

Judgment 4/2003

**Holland v HM Procureur et al
Royal Court
(Civil action File 601)
21st October, 2002**

Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 – notice issued by HM Comptroller – judicial review of actions by Law Officers – information to be provided when notice issued.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 21st day of October, 2002 before Sir de Vic Carey, Bailiff; sitting alone.

EDWARD JOSEPH MICHAEL HOLLAND

Applicant

and

H. M. PROCUREUR

Respondent

and

JAMES GARDINER
JAMES MacDONALD
DEBORAH MOLLETT
PATRICK MURRIN

Interested Parties

Whereas on the 5th October, 2002 the Bailiff considered an application by the applicant for an order restraining H. M. Procureur from taking further steps in respect of Notices dated 1st October, 2002 served on the Applicant and Interested Parties and heard thereon Advocates P. T. R. Ferbrache and P. Robey Counsel for the Applicant and Respondent respectively.

The Bailiff this day ISSUED guidance in the terms of the judgment attached hereto, the said application being WITHDRAWN thereafter by the agreement of the parties.

S. M. D. ROSS
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Before:

SIR DE VIC CAREY
BAILIFF

Between:

EDWARD JOSEPH MICHAEL HOLLAND

Applicant

and

H.M. PROCUREUR

Respondent

and

JAMES GARDINER
JAMES MacDONALD
DEBORAH MOLLETT
PATRICK MURRIN

Interested Parties

Date of Hearing: 5th October, 2002

Date judgment handed down: 21st October, 2002

Advocate for the Applicant: P.T.R.Ferbrache

Advocate for the Respondent: P.J.Robey

1. The Applicant received from Her Majesty's Comptroller dated the 1st October a Notice requiring him to attend before persons named therein to answer questions and furnish information.

2. The letter was relatively brief after reciting the powers of the Law Officers under the 1991 Law the learned Comptroller stated in paragraph 2:-

"I am satisfied that there are suspected offences of serious or complex fraud within the meaning of the Law and that there is good reason for me to exercise the powers conferred upon me for the purpose of investigating the affairs, or any aspects of the affairs of the persons, entities or companies under investigation."

3. He then goes on to advise the Applicant of the date when he must appear and furnish information and he also authorises disclosure of information in any circumstances where an obligation of

confidence is owed within the meaning of section 1(9) of the Law. The Notice then goes on to detail the persons, entities or companies under investigation. This section contains the name of five individuals and ten companies.

4. The Applicant applies to the Court for an Order restraining H.M. Procureur from taking further steps in respect of notices served on the Applicant and four other persons who are described as the Interested Parties. These notices have been issued under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991 (the "1991 Law").
5. The Applicant also asks to see a copy of the Letter of Request sent to H.M. Procureur by the United States government and any supporting information and a fully reasoned response to a letter which had been written on behalf of a Mr. and Mrs. Tollman by Carey Langlois & Co., dated 3rd October, 2002, parts of which letter have been adopted in argument on behalf of the Applicant and the Interested Parties by Advocate Peter Ferbrache.
6. Mr. Peter Ferbrache, in particular took no point on the issue of consent directives which the Tollmans had felt obliged to sign. The points he does make may be summarised as follows:-
 - (1) That there had been a failure to provide reasons for the conclusion that this was a case of serious and complex fraud and that Mr. Holland had information relevant thereto. (As I have indicated the Notice from H.M. Comptroller was shortly expressed.)
 - (2) As a separate and distinct point there was authority for suggesting that Letters of Request should be produced in circumstances such as these. For this he relied on a decision of Latham, J. at first instance on the 12th February, 1998, in the case of Zardari v. the Secretary of State for the Home Department where the judge concluded that there was an arguable case that the applicant in that matter was entitled to disclosure of the Letter of Request or of its contents. As in that matter the Pakistan government agreed to the Letter of Request being disclosed the issue was not further considered.
 - (3) That the nature of the offences was in any event fiscal which in some way precluded issuance of the notice.

7. Mr. Robey on behalf of Her Majesty's Procureur advised me that this had been an ongoing investigation. His response to the Applicant's complaint had been dealt with in a brief letter from him to Ozannes dated the 4th October in which he confirmed that the notices are considered to have been lawfully issued and that he had nothing further to add to a letter he had already written to Carey Langlois & Co. dated the 3rd October. In that letter Mr. Robey declined to disclose the contents of the Letter of Request. What he was prepared to disclose was a copy of the indictment albeit that as this letter was going to Mr. Tollman's advocates the client would no doubt be aware of the indictment. As to Carey Langlois' remaining points these are dismissed by Mr. Robey in a firm and slightly peremptory way.
8. As the hearing progressed it became apparent to me that the Applicant or at least his advocate knew a lot more about this matter than merely what was contained in H.M. Comptroller's notice. Mr. Peter Ferbrache admitted that he had sat in on a previous interview in response to a previous notice when Mr. James Gardiner had been questioned but I accept that the information gleaned therein was not necessarily available to be shared with this Applicant.
9. However, I have to come to this matter afresh. The decision of the Court of Appeal in Bassington v. H.M.Procureur 1998 26 GLJ 86 clearly shows that the Law Officers are not above the law and that their actions in issuing these notices are subject to review by this Court.
10. Mr. Robey submitted that reasons as such were not required of the issuer of a notice under the 1991 Law. If the notice was challenged it was for H.M. Procureur to come to this Court and satisfy this Court that there were good reasons for the request. I can well understand in the sensitive world in which Mr. Robey is operating in executing Letters of Request from foreign jurisdictions that there is a certain attraction, both for saving time and in the interests of security, in sharing as little information as possible with the person who is to be questioned. However, in this case the Applicant, Mr. Holland, is a long serving employee of Trafalgar Travel. He claims to be worried about disclosing matters relating to his employer's business and deposes to that fact. Is it sufficient for him to be told that the learned Comptroller has concluded that the situation exists where there is a case of serious complex fraud and that he the Applicant has relevant evidence to give? In my view to say "yes" in all cases would involve too simplistic an

approach. It is further clear that in the Zardari case Latham, J. felt that some amplification and explanation was to be required of the person giving the direction.

11. I take Mr. Robey's point that the circumstances will vary from case to case, but I consider that this Applicant, who is an employee of a company whose ultimate parent and shareholders are the subject of inquiry, should have some explanation of how he is linked into this inquiry before he has to attend upon the investigators. I considered that it was not appropriate for me to have to hear a long explanation of what previous contact and explanations have been given to the various people in Guernsey who have relevant information to give on this subject.
12. I felt that the Applicant here was entitled to a succinct summary of what the elements of the offences being investigated were and also the link of the offenders to the entities which he represented. Not all the persons under investigation were indicted or indeed referred to in the indictment.
13. In saying this I was not expecting the Law Officers to disclose information that was sensitive or confidential and unless there was a factual challenge the information need not have been on oath. Mr. Robey agreed to provide information in this case in the form I suggested. This satisfied Mr. Ferbrache. How much the Applicant was further enlightened by Mr. Robey's note of the facts I know not. The point is that he had it available to him before the interviews and those interviews both with him and the interested parties were able to take place without further delay or intervention from me.
14. There remains the third point that Mr. Ferbrache raised namely that the offences were fiscal. The allegation in this case centres on a purported initial fraud on the Bank of America whereby the Bank was persuaded that certain debtors including Mr. Hundley and Mr. Tollman were not able to meet a debt due to the Bank and that as a result the Bank was persuaded to sell the debt to third parties at a discount. The apparent impecuniosities of Hundley and Tollman are said to have flowed from their having wrongly and fraudulently moved monies out of the United States. A consequence of that was that the Internal Revenue Service did not get its dues on those monies. This clearly is not just a fiscal fraud. Even if it was I see nothing in the legislation that

precludes the investigation of serious and complex fraud upon governments whether in their capacity as tax collector or otherwise.

15. Mr. Ferbrache has asked for a written judgment which I have now recorded. Whilst I have given guidance in this case I accept that in the time available the Court did not have the opportunity of exploring the precise parameters of the way in which these directions from the Law Officers were to be dealt with or reviewed by this Court. I sensed that Mr. Robey felt that he had to reserve his position for future cases where circumstances might be different from these. I accept that and what I say here must rather as in the case of Zardari be regarded as inconclusive of the point. I would however hope that two lessons are learnt from this case. Firstly, that these notices must be served in good time to enable persons who receive them to obtain advice and raise proper queries concerning them. Secondly, the notices should be accompanied by a side letter from the Law Officer giving as much detail with regard to the background of the investigation as is deemed appropriate. I accept that the detail of what is appropriate in any particular case may have to be reviewed further in the future.

16. Finally the issue of what order was appropriate in respect of this application was not discussed. In view of the way it developed it may be simpler to record it as having been withdrawn by agreement and H.M.Greffier will be directed to issue an Order accordingly unless either counsel indicates within 7 days to H.M.Greffier that he wishes to be heard further.