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UPDATE

No problem with no consent regime.

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In the significant recent judgment of the Royal Court of Jersey in *Prospective Applicant v Chief Officer of the States of Jersey Police* [2019] JRC 161, the court considered and analysed extensively the consent regime in Jersey, established by Part 3 of the Proceeds of Crime (Jersey) Law 1999 (the **1999 Law**), in the context of an application to judicially review and quash the decision of the Jersey Financial Crimes Unit (the **JFCU**) to maintain its refusal to consent to the operation of certain bank accounts. In what is the most substantive judgment in Jersey on this issue since 2008, detailed examination was given to the underlying rationale and justice of the regime, in particular the fact that Jersey places no statutory time limit on the length of a no consent, although the judgment stops short of providing guidance as to the point at which a refusal of consent will become disproportionate.

Background

The Applicant for judicial review in this case was the chief executive officer and beneficial owner of a company (the **Company**) that acted as adviser to a hedge fund (the **Hedge Fund**), which itself invested in equity positions and financing, notably distress financing. The Applicant was also a beneficiary under a Jersey discretionary trust which had invested in, and received dividends from, the Hedge Fund, via a BVI company (**BVI Co**).

The Applicant and the Company were defendants in class actions in the United States in which, pertinently, it was alleged that they were involved, along with others, in the practice of manipulative share issuance, described as "*a fraudulent course of conduct*", by which the value of the claimants' shares were harmed. These allegations were under investigation by the relevant regulatory authority in the USA, namely the U.S. Securities and Exchange Commission (the **SEC**). However, the SEC had not, as at the date of the hearing, taken any regulatory action, nor had it notified the Applicant that it intended to take such action, notwithstanding that the SEC's investigation began nearly two years before. Moreover, neither the Applicant nor the Company had been notified by any criminal authorities (the SEC not being endowed with criminal investigatory or prosecutorial functions) that they were the subject of any investigation.

In July 2018, the Jersey administrators of the Jersey trust and BVI Co filed a suspicious activity report (a **SAR**) with the JFCU. Thereafter, the JFCU took the decision to withhold consent to the normal operation of the Applicant's accounts. The no consent letter was dated 31 July 2018. The JFCU reviewed the matter on 8 November 2018 but the JFCU decided to maintain the no consent.

In essence, the JFCU's suspicions were grounded on, *inter* alia, certain redemptions made from the Hedge Fund as follows. First, following the share transactions in question in the US proceedings, BVI Co received a redemption from the Hedge Fund of US$36.8 million, of which US$12 million was caught by the no consent letter. Second, and separately, a further US$4 million was caught by the no consent letter, representing a redemption of an investment in the Hedge Fund, made by a charitable company limited by guarantee (the **charity**), administered in Jersey. It was clear that the Applicant had some involvement with the charity but he declined to disclose the source of the initial investment funds, contributed into the charity in 2013. The JFCU's suspicion was that the US$ 12 million held by BVI Co and the US$4 million held by the charity represented the benefit of criminal conduct.

The Applicant and the Company denied any impropriety and alleged that the US class actions were speculative and unfounded. In an earlier judgment in this case, it was stated that less than 1% of class action filings reach a trial verdict.

The present application sought to judicially review and quash the decision of the JFCU to maintain the no consent, taken on 8 November 2018. As at the date of the hearing (13 June 2019), no decision had been taken by the JFCU as to whether or not a full criminal investigation should be launched.

The Statutory Framework

In Jersey, if a financial institution submits a SAR pursuant to the 1999 Law and the JFCU grants consent to move funds, the financial institution has the comfort of knowing that it will not be prosecuted for money laundering if it carries out the transaction and the funds later transpire to be the proceeds of crime (Article 32 of the 1999 Law). If the JFCU refuses consent and the financial institution proceeds with the transaction, it will have no defence to money laundering under Article 32 of the 1999 Law. Inevitably, therefore, financial institutions in such a situation will not take the risk and, therefore, will not carry out the transaction based on its customer's instructions while the suspicion subsists. However, the 1999 Law does not impose any time limit by which the police have to take action against the financial institution's customer or, if it does not, by which it must give, or will be deemed to have given, consent.

The Applicant said that this legal framework means that, in effect, refusal of consent engenders an indefinite and unrestricted freeze of the funds in question, without the formality of a court order imposing such a freeze.

Similar (though not identical) relief is available through court order in Jersey in the form of a *saisie judiciaire* under Articles 15 and 16 of Part 2 of the 1999 Law. A *saisie* is granted on the application of the Attorney General and restrains a person in Jersey from dealing with funds and requires them to vest Jersey-situate assets in the Viscount, if certain conditions are satisfied (*saisies* are made in support of criminal proceedings, investigations and confiscation orders in Jersey and, by virtue of modifications made to Article 15 in 2008, also overseas). Notably, under Article 15, a *saisie* must be discharged if proceedings have not been instituted within a reasonable time.

The Judicial View

There has been judicial criticism of the Jersey consent regime in the past based, in particular, on the absence within that regime of the same protections which exist within the *saisie* framework, i.e. in respect of discharge of the *saisie* absent the progression of the underlying proceedings in contemplation. For example, see *Chief Officer of SOJP v Minwalla* [2007] JLR 409 (***Minwalla***) and *Gichuru v Walbrook* [2008] JRC 068 (***Gichuru***).

In *Minwalla*, Sir Michael Birt (then Deputy Bailiff), at paragraph 20, said:

It is hard to reconcile this situation [of an informal freeze without court order under the no consent regime] *with the carefully structured protections provided in respect of a saisie, which are clearly intended to ensure that funds are not frozen indefinitely or for an unreasonably long period in the absence of criminal charges.*

The court in *Minwalla* went on to contrast parallel UK legislation which provides that the police have 7 days from the STR (equivalent to a SAR) in which to respond and, if they do respond, they have a further 31 days to in which to apply for a restraint order (the equivalent of a *saisie*). In other words, in England and Wales, an "informal freeze" could last a maximum of 38 days (see paragraph 20, *Minwalla*). In conclusion (paragraph 75, *Minwalla*), the court urged that immediate consideration be given to introducing similar time limit provisions in Jersey. This suggestion was endorsed by the Royal Court in *Gichuru* but no such amendments to the Jersey legislation have ever been introduced.

In the Guernsey Court of Appeal case of *Chief Officer, Customs & Excise v Garnet Investments Limited* [2011] 19/2011 (***Garnet***), which centred on the money laundering offences and no consent provisions contained within the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 (the Guernsey no consent provisions are equivalent to those in Jersey), the Court considered and distinguished the comments made in *Minwalla*. The Guernsey Court of Appeal said that:

(a) the informal freeze referred to *Minwalla* was, in fact, the practical impact of the criminal law on the financial institution concerned rather than an accurate characterisation of the consent regime as an aid to the freezing of property (paragraph 31);

(b) the difference in approach between Guernsey, on the one hand, and England and Wales, on the other, was readily explicable and justifiable on the basis of the different nature of the financial transactions that are of concern in the two jurisdictions (Guernsey has less fast-moving transactional business that would be damaged by the absence of a deemed consent) and the lower level of investigative resources (paragraphs 46 – 52);

(c) "In any case where there is a suspicion that has not been dispelled, the police must be entitled to refuse consent whatever period of time has elapsed" (paragraph 56, emphasis added).

Garnet was recently followed by the Hong Kong Court of Appeal in *Interush v Commissioner of Police* [2019] HKCA 70 (***Interush***). Notably, Hong Kong is a jurisdiction which, like Jersey and Guernsey, places no statutory time limit on the length of a no consent.

Decision

The Court dismissed the Applicant's application for judicial review, finding that the decision to maintain the no consent on 8 November 2018 had been reasonable and proportionate.

In relation to each of the grounds relied on by the Applicant for judicial review, the Court decided as follows:

- Ground 1: Illegality (*ultra vires*): existence of suspicion is sufficient to ground a proper refusal of consent and it is not necessary for there to be a criminal investigation currently on foot or in immediate prospect, as had been argued by the Applicant;
- Grounds 2 and 3: Illegality (failure to take into account relevant considerations and taking into account relevant considerations): These grounds were somewhat contradictory but, in any event, the Court found that the JFCU had taken into account relevant considerations (in particular, the absence of a criminal investigation, the passage of time since the trading activity and the commencement of the SEC investigation, and the absence of any *saisie*) and that it had not taken account of irrelevant considerations;
- Ground 5: Procedural unfairness (failure to give reasons for the decision): the JFCU had given sufficient reasons by explaining the JFCU's concerns in email correspondence and in a meeting; the JFCU had been provided with detailed interrogatories by the Applicant's lawyer but the JFCU was under no obligation to respond to those or to go further than it did.
- Ground 4 (i.e. Irrationality- disproportionality) gave rise to the most detailed part of the substantive judgment, being the only issue on which the Applicant had *"a substantive case"*, and, as such, it warrants greater examination than the other grounds:

In summary, the Court found that the Applicant's rights under Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) were engaged:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"*

- Such engagement of Article 1 Protocol 1 rights had also been found in *Garnet*, a decision which the Royal Court had *"no doubt that* [it] *should follow"* as being *"of the highest persuasive authority in respect of equivalent legislation and legislative history"*. The fact that the Applicant's Article 1 Protocol 1 rights were so engaged means that there could come a point where the continued imposition of no consent would become disproportionate.
- The Court applied the four-stage proportionality test adopted in *Interush*, with the fourth stage giving the court most pause for thought, namely whether a reasonable balance had been struck between societal benefits of the encroachment and the inroads made into the rights of the individual, in particular whether it resulted in an unacceptably harsh burden on the individual.
- The court acknowledged that the transactions in question took place, and the US proceedings and SEC investigation were commenced, as long ago as 2017 and that the no consent letter was issued in July 2018 and, yet, no criminal investigation had apparently been instigated. However, given the importance of tackling money laundering, it could not be said that, as at 8 November 2018, the practical effect of

the no consent letter placed an unacceptably harsh burden on the Applicant (or any burden at all in respect of the US$4 million as those funds are held within the charity, in respect of which the Court had been given scant information).

- Accordingly, the point at which the no consent would become disproportionate had not been reached in the present case.

The Court was at pains to point out that the dismissal of the application did not mean that the no consent in this case could be maintained indefinitely because (as *Garnet* had established) there can come a point when its maintenance would become disproportionate. However, the Court declined to give guidance as to when such a point would be reached as it will depend on the factual matrix of each case, venturing only to say that the ongoing absence of a criminal investigation will be a key factor in this regard.

Discussion

The Court acknowledged the very stark statement in *Garnet* that the police may refuse consent *"whatever period of time has elapsed"* where there is an unresolved suspicion. However, the Royal Court clearly considered that the apparent harshness of this position had been ameliorated by the Guernsey Court of Appeal's acknowledgment in *Garnet* that the practical effect of the no consent letter meant that Article 1, Protocol 1 was engaged. Implicitly, therefore, there is a point when the continuation of a no consent letter would become disproportionate.

In similar cases to the present one, therefore, the JFCU's actions will be open to scrutiny on proportionality grounds in the context of Article 1, Protocol 1 of the ECHR. It is helpful to have a clear statement as to this. However, what is still unclear is in what kind of factual circumstances the JFCU's actions will be judged to be disproportionate. The facts of *Garnet* were much more stark than the facts of the present case and one may surmise that it was relatively easy for the Guernsey court to conclude there that the decision to maintain the no consent letter was proportionate.

Here, there were certain factors clearly militating in favour of the Applicant on proportionality, e.g. the lack of criminal investigations nearly two years after commencement of the SEC investigation. However, the Royal Court still concluded that the maintenance of the no consent was proportionate. Why did it do so?

It placed some emphasis on the fact that, as at 18 November 2018, the no consent had only been in place for three months and the JFCU was still in the process of gathering and collating evidence. However, it is apparent that the Royal Court was heavily influenced by the public policy consideration of upholding the anti-money laundering ethos of the Island (see paragraphs 134 and 135). This is, self-evidently, a worthy, indeed, an essential consideration. However, as it was once memorably judicially described, public policy *"is a very unruly horse, and when once you get astride it you never know where it will carry you"* (per Burrough J in *Richardson v Mellish* 130 E.R. 294 at 252). The Court also noted that it had received scant information on certain facts, including the source of funds. This highlights the need for anyone challenging a "no consent" to be able to evidence the legitimacy of any funds sought to be released.

Will the *"great hardship and unfairness"* (*Minwalla*) which may be engendered by the informal freeze under the no consent regime really be ameliorated by the application of proportionality pursuant to Article 1, Protocol 1 of the ECHR? Time will tell but, given the emphasis on public policy, one may speculate that it would take a very clear case of disproportionality to succeed in a judicial review application of this nature. No guidance as to when the proportionality threshold will be breached has been given by the Court and the testing of this threshold is ripe for further litigation in future.

It may well be the case that the potential recourse to proportionality in cases such as this will dissolve any impetus which may have once existed to reform the no consent regime by the imposition of time limits (as was suggested in *Minwalla* and *Gichuru*).

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