

Lessons to be learned from a recent regulatory matter

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Lessons to be learned from a recent Guernsey regulatory matter

We were recently instructed by a Bank in relation to a regulatory matter. The Bank had made a suspicious activity report to the Financial Investigation Unit ("FIU") due to their concerns about the potential source of funds in an account. These concerns were raised by two articles which had been discovered in the public domain relating to an individual and his conviction by a Brussels court of VAT fraud. It was the Bank's belief that the individual was primarily the source of wealth for the account and it did not know whether the funds were the proceeds of crime. Following correspondence with the FIU the Bank was told that it did not have consent to end the relationship with the customer. As a consequence, the Bank was prohibited from transferring or otherwise disposing of the funds pursuant to section 39(3) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999.

Last year, one of the account holders attended the Bank's offices in Guernsey, accompanied by the potential beneficial owner and orally gave instructions for the transfer of the funds in the account to a particular company. When the account was originally opened a loan from the company had been cited as the source of the funds. The Bank was informed that the company was now requesting immediate repayment of the loan in order to enable it to purchase real estate in Dubai. Company documentation showed that its shareholders are the potential beneficial owner (60%) and the account holder who attended the Bank's Guernsey office (40%).

Various correspondence ensued between the Bank and the customer during which the Bank made it clear that for regulatory reasons beyond its control it was unable to transfer the money. Late last year, the customer issued proceedings against the Bank for return of the money, breach of contract and damages. The Bank made the decision to apply to have the

customer's claim struck out on the basis that there had been no breach of contract and so the Plaintiff's action was bound to fail. The Bank asserted that its terms and conditions provided an absolute defence to the breach of contract claim because they allowed the Bank to take any action which is appropriate in order to act in accordance with any laws and regulations.

Both parties referred to The Chief Officer, Customs & Excise, Immigration and Nationality Service v. Garnet Investments Limited [2011-12] GLR 250 ("Garnet") as lending support for their respective positions. This was a judicial review action. The decision challenged was that of the FIU to refuse consent to the bank in that case, BNP Paribas, to make payments requested by Garnet Investments Limited. The Lieutenant Bailiff concluded that it was irrational and disproportionate for the FIU to refuse consent to the transaction requested by the customer where no criminal proceedings had been commenced and no active investigation was in train. This indicated that there was no realistic prospect of any action being taken by any criminal law enforcement authority that might lead to the funds being restrained or confiscated. The Court of Appeal allowed the appeal on behalf of the FIU.

In reaching his decision the Deputy Bailiff acknowledged that pursuant to Garnet there is no obligation on the part of the a bank customer simply to bring a private law action because it is open to a customer to proceed by way of judicial review. The Deputy Bailiff commented, however, that this may not be a desirable course of action because the focus would be on the decision taken to decline to give consent, rather than it being focused on whether the funds themselves are tainted. The Deputy Bailiff considered that the better course of action would be for the Plaintiff to amend the claim to remove the damages element and simply seek a declaration that the monies are "clean" and can be transferred by the Bank. The strike out was, therefore, unsuccessful and the Plaintiff has proceeded to amend its claim.

The Deputy Bailiff commented that the case really should proceed to a full trial to enable the question of whether it is possible to contract out of the type of private law remedy advocated as being the preferable course of action for a bank customer to take where there is a "no consent" situation to be determined after all the relevant material has been placed before the Court. He echoed the statement of Tomlinson J in a recent case, Amalgamated Metal Trading Ltd v. City of London Police Financial Investigation Unit [2003] 1 WLR 2711, "*The arising of such disputes is one of the ordinary commercial risks which any financial institution faces.*"

This judgment has been an interesting indication of how such matters will be treated and has demonstrated that banks will have to accept that they may face many similar cases in the future until the regulatory regime is re-examined and potentially changed.

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