MOURANT OZANNES

BRIEFING

Garnet

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Introduction

A Mourant Ozannes team consisting of Guernsey litigation partner Christopher Edwards and associates Michaela Ryan and Rocco Cecere, have had another significant success for their client Garnet Investments Limited ("**Garnet**") by successfully quashing a decision of the Financial Intelligence Service (the "**FIS**") to refuse consent to a Guernsey bank to transfer funds held by Garnet.

The issue

The money laundering regime established in Guernsey by the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, (the "**1999 Law**"), though similar to that which exists in Jersey, differs significantly from that which operates in the UK, in that there is no "moratorium" regime. Unlike the moratorium regime under which SOCA operates, if a local institution seeks the consent of the FIS to undertake a transaction which it suspects may involve the proceeds of crime (and hence avail itself of a defence to a prosecution under the 1999 Law), the FIS is not required to respond to that request within any given period at all. This often creates practical difficulties for institutions who are in the interim unable to comply with an instruction and unable to explain why they cannot comply. Moreover, that limbo can be extended indefinitely as, if the FIS refuses consent, it is not obliged to apply for a restraint order freezing the suspected proceeds of crime within any given period or indeed at all. Institutions and their customers have, for some time, struggled which the practical difficulties which this lacuna creates. This decision may provide them with some hope but, first, some background.

Garnet

Garnet is an investment vehicle beneficially owned by Hutomo Mandala Putra, otherwise known as Tommy Suharto ("**Mr Hutomo**"), which received, in the months following the resignation, in May 1998, of Mr Hutomo's father as president of the Republic of Indonesia, significant sums from the sale of Mr Hutomo's interests in, inter alia, Lamborghini and Superbike (the "**Funds**"). The Funds were held in account at BNP Paribas, but, in the latter part of 2002, Garnet gave instructions for the Funds to be transferred to another bank. BNP Paribas said that it could not do so, citing concerns that Mr Hutomo (and his father) may have been involved in corrupt activities.

The Freezing Order Proceedings

After instructing Mourant Ozannes in 2006, Garnet brought proceedings against BNP in the Royal Court of Guernsey to compel BNP Paribas to comply with its instructions. BNP said it was unable to because it was concerned the Funds were subject to a constructive trust in favour of the Government of Indonesia and, alternatively, they may be the proceeds of crime.

That led, in January 2007, to the Government of Indonesia intervening and obtaining a freezing order over the Funds. That freezing order was ultimately discharged by the Guernsey Court of Appeal in January 2009, who noted that:

1. The only civil claim which the Government of Indonesia had brought against Mr Hutomo in the interim had been lost;
2. There were no criminal proceedings outstanding against Mr Hutomo;
3. No steps had been taken by the Government of Indonesia to freeze Mr Hutomo's Indonesian assets, notwithstanding that it was accepted that they were very substantial; and
4. The Government had not brought any

claims in any other jurisdictions to freeze any of the other assets of Mr Hutomo.

A new instruction

After the freezing order had been discharged, Garnet issued a fresh instruction to BNP to transfer part of the Funds to an account in Indonesia. Anticipating the likelihood that BNP would seek the consent of the FIS, Mourant Ozannes, on behalf of Garnet, wrote to the FIS setting out why, in the view of Garnet, the FIS should grant consent. Notwithstanding, in June 2009 the FIS refused consent (the "Decision").

The conundrum

Garnet found itself faced with a conundrum. The FIS had not any time since 2002 suggested they intended to apply for a restraint order. Notwithstanding, the effect was the same – Garnet was unable to deal with the Funds. Garnet recognised that the reason it could not deal with the Funds was the Decision, and brought an application for judicial review against the FIS.

The grounds

Garnet argued the Decision should be set aside for the following reasons:

1. First, it was unreasonable. No proceedings had been brought under the 1999 law for a restraint order against either itself or Mr Hutomo, there were no known criminal investigations against Mr Hutomo under way anywhere in the world and nor had Mr Hutomo ever been found guilty of any allegation of financial corruption.
2. Second, the refusal of consent was disproportionate. It had the effect of putting in place an informal restraint. The intention of the 1999 law must have been an application for restraint order should be made within a reasonable time. The Decision was therefore disproportionate to the intention of the law and to Garnet's rights and freedoms.
3. Third, the FIS committed a procedural improprietary by not giving reasons for the Decision. Though giving reasons was often a sensitive matter, there were no investigations or proceedings which could be prejudiced, and the FIS had seemingly only relied on open source material in coming to the Decision. There was therefore no basis not so say why they had refused consent.
4. Fourth, the Decision was in breach of Garnet's human rights. It was an unlawful interference with Garnet's property rights in a manner which was disproportionate to the legislative intent behind the 1999 law.

The Judgment

The Court noted that it was not its function to evaluate the merits of any claim to the Funds. It accepted that Garnet did not have to establish that the Funds were not the proceeds of crime, and that it was not for the FIS to arbitrate, extra judicially, on Garnet's rights to the Funds.

The Court held that, by the time the Decision had been taken, the means used to impair the rights and freedoms of Garnet to deal in the Funds had become excessive in relation to the object of the 1999 law, since ample time had already been given to the Government of Indonesia to take action. Moreover, though the Court confined its judgment to the Decision, it accepted that the mere effluxion of time could of itself cause a refusal to give consent which was reasonable when decided upon to subsequently become unreasonable.

The Court also, noting that there was no investigation to imperil, and no proceedings to prejudice, and given that the decision had been made on the basis of open source reports, held that Garnet should have been given reasons why consent had been refused.

Finally, in dealing with the property rights of Garnet, the Lieutenant Bailiff rejected the argument of the FIS that the Decision did not impact upon the property rights of Garnet, because, in the argument of the FIS, all it did was deny BNP a potential defence. The Court, rather, accepted the argument of Garnet that the practical consequence of a refusal of consent was a interference in those property rights. The Court held that the law should recognise that the FIS has the power to effect the ability of Garnet to deal with the Funds, and that where the FIS chose not to give reasons, in circumstances where refusal of consent "looks simply extraordinary", they must accept that decisions which seem arbitrary are likely to be the subject of an

adverse ruling. The Court held that "Garnet has lost the right to deal with this property for long enough".

For those reasons the Court quashed the Decision, on the grounds that it was:

- Unreasonable;
- Disproportionate;
- Unlawful;
- In breach of Garnet's human rights.

What does it mean?

Though the facts involved are somewhat unusual, the decision provides a welcome reminder to the FIS that:

1. They wield considerable powers. The FIS attempted to downplay the effect which a refusal of consent has upon a customer's ability to deal with their funds. This argument was emphatically rejected.
2. They must exercise those powers in a proportionate manner, having regard to the purpose of the 1999 Law. The Court accepted that the power cannot be used to informally freeze funds indefinitely and that there must, at some point, come a time where "enough is enough".
3. They are accountable for the decisions they make. They may, in appropriate cases, be required to provide reasons. They are always required to keep a decision to refuse consent under regular review.
4. The courts will, in appropriate circumstances, intervene to hold them accountable.

The Court noted that what might be a reasonable time before "enough is enough" will vary from case to case. It has, though, given some useful guidelines, which might encourage others facing a similar conundrum to chance their arm before the courts.

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