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ROYAL COURT
(Samedi Division)

21st January 2016

Before: T J Le Cocq Esq, Deputy Bailiff with Jurats Grime and Sparrow

Between	**SWM Limited**	**Appellant**
And	**Jersey Financial Services Commission**	**Respondent**
And	**Her Majesty's Attorney General**	**Third Party**

Advocate O A Blakeley for the Appellant
Advocate B H Lacey for the Respondent
HM Solicitor General in person

JUDGMENT

DEPUTY BAILIFF:

1. This is an application by SWM Limited ("SWM") seeking a declaration from this Court that, should it make certain payments, it will be doing so "in the ordinary course of business" and therefore not in contravention of a prohibition contained in a direction issued by the Jersey Financial Services Commission ("Commission") to SWM dated 9th January 2015 ("the Direction").

2. SWM is referred to as the Appellant because this application takes place in the context of an appeal made by SWM against certain actions and decisions of the Commission although, in reality, SWM is seeking a declaration from this Court under the Court's original jurisdiction. Because the original form of the summons issued by SWM for declaratory relief sought a declaration relating to whether or not a criminal offence would, in certain circumstances be committed under Article 37(1) of the Financial Services (Jersey) Law 1998 (as amended) ("the Law") the Court, on an earlier occasion, indicated that the summons should be brought to the

attention of the Attorney General. That was done and we have had the benefit of the submissions of the Solicitor General, to whom we gave leave to intervene, before us this morning.

3. Recent exchanges between SWM and the Commission mean that the larger part of SWM's summons for declaratory relief has fallen away and we are only left considering paragraph 1(d) of the summons which is seeking a declaration in the following terms:

> ***"(d) If SWM makes payments to professional advisers for the sole purposes of obtaining professional advice and/or expert evidence for use by SWM and its business then such payments are not prohibited by paragraph 1.2.2 of the direction and neither does SWM need to obtain the prior written consent of the Commission before making such payments;***
>
> ***The relevant part of paragraph 1.2.2. of the direction reads as follows:***
>
> ***"1.2.2. SWM shall refrain from:***
>
> ***1.2.2.1…***
>
> ***1.2.2.2…***
>
> ***1.2.2.3. making shareholder loans or payments that are not in the ordinary course of business***
>
> ***without the prior written consent of the Commission"***
>
> ***and that, accordingly, SWM shall not be in breach of the direction by making such payments without obtaining the prior written consent of the Commission nor shall it be committing an offence under the law by doing so."***

4. As we have said, the full summons included a request for a declaration relating to whether or not a criminal offence would be committed in certain circumstances under Article 37(1) of the Law. As that was no longer an issue, the Court asked the Solicitor General whether he still wished to make submissions and he confirmed that he wished to make submissions in connection with what remained of the summons for declaratory relief.

Background

5. It is not necessary to go into the background in great detail. For our purposes it may be summarised as follows:

   (a) SWM is a financial services company regulated by the Commission.

   (b) SWM is currently subject to regulatory action by the Commission which, amongst other things, has required SWM to commission a report from Grant Thornton into the suitability of advice that SWM gave to 42 of its clients who made certain investments between six and 11 years ago. Grant Thornton in its report has concluded, of the sample of customers of SWM that it considered, that to a great extent the advice and hence the investments had been unsuitable.

   (c) SWM did not wish to commission the report from Grant Thornton and expressed the view that Grant Thornton did not have sufficient expertise in the investments in question to make a valid judgment on the quality of SWM's advice. The Commission disagreed with this view and required SWM to commission Grant Thornton to prepare its report.

   (d) On receipt of that report, SWM prepared what is referred to as a "Management Response" disputing material parts of the Grant Thornton report and opinion and submitted this response to the Commission. The Commission expressed the view, somewhat unsurprisingly, that it preferred the report of Grant Thornton which was independent to that of SWM which inevitably was not.

   (e) SWM then indicated that it wished to take further advice and that it wished to commission a report from another expert so that, depending upon what that expert said, it would have evidence to place before the Commission when it reviews the Grant Thornton report and when it reaches any decision about SWM.

   (f) The Commission has issued a number of directions some of which are disputed by SWM. SWM also dispute the Commission's interpretation of the Direction. The various concerns that SWM have had about the actions of the Commission have given rise to lengthy and sometimes strenuous correspondence. That correspondence, and indeed the actions of the Commission in general and the other issues that exist between SWM and the Commission, need not concern us at this point.

(g) As a result of the findings in the Grant Thornton report the Commission has started a decision making process which might in some circumstances lead to the revocation of SWM's licence. Accordingly SWM wishes to place itself in a position to refute by evidence, if possible, Grant Thornton's conclusions.

(h) The Commission's position, set out in correspondence and indeed in argument before us, is that the Direction prohibits SWM from using its resources to pay for a further report as the preparation of such a report could not be in SWM's "ordinary course of business" and it therefore requires, before spending its money to that end, the prior permission of the Commission.

(i) As to whether that permission should be granted, the view of the Commission appears to have changed over time. Initially it appeared to be taking the very clear view that it would not grant permission for the use of funds. It has however recently indicated that it wished further information from SWM relating to the identity of SWM's expert, the timing of the report and its cost, with a view to considering whether permission should be granted.

(j) SWM says that it should not need to provide this information and that the payment of such money does not fall within the prohibition in the Direction as it is obviously a payment "in the ordinary course of business".

(k) SWM, like all financial services companies, has to retain sufficient assets to satisfy the adjusted net liquid assets (ANLA) requirements. It was not disputed before us that should SWM use its resources to obtain a further report it would not thereby be placed in breach of the ANLA requirements.

The issues for the Court

6. The issues before the Court may be summarised as follows:

i) Does the Court have jurisdiction to make the declaratory relief sought by SWM?;

ii) If so, should as a matter of policy the Court be prepared to grant a declaration in the present circumstances?;

iii) If so, is the action proposed by SWM in the ordinary course of business?

7. The reason that SWM seeks a declaration is that, should it make a payment that is in breach of the Direction, then it may commit an offence. It argued that what it proposes is within the ordinary course of business but does not wish to take the risk that it will, in following that belief, be committing an offence under the Law.

8. The Commission's view could not be clearer. In its letter to SWM of 23rd October 2015 the Commission said:

> ***"The Commission considers SWM was to obtain the Commission's prior written consent where it will incur an expense not in the ordinary course of business. For the avoidance of doubt, the Commission does not understand how SWM will commission an independent review without incurring an expense not in the ordinary course of business and therefore considers such appointment would be in breach of the direction. I would remind you that, a failure to comply with the direction is a criminal offence under Article 23(15) of the Law …".***

Jurisdiction to make the declaration sought

9. The first Jersey case to examine the extent of the Court's jurisdiction to make declaratory judgments is In the matter of Curatorship of X [2002] JLR 259 in which the Court examined English authorities on declaratory judgments as well as looking at the Scottish equivalent and, in referring to the Scottish approach, at paragraph 18 said this:

> ***"We think that the broad and flexible approach is preferable to the more structured and technical approach which appears to hold sway in England, which is based partly upon historical considerations which have no application in Jersey. The principles of Scottish law … offer a sensible and convenient approach to the question of when the Court should agree to give declaratory relief and we hold that they represent the correct approach under Jersey law…".***

10. The Court then went on to say:

> ***"We do not think that the Court in Jersey Hotels was purporting to hold definitively that the distinction between future and hypothetical rights went to the jurisdiction of the Royal Court to grant declaratory judgment but, if it did so hold, we respectfully disagree. In our judgment, the Court should not become embroiled in a technical consideration of whether a matter can be categorised as a future or***

hypothetical right. The Court should adopt a broader approach and consider whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief…".

11. In Zamir and Woolf: The Declaratory Judgment (Fourth Edition) the learned authors, at paragraph 1-12 state:

> ***"Situations often arise in which a person finds himself uncertain as to his rights and duties. He is then confronted with a dilemma; whether to avoid any activity, the legality of which is doubtful, or to act on his own interpretation of the law and, in consequence, be exposed to the risk of incurring penalties or damages or of administrative interference with his interests. In the absence of the declaratory judgment, he could not obtain any legal relief in that situation; being unable to seek the aid of the court until his rights were actually infringed or at least, until he was threatened with imminent danger or serious injury… now, however, he may be rescued by declaratory proceedings. With the development of declaratory relief the range of interest susceptible of legal protection has been greatly widened…".***

12. It appears to us that the declaration sought by SWM from this Court is more than a fanciful or indeed a hypothetical declaration. SWM is seeking clarity for a practical purpose, whether it can use its money for the purpose that it wishes, namely for professional advisers and/or expert evidence without being in breach of the Direction and therefore exposed to a criminal prosecution. On ordinary principles, therefore, we believe that the Court does have a jurisdiction to make the declaration sought if, as a matter of discretion, it is appropriate for us to do so.

Should the Court make a declaration in these terms?

13. The Solicitor General, in his helpful submissions, urged the Court to take a cautious approach in being prepared to make a declaration of the type sought by SWM. He argues that there is the possibility, should the Court make a declaration in the terms sought, that this would affect any future decision of the Attorney General as to whether or not he should prosecute for a breach of a direction. This, so the Solicitor General suggests, may trespass upon the exclusive prerogative of the Attorney General to bring criminal proceedings and accordingly the Court should not make a declaration.

14. In support of his argument the Solicitor General placed before us a number of Jersey authorities emphasising that the decision whether or not to bring a prosecution is solely a matter for the

Attorney General. We do not need to refer to those authorities. It is, subject to whatever review may or may not be available before the Courts, entirely a matter for the Attorney General whether he brings any criminal proceedings. This was not disputed.

15. We naturally accept that a Court will approach with circumspection and caution any request for a declaration that might have a direct effect on the exercise of the judgment of the Attorney General in whether or not criminal proceedings should be brought. The making of a declaration is a matter of discretion for the Court and the importance of not impinging upon the Attorney General's jurisdiction will be something that a Court would bear in mind.

16. We do not, however, think that that is what we are being asked to do by SWM. The Court instead is being asked to express an opinion as to the meaning of an administrative direction. Of course it may be that that opinion will be taken into account, amongst other things, should the Attorney General ever be called upon to make a decision as to whether a prosecution should be brought in this or another case. But any declaration of the Court would not necessarily be determinative of such a decision and even if it were it is to our mind too far removed from the possible exercise in the future by the Attorney General of such a power. Any declaration made by this Court in these circumstances does not in our view usurp the function of the Attorney General.

17. We are reinforced in this view by the extract from Zamir and Woolf at 4-206 in which the learned authors say:

> ***"In practice, however, the civil courts are likely, as a matter of discretion, to be especially reluctant to interfere with any exercise by the criminal courts of their proper jurisdiction and where what is involved is a serious criminal offence and less reluctant where what is involved is a breach of a regulation or a non-compliance with some administrative direction. It is right that this should be so particularly in relation to the trial of such lessor offences, the Magistrates will be subject to judicial review by the High Court; in an obvious case resort to the High Court at the outset may therefore be a more convenient course. On the other hand there can be little justification for the civil courts, instead of a jury, being asked to adjudicate on a serious criminal offence, especially if there are issues of fact involved.***

And at paragraphs 4-207 and 4-208:

> ***"… where, however, a party brings proceedings before the court relating to matters involving statutory construction or administrative notices because he wanted***

to avoid violating the law and in order to ascertain and observe the law, the court should surely be much more sympathetic towards granting declaratory relief if convenient.

The utility of declaratory relief in such circumstances was emphasised in Dyson –v- Attorney General. Cozens Hardy MR said that he could not "imagine a more proper case" for the exercise of declaratory discretion and he added that the defendant's contention "that no court should interfere unless and until a penalty is sued for that seems extravagant". The declaration asked for was consequently granted…".

18. There does not appear to us to be substantial issues of fact in this application. It is clear on the face of the declaration sought what it is SWM wishes to do and we are being asked to indicate whether that would, in the view of the Court, be something that was within the ordinary course of SWM's business.

19. This is a simple interpretation of an administrative direction which will avoid SWM falling foul of the Law and incurring a penalty or the risk of prosecution. This seems to us to be entirely appropriate circumstances in which to exercise our discretion to grant a declaratory judgment.

Ordinary course of business

20. Having decided that the circumstances are such that the Court should be prepared to consider a declaration we have turned to consider whether what it is proposed by SWM would be an action within the ordinary course of its business.

21. It is clear that the Commission takes the view that the payment proposed by SWM is other than in the ordinary course of its business. In a letter from the Commission's legal advisers to SWM's legal adviser of 1st December 2015 the Commission says the following:

"… it is difficult to see, in the Commission's opinion, how the instruction of a "one-off" expert opinion to review expert, unregulated funds and their suitability of being sold to retail investors can be construed as being in the ordinary course of business. It is considered to be an exceptional item….".

22. However, in the case of Ashborder BV –v- Green Gas Power Limited [2004] EWHC 1517 (Ch) the court was called upon to consider whether certain payments were made by an entity in the

"ordinary course of its business" as permitted in security documentation. At paragraph 202 of its judgment the court said:

> ***"The proper starting point is that the words in the expression "ordinary course of its… business" are ordinary words of the English language which must be given the meaning which ordinary business people in the position of the parties to the facility agreement in the debentures would be expected to give them against the factual and commercial background in which those documents were made.***
>
> ***…."***

And at paragraph 203 the court said:

> ***"On the other hand, such businessmen would not be likely to take so narrow a review of "ordinary course of business" that it would not embrace a transaction for the preservation and continuance of a company's business, merely because it was not a transaction that had ever been carried out before".***

23. And at paragraph 227 of his judgment the court said this:

> ***"… I do not propose to attempt any particular formulation of the test for determining whether a transaction falls within the ordinary course of companies business for the purposes of a floating charge, or to make any comprehensive statement of the criteria for determining when a transaction is to be helped have taken place in the ordinary course of business for that purpose. On the other hand, it may be helpful to summarise briefly the following conclusions that I have reached from the decided cases that I have reviewed: (1) the question of whether a particular transaction is within the ordinary course of a company's business in the context of a floating charge is a mixed question of fact and law; (2) it is convenient to approach the matter in a two stage process; (3) first to ascertain, as a matter of fact, whether an objective observer, with knowledge of the company, its memorandum of association of its business would view the transaction as having taken place in the ordinary course of its business; … (5) subject to any such special considerations resulting***

from the proper interpretation of the charge document, there is no reason why an unprecedented or exceptional transaction cannot, in appropriate circumstances be regarded as in the ordinary course of the company's business; (6) to any such special considerations the mere fact that a transaction would, in a liquidation, be liable to be avoided as a fraudulent or otherwise wrongful preference of one creditor over others, does not, of itself, necessarily preclude the transaction from being in the ordinary course of the company's business; (7) nor does the mere fact that a transaction was made in breach of fiduciary duty by one or more directors of the company; (8) such matters in 6 and 7 may, however, where appropriate and in all the circumstances, be among the factors leading to the conclusion that the transaction was not in the ordinary course of the company's business; (9) transactions which are intended to bring to an end, will have the effect of bringing to an end, the company's business are not transactions in the ordinary course of its business."

24. Although that case related to the interpretation of the words "ordinary course of its business" within security documentation it seems to us that it provides useful guidance as to the correct approach.

25. In our view, without seeking to be definitive or restrictive, it seems to us that the following observations apply to interpreting the expression, "ordinary course of business":

(a) The expression should be given its ordinary English meaning;

(b) The expression "ordinary course of business" does not preclude a single, one-off exceptional act which the company might never have done before nor never do again. An example deployed before us was that a company may occupy premises in which the roof becomes damaged. It may then need to build a new roof. Even though it had never before had to build a roof and would never need to do so again would the building of the roof be in the ordinary course of its business? It seems clear that it would be.

(c) Actions which are likely to preserve or protect a company's business against a threat to it may well be in the ordinary course of its business.

(d) The question of whether or not an action is in the "ordinary course of business" may be fact specific and cannot be isolated from the context in which a company conducts its business.

26. The Commission argued that what is anticipated is clearly an extraordinary payment, a one-off in nature, and it cannot therefore logically be within the ordinary course of SWM's business. We do not agree. It seems to us that it is quite possible for a single one-off payment to be within the ordinary course of the company's business.

27. The Commission also observes that the purpose of the direction is to preserve assets within SWM so that they can be available for compensation to any of SWM's customers who have been wrongly sold investments and who might thereby have suffered a loss that they can claim from SWM. It should be noted that SWM is uninsured in relation to the investments that are considered in the Grant Thornton report.

28. Whilst we understand the motivation of the Commission, that does not assist the Commission in its argument. Either the making of the proposed payment is within the ordinary course of SWM's business or it is not. If payment falls outside the terms of the Direction then the motivation for the issue of the Direction is irrelevant.

29. In this case SWM carries out its business in a regulated environment. As part of that business from time to time it will need to engage with the regulator and sometimes it may well need to take advice in connection with that engagement. To do so would not seem in any sense to be outside the company's ordinary course of business.

30. Furthermore, it is possible that a regulator, as here, will seek to take steps against one of its regulated entities and that the entity will wish to defend itself against those steps. Indeed such is all the more the case where, as here, one of the consequences of the steps taken by the Commission may be the end of SWM's business. It seems to us that if SWM in order to preserve its business disputes or wishes to challenge the evidence on which the Commission will rely then it is in the ordinary course of its business, though exceptional, to secure evidence to do so.

31. As we set out above, we were assured by Advocate Blakeley, for SWM, that no amount of money used by SWM would take it below its ANLA requirements. Were such payment to do so, however, then it would in our view be difficult to argue that that would be within the ordinary course of SWM's business as the ordinary course of the business would be to maintain and meet the ANLA requirements.

32. However, that is not the case here. In the circumstances we are satisfied that what SWM wishes to do is done in order to defend its business, arises naturally from the regulatory environment in which it operates, and is accordingly, whilst exceptional, within the ordinary course of SWM's business.

33. Accordingly we make the declaration set out at paragraph (d) of the summons (set out in paragraph 3 above).

34. We were informed during the course of argument that depending upon the decision that the Court reaches it may be that the appeal will become unnecessary and fall away. It seems to us that a further reason to make a declaration may be if to do so might resolve a multiplicity of proceedings but that is not a matter that we have felt the need to take into account in the present case.