Guardian Global Capital (Suisse) SA v Jersey Financial Services Commission

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	29 April 2020
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Text

[2020] JRC 73

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, **Esq**., Bailiff, **and** Jurats Olsen **and** Austin-Vautier

Between
Guardian Global Capital (Suisse) SA
Representor
and
Jersey Financial Services Commission
Respondent

Advocate P. G. Nicholls **for the Representor**.

Advocate H. Sharp **for the Commission**.

Authorities

Financial Services (Jersey) Law 1998 as amended.

R (KBR Inc) v Director of the Serious Fraud Office [2019] 2 WLR 267.

Criminal Justice Act 1987.

Masri v Consolidated Contractors Int (UK) Limited (No.4) [2010] 1 AC 90.

Serious Organised Crime Agency v Perry and others [2013] 1 AC 182.

Proceeds of Crime Act 2002.

Cox v Ergo Versicherung AG [2014] AC 1379.

R v Jimenez [2017] EWHC 2585

Judicial Review — application seeking the Court's determination of the power of the Commission to issue a Notice on a foreign company

Bailiff

THE

1 This is an application by Guardian Global Capital (Suisse) SA ("GGC") seeking the Court's determination by way of judicial review of the power of the Jersey Financial Services Commission ("the Commission") to issue a notice under Article 32(2) of the Financial Services (Jersey) Law 1998 as amended ("the Law") to compel a foreign company to provide documentation and information held within Jersey by one of its directors or officers.

2 At the outset of the application before us it was made clear by GGC through counsel that it would have preferred to deal with this matter by way of an application for directions akin to an application that might be made with regard to a trust because it was seeking the guidance of the Court. It was perfectly content to comply with the notice in question provided it could be satisfied that the Commission had the power to issue it. It was accepted before me that this application should, however, be characterised as a judicial review.

3 On 19 th July, 2019, the Commission served a compulsory notice dated 18 th July 2019

("the Notice") on GGC pursuant to Article 32(2) of the Law requiring the production of certain documents. The principal of GGC is a Jersey resident Mr Philip Van Neste and the Notice was served on him personally at the Commission's offices in St Helier.

4 The basis for the issuing of the Notice was that the Commission suspected that GGC, through Mr Van Neste, had conducted unauthorised trust company business in or from within the Island in contravention of Article 7 of the Law. This is not a matter that we are called upon to consider or to determine at this point.

5 GGC challenges the Notice on the grounds that:

(i) GGC is not regulated by the Commission;

(ii) GGC is a Swiss-resident entity and Article 32(2) has no extra-territorial effect;

(iii) Issues of confidentiality arise, such that the current trustees and all the beneficiaries must be convened to Court in order to " *make submissions*" about possible compliance with the Notice.

6 The Commission's answer to those points may, in summary, be characterised as follows:

(i) It is irrelevant that GGC is not regulated by the Commission. Article 32(2) is concerned with whether a person has engaged in unauthorised trust company business;

(ii) The Notice only requires the production of documents located in Jersey and held by Mr Van Neste. It was served on him in Jersey. Therefore the primary case of the Commission is that no legal issue of extra-territorial effect arises. In the alternative, the Commission argues that Article 32(2) of the Law does indeed have extra-territorial effect and that there is more than a " *sufficient connection*" with Jersey;

(iii) The compulsory nature of the Notice overrides any confidentiality owed and there is therefore no basis for requiring any other parties to make submissions.

Background

7 GGC is a Swiss-resident company incorporated in Switzerland on 8 th November 2012 and it has a present place of business in Geneva. It is a wholly owned subsidiary of Guardian Capital Holdings Limited ("GCH"), which is a Jersey company incorporated on 3 rd January 2013 and which is registered in St Helier.

8 Mr Van Neste is, it is accepted, a resident of Jersey and at all material times he has been the owner of the entire share capital in GCH.

9 GGC had formerly conducted trust company business in Switzerland and was licensed and regulated in Switzerland, ultimately by the Swiss Financial Markets Supervisory Authority. Mr Van Neste was appointed as a director of GGC on 5 th December 2017 and from 28 th March 2018 until 21 st September 2018 was the sole director of it.

10 It is averred in GGC's representation that at all material times GGC had been a trustee of a number of trusts listed therein which are referred to collectively as “The Guardian Trusts”.

11 On 5 th February 2019 GGC appears to have been served by the Commission with a notice under Article 32(2) of the Law which asserted that the Commission was in possession of information that gave reasonable grounds to suspect that GGC had carried on unauthorised financial services business. The Representation shows that on 19 th February 2019 GGC complied with that Notice. A further notice was issued on 9 th April 2019 and on 1 st May 2019 the terms of that Notice were complied with.

12 It is the Notice that is the subject of the application before us today to which GGC objects. The Notice requires, within a specified period, that GGC provides information and documents expressed as follows:

> *“1. A copy of all documents and records in [GGC's] possession, custody or control relating to the period 1st June 2018 to 1st October 2018 (inclusive) in relation to*
>
> *A. …*
>
> *B. …*
>
> *C. [The Guardian Trusts]*
>
> *2. A copy of all documents and records in [GGC's] possession, custody or control relating to the period 4 th February 2019 to 18 th July 2019 (inclusive) in relation to:*
>
> *A. … [two of the Guardian Trusts]”*

13 GGC argues that the Notice requires it to disclose confidential trust information to the Commission in relation to the Guardian Trusts.

14 It appears to be undisputed that GGC is no longer a trustee of any of the Guardian Trusts and is not, and has never been regulated by the Commission. GGC's representation is supported by an affidavit filed by Mr Van Neste which supports the background set out above. With regard to the Notice, at paragraph 47 of his affidavit, Mr Van Neste says:

> *“The July Notice was fundamentally different to the previous two notices.* Unlike

the previous two notices which appear to be directed at issues pertaining to the corporate governance, administration and management of GGC, the July Notice required the production of a significant volume of what would otherwise be confidential trust documentation."

The statutory framework

15 The long title to the Law describes it as:

> ***"A law to make provision for the supervision of certain types of financial service business, generally to provide for purposes connected with, and incidental to, the supervision of certain kinds of financial service business, and to create certain offences relating to insider dealing, market manipulation, and providing misleading information, in respect of financial matters."***

16 Article 2(1) defines " *financial services business*" as follows:

> ***"A person carries on financial service business if by way of business the person carries on investment business, trust company business, general insurance mediation business, money service business, fund services business or AIF services business."***

17 Article 5 of the Law provides that:

> ***"The Commission shall have the powers conferred on it by this Law and the duty generally to supervise the persons registered by it in the exercise of those powers."***

18 Article 7(1) of the Law under the heading " ***Prohibition of carrying on unauthorised financial services business***" provides:

> ***"1) Subject to paragraph (2) –***
>
> > ***(a) a person shall not carry on financial service business in or from within Jersey; and***
> >
> > ***(b) a person being a company incorporated in Jersey shall not carry on such business in any part of the world*** ,
> >
> > ***unless the person is for the time being a registered person under this Law, and acting in accordance with the terms of his or her registration*** .
>
> ***…***

(3) Any person who holds himself or herself out as carrying on financial service business in or from within Jersey, and any company incorporated in Jersey which holds itself out as carrying on financial service business shall, for the purposes of this Article, be treated as carrying on such business .

(4) A person who contravenes this Article shall be guilty of an offence and liable to imprisonment for a term not exceeding 7 years or a fine, or both."

19 We pause in setting out the statutory provisions to observe that Article 7 seems highly likely to involve the Commission in dealing with persons who are not registered with it and possibly never were registered with it.

20 It is Article 32(2) of the Law and more specifically its reach that falls to be determined within this application. Article 32(2) provides:

"(2) If the Commission has reasonable grounds to suspect that a person has contravened Article 7, 39G or 39L, the Commission, an officer or an agent may, by notice in writing served on that person, require the person to do either or both of the following —

(a) to provide the Commission, an officer or an agent, at such times and places as are specified in the notice, with such information or documents as are specified in the notice and as the Commission, an officer or an agent reasonably requires for the purposes of investigating the suspected contravention;

(b) to attend at such times and places as are specified in the notice and answer such questions as the Commission, an officer or an agent reasonably requires the person to answer for the purpose of investigating the suspected contravention."

21 Any failure to comply with Article 32(2) is punishable with a criminal sanction.

22 It seems to us that Article 7 and Article 32(2) read together make it clear that an Article 32(2) notice can be issued for the purposes of investigating an infraction of Article 7. That is expressed on the surface of the Articles. It also seems to us to follow that an Article 32(2) notice may be served on a person or entity not registered by the Commission. We see no reason to place any other interpretation of the statutory position and indeed were we to suggest otherwise, that would arguably leave a very substantial hole in the investigatory powers available to the Commission to investigate Article 7 contraventions. In other words, it simply would not be able to investigate using that power in respect of anyone who was not registered. That would seem to us to make a nonsense of the purpose of the statutory provisions.

23 Article 40(4) of the Law expressly provides that a notice may, in the case of a company incorporated outside Jersey, be served on, amongst others, a person who is a principal person in relation to it. It provides as follows:

> ***"Any such notice, direction or other document may –***
>
> > ***(a) in the case of a company incorporated in Jersey, be served by being delivered to its registered or principal office;***
> >
> > ***(b) in the case of a partnership, company incorporated outside Jersey or unincorporated association, be given to or served on a person who is a principal person in relation to it, or on the secretary or other similar officer of the partnership, company or association or any person who purports to act in any such capacity, by whatever name called, or on the person having the control or management of the partnership business, as the case may be, or by being served on the person or delivered to the person's registered or administrative office."***

24 The Notice was served in Jersey on Mr Van Neste.

25 It accordingly seems to us from Article 40(4) that service of a notice can be effected against a company incorporated outside Jersey and therefore in principle on GGC, and moreover that such service may be effected on a principal person in relation to that company or any person who purports to act in any such capacity. This is strong support for extra-territorial reach in appropriate circumstances.

Case law

26 In *R (KBR Inc) v Director of the Serious Fraud Office* [2019] 2 WLR 267, the English High Court was called upon to consider the decision of the Serious Fraud Office to serve a notice under Section 2 of the Criminal Justice Act 1987 on KBR Inc, a company incorporated in the USA, requiring it to produce documents situated outside the United Kingdom. The notice was served by the Serious Fraud Office on a senior company officer during a meeting in London. KBR applied for judicial review for one of the notices served on it to be quashed because it purported to compel the production of material held overseas.

27 The High Court upheld the notice stating that a UK company could be compelled by a notice to produce documents it holds overseas, but that the extra-territorial effect was in effect limited to foreign companies in respect of documents held overseas where there is a "*sufficient connection*" between the company and the United Kingdom. As a matter of fact the Court found that KRB Inc had such a sufficient connection.

28 In the judgment, after a consideration of authorities thought to be relevant in that case and

accepting the principle that there is a presumption against extra-territorial reach of statutory provisions, Gross LJ at paragraph 64 said this:

> ***"64. Turning to section 2(3) itself, in my judgment and as a matter of first importance, it must have an element of extra-territorial application. It is scarcely credible that a UK company could resist an otherwise lawful Section 23 Notice on the grounds that the documents in question were held on a server out of the jurisdiction. In this regard, were a UK company in position to forestall a serious fraud investigation by transferring documents abroad … it would be in the highest degree unfortunate, …"***

29 At paragraph 68 the learned judge went on to say:

> ***"68. However inconclusive the debate as to legislative history, the legislative purpose and the mischief at which Section 2(3) is aimed permits no such doubt. As already indicated, the SFO's business is 'top end, well heeled, well-lawyered crime'. By their nature, most such investigations will have an international dimension, very often involving multi-national groups conducting their business in multiple jurisdictions, whether through a branch or subsidiary structure (it should matter not). It follows that the documents relevant to the investigation of the UK subsidiary of such a group may well be spread between the UK and one or more overseas jurisdictions. …"***

30 And at paragraph 71, the judge continued:

> ***"71. Accordingly, I would conclude the extra-territorial ambit of Section 2(3) is capable of extending to some foreign companies in respect of documents held abroad. For my part, however, I would not go further and say that the reach of Section 2(3) extended to all foreign companies in respect of documents held abroad, … As it seems to me, the right answer … is a 'nuanced answer': Section 2(3) extends extra-territorially to foreign companies in respect of documents held outside the jurisdiction where there is a sufficient connection between the company and the jurisdiction. …"***

31 GGC argues that the approach of the Court in the *KBR* case should not guide us. It was dealing with a different statutory regime and is, of course, not binding in Jersey. Furthermore, we are advised by counsel that it is subject to appeal.

32 Instead GGC relies on the position, which may be taken almost as axiomatic, that unless the contrary intention appears then statutes have territorial but not extra-territorial effect.

33 In *Masri v Consolidated Contractors Int (UK) Limited (No.4)* [2010] 1 AC 90, paragraph 10 Lord Mance, giving the judgment of the House of Lords said:

> ***"… the principle relied upon is one of construction, underpinned by considerations of international comity and law.*** It is that 'unless the contrary intention appears … an enactment applies to all persons and matters within the territory to which it extends but not to other persons and matters' Bennion on Statutory Interpretation 4 th Ed (2002) … the principle may not apply at any rate with the same force to English subjects … but that is presently irrelevant. Whether and to what extent it applies in relation to foreigners outside the jurisdiction depends ultimately as Lord Wilberforce said in *Clark v Oceanic Contractors Inc* **(P152C) upon who is 'within the legislative grasp or intendment' of the relevant provision.** To this a nuanced answer may be given, as in that case where United Kingdom PAYE legislation was held to apply to a foreign company employing workers to work in North Sea operations and as in *Holmes v Bangladesh Biman Corporation* (1989) AC 1112 **where apparently general wording of a United Kingdom Carriage by Air Order was not taken to apply to carriage by air wholly to be performed in the territory of the foreign state."**

34 This principle appears to us to be clear but, at paragraph 19 of the judgment of the Court, Lord Mance went on to say:

> ***"I accept that the existence of a close connection between a subject matter over which this country and its courts have jurisdiction and another person or subject over which it is suggested they have taken jurisdiction will be relevant in determining whether the further jurisdiction has been taken.*** It will be a factor in construing, or ascertaining the grasp and intendment of the relevant legislation or rule."

35 GGC urges us to follow the cases of *Serious Organised Crime Agency v Perry and others* [2013] 1 AC 182. In that judgment, the Supreme Court considered the jurisdictional scope of the Serious Organised Crime Agency's powers under the Proceeds of Crime Act 2002 to make property freezing orders and disclosure orders in relation to a man who had been convicted of fraud offences in Israel. The Court in that case found that the Serious Organised Crime Agency had no power to impose on persons outside the jurisdiction positive obligations to provide information and render them subject to criminal sanction in the event of non-compliance.

36 At paragraph 94 of the judgment, the Court said this:

> ***"The point is a very short one.*** No authority is required under English law or for a person to request information from another person anywhere in the world. But Section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. Subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of

country A. Section 357, read with Section 359, does not simply make prescribed conduct a criminal offence. It confers on the United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particular startling breach of international law. For this reason alone I consider it implicit that the authority given under Section 257 can only be exercised in respect of persons who are within the jurisdiction."

37 And in a supporting judgment, Hughes LJ at paragraph 156 stated:

> ***"For my part, if it were possible to construe the complex provisions of POCA in such a way as to admit of limited extra-territorial effect for Part 5, but only where there is a sufficient jurisdictional connection between a part of the UK and the criminal proceeds, I should have wished to do so.*** I am however reluctantly persuaded that this cannot be achieved by construction and would involve illegitimately the re-writing the statute."

38 In *Cox v Ergo Versicherung AG* [2014] AC 1379, in a case concerning the extra-territorial effect of an English statue in connection with a fatal accident in Germany, in terms of general principle, at paragraph 29, Lord Sumption said:

> ***"In the present case it is common ground that the lex causae arrived at on ordinary principles of private and international law is not English but German law.*** There is nothing in the language of the Fatal Accidents Act 1976 to suggest that its provisions were intended to apply irrespective of the choice of law derived from ordinary principles of private international law. Such an intention would therefore have to be implied. Implied extra-territorial effect is ***certainly possible, and there are a number of examples of it.*** But in most if not all cases, it will arise only if (1) the terms of the legislation cannot effectually be applied or its purpose cannot effectually be achieved unless it has extra-territorial effect; or (2) the legislation gives effect to a policy so significant in the law of the forum that Parliament must be assumed to have intended that policy to apply to anyone resorting to an English court regardless of the law that would otherwise apply."

39 In *R v Jimenez* [2017] EWHC 2585 the English Court of Appeal was called upon to consider the validity of the service by HMRC of a tax notice on a UK national residing in Dubai.

40 In handing down the judgment of the Court Lord Justice Patten at paragraph 14 said this:

> ***"But recognition of a principle that Parliament can generally be presumed not to have legislated in respect of persons resident or events occurring abroad does not prevent particular legislation from being construed as***

having some extra-territorial effect if such an interpretation can be derived from the language of the statute and its purpose. ….”

41 At paragraph 24 of the judgment, the Court went on to say:

> ***“… but as I have already indicated, the question whether either the statute itself or some power which it confers is intended to have some extra-territorial effect is likely to depend upon close examination of the interaction between any relevant principle of international law which would operate against giving the domestic legislation process some extra-territorial effect and the public interest considerations which favour a construction that involves the power being exercised in relation to persons outside the jurisdiction.*** …”

42 In paragraph 39 of the judgment, the Court gave some consideration as to what the relevant factors might be:

> ***“It seems to me that there are a number of factors which point to HMRC being authorised by paragraph 1 to give a taxpayers notice to someone outside the UK.*** The first is the subject matter and purpose of the legislation. We are not concerned with provisions (as in Masri) designed to facilitate the conduct of private litigation or (as in re Tucker) which relate to ordinary bankruptcy. In ***so far as insolvency cases provide an analogy, this is much closer to Re Seagull or Bilta where there is an obvious public interest in securing the purpose for which Parliament thought it necessary to confer the relevant powers.*** The prevention of tax evasion which will often have a cross-border aspect to it serves an important public purpose in maintaining public revenue. Coupled to this the subject matter of the legislation also, as I have said, identifies a sufficient connection between the recipient and the jurisdiction. At paragraph 1 notice can only be given to someone who is or may be a UK taxpayer and it is this status rather than his place of residence which is key to availability and operation of the power.”

43 In paragraph 49 of the judgment, the Court went on to say:

> ***“Whether the legislation has such an extensive grasp, as I have explained, a question of construction informed by the purpose of the legislation, the public interest which is serves, and the extent to which its application or enforcement abroad would cut across or offend against the territorial sovereignty of another state.*** … We are not concerned with the statutory regime which criminalises the conduct abroad of a foreign national or which authorises a course of action abroad for a purpose which does not justify paragraph 1 having such a territorial reach. The decision in Seagull (treated as correctly decided in Masri) and the more recent decision of the Supreme Court in Bilta and the divisional court in KBR confirmed that the jurisdiction to serve a notice requiring the provision of information from a person resident abroad or

even to impose liability on the recipient will not raise eyebrows where they serve to protect a sufficient national interest. In my view, the present case falls squarely within that category of case."

Conclusion

44 As we have already indicated, in our judgment a combination of Article 7, Article 32(2) and Article 40 of the Law persuades us that the legislature understood that there would be some extra-territorial reach to the statute.

45 The public interest is, to us, clear. It must be open to the Commission to investigate questions of potential carrying out of unlawful trust business as the entire thrust of the Law is to protect the Island's reputation and to create a properly regulated financial services industry. If GGC's argument were to be correct, then it would be open to anyone to set up a trust company in any jurisdiction at all outside Jersey and could administer Jersey trusts within the Island but refuse to provide information. That cannot be in the public interest nor can it have been within the intention of the legislature.

46 Furthermore the public interest in giving the Commission the effective means to carry out the obligations foreshadowed in Article 7 of the Law, and indeed the broader public interest of safeguarding the reputation of the Island and its financial services industry and to prevent business being conducted within the Island of a financial services nature without the control of the Commission, seems to us to afford more than ample justification for the extra-territorial reach of the Law in these respects.

47 Moreover we are entirely satisfied that there is a sufficient connection, if such be necessary in the light of our primary view of the statute. The Commission has served a notice on GGC requiring the production of documents for the purpose of conducting an enquiry as to whether unauthorised business has been conducted in or from Jersey. That Notice was served on a Jersey resident and the documentation to be produced is located in Jersey. The trusts concerned are Jersey trusts and GGC's holding company is a Jersey company and the Notice was served on its principal. Indeed as far as we can determine the only foreign element is the residency of GGC itself.

48 Indeed GGC accepts, in its skeleton argument, that if the principles in *KBR* set out above are felt to be persuasive by the Court then the Court is " *likely to be persuaded that a 'sufficient connection' exists …"*.

49 We are persuaded by the principles set out in *KBR*.

50 In our view any extra-territoriality concerned in this case is 'marginal'. In our judgment for the reasons set out above, we hold that on a proper construction and applying the

principles set out in *KBR* and in *Jimenez*, Article 32(2) has extra-territorial effect in these circumstances and the Notice is accordingly valid.