

UPDATE

The Point of Return – Royal Court decision highlights remediation is key to addressing enforcement action

Update prepared by Simon Gould (Partner, Jersey) and Mathew Cook (Counsel, Jersey)

In this recent case, the Royal Court considered the JFSC's decision to revoke the registration of an investment business. The decision highlights the importance of remediation in enforcement scenarios.

In the recent case of *SWM Limited v Jersey Financial Services Commission [2019] JRC100*, the Royal Court considered a decision by the Jersey Financial Services Commission (the **JFSC**) to revoke the registration of investment business SWM Limited (**SWM**). Whilst the Court upheld a majority of the findings of the JFSC, it ultimately disagreed with the sanction imposed and sent it back to the JFSC for re-consideration. The key area where the Court disagreed with the JFSC concerned remediation implemented by SWM.

In our separate briefing, [P.R.O.T.E.C.T.](#) we set out some key considerations for businesses facing potential enforcement action, and a number of those recommendations are echoed in this case.

Background

The JFSC decided to revoke the registration of SWM in August 2018, this decision stemming from concerns raised by the JFSC over the suitability of advice given by SWM to its clients in respect of alternative investment funds.

The dispute between SWM and the JFSC has already resulted in a number of interesting points in previous judgments, including: (i) the right of a party subject to potential regulatory action to obtain advice and evidence in response to address issues raised; and (ii) disclosure obligations to third parties of reports prepared in a regulatory context which do not attract legal professional privilege.

In this latest decision, the challenge was focused on the final decision of the JFSC to revoke SWM's registration on the basis the JFSC did not consider SWM to be "fit and proper". It is well established that the Court may only interfere in a decision of the JFSC if it considers that decision to be unreasonable, in the sense of being beyond the bounds of reasonable justification.

Basis of the decision of the JFSC

The Court started by considering the conclusions of the Board of the JFSC as to SWM's fitness and propriety, and largely endorsed the conclusions of the JFSC. In summary:

- **Due Diligence Procedures** – the Court highlighted a potential discrepancy between the decision of the Executive and that of the Board of the JFSC, but the Court ultimately considered the Board had properly concluded that SWM lacked competence by having no written procedures in relation to due diligence and no adequate contemporaneous records of due diligence carried out for certain products;
- **Prohibited third party payments** – under the Investment Business Code of Practice, SWM was not permitted to receive remuneration by way of commission from product providers for investment advice services to retail clients unless certain exceptions applied. SWM did have an arrangement with Cherry Godfrey whereby Cherry Godfrey would contribute £200 for SWM to provide a financial review and investment advice to clients, the payment being irrespective of whether SWM ultimately referred the client to Cherry Godfrey. There was disagreement amongst the Court as to whether this was a "commission", but the Court ultimately disagreed with the JFSC that the payments made in this case justified a finding of lack of integrity on the part of SWM;

- **Complaint handling** – the Court agreed with the JFSC that SWM had lacked integrity in (a) refusing to re-open a particular complaint (this "*just crossing the line*"); and (b) advising a client that it would not provide investment advice to the client if a complaint against SWM was maintained;
- **Insurance** – SWM was un-insured in respect of claims concerning certain products, this being a result of a mis-understanding over the nature of insurance and disclosure issues. The Court considered that the JFSC's decision that SWM lacked competence by failing to have adequate insurance was "unassailable";
- **Disclosure** – The JFSC had failed to provide certain documents to SWM during the process, and the Court concluded that letters from investors to the JFSC were potentially relevant to the appropriate sanction to be imposed and, as such, should have been disclosed.

Sanction imposed by the JFSC

Whilst, as reflected above, the Court largely endorsed the findings of the JFSC, the Court ultimately differed on the question of the appropriate sanction to be imposed.

The decision of the Board of the JFSC was made on the basis that the Code breaches were ongoing, thereby meaning SWM continued to pose a risk to the best interests of Jersey retail financial services clients. The Court was referred to responses provided by SWM to the JFSC's on-site visit report. The Court considered that the responses addressed the points raised, by referring to new policies, procedures, template letters, due diligence documents, a compliance monitoring plan and other documents. The Court had no evidence before it that the Executive was dissatisfied with these documents.

As such, the Court said it could not agree with the finding of the Board that SWM had refused to take steps to remedy any of the significant failings in respect of due diligence documentation. The Court found that SWM had in fact taken considerable steps to remedy the deficiencies. As the Board had described the due diligence documentation failing as a core element of its findings, the Court concluded that that alone was sufficient to quash the revocation. On that basis, the Court referred the matter back to the JFSC for re-consideration.

Our View

This is a key case for regulated entities to review and understand. Whilst there appear to have been significant issues arising in the conduct of SWM's business, it had ultimately taken a number of steps during the enforcement process to seek to address those matters. As a public body, the JFSC was duty bound to take all relevant matters into account and to give credit for remediation undertaken. It appears from the decision of the Court that there was a failure to do so in this case. It demonstrates that how to respond to regulatory concerns is an absolutely crucial question for regulated businesses.

In a post-script, the Court urged SWM to adopt a "somewhat less adversarial approach" in the matter going forward. Clearly another key question for business is managing the relationship with the regulator in an appropriate way.

Contacts



Simon Gould
Partner, Mourant Ozannes
Jersey
+44 1534 676 367
simon.gould@mourant.com



Mathew Cook
Counsel
Jersey
+44 1534 676 371
mathew.cook@mourant.com

This update is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this update, please get in touch with one of your usual contacts. © 2019 MOURANT OZANNES ALL RIGHTS RESERVED