



EXTRATERRITORIALITY IN JERSEY LEGISLATION - – AN EXTERNAL THREAT TO TRUSTS?

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In the matter of the Saisies Judiciaires of Robert Tantular [2020] JRC 058 (8 April 2020)

This is the first of the two recently published cases dealing with the potential extraterritorial effect of legislation, both following the recent decision of the English High Court in *R (KBR Inc) v Director of the Serious Fraud Office* [2019] 2 WLR 267, and earlier Supreme Court authority. Both cases have implications for Jersey trusts.

By way of brief background, in 2013 and 2014 the Royal Court granted two saisie judiciaires over the realisable property of Mr Tantular. These applications were brought at the request of the Indonesian Government, following the convictions in Indonesia of Mr Tantular for fraud and money laundering, to preserve assets pending the enforcement of financial confiscation orders made in Indonesia. Saisie judiciaires are a form of Royal Court order restraining the use of assets imposed under Article 16(1) of the Proceeds of Crime (Jersey) Law 1999, as modified by the Proceeds of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008 (“the Modified Law”).

Mr Tantular did not own property in

Jersey. However, he was the settlor and a beneficiary of the Jasmine Investment Trust, a discretionary trust governed by Jersey law (“Trust”). The only valuable assets of the Trust were the shares in a BVI company (“Jonzelle”) which, in turn, held a residential property in Singapore (“the Property”).

In the present application, Mr Tantular contended that, upon a proper construction of the legislation, the saisie judiciaires were limited to assets in Jersey, and therefore did not extend to the shares in Jonzelle or the Property. This argument was founded upon the well-known rule of construction that legislation should not be given extra-territorial reach unless it contains clear language to that effect. In support of this analysis, reliance was placed on Jersey’s international obligations under various conventions which, it was said, made clear that territorial limits should be observed and only obliged Jersey to enforce confiscation orders in respect of property situated in Jersey, as well as *King v Director of Serious Fraud Office* [2009] 1 WLR 718 and *King v HM Procureur* [2011-12] GLR 285 in which the English and Guernsey Courts respectively declined to extend comparable legislation to assets outside their respective jurisdictions.

The starting point for the Royal Court

was to observe that the law had moved on since *King v Director of Fraud Office* [2009] 1 WLR 718 in connection with the presumption against extra-territorial reach. As per Gross LJ in *R (KBR Inc) v Director of the Serious Fraud Office* [2019] 2 WLR 267, the question of whether a statutory provision applied to persons or matters outside the jurisdiction depended on its proper construction. It was not, or at least was no longer, necessary to search for express authorisation or for necessary implication.

The Royal Court concluded that, as a matter of construction of the Modified Law, a saisie judiciaire under that law is not limited to property situated in Jersey. The primary reason for this was that it was clear on the face of the statute that Articles 16(4)(b) and (c) were intended to apply to property situated in Jersey or elsewhere. This was consistent with the unambiguous definition of property in Article 1 (“...whether situated in Jersey or elsewhere...”) and reinforced by the contrary language of Article 16(4)(a), which makes clear that the content of that sub-section is limited to property situated in Jersey (no such limitation being present in Articles 16(4)(b) and (c), both referring only to “realisable property”).

The thrust of the Royal Court's analysis was that the purpose of the Modified Law and analogous legislation was to comply with Jersey's international obligations to assist in the fight against cross-border financial crime, and it would be surprising if this legislation did not apply to assets held through the very structures for which Jersey is most known. It would also be surprising if a defendant could use a common feature of such structures to argue that certain assets were beyond the Court's reach.

Guardian Global Capital (Suisse) SA v JFSC [2020] JRC 073 (29 April 2020)

This is the second of the two recently published cases dealing with the potential extraterritorial effect of legislation, again following the recent decision of the English High Court in *R (KBR Inc) v Director of the Serious Fraud Office* [2019] 2 WLR 267, and earlier Supreme Court authority.

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."

Guardian Global Capital (Suisse) SA ("GGC"), a Swiss company, sought relief by way of judicial review of the power of the Jersey Financial Services Commission ("Commission") to issue a notice under Article 32(2) of the Financial Services (Jersey) Law 1998 ("Law") to compel it to provide documentation and information held within Jersey by one of its directors or officers. The basis for the issuing of the notice was that the Commission suspected that GGC, through a Jersey-resident director, had conducted unauthorised trust company business in or from within the Island in contravention of Article 7 of the Law. Article 7(1)(a) of the Law has application to foreign companies and provides that, except as registered

under the Law, "a person shall not carry on financial service business in or from within Jersey". The documentation required to be produced by the Commission was held in Jersey and the trusts in question were Jersey trusts. GGC challenged the Notice on the ground inter alia that it was a Swiss-resident entity and Article 32(2) has no extra-territorial effect.

The Royal Court confirmed and applied the findings in *R v Jimenez* [2017] EWHC 2585, namely that whether legislation has extraterritorial effect is a question of construction informed by the purpose of the legislation, the public interest which it serves, and the extent to which its application or enforcement abroad would cut across or offend against the territorial sovereignty of another state.

In its consideration of the earlier authorities, the Royal Court quoted the following extract from Patten LJ in *R v Jimenez*

"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"

The Royal Court also had regard to the decision in *R (KBR Inc) v Director of the Serious Fraud Office* [2019] 2 WLR 267. In that case, the English High Court upheld a notice under s 2 of the Criminal Justice Act 1987 issued by the SFO and served in the UK on a company officer of a US company for the production of material held overseas. The Court stated that a UK company could be compelled by a notice to produce documents it held 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 UK. As a matter of fact the Court found in that case that the US company had such a sufficient connection.

The Royal Court held that on a proper construction of the Law, the Commission had power under Article 32(2) of the Law to compel a foreign entity to produce documents held in Jersey. The combination of Article 7, Article 32(2) and Article 40(4) of the Law (the latter expressly providing for the service of notices on companies incorporated outside Jersey) showed that the legislature understood that there would be some extra-territorial reach to the statute. This was supported by an underlying public interest in the Commission investigating businesses potentially carrying out unlawful trust operations, as the entire thrust of the Law was to protect the Island's reputation and to create a properly regulated financial services industry.

Comment

There is a degree of friction between extraterritoriality and the principle of comity, where foreign matters are usually determined by the domestic courts of the most closely aligned jurisdiction, subject to applicable conflict of laws rules.

However, it is widely held that extraterritoriality may be an important legislative tool in the areas of crime and financial regulation. As was recognised in the English case of *KBR*,

"were a UK company in position to forestall a serious fraud investigation by transferring

documents abroad...it would be in the highest degree unfortunate” and “most such investigations will have an international dimension, very often involving multi-national groups conducting their business in multiple jurisdictions”

It makes sense, in these circumstances, for appropriate powers be given to, and exercised by, the relevant authorities to facilitate the investigation of crime and upholding proper financial regulation where a connection exists sufficient for the domestic Court to exercise its jurisdiction. Indeed, the position might

be exacerbated in the case of Jersey specifically and in respect of “the very structures for which Jersey is most known” (per the Commissioner Clyde-Smith in *Tantular*).

But is extraterritoriality appropriate in a trust context? Perhaps. Many would say that it is appropriate that powers are given to, and are being exercised by, the relevant authorities in combating financial crime and/or upholding financial regulation. They would say that the recent decisions of *Tantular* and *Guardian Global Capital* emphasise and support Jersey’s position as leader amongst the international finance centres and a safe, secure and rigorous jurisdiction for asset administration. They might also say that the extraterritoriality of this legislation has its limits. There must be a sufficient connection with Jersey. In *Tantular*, that connection was the trustee (in its capacity of a Jersey law governed trust) which held the relevant foreign property was a trust company incorporated and regulated in Jersey, and in *Guardian Global Capital*, it was, inter alia, the presence of one of the company’s officers in Jersey.

However, on the other hand, it could also be said that this development is a further, external control over a trustee of a trust which may have little connection with Jersey. It is also a

control which, in many cases, would not be welcomed by the trustee, settlor or beneficiaries. There may be fresh, complex jurisdictional considerations for trustees, particularly if the jurisdiction in which the assets are based does not recognise the Jersey orders. And what about the reaction overseas? The possible risks of Jersey attempting to exercise jurisdiction over property situated in other sovereign countries is confusion, multiplication of effort and expense and potentially even disquiet in other countries.

However, as matters stand, the decisions would appear to have clearly confirmed the extraterritorial scope of these statutes. Trustees may need to be mindful of the same in their administration of trust assets, even where situated outside of Jersey.



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.”