Judgment 5/2011

Garnet Investments Ltd v Chief Officer of the FIS, Customs & Excise, Immigration and Nationality Service – Royal Court (Civil Action File 1425) - 15th February 2011

Judicial review – decision by the FIS refusing permission to operate bank account belonging to the applicant – Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 – whether decision unreasonable in the Wednesbury sense, disproportionate and in breach of Article 1 Protocol 1 of the European Convention on Human Rights – failure to give reasons – decision quashed.

The 14th day of February 2011 before Catherine Mary Newman QC, Lieutenant Bailiff alone

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 15th day of February 2011 before Catherine Mary Newman, QC, Lieutenant Bailiff, alone.

GARNET INVESTMENTS LIMITED

Applicant

V

THE CHIEF OFFICER - CUSTOMS & EXCISE, IMMIGRATION & NATIONALITY SERVICE

Respondent

Whereas on 7th and 8th September 2010 the Lieutenant Bailiff considered an application, in the terms attached hereto, for permission to seek Judicial Review of a decision by the Respondent and the Lieutenant Bailiff heard thereon Advocates C Edwards and F Raffray counsel for the Applicant and Respondent respectively and whereas on 9th November 2010 the Lieutenant Bailiff had communicated to the parties her decision in favour of granting judicial review the Lieutenant Bailiff this day handed down the her reasons in the terms attached hereto and:

1. Quashed the said decision

2. Directed that the parties may make written or oral submissions of any further relief to be granted.

S M D ROSS
H M Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 7th and 8th day of September, 2010 before Catherine Mary Newman, QC, Lieutenant Bailiff, alone.

GARNET INVESTMENTS LIMITED

Applicant

V

THE CHIEF OFFICER - CUSTOMS & EXCISE, IMMIGRATION & NATIONALITY SERVICE

Respondent

1. On 1st October 2009 a Cause was issued by the Applicant ('Garnet'), a BVI company, requiring the Chief Officer, FIS, Excise, Immigration and Nationality Service ('the FIS') to see the Court hear and determine an application for permission to seek judicial review.
2. On 23rd October 2009, having considered the application, the evidence in support of it and a written argument, I caused the Greffe to inform the parties that I was minded to grant permission for Garnet to seek judicial review. At a directions hearing on 9th November 2009 I gave directions for the conduct of the application. It was in due course fixed to be heard and was heard on 6th and 7th September 2010.
3. In my judgment it was and remains appropriate for Garnet to seek relief by way of judicial review.
4. On 9th November 2010 I communicated my decision in favour of granting judicial review to the Greffe and invited the parties to attempt to agree the form of relief. I understand that they have not been able to agree. I will now give my reasons for that decision.
5. Garnet, which was incorporated on 13th March 1998, holds 3 accounts with BNP Paribas (Suisse) SA ('BNP') in Guernsey which were opened in or about July 1998. There are very substantial sums standing to the credit of these accounts. I see no particular reason to publicise in this judgment the account numbers or the precise amounts standing to their credit. There was no dispute before me about those matters and both Garnet and FIS are fully aware of the identity of the accounts and their credit balances.
6. The immediate source of the funds in the accounts was as follows:

a. from the sale, in July 1998, of shares in Automobili Lamborghini Spa and Lamborghini USA Inc by V Power Limited, a company beneficially owned by Hutomo Mandala Putra ('Mr Putra') who is the beneficial owner of Garnet, to Audi AG;

b. from the sale, in two tranches the first of which was in May 1998, of a shareholding in Superbike International Limited, a company owned by Motorbike International Limited, which was beneficially owned by Mr Putra;

c. from a transfer from Midland Bank Limited in August 1998 which represented a sum transferred by Mr Putra from an account in his name with Aspinalls in Mayfair, London;

d. from a transfer, in September 1998, from Latona Limited, a company beneficially owned by Mr Putra and which had sold a property in the U.K.

7. BNP had accepted those funds into Garnet accounts.

8. Mr Putra is variously referred to as Mr Hutomo or Mr Putra. I shall adopt the style 'Mr Putra' as that is the one most frequently used by both sides in these proceedings (though not exclusively used by Garnet).

9. In about 2002 and 2003 Garnet issued three instructions to BNP for the transfer of the funds from the accounts. Again, I do not think that the identity of the transferee accounts needs to be set out in this judgment. There is evidence that BNP had historically complied with instructions.

10. BNP refused to comply with the instructions. By letter dated 28th February 2003 it stated that the '*circumstances of' Mr* Putra's conviction for complicity in the murder of an Indonesian judge who had previously ruled against him in relation to a real estate transaction '*suggest that he may have been involved in corrupt activities within Indonesia, and questions must therefore arise over the origins of his personal wealth.'* Mr Putra's conviction had already been overturned by the Indonesian Supreme Court on 20th November 2001. BNP also stated that given that Mr Putra is closely related to the former President of Indonesia (he is one of his sons) they were concerned that there might be a claim to the money from the present or a future Indonesian government. BNP had also become aware of various press articles asserting that Mr Putra and his family may have been involved in corrupt activities whilst his father was President. When, on 3rd March 2006, Garnet issued proceedings in the Royal Court of Guernsey seeking a declaration that BNP comply with the instructions ('the BNP proceedings'), BNP asserted that it was concerned that if it did so it might commit an offence under the Criminal Justice (Proceeds of Crime) (Bailliwick of Guernsey) Law 1999 ('the Law') and that it was concerned that the funds might be subject to a constructive trust in favour of the Government of Indonesia.

11. In an affidavit sworn by Antonia Bligh, a Detective Inspector in the Guernsey Police Force who was the Director of the FIS, on 4th May 2006 in the BNP proceedings, she stated that BNP had made a disclosure to the FIS under the Law on 16th October 2000 which, from its terms, was based partly on reports in the media linking Mr Putra to corruption in Indonesia generally. She deposed that in September 2002 the FIS learned from the UK authorities that the Indonesian authorities were 'considering' pursuing a civil action in relation to the funds. On 1st November 2002 the FIS refused to give consent to the operation of the accounts. Detective Inspector Bligh further deposed that in June 2004 BNP informed the FIS that it no longer held any suspicions about the Motorbike International Limited funds and these were subsequently released. On 10th March 2006 BNP wrote to the FIS to seek consent under the Law to operate the Garnet accounts, which consent was refused on 14th March 2006. The grounds for refusal were stated to be that Mr Putra might be linked to corruption.

12. In January 2007 the Government of Indonesia was joined to the BNP proceedings for the purpose of enabling it to advance such arguments as it might deem appropriate in support of any claim it desired to make to a proprietary interest in the funds in the accounts. It sought and obtained a freezing order restraining Garnet from disposing of or dealing with the funds in the accounts save for the purpose of obtaining legal advice and representation.

13. Garnet applied to discharge the freezing order and, following various reviews of the order by the Royal Court and the Court of Appeal, it was discharged on 9th January 2009 and leave to appeal to the Privy Council was refused. Subsequently, the Privy Council also declined to take any appeal in the matter. That was the end of the potential proprietary interest point. Once the freezing order was finally discharged, Garnet once again instructed BNP, by letter dated 13th February 2009, to transfer part of the funds held in the accounts to an account in Indonesia ('the 2009 Instruction'). Garnet's advocates also wrote to the FIS on 27th March 2009 setting out why consent should be granted. Correspondence ensued which included many chasing letters from Garnet's advocates and many replies from the FIS stating that the matter was under consideration. By letter dated 29th June 2009 the FIS informed Garnet that they had refused BNP consent to comply with the 2009 Instruction ('the Decision'). FIS subsequently, on 3rd July 2009, confirmed its decision notwithstanding the Privy Council's decision not to take an appeal in the case, which was made known to the FIS by Garnet's advocates in a letter dated 2nd July 2009.

14. Shortly after the oral hearing before me in September 2010, on 14th September 2010 the FIS voluntarily disclosed that by letter dated 16th June 2009 the Indonesian Government had stated to the FIS that it would lodge a formal request for mutual legal assistance in criminal matters inviting the Attorney General of Guernsey to seek to restrain the use of the funds and that this request would be made within 90 days. I infer that this letter was the piece of the jigsaw awaited by the FIS before refusing consent in the letter of 29th June 2009.

15. Garnet claims that the Decision was unreasonable in the Wednesbury sense, was disproportionate, that reasons were not provided and that the decision was a breach of the Human Rights (Bailiwick of Guernsey Law 2000 ('the Human Rights Law') by virtue of its being in breach of Article 1 Protocol 1 of the Convention for the Protection of Human Rights and Freedoms ('the Convention').

Wednesbury Unreasonableness

16. Garnet takes a number of points in reliance on this classic principle: see **Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.** Without setting out each one in detail I believe that they may fairly be summarised as follows:

a. In all the time which has passed since the disclosures were made to the FIS by BNP, the FIS has not begun proceedings under the Law for a restraint order against Garnet or Mr Putra. At the time of hearing the substantive application for judicial review the time period between the first refusal and the hearing was nearly 8 years.

b. Indeed, at the time the Decision was made in June 2009, Indonesia was not a designated country under the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) Ordinance 1999 ('the Ordinance') meaning that at the time the Decision was made the FIS could not obtain a restraint order under the Law. Although Indonesia did become a designated country on the coming into force of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) (Enforcement of Overseas Confiscation Orders) (Amendments) Ordinance 2009, no application for a restraint order has been made of which I have been made aware.

c. There is not even an arguable case for a proprietary claim in favour of the Government of Indonesia, and there are no outstanding judgments or pending proceedings, criminal or civil, against Garnet or Mr Putra anywhere in the world save for a pending appeal lodged by the Government of Indonesia in a civil case referred to as the 'TNP Claim' in which the Government of Indonesia lost at first instance. The Government of Indonesia has not asserted any direct claim to the funds.

d. There are no known criminal investigations against Garnet or Mr Putra under way and Mr Putra has never been found to be guilty of financial corruption.

e. Moreover the funds have not been held to be the proceeds of criminal conduct under the Law or under any law.

f. The 2009 Instruction is for the funds to be remitted to Indonesia which would give the Government of Indonesia ample opportunity to take such steps as may be available to them in Indonesia to protect any claim they may have.

g. The FIS have an ongoing responsibility to review the refusal of consent and revoke their Decision if that becomes appropriate.

Proportionality

17. There has been some argument about whether proportionality is now a separate head of judicial review. Both parties seem inclined to accept that it is not currently a separate head of claim in England and Wales and this court is of the same view. Nevertheless, both parties also appear to accept that some consideration of proportionality may now form a permissible part of the consideration of Wednesbury unreasonableness.

18. Garnet argue that the refusal of consent to follow the 2009 Instruction has the effect of putting in place an informal restraint where no restraint order has been applied for. Since the intention of the Law, they argue, must have been that an application for a restraint order should be made within a reasonable time, the Decision was disproportionate to the intention of the Law and to Garnet's rights and freedoms and was therefore unreasonable.

No Reasons

19. Garnet asserts that the FIS have committed a procedural impropriety by giving no reasons for their Decision. The impact of the Decision on Garnet's proprietary interest in the funds when balanced

with the matters identified in Garnet's claim which I have summarised at paragraph 16 above, meant that the FIS were under a duty to give proper reasons for the Decision.

20. There have been a number of judgments in which the English courts have required reasons to be given for an administrative decision. Among them are situations where reasons were required in order to make a right of appeal workable, or to explain an otherwise aberrant outcome. However there is no principle which requires that reasons must always be given for an administrative decision.

Breach of the Human Rights Law

21. Garnet's case under the Human Rights Law is that there is an interference with its property rights in the funds in a manner which does not accord with the conditions set by law and which is disproportionate in relation to the legislative intention behind the Law which was, it contends, to enable the FIS to investigate disclosures and refuse consent to a transaction to enable them to make an application under the Law for a restraint order. Garnet contends that the intention of the Law is that the application for a restraint order should be made within a reasonable time and was not to permit it to keep in place an indefinite informal restraint.

The Application and the Evidence

22. Garnet seeks an order quashing the Decision and a Declaration that the FIS should immediately grant consent to BNP pursuant to section 39(3) of the Law enabling it to comply with the 2009 Instruction.

23. The application for judicial review was supported by affidavit evidence from Mr Putra, who gave an address in Jakarta. He confirmed that he is the beneficial owner of Garnet, and briefly set out the source of the funds described in the application. He explained that he wished to transfer the funds to another bank because he was not content with the way in which they had been invested by BNP. He identified the instructions which had been given to move the funds with which BNP had not complied. His evidence went through the history of the BNP Proceedings and the various findings made.

24. At paragraph 62 of his affidavit he turned to the 2009 Instruction. Mr Putra deposed that he lived in Indonesia and had substantial assets there, so if the Government of Indonesia had claims they wished to bring against him they could do so. Moreover he had deliberately chosen to give instructions to transfer the funds to an Indonesian bank so that if the Government of Indonesia wanted to apply for a restraining order there it would be able to do so. He emphasised that no evidence of claims based on allegations of corruption had materialised, as had been pointed out by the Court of Appeal in quashing the freezing order in January 2009.

25. The FIS' opposition to the application for judicial review was set out in an affidavit of Mr Martyn Waters ('Mr Waters') a Senior Investigation Officer in the FIS, sworn on 18th December 2009. He helpfully set out the origins of the Law and explained how the FIS try to apply it. He informed the court that after the Court of Appeal ruling in January 2009 the Indonesian authorities informed the

FIS that the Government of Indonesia was conducting criminal investigations and civil action against Mr Putra. The FIS also believed that Mr Putra had not adequately explained to BNP the source of the funds used to buy the Lamborghini shares. They make glancing references to Mr Putra's 'inability' to remember the ultimate provenance of the Garnet funds; particularly in their principal skeleton. However no witness has provided any account of the questions which Mr Putra has been asked and the answers which he has or has not given. The expectation of the FIS seems to be that the court must accept mere assertion that there has been some unsatisfactory conduct on Mr Putra's part without anyone having to depose to it. That is not the case. In any event, it is not the present function of the court to evaluate the merits of any claim by any third party to the Garnet funds.

26. The FIS had communications from the Indonesian authorities between 16th April 2009 and 15th June 2009 and had a review meeting with its legal advisors on 9th June 2009. FIS decided to defer making a decision until it had heard further from the Indonesian authorities. They wanted a firm indication as to what those authorities would do.

27. Mr Waters deposed that on 16th June 2009 the FIS received a letter from the Indonesian Attorney General describing the activities being undertaken and giving a clear representation as to when HM Procureur could expect to receive a request for legal assistance. The court was later told, as I have already mentioned, that the period of 90 days was given as the time within which an application for mutual legal assistance would be launched. So far as I am aware no such request has ever been received. Advice was taken and the Decision was made and has stood unchanged since that time.

28. Mr Waters expressly stated that the decision not to consent remained under review at all times.

29. Mr Waters opposed the imposition of any requirement to give reasons for decisions not to consent, claiming that such a requirement would undermine the role that his department plays in combating international financial crime and money laundering. In consequence, he does not explain how the failure of the Government of Indonesia to get permission to appeal to the Privy Council following the Court of Appeal's decision in relation to the freezing order affected its decision if at all, notwithstanding the fact that in a letter dated 24th April 2009 the FIS had told Garnet that the fact that such application had been made had affected the decision –making process at an earlier stage.

30. Both Mr Waters and Detective Inspector Bligh appear to have relied for information about Mr Putra contained in articles in the international press, internet postings and other online reports including reports expressing the views of non-governmental agencies such as Amnesty International. There does not appear to have been any direct adverse intelligence about these funds or Garnet. Indeed, Detective Inspector Bligh had ascertained that there were no proceedings or investigations under way in the UK in relation to these funds. Despite talk of corruption, criminal investigations and civil proceedings supposedly emanating from the Government of Indonesia in its communications with the FIS, it appears to have done nothing at all.

Legal Arguments on the relevant principles of Judical Review applicable to the case

31. It is common ground that the process of judicial review is not concerned with the merits of a decision of a public body but whether the decision has been taken in a lawful manner. Decisions which have been taken in disregard of relevant considerations or which have been made taking into account irrelevant considerations may (not must) be struck down. Decisions taken under statutory powers must be taken in accordance with the purpose for which the discretion to take such a decision is conferred. The well known Wednesbury principle allows attacks on decisions which are so outrageous in defiance of logic or accepted moral standards that no sensible person who had addressed his mind to the question could have arrived at them. The process of examining decisions under attack as Wednesbury unreasonable includes taking into account matters which it is proper and relevant to consider and disregarding matters which are extraneous to the proper consideration of the matter. Notwithstanding the fact that the court may scrutinise decisions of public authorities, the court must always have in mind that it is not the primary decision maker.

32. Garnet acknowledged, in its skeleton argument, that the principle of proportionality is a developing one. That it could have a role to play in judicial review cases was first raised by Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374.** As I have already indicated, the law in England and Wales does not appear to have developed to a point where proportionality has become a separate head of judicial review (see **R (Daly) v Secretary of State for the Home Department [2001]2 AC 532)**. In **R (on the application of Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions [2009] UKHL 23** Lord Slynn said (at paragraph 51), '*Trying to keep the 'Wednesbury' principle and proportionality in separate compartments seems to me to be unnecessary and confusing'.*

33. A decision which is seriously disproportionate is plainly one which is unreasonable in the Wednesbury sense: **Brind and Others v Secretary of State for the Home Department [1991] 1 All ER 720** per Lord Ackner. It is a facet of irrationality: **Sharon Tucker v Secretary of State for Social Security [2001] EWCA Civ 1646.** However even proportionality must be judged objectively: **R (Williamson) v The Secretary of State for Education and Employment [2005] 2 AC 246 at 51**.

34. Citing Michael Fordham's Judicial Review Handbook, Garnet summarises this aspect of the argument by submitting that the test for proportionality consists of 4 key questions:

a. whether there is a legitimate objective
b. whether the measure is suitable for achieving it
c. whether it is necessary (the least intrusive means) for achieving it
d. whether the ends justify the means as viewed overall.

35. Garnet accepts that, in principle, the legislative objective behind the Law is sufficiently important to justify limiting fundamental property rights in appropriate circumstances. However it contends that an entirely informal property freeze for eight years is not rationally connected to meeting the objective and, when viewed over such an extended time period, excessive.

Procedural Impropriety

36. Turning to procedural impropriety, the courts have in some cases required decision makers to give reasons even if the law conferring the particular decision making power does not expressly state that reasons must be given. Relevant factors include the nature of the interest concerned and the impact of the decision on that interest, and the context of the decision. When reasons are given, it is obvious that they must be sufficient to enable the person affected by a decision to understand the essential basis for the decision; so that the person affected can see why they have won or lost.

The Law

37. Section 39 (1) of the Law makes it an offence for a person to be concerned with an arrangement whereby the retention or control by or on behalf of another person's proceeds of criminal conduct is facilitated, in circumstances where the person knows or suspects that the other person is or has engaged in or benefited from criminal conduct. It is a defence to disclose one's suspicions to the police and if the police then consent to the steps which are proposed to be taken.
38. Section 35 of the Law sets out the arrangements for the enforcement of external confiscation orders; those arrangements apply to the British Isles and any countries designated by Ordinance of the States or by Statutory Instrument under s96 Criminal Justice Act. Once a country is designated by a Statutory Instrument under s96 CJA it remains designated notwithstanding the amendment or repeal of the primary legislation until amended or revoked by Ordinance of the States.
39. The FIS' handbook, part of which is set out in Mr Waters' affidavit, and which gives informal guidance, explains that '*the consent facility gives law enforcement agencies an opportunity to intervene by effectively delaying the proposed transaction while taking some form of tactical action….. Where consent is refused, this should not be regarded as indefinite. As the lack of consent effectively restrains funds without a court order, a decision to refuse consent in any particular case should be continually reviewed.*

Discussion

40. It is a striking feature of the Law that there is no statutory moratorium after which a refusal of consent to a transaction expires.
41. The FIS point out, accurately, that the Law does not expressly provide that a refusal of consent must be followed at any time by an application for a restraint order within the Law. Surprisingly, they do not accept that the refusal of consent will have a far reaching and serious effect on a person's ability to enjoy his assets. They say that the majority of consent requests are resolved in a short time. They argue correctly that the English regime is now quite different to that on this Island, and that it is clear that where there are grounds for a suspicion the FIS is prima facie entitled not to provide BNP with a defence to a criminal charge and that the law of Guernsey does not express that to be subject to any time limit. I accept that also. But if the FIS seeks to go further and argue that the maintenance of a decision to refuse consent is never susceptible to consideration by the courts by way of judicial review I do not accept that contention. In their principal skeleton

argument the FIS do acknowledge that judicial review is one of two options which, as a matter of law, are open to Garnet, the other being a private law action. They do not, it seems to me, seek to argue that the remedy of judicial review is not available or inappropriate; had they done so I would in any event have taken the view that such arguments should have been pressed at the hearing of the application for permission to bring judicial review proceedings and not on the substantive hearing of the judicial review itself.

42. The FIS agree that proportionality has not yet been adopted as a separate ground of judicial review in England and Wales, and the same principle holds in Guernsey. They agree that the Wednesbury test remains applicable. They do not appear to argue that proportionality is completely irrelevant to the application of the Wednesbury test. They rely on **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 60** a decision of the Privy Council in which a three stage test was adopted:

a. Whether the legislative object, seen in the Billet d'Etat introducing the legislation, of permitting the law enforcement agencies to pursue those who benefit from crime is sufficiently important to justify limiting a fundamental right. It is common ground in this case that in appropriate circumstances this test is fulfilled.

b. The measures designed to meet the legislative objective are rationally connected to it. The FIS link the Decision to the denial of the defence to the Bank, which is correct, but they also argue that it is for the customer, in this case Garnet, to show that the proceeds to be transferred do not on a balance of probabilities represent the proceeds of crime. That, in my judgment, is not correct. It is not the function of the FIS to arbitrate extra judicially on Garnet's rights to the funds in BNP's accounts. Had Garnet pursued the claim against BNP as it could have chosen to do, and had BNP raised a prima facie case for its suspicions, Garnet would then have borne the evidential burden of showing that such suspicions were unfounded on the balance of probabilities. But these proceedings are not about resolving the question of whether the funds in the BNP accounts are in fact the proceeds of crime, rather they are about whether, in the circumstances in which the Decision was made, it is susceptible to attack by way of judicial review, which strikes at the process by which the decision was reached by a decision maker imbued with power to make decisions which affect the lives and interests of citizens.

c. The means used to impair the right or freedom are no more than is necessary to accomplish the object. The FIS refer here to two matters which they say illustrate that the means used have not been excessive, first, the suspicion of BNP which led to the disclosure and secondly the fact that 'clear representations had been made that formal assistance was likely to be sought from the Bailiwick'. This point is made in the FIS' skeleton argument and paragraph 30 of Mr Waters' affidavit, and was fleshed out in the voluntary disclosure of 14th September 2010. On this point I hold that by the time of the Decision the means used to impair the right or freedom had become excessive in relation to the object of the legislation since ample time had been given to the Government of Indonesia to take action. The representation that assistance was likely to be sought

from the Bailiwick should have been seen with considerably more scepticism than it was particularly given the apparent requirement for a further three months.

43. This case does not present facts in which it is necessary to rule on whether proportionality is, in Guernsey law, a separate head of judicial review. I see no reason why proportionality should not play a significant part in a Wednesbury type consideration as well as in the consideration of irrationality and perversity arguments and every good reason why it should. It is particularly useful in cases like the present where few, if any, reasons have been given for a decision at the time it was made and it is difficult to see what factors have been taken into account and what factors have not.

44. To interfere with the operation of the mandate between a customer and his banker is a serious thing: see **K Limited c National Westminster Bank [2006] EWCA Civ 1039.** It is true that the evils of financial corruption and money laundering need to be curbed, but where an account is blocked because of a suspicion, the account holder is effectively treated as if he were guilty unless the blocking is a temporary safety measure to hold the ring until proceedings are commenced or a restraint order obtained. The balance to be struck is between the customer's right to deal with his assets and the need to preserve moneys which might be liable to confiscation following conviction: **Chief Officer of States of Jersey Police v Minwalla [2007] JLR 409.**

45. The customer is placed in a position where he must either sue the bank or make an application for judicial review. Suing the bank may not afford an effective outcome because even though no proceedings may have been commenced against the customer by anyone the bank may still have its own suspicions and therefore be at risk of committing a criminal offence. In such circumstances there could be no certainty that the court would order the bank to comply with the mandate. An application for judicial review directed against the decision maker is one where the customer has to meet a high standard, but if the standard is met effective relief can be granted.

46. Plainly, the decision maker who refuses consent to a transaction should regularly review that refusal in the light of events and developments. Not to do so would be extremely oppressive. It is also clear to my mind that a decision which was once reasonable may become unreasonable and liable to be quashed through effluxion of time: see the comments of the Deputy Bailiff of the Royal Court of Jersey in **Gichuru v Walbrook [2008] JRC 131** taking the same view. The FIS do not accept that mere effluxion of time can cause a refusal to give consent which was reasonable when decided upon to become unreasonable. I disagree. Nevertheless that is not in fact the result of my ruling. I say nothing about whether the original refusal of consent is liable to attack as being one which has now become unsustainable. I confine my judgment to the Decision which is the subject matter of the judicial review application and to the position in June 2009.

47. In any event, in my judgment it is impossible to set any particular time limit for observation in all cases, rather each case must turn on its own facts. However in my judgment where an investigation is ongoing, or proceedings have been started but are taking a long time to conclude, the position is very different from the situation where, as here, no proceedings have been started at

all nor is there any sign of any continuing investigation which might lead to some proceedings being started.

48. The matters relied on by Garnet as I have described them at paragraph 16 above are all, on the evidence before me, true. By the time of the Decision, not only had the Government of Indonesia had more than ample time to commence an investigation or start proceedings had it any claim and the will to pursue it, but it had also heard and presumably taken full account of the remarks of LB Carey and Vos JA in the BNP proceedings. I have referred to part of the chronology of the BNP proceedings earlier in this judgment. A fuller history is set out in the judgment of Vos JA in the 9th January 2009 judgment of the Court of Appeal by which the freezing order was discharged. This followed the ruling given on 23rd May 2007 in the course of the BNP proceedings, to which the Government of Indonesia had been joined, in which LB Carey referred to the fact that the freezing order at that time in place afforded the people of Indonesia, through their government, a opportunity to lay claims to the funds in the accounts in Guernsey on the grounds that they were the proceeds of corruption or misappropriation. Any such action, he said, had to be progressed with 'considerably more vigour than appears to have been displayed up to the present time' and described a 'general malaise' about bringing any proceedings. It was not appropriate, he said, for '*the Government of Indonesia, having been notified by this court of the existence of the proceedings by [Garnet] against [BNP….to give the appearance of using this small jurisdiction as the lead forum for taking proceedings against Mr Putra.'*

49. In a further ruling by LB Carey on Garnet's application to discharge the freezing order, dated 29th August 2008, he repeated his concerns. He also expressed himself to have been worried that it was only his own invitation to the Indonesian authorities to say whether they wished to intervene in the BNP proceedings which had encouraged any action on their part. But little, he said, had been achieved, and he was not filled with confidence that anything would be achieved. He decided that the injunction had to have an end date by which there would have to be an order of the Indonesian court or the Guernsey court and set that date as 23rd May 2009. The Court of Appeal held, on 9th January 2009, that the freezing order should have been discharged with immediate effect on 29th August 2008 and Vos JA said that he was left with the impression that neither side had been or felt able to be entirely frank or open with the court. He thought it seemed at least possible that there was limited political will to take steps in Indonesia in relation to the alleged corruption. He emphasised that the court could only act on facts and the facts were that

a. the Government of Indonesia had always accepted that Mr Putra had huge wealth in Indonesia;
b. no proceedings had been brought against Mr Putra before the Guernsey court demanded an undertaking that they be started as part of the process of granting it a freezing order;
c. no successful application had been made in Indonesia to freeze Mr Putra's assets there;
d. no steps had been taken in any other overseas jurisdiction to institute civil proceedings or to trace or freeze the alleged overseas assets of Mr Putra of Mr Soeharto;

e. The claim started first against Mr Putra had failed. In the absence of any real evidence as to present corruption in the Indonesian courts or elsewhere, Vos JA could only presume that proceedings in Indonesia were conducted regularly and properly and that cases were determined on their merits.

50. When making the Decision, the FIS should have had this history and these remarks very much to the forefront of their minds. Mr Waters' evidence and the arguments advanced on behalf of the FIS before me illustrate, by their failure to grapple with them, that the FIS did not take these matters into account sufficiently or at all. Indeed the fact that in June 2009 they were willing to give the Government of Indonesia yet more time, a generous further three months, simply to make an initial request for judicial assistance (and it is entirely unknown what specific claim or claims such a request would have related to) indicates to me that the FIS was simply unwilling to acknowledge that the lassitude displayed by the Government of Indonesia shifted the balance which the FIS had to strike to one where the continuation of the refusal of consent was thoroughly unreasonable and disproportionate. It would have been a different matter if anything had actually happened in the period between the judgment of the Court of Appeal and June 2009, but nothing had. The need to avoid frustrating an inquiry or a request for international mutual legal assistance is recognised but not without some limit. In June 2009, to go on giving the Government of Indonesia the benefit of the doubt about its claim or its willingness to do anything about such claim as it might have had was excessively credulous and it resulted in oppression to Garnet.

51. I turn now to the failure to give reasons. Garnet argues that this was a procedural impropriety. Where a body like the FIS is concerned the giving of reasons can be a very sensitive matter and can imperil an investigation or putative future proceedings. However that was not the case here at the time of the Decision. Garnet knew that there was no investigation going on into Mr Putra's conduct anywhere in the world and that there were no criminal proceedings being prepared or in being. In such circumstances there was no investigation to imperil and no proceedings to prejudice, nor, in the particular circumstances of this case was there any real prospect of there ever being any. The original disclosure had largely been made on the basis of open source reports, and there is no suggestion from the FIS in the evidence before me that the Decision was based on any further information about Mr Putra or Garnet. Given the Court of Appeal's comments and those of LB Carey to which I have already referred, I hold that Garnet should have been given reasons for the Decision.

52. Property rights are not to be interfered with by the state without due process of law. The continuation of refusal, and the Decision, was plainly within the powers of the FIS but the Decision in June 2009 was capable of appearing rather one sided given the opportunities offered to, and passed over, by the Indonesian Government. As is plain the question of the giving or withholding of consent arises in relation to whether or not a person who makes a disclosure has a defence to a criminal charge a provided for by s39(3) of the Law. It clearly envisages a situation where consent may not be forthcoming. The practical consequence is that the discloser who has a suspicion is

very unlikely to permit dealing with the asset and risk criminal liability. In my judgment the law should recognise that in reality the officer has power to affect the ability of the property owner to deal with his property and should be willing therefore in appropriate cases to scrutinise the processes adopted by the decision maker whether to give or withhold consent. If he chooses not to give reasons, in circumstances where a refusal of consent looks simply extraordinary, as here in June 2009, he must accept that decisions which seem arbitrary are likely to be the subject of an adverse ruling on judicial review. This balancing of property rights against the powers of the decision maker blends into the Human Rights Law argument, to which I will now turn.

53. The Human Rights Law provides that it is unlawful for a public authority to act in a way which is incompatible with a right enshrined in the Convention Rights as defined in the Human Rights Law. States have the right to enforce such laws as they believe to be necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. As applied to the present case the right engaged is the Article 1 right protecting property which provides that no one is to be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law and there must be a fair balance between the individual's right and the right of the state to control the use of such property in accordance with the general interest.

54. The term 'possessions' is not limited to tangible chattels in this context but includes choses in action: **Marckx v Belgium [1979] ECHR 6833/74**. The fact that the right in question here is a chose in action is of therefore of no consequence. De facto deprivation of the right to enjoy property by preventing the applicant from dealing with it can qualify as deprivation of property for these purposes: **Sporrong and Lönnroth v Sweden [1982[ECHR 7151/75 and (1985) 7 EHRR CD256.**. Deprivation is permitted in the public interest and subject to the control of the law and must be subject to conditions provided for by law. The right of the state to control the use of such property must derive from a legislative provision.

55. When considering whether a fair balance has been struck between the rights of the state and the owner's property rights, the courts rightly look at delays on the part of either party, the duration of the interference the detriment caused by the fact that the right to use one's possessions freely has not been resolved: See **Beyeler v Italy [2000] ECHR 33202/96** and **Matos e Silvia Lda and Others v Portugal (1977) 24 EHRR 573.** Garnet asserts that the Decision was in breach of Art 1 Protocol 1 of the Convention.

56. Garnet has lost the right to deal with its property for long enough. The fact that the right to deal with one's assets can be informally curtailed without court order is a power that must be used carefully and its use kept under careful review. Just as these Islands must not be used for money laundering so also they must not be used as the provider of primary extra judicial relief for jurisdictions which cannot or will not make adequate arrangements of their own. That would be equally wrong and unfair.

57. As the obligation to review did take up time in oral argument, as well as being addressed in written submissions, I should say something about it. The FIS focus solely on whether the Decision was lawfully and properly taken at the time it was taken. It is common ground that the FIS have a duty at all times under a duty to review the Decision. But they do not address it in any detail in their arguments. At the very least they must have reviewed the Decision when taking important steps in this litigation: when deciding to oppose the application for permission; deciding to oppose the substantive application; attending court to argue it. At each of these stages they should have given consideration as to whether the Decision remained sustainable. They have not afforded the court any explanation of why that was thought to be so. I infer that they simply hoped that the Government of Indonesia's June 2010 letter would be sufficient to protect the Decision until the three months had expired.

Conclusion

58. Garnet seeks an order quashing the decision on the following grounds; that it was

a. irrational

b. illegal

c. disproportionate

d. procedurally improper

e. in breach of Human Rights Law Art 1 Protocol 1

and an order declaring that the Respondent should immediately grant consent to BNP pursuant to section 39(3) of the Law; and an injunction requiring it to grant such consent immediately.

59. I will grant an order quashing the Decision, and do so on the grounds that I hold it to have been unreasonable in the Wednesbury sense, disproportionate when considered in the process of the Wednesbury evaluation, an excessive interference with Garnet's prima facie property rights, unlawful and a breach of Article 1 Protocol 1

60. As to the precise form of relief, Garnet will need to support its claim for orders requiring the FIS to give its consent and the parties may make written or oral submissions on the form of any further relief to be granted.

61. I wish to add that I appreciate that the FIS are and were at all times in a very difficult position, being faced with the opportunity to assist in the potential recovery of assets which may be connected with large scale corruption in Indonesia, but having to deal with authorities who seem to lack the will or the ability to get off the fence in one direction or another.

62. I want to thank both advocates for their painstaking help. Far too many authorities which were never referred to in oral or written argument were provided to the court, which is wasteful, but the skeleton arguments were very helpful and the oral submissions concise and illuminating.