma for the buy-

back shares valued Puma at a 43.6 per cent discount to its net asset value (**NAV**). There was to be a single member class, comprising all minority shareholders.

At an *ex parte* hearing on 10 November 2016, the Royal Court ordered that a meeting of minority shareholders be convened to vote on the proposed Scheme. The Scheme was approved by the required majorities at the Scheme meeting on 1 December 2016. In all, 95.88 per cent by value (comprising 25.89 per cent by number) voted in favour of the Scheme. A separate special resolution to approve the share buy-back was also passed, as required by section 314 of the Companies Law.

Where a scheme is approved by the requisite majorities, section 110(2) of the Companies Law provides that the Court 'may' sanction the scheme. As such, the Court has an overarching discretion whether or not to sanction the scheme. The Companies Law says that in exercising its discretion, the Court may consider:

- whether the majority is acting in good faith in the interests of the class of members it professes to represent, and
- the different interests of members are such that they should be treated as belonging to a different class of members.

Opposition to the Scheme

Two minority shareholders voted against the Scheme, and Mourant Ozannes was instructed by one of those shareholders to oppose the Scheme at the subsequent sanction hearing before the Royal Court.

The shareholder asserted that the Royal Court had no jurisdiction to grant the Scheme as Puma had not (and indeed could not) comply with the statutory requirement to obtain the consent of shareholders whose shares are to be acquired.

The shareholder also opposed the Scheme on discretionary grounds, including that the Scheme was not fair and not reasonable, was disproportionate to the aims of the board and the Scheme document contained material non-disclosures.

Lack of Jurisdiction

The opposing shareholder submitted that the Royal Court could not sanction the Scheme as Puma had not complied with section 313(3) of the Companies Law, which requires that it 'must obtain the consent of the shareholders whose shares are being acquired to that acquisition'. As a matter of normal statutory construction, a general provision cannot override a specific provision. It was argued that the Royal Court did not have the power to sanction a scheme of arrangement the effect of which is to authorise a company to acquire its own shares from a member who has not consented to sell those shares to the company. While Puma had the consent of those who voted in favour of the Scheme, there was no consent from those voting against the Scheme or those who did not vote at all.

At the contested sanction hearing, Puma did not deny that there was a need to comply with the provisions in section 313(3) of the Companies Law, rather it argued that the approval by the statutory majority of the class of members in the court meeting, together with the sanction of the Royal Court, supplies the consent needed to complete the share buy-back.

In his judgment, the Bailiff readily accepted that in order for a scheme of arrangement to give effect to the acquisition by a company of its own shares, it must be in accordance with *both* the scheme of arrangement provisions and the share buy-back provisions of the Companies Law. However, he did not agree that the mechanism of the Scheme was sufficient to meet the requirements of section 313(3) for 'consent of the shareholders'. The Bailiff accepted the opposing shareholder's submissions that the natural meaning of the words 'must obtain the consent of the shareholders' means it is from those individual shareholders that the consent must be obtained.

Accordingly, Puma had not complied with the provisions in the statute and it was held that the Court had no jurisdiction to sanction the Scheme.

Discretionary arguments

Having accepted that there was no jurisdiction, the Bailiff went on to consider whether he would have sanctioned the Scheme if he had the jurisdiction to do so.

The opposing shareholder had raised a number of arguments that it said weighed against exercising the discretion in favour of the Scheme. These included:

- That the Scheme was not fair and not reasonable. The rationale for the Scheme was said to be disproportionate and the Scheme itself was unnecessary. If Puma wanted to achieve a liquidity event for those shareholders wanting to sell, it could conduct a selective buy-back from those individual shareholders – there was no need to make it compulsory.
- The offer price proposed under the Scheme amounted to a 43.6 per cent discount to NAV with no justification for such a discount and no explanation as to how the offer price had been arrived at.
- A number of minority shareholders who had given irrevocable commitments to vote in favour of the Scheme had undisclosed business relationships with Mr Howard Shore through Shore Capital and its associated entities, and this included Mr Shore's brother.

In his comments on the question of discretion, the Bailiff focussed on whether the majority who voted in favour of the Scheme had acted in good faith in the interests of the entire class of which they represented, a point he described as the 'real issue' in the case on discretion.

The Bailiff noted that the onus is on the company to satisfy the Royal Court that the statutory majority is acting bona fide in the interests of the class of members it represents. By pursuing a scheme of arrangement rather than seeking the consent of each and every shareholder to the acquisition of shares, Puma was, in the view of the Bailiff, exposed to the criticism that the Scheme was designed to 'coerce the minority'. The onus was on Puma to show this was not the case and in the Bailiff's opinion, it had failed to do so. Irrespective of whether he found that he had jurisdiction, the Bailiff said he would have rejected the Scheme on discretionary grounds.

Commentary

The decision reinforces the protections offered to minority shareholders against share buy-backs. Shareholders must consent to an acquisition by the company of their shares – the court cannot order them to do so, nor can it substitute its consent for that of the shareholder. That the Royal Court sought to enforce these requirements is unsurprising, given the requirement that schemes of arrangement comply with relevant statutory restrictions or procedures, which is a well-settled principle both in the UK and internationally.

In its submissions, Puma cautioned the Royal Court that adopting the interpretation suggested by the opposing shareholder would effectively place Guernsey out of step with accepted practice for schemes of arrangement. Any such concerns are unfounded. Of course, there are circumstances where a dissentient shareholder (or those who give no opinion) will be 'dragged along' with the majority favouring a transaction and this regularly occurs in Guernsey on takeover schemes, where there is a third party bidder. The difference here regarding the Puma transaction is that while the specific takeover provisions in the Companies Law provide a mechanism to compel shareholders to sell in certain circumstances, they do not impose any restrictions or special requirements for effecting takeovers by other means. That is the important distinction that the Royal Court was careful to recognise.

The transaction proposed by Puma was highly unusual and not one seen either here in Guernsey or in the UK before – it was in effect a 'takeover' by the Majority Shareholders paid for by the company. Puma did not identify any examples from other jurisdictions where schemes of arrangement have been used to give selective share buy-backs compulsory effect. It is also highly unusual for a scheme of arrangement to be refused sanction on discretionary grounds, as schemes of arrangement are normally carefully constructed to avoid these problems.

The fact that the Bailiff was, in any event, not satisfied on the evidence that the majority of shareholders voting on the Scheme had acted bona fide in the interests of the class as a whole is a significant finding. While fact sensitive, it makes clear that the court sanction process is not simply a rubber stamp exercise and the Royal Court's discretion to approve a scheme of arrangement should not to be taken lightly by those promoting these arrangements.

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It's my privilege – or is it?

Update prepared by Chantal Barrett (Counsel, Guernsey)
March 2017

A look at who is the 'client' for the purposes of Legal Advice Privilege in Guernsey following the decision in *The RBS Rights Issue Litigation [2016]*.

In December 2016, the English High Court ruled that notes, transcripts and other documents relating to witness interviews in the course of an internal investigation by RBS were not covered by legal advice privilege notwithstanding the fact that they had been prepared by in-house and external counsel.

Under English law, confidential communications between a legal adviser and his client which are created for the purpose of giving or receiving legal advice are privileged and the Court cannot order the disclosure of those communications to third parties. This is known as Legal Advice Privilege (**LAP**) and Guernsey case law confirms that identical principles apply in this jurisdiction.

It should be noted that although they are often confused, LAP is entirely separate from Litigation Privilege which can exist outside of the client-solicitor relationship in relation to any documents or communications which have been produced for the dominant purpose of obtaining advice in relation to litigation, obtaining or collecting evidence for the litigation, or obtaining information which may assist in obtaining or collecting such evidence.

The interviews in the RBS case were carried out with current and former bank employees in response to two US Securities and Exchange Commission subpoenas and allegations made by a former employee against RBS. In later litigation, RBS shareholders sought disclosure of the records of these interviews and RBS refused, claiming that the documents were covered by LAP.

The Court decided the issue by applying a narrow interpretation of the definition of 'client' as consistent with the (heavily criticised) 2004 Court of Appeal decision in *Three Rivers (No 5).* The Court held that only communications with those employees within the bank whose role was to obtain and receive legal advicewas covered by LAP and, crucially, this did not extend to communications with other employees who had material information that the lawyers needed in order to give the legal advice.

The combination of these two decisions produces a controversial result. It is in the public interest that individuals and companies are able to obtain full and proper legal advice and in order to give such advice, the lawyers need access to all of the relevant information available. Clients need to feel safe in giving such information to their lawyers in the knowledge that it will not subsequently be revealed to others. This is the very basis of the principle of LAP.

The effect of these decisions is to significantly erode the scope of the protection given by LAP in English law. It will not be uncommon that the information needed by a company's lawyers to provide legal advice will not be held by those individuals within the company (often at board level) given the role of obtaining legal advice. People at various levels of the organisation including 'the shop floor' may have been involved and will hold material information which needs to be gathered before the advice can be given. The effect of the RBS case is that whilst the eventual advice will be privileged, the investigation (and any notes produced during that investigation) will not - even when conducted by lawyers. The result has been criticised as uncommercial and it was widely expected that RBS would appeal direct to the Supreme Court although it has now been confirmed that in fact no such appeal will be brought because the disputed documents are no longer relevant to the underlying dispute.

Neither this decision (or that of the *Three Rivers* case which preceded it) is binding in any sense on a Guernsey Court. The fact that both decisions are controversial and have been heavily criticised make it less likely that a Guernsey Court would necessarily come to the same conclusion if faced with this issue. As ever, Guernsey law has the advantage of being able to take account of the case law of other common law jurisdictions and would

take note of the fact that in the 13 years since *Three Rivers* was decided, Australia, Singapore and Hong Kong have all declined to follow the reasoning of the Court of Appeal in that case.

That being said, unless and until the RBS case is successfully appealed or the issue comes before the Guernsey courts for determination, the most prudent advice is that companies should be very cautious when creating documents and recording interviews for the purposes of internal investigations because of the danger of creating disclosable (and potentially damaging) documents, even where in-house or external counsel are involved in the process. The best advice is that, wherever possible, the contents of such documents should be restricted to the facts and should avoid any commentary thereon which could be used against the company in the future.

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Guernsey Court of Appeal considers TIEA notice for the first time

Update prepared by Christopher Edwards (Partner, Guernsey) and Chris Duncan (Senior Associate, Guernsey)
February 2017

// A recent decision of the Court of Appeal has provided helpful guidance on the ability to challenge a decision of the Director of Income Tax (the Director) to issue a notice in response to a TIEA request, as well as the manner in which the Director should act when considering such a request.

A recent decision of the Court of Appeal has provided helpful guidance on the ability to challenge a decision of the Director of Income Tax (the **Director**) to issue a notice in response to a TIEA request, as well as the manner in which the Director should act when considering such a request.

The proceedings

Mourant Ozannes was instructed by a taxpayer who became aware that the Director had issued a notice to a local institution requiring that it produce documents concerning entities said to be connected to the taxpayer. The notice was issued by the Director in response to a TIEA request from a foreign country. The Income Tax (Guernsey) Law, 1975 provided that the recipient of the notice (the **Institution**) could appeal the decision to issue the notice. However, it did not provide a right for any other person (such as the taxpayer) to challenge the notice, or even require that the Director provide the taxpayer with a copy of the notice.

The taxpayer wrote to the Director and the Institution to explain why the decision to issue the notice was unlawful. Notwithstanding, the Director declined to withdraw the notice. The Institution was unwilling to exercise its right of appeal and intended to comply with the notice. Left with no other option, the taxpayer decided to judicially review the decision of the Director to issue the notice.

The taxpayer was unsuccessful at first instance in obtaining permission to bring judicial review proceedings. The Judge upheld the arguments of the Director that his decision to issue the notice was not justiciable, and that the taxpayer had an alternative remedy in that he could challenge in the foreign jurisdiction the use of the documents obtained via the notice.

In the view of the Judge those were both 'knockout' blows.

The taxpayer obtained an urgent injunction preventing transmission of the documents provided in response to the notice pending an appeal.

In allowing the taxpayer's appeal, the Court of Appeal conclusively rejected both of the Director's arguments. In relation to justiciability, the Court held: 'To acquiesce in the Respondent's approach would be to accept that the Royal Court either has no jurisdiction to consider, or should not consider, the rights of those affected by insular legislation concerning a TIEA. We think that cannot be right …' The Court also rejected the argument that the creation of the statutory appeal right for recipients excluded the availability of judicial review. In doing so the Court noted the reality that whereas the recipient (such as the Institution) would likely only have an indirect interest in challenging a notice, a taxpayer or account holder (who may not be the same) would have a direct interest in ensuring that the power to issue the notice was exercised in accordance with the law. As to alternative remedy, the Court accepted the taxpayer's arguments that the foreign courts could not be expected to consider the lawfulness of the decision of the Director to issue the notice, which must be a matter for the Guernsey courts. The Director was ordered to pay the taxpayer's costs of the appeal, and the substantive review was remitted to the Royal Court for an early hearing.

The Court's decision confirms that the availability of judicial review exists in relation to a decision by the Director to issue a notice in response to a TIEA request. That right would lie, not only to a taxpayer, but also an account holder, or conceivably any other party who was able to demonstrate a sufficient interest.

The role of the Director

In reaching its conclusions, the Court considered the role played by the Director. The exercise of the power to issue a notice requires the Director to be satisfied that the underlying request is in accordance with the TIEA provisions. The Court rejected arguments that the Director could, in effect, self-certify that the request was valid, thereby removing any right of challenge. The Court held that whilst the Director must be satisfied that the request is in accordance with the TIEA, he is not required to make exhaustive investigations of foreign law to reach that conclusion. As the Court noted: 'He is entitled to proceed on the assumption that the requesting state is acting lawfully, at least until material is put before him that this might not be the case, at which time he should make such enquiries as would be reasonable to satisfy himself that the request is a proper one to which effect should be given.' The Court also confirmed that the Director must act rationally in exercising his powers, though that does not mean that he must critically examine the letter of request.

Disclosure of documents

The taxpayer had, prior to the hearing of the appeal, intimated that he would bring an application for disclosure of the request and associated correspondence. Though the Court was not called upon to consider that application, it did recognise the need to balance the competing European Convention rights of the taxpayer against the proper response to a request from a treaty partner. It also gave some limited guidance as to how an application might be considered in saying that 'there should be at least some plausible ground advanced on which it can be said that the Appellant needs to see the request to make the representations which are to be properly advanced on judicial review.' Presumably if an applicant could identify such a ground then disclosure of the request and accompanying documentation may conceivably be ordered.

Implications for recipients

Whilst there is no statutory obligation for the recipient of a notice to notify the taxpayer concerned, a recipient should now in light of this decision, consider carefully whether to inform the taxpayer (unless there is a prohibition imposed on doing so). In most cases a recipient will owe the taxpayer duties of confidentiality as they will be a current or former client. A recipient should carefully consider those duties when making its decision whether to inform the taxpayer that it has received a notice. If it does not inform the taxpayer and simply complies with the notice, it does so at the risk of being criticised for complying with a potentially invalid notice. It also begs the question how a recipient could fully and properly form a view as to whether a notice is valid, without engaging with the taxpayer whose affairs are said to be under investigation.

If a recipient decides to inform the taxpayer, it should do so promptly. A recipient's statutory right of appeal must be issued within 30 days from the date of a notice. Whilst there is no legislative time frame for seeking judicial review, it is likely the court would expect a judicial review to be issued within a similar period. Moreover, the value of any relief obtained is likely to be much less if the notice has already been complied with and the documents transmitted to the home jurisdiction.

The good news for recipients is that, if they engage constructively with the taxpayer, they should be able to shift the burden to bring any challenge back on to the taxpayer, where it will often more comfortably sit.

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Harbour v Orb: a 'last-gasp' attempt to avoid désastre

Update prepared by Justin Harvey-Hills (Partner, Jersey) and Bethan Watts (Associate, Jersey)
February 2017

The Jersey Royal Court has reviewed relevant bankruptcy law and has declared a company and its sole shareholder directed *en désastre* in spite of the fact that proceedings were commenced in Jersey. The Court found that the English proceedings had been commenced to subvert the Jersey bankruptcy procedure.

As we reported in our legal update 'Jersey Court refuses representation for letter of request' (October 2016), in *Harbour v ORB* [2016] JRC 171 the Jersey Court, for the first time, refused to issue a letter of request to the English High Court for the appointment of an English law administrator over a Jersey company. At present Jersey does not have an equivalent to a UK administration order. Such orders may, however, be obtained in respect of a Jersey company either by virtue of the High Court's original jurisdiction where the company's centre of main interests is in England and Wales or, where it is not, by the Jersey Court issuing a letter of request to the High Court and the High Court granting assistance in insolvency matters pursuant to section 426 of the Insolvency Act 1986.

The latter route has been successfully used in relation to a number of Jersey companies, and remains an important option (which is also available where an administration order is sought from the Scottish or Northern Irish courts). But the decision in *Harbour v Orb* showed that this option has its limits. It is necessary to establish that the company has a substantial connection with the UK and that, ultimately, a UK administration is likely to be the most effective method of collecting and administering the company's assets in the interests of its creditors. The applicant in *Harbour v ORB* was unable to demonstrate either of these points. The application for a letter of request was accordingly refused.

Since that decision, a series of events culminated in a decision by which the Court declared the assets of both the Jersey company (**Orb**) and the Jersey resident director and shareholder (**Dr Cochrane**) to be *en désastre* (bankrupt): *Harbour Fund II LP v Orb a.r.l and Dr Gail Cochrane* [2017] JRC 007. The new judgment shows the Jersey Court's robust approach where there is a 'last gasp' and inadequately evidenced attempt to stave off an order of *désastre* by alleging that the debtor has a right of set off against the applicant creditor.

The Facts

Following the refusal to issue a letter of request, Harbour made a formal demand as a creditor of Orb for a liquidated sum of £5.2m. This demand was not met, so pursuant to a personal guarantee Harbour issued a formal demand to Dr Cochrane. When she too failed to pay, Harbour brought an application in the Jersey Court for a declaration *en désastre* in respect of both Orb and Dr Cochrane (the **Respondents**). A hearing was listed for 24 November 2016. On 22 November 2016, two days before the hearing, the Respondents filed a claim in the English High Court against Harbour for a sum of £73m (the **English Claim**). Off the back of this claim, the Respondents resisted the application for a declaration *en désastre*, on the grounds that Harbour's liquidated claim of £5.2m may be subject to set-off and counterclaim, pending the outcome of any decision of the English Court.

Relevant Legal Principles

The principles applied by the Court are set out in Article 3 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 and Rule 2 of the Bankruptcy (*Désastre*) Rules 2006. Under these rules, a creditor applying for a declaration *en désastre* must show that the debtor is cash flow insolvent (ie unable to pay its debts as they fall due) but has

realisable assets. Any creditor will have standing to bring an application if it has a claim of at least £3,000 which is a certain debt and is undoubtedly due and payable. However, in order to be a 'certain debt' that claim cannot be the subject of a genuine dispute and arguable defence (*SO Holdings* [2011] JLR 782).

The English Claim

The English Claim was drafted and filed without any legal advice. The grounds of the claim are, in short, that Harbour had breached the terms of a funding arrangement in relation to earlier proceedings, and as a result Dr Cochrane had been forced to take on a contingent liability of around £73m from another third party funder. After having filed the claim, the Respondents instructed English solicitors to advise on the English Claim, and Jersey lawyers to resist the application for a declaration *en désastre*. Both sets of lawyers were instructed merely a day before the hearing.

The English solicitors filed a last-minute affidavit in the Jersey proceedings, alerting the Jersey Court to the newly issued English proceedings, and stating the view that the English Claim was a genuine claim, and was 'no last-gasp gimmick'. The Respondents argued that to allow the bankruptcy proceedings to go ahead would be manifestly inappropriate and unfair in the light of a real and genuine dispute for which the proper means of resolution was before the English Courts. It was submitted that the Jersey Court should not pre-judge the outcome of any English proceedings or summarily determine whether there was allowable set-off or counterclaim as a matter of English law.

The Court's reasoning

The Court had a number of criticisms of the approach taken by the Respondents:

- The English solicitors could not realistically, in only one day, come to a reasoned conclusion as to the legitimacy of a claim which they did not draft. Indeed, the affidavit itself states that the English solicitors had not had a chance to read all of the relevant material.
- Prior to filing the claim, Dr Cochrane had never made any mention of a prospective claim, including in her earlier affidavit. The Court stated that it was inconceivable that if the claim was genuine, no reference would ever have been made to it before.
- The application for a declaration *en désastre* was not 'without notice'. The Respondents had known of the application from as early as September 2016. Harbour had taken every reasonable step to notify the Respondents of its intentions, including seeking an *inter-partes* hearing.
- There was no evidence filed in support of the Respondents' arguments. The Court expressed the view that at the very least it would have expected to see an affidavit filed by Dr Cochrane to assist with the exercise of the Court's discretion.

In summary, the Court found that the English Claim was indeed a 'last gasp' attempt to avoid bankruptcy.

It is clear from the judgment in this case that it is of paramount importance to the Jersey Court that it should be seen to be discharging its responsibilities for dealing with the affairs of a Jersey registered company and a Jersey resident who appeared to be insolvent. The decision of the Court was guided by pragmatism, and was not swayed by a weak attempt to subvert the established legal principles.

In order to oppose a declaration *en désastre* the Court needs to be presented with sufficient evidence to justify its opposition. The Court made clear in this case that it might have been minded at the very least to agree to a short adjournment to allow the Respondents to obtain additional funding, had it been presented with evidence to justify the Court exercising discretion in that way.

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Company restoration - finding a means to an end

Update prepared by Bruce Lincoln (Partner, Jersey) and Bethan Watts (Associate, Jersey)
February 2017

The Jersey Royal Court has heard a representation concerning the restoration of a company to the Register of Companies. The case was unusual because the applicant sought to restore the company in order to place it into a court supervised liquidation process, and it first had to overcome the fact that it was not a registered shareholder of the dissolved company and, therefore, appeared to lack standing to bring the application.

The recent case of *In the matter of the Representation of Rendle and Butcher, joint liquidators of Arck LLP* [2017] JRC 004 concerned an application to the Jersey Royal Court to restore a dissolved company to the register in order to recover a debt due from that company. The unusual element of this case, however, was that the applicant wanted to restore the company so that it could be placed into a court supervised liquidation process (under which, it believed, there were better prospects of recovering assets for creditors); but in order to be able to make that application (for a just and equitable winding-up) the applicant first had to overcome the fact that it was not a registered shareholder of the dissolved company and, therefore, appeared to lack standing to bring the application.

The facts

Arck LLP (**Arck**) was established by Mr Clay and Ms Clark as an investment vehicle, and between 2006 and 2011 it attracted a total of approximately £50 million from private investors. In 2012 both Mr Clay and Ms Clark were found guilty of fraud and forgery offences. They were sentenced, and were disqualified from serving as directors. Arck was put into liquidation.

In relation to one particular property development, Arck had advanced a loan of approximately £24.4m to Arck Estrela Limited (**Estrela**) which remained outstanding and was therefore a receivable asset to Arck in liquidation. The liquidators sought to recover this loan, but were unable to do so because Estrela had been dissolved.

The ownership structure of Estrela was complex, and therefore the steps which needed to be taken to restore it to the register and then pursue an equitable winding up were equally complex. Arck held an indirect interest in Estrela, via two other dissolved companies, which would both have needed to be restored in order for Arck to apply for the restoration of Estrela.

In addition to this indirect ownership, in 2011 an individual named Mr Hobbs had agreed that he would hold 100 shares in Estrela as a bare trustee for Arck. Unfortunately the declaration of trust was never executed. The Court was asked to decide whether there was a valid bare trust in place, which would provide Arck with standing to (i) make an application for Estrela to be restored to the register; and (ii) apply for Estrela to be equitably wound up, which would permit the recovery of Arck's debt.

Relevant Law

- Article 213 of the Companies (Jersey) Law 1991 governs the process for restoring a company to the register. The effect of a successful application under this article is that the dissolution of the relevant company is voided, and the public record is amended so that it is as if the dissolution never occurred. Article 213(1) states that an application may be brought under this section by the liquidator of the company

concerned, or by any other person appearing to the court to be interested. The case of *Independent Marine Services Limited* [1996] JLR 294 establishes that there is a low threshold to establish a sufficient interest.

- Article 47 of the Companies (Jersey) Law 1991 permits the Court to rectify a company's register of members.
- Article 155 of the Companies (Jersey) Law 1991 governs the process for the just and equitable winding up of a company. An application for a just and equitable winding up may be made by the company, or by a director or member of the company, but there is no provision for an application by a creditor.
- Article 43(3) of the Trusts (Jersey) 1984 Law allows for the termination of a Jersey trust and the distribution of trust property to the entitled beneficiaries.

The predicament

The Court had no problem finding that Arck had a sufficient interest for the purpose of Article 213 through its position as a creditor and as an indirect beneficial owner.

However, without being a registered member of Estrela, the liquidators of Arck would not have standing to apply for an equitable winding up under Article 155. Further, the original directors of Arck were companies who had themselves been dissolved, which meant that without Court intervention to rectify the register of members, there was no practical means for Arck to become a member of Estrela.

The solution

The Court took a pragmatic view in this case and was willing to find that the 100 shares in Estrela which were held by Mr Hobbs were held on a bare trust for Arck. This trust was terminated and so the 100 shares came to be held directly by Arck.

The Court was then able to exercise its power to rectify the register of members of Estrela so that Arck was registered as a member and thereby gained standing to apply to wind up the company on a just and equitable basis.

Comment

This case is an interesting twist on the relatively common process of restoring a dissolved company to recover a debt. The Court very neatly brought together four separate procedures in order to reach an equitable outcome in circumstances where the creditors of Arck were unfairly out-of-pocket.

The case does not contain any 'new law' per se, but it is noteworthy in its application of what is usually a very standard procedure.

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Disclosure to Beneficiaries: Trusts Law vs Data Protection Law

Update prepared by Jessica Roland (Managing Partner, Guernsey), Edward Devenport (Partner, Jersey), Helen Ruelle (Partner, Jersey), Jeremy Wessels (Partner, Guernsey) and Mathew Cook (Counsel, Jersey)
March 2017

// **A recent decision of the Court of Appeal suggests that beneficiaries seeking trust information may be able to get around trust law restrictions by filing a data subject access request under data protection legislation. This is a significant development for trustees. However, its impact in Jersey and Guernsey may thankfully be limited as our data protection laws specifically recognise the applicable trust law rules limiting disclosure.**

The case of *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74 concerned beneficiaries of a Bahamian trust who were challenging the validity of certain distributions in the Bahamian Courts. Taylor Wessing LLP (English legal advisers to the trustee) provided a detailed response to the claims, and the claimants subsequently filed a data subject access request (a **DSAR**) on Taylor Wessing under the English Data Protection Act 1998 (the **DPA**), which provides data subjects a right of access to information that is processed by a data controller in respect of them.

In the first instance decision, the English Court declined to enforce the DSAR on a number of grounds, including that the DSAR provisions of the DPA were not intended to assist claimants in litigation and to get around other restrictions on entitlement to information. See our update in that regard (Data subject access requests: How to deal).

However, the Court of Appeal has overturned that decision and enforced the DSAR. The judgment touches on three main areas:

- First, whether the material fell within a relevant exemption. The DPA provides an exemption from disclosure of material that is subject to legal professional privilege and Taylor Wessing claimed the material fell within this exemption. The Court of Appeal held that that this exemption should be narrowly construed and would only extend to documentation that could be withheld as being privileged under English law. It rejected an argument that this exemption should be extended to restrictions arising under foreign law trust principles. The DPA does not expressly include an exemption to mirror applicable trust law rules and the Court made it clear that Parliament would have needed to expressly include such an exemption if that was the intention.
- Second, it was argued that the DSAR would involve disproportionate effort, the DPA also creating an exemption in that regard. The Court of Appeal held that the question of disproportionate effort must be considered across the entire DSAR process (not just the actual supply of information as had been suggested), but it was for the data controller to evidence why the supply of information would be disproportionate. In this case, Taylor Wessing did not provide this information and so the claim failed.
- Third, it was claimed that the purpose of the request was for litigation in the Bahamas, and was an improper purpose. The Court of Appeal noted that the DPA was 'purpose-blind' and that whilst the fact litigation was ongoing may be a relevant factor for consideration by the Court in exercising its discretion whether to enforce a DSAR, this does not mean a DSAR submitted to assist in litigation was an abuse of process or could be ignored. The Court upheld the DSAR in this case and ordered disclosure.

Comment

In an earlier Court of Appeal decision in *Durant v Financial Services Authority* [2004] FS 573, it was commented that the DSAR provisions were not there to assist data subjects 'for example, to obtain discovery of documents that may assist him in litigation or complaints against third parties'. This was taken by many to mean that DSARs arising from a complaint or litigation were unlikely to be enforced. However, in this case, the Court of Appeal stated that the earlier comment in *Durant* concerned the definition of 'personal data' and so a claimant could not claim something was 'personal data' just to obtain that information for the purposes of litigation. However, it didn't create a general prohibition on DSARs which were submitted to assist in litigation. This appears to echo the position taken recently in the Jersey case of *Alwitry v The States Employment Board and another* [2016] JRC 050, wherein a DSAR was upheld notwithstanding it was made as part of a complaint process.

In Jersey and Guernsey, the data protection laws include specific DSAR exemptions which mirror applicable trust law provisions restricting disclosure (Article 29 of the Trusts (Jersey) Law 1984 and Section 38 of the Trusts (Guernsey) Law 2007). There is no equivalent exemption in the DPA and the DPA makes it clear that DSAR rights apply notwithstanding any rule of law prohibiting disclosure other than where covered by an exemption. As such, trustees in Jersey and Guernsey should be in a better position in defending DSARs from beneficiaries and whilst certain information may still fall to be disclosed if it falls outside the Trust law restrictions, the DSAR option does not present an easy route around longstanding trust law principles.

The trust exemption featured in the Jersey and Guernsey data protection law was lobbied for by the trusts industries precisely to ensure that the limits on disclosure requirements of a trustee could not be avoided by way of a data subject access request, a loophole which this case demonstrates is capable of being exploited in other jurisdictions.

Trustees will still however need to exercise caution where information is handed over to parties who may not be able to rely on the Jersey or Guernsey law exemptions. It will also be interesting to see if these exemptions are carried over into the new laws which will be consulted on in 2017 in order to implement the provisions of the General Data Protection Regulation in the Islands.

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W v JFSC – Administrative appeals: duty of administrative body to give reasons

Update prepared by Mathew Cook (Counsel, Jersey) and Roisin Hocking (Trainee, Jersey) March 2017

This recent decision highlights the expectation that the JFSC, and other administrative bodies, give reasons for their decisions. In this case, the Court ordered the JFSC to give clarification of their reasons for a decision to issue a public statement, even if the reasons document had to be provided separately to the public statement itself. This was to allow the person affected by the decision to know why a decision has been reached and what material was relied upon.

Introduction

A recent decision of the Master of the Royal Court has considered the obligation of the Jersey Financial Services Commission (**JFSC**), and administrative bodies generally, to give reasons for their decisions.

The JFSC regulates financial services business in Jersey. It has extensive powers under the Financial Services (Jersey) Law 1998 (**Financial Services Law**). As well as power, in certain broadly defined circumstances, to revoke the registration of a financial services business, the JFSC has a number of other important powers, including a wide power to give directions under Article 23 and power under Article 25 to make public statements concerning businesses and individuals.

As part of its investigation into the affairs of a Jersey trust company, the JFSC gave directions (under Article 23 and certain other regulatory laws) to one of its directors and owners, referred to as W, and further resolved to issue a public statement regarding him. W is appealing the decision to issue a public statement, because the decision to issue a public statement is under appeal, the proceedings have been anonymised by the court. The present judgment relates to an interlocutory application by which W sought a detailed statement of findings of fact made by the JFSC, justifying the proposed public statement and specific requests for further and better particulars or for details of certain paragraphs of the proposed public statement.

Law

The Master noted that the decision of the JFSC had been communicated to W by a letter which referred to the public statement as containing the reasons for the decision to issue directions. Article 23(5)(a) of the Financial Services Law requires a notice of a direction to specify the reasons for giving directions. Each of the directions issued by the JFSC also referred to the reasons for the directions being the findings set out in the public statement.

The Master also noted that Article 25A of the Financial Services Law provides in summary that where the JFSC intends to issue a public statement identifying any registered or formerly registered person (which would include W), notice of this intention must be given to the person concerned. The notice is also required to set out the reasons for issuing a public statement.

However neither the board minutes recording the decision to issue a public statement in respect of W, nor the letter, nor the public statement itself nor any of the affidavits filed on behalf of the JFSC contained any reasons for the decision to issue a public statement. This was a breach of Article 25A.

Looking at the matter from a more general perspective, the Master referred to *De Smith's Judicial Review* 7th Edition, 7-102 - 1-03, *Finance and Economics Committee v Bastion Offshore Trust Company* [1994] JLR 370, *Interface Management Limited & Ors v JFSC* [2003] JLR 524, *Anchor Trust v JFSC* [2005] JLR 428 and *Anchor Trust v JFSC* [2006] JCA 040, and drew the following conclusions:

- There is an obligation on an administrative body to give reasons.
- The extent of the reasoning required is to allow the person affected by the decision to know exactly why a decision has been reached and what material has been relied upon by the decision maker in reaching that decision.
- The reasons can be brief; indeed brevity is to be encouraged as long as the obligation in the preceding sub-paragraph is met.
- Reasons do not need to indicate why the material relied upon was preferred to other evidence.
- Clarity of the explanation given is particularly important where any finding involves a conclusion as to the honestly or other similar characteristic of the person about whom a decision is being made.
- Any breaches of duty or codes of practice relied upon should be identified expressly.

Decision

In an administrative appeal, the Master held that he had power under the Royal Court Rules to compel a party to take the step of clarifying reasons or evidence where that evidence is not understood, in order to ensure the efficient conduct of such proceedings.

On the facts of this case, the Master held that further reasons were required to be given by the JFSC. Its error was to have used the public statement as the reasons for its decision. The essence of a public statement, the Master said, is ultimately to warn individuals, whether in Jersey or elsewhere, not to deal with the subject matter of the public statement. Such statements are likely to be concise and only contain an outline or summary of the matters that have led to the necessity for a public statement. The obligation to give reasons however fulfils a different function. It is so that the person affected knows why the decision has been made and what material has been relied upon in making that decision. The more difficult the issue being considered by the JFSC, the more potential there is for tension between the simplicity required by a public statement and the level of detail needed to meet the applicable legal obligations when giving reasons. The Master encouraged the JFSC to reflect on its current practice and whether or not it should keep separate any public statement, if it decides to issue one, from any reasons it is required to provide.

The additional reasons or facts required were to be provided by way of supplemental affidavit. The JFSC was being asked to expand upon the reasons for its decision at the time, not to formulate additional reasons or conclusions above and beyond those already reached. To the extent that the JFSC was unable to provide any further reasons, then this should be made clear in its affidavit, including setting out why it was unable to expand any further at this point in time. It would then be for the Court at the substantive hearing or upon any appeal to evaluate the response contained in the affidavit.

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