

Meaning of “ordinary course of business”

Insights - 18/02/2016

SWM Limited (SWM), a regulated financial services company, sought a declaration from the Royal Court that certain payments it wished to make would be “in the ordinary course of business” and therefore would not be in contravention of a prohibition contained in a direction (the Direction) issued by the Jersey Financial Services Commission (the JFSC) to SWM pursuant to Article 23 of the Financial Services (Jersey) Law 1998, as amended (the Law).

The Facts

SWM was subject to regulatory action by the JFSC and was required to commission a report from Grant Thornton (GT), into the suitability of investment advice given to certain of its clients. SWM objected to GT’s appointment, challenging GT’s expertise in the relevant investments and GT’s ability to make a valid determination on the quality of SWM’s advice. The JFSC disagreed. GT’s report concluded that, to a great extent, the advice (and hence the investments made) had been unsuitable.

SWM disputed material parts of the GT report and advised the JFSC it wanted to commission a separate report to place further evidence before the JFSC. The Direction prohibited SWM from making “payments that were not in the ordinary course of business”. The JFSC submitted that payment by SWM for a separate report was not in the “ordinary course of business” and would require the JFSC’s prior permission. SWM sought declaratory relief from the Royal Court to the contrary.

The questions for the Court were:

- (a) Does it have jurisdiction to make the declaratory relief sought?
- (b) Should it, as a matter of policy, be prepared to grant a declaration in the present circumstances?
- (c) Was the action proposed by SWM in the ordinary course of business?

The Decision

The Court concluded as follows:

The declaration sought was for a practical purpose rather than being of a fanciful or hypothetical nature. Such purpose was to determine whether SWM could use its money for the purpose that it wished without being in breach of the Direction and therefore exposed to a criminal prosecution under the Law. The Court decided that it did have jurisdiction to make the declaration sought if, as a matter of discretion, it was appropriate in the circumstances.

The policy issue in question was whether a declaration would affect any future decision of the Attorney General (AG) as to whether he should prosecute for a breach of a direction, which may in turn trespass upon his exclusive prerogative to bring criminal proceedings. Whilst the Court acknowledged the need for caution, the Court found that a declaration in the circumstances would not impinge upon the AG's jurisdiction as it would only be expressing an opinion as to the meaning of an administrative direction. Any declaration would not necessarily be determinative of such a decision and, even if it were, it would be too far removed from the possible future exercise by the AG of his power.

On the question of whether SWM's proposed action was in the "ordinary course of its business", the Court considered that the expression:

- (i) should be given its ordinary English meaning;
- (ii) would not preclude a single, one-off act of the business;
- (iii) may well include acts which are likely to preserve the company's business against a threat to it; and
- (iv) should be interpreted in the context of the company's business.

The Court noted the significance of SWM operating in a regulated environment and the need to engage with the JFSC and seek advice in connection with that engagement. The obtaining of a report to challenge evidence relied upon by the JFSC in order to preserve its business was, notwithstanding it being an exceptional step, in the ordinary course of its business.

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