

JERSEY / JUDGMENT

SWM Ltd -v- JFSC [2016]

JRC 094 (11 May 2016)

[2016] JRC 094

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judgment

the deputy bailiff: 1. This is an application by SWM Limited ("SWM") seeking a stay of a direction issued by the Jersey Financial Services Commission ("the Commission") in its letter of 22 nd October, 2015. On 24 th November, 2015, the Court ordered the stay in the terms requested by SWM. These, in brief, are our reasons. 2. This application takes place in the context of an appeal by SWM against various decisions and directions of the Commission. 3. It is not necessary to go into the background in enormous detail. For the purposes of this application we summarise it in largely the same terms as the Court summarised it in its judgment of 21 st January, 2016, (SWM Ltd-v-JFSC

[2016] JRC 014) which dealt with an application that was brought later in time than the application that is the subject of the present judgment. The summary, so far as is relevant, is as follows:- (i) SWM is a financial services company regulated by the Commission. (ii) SWM is currently subject to regulatory action by the Commission which, amongst other things, has required SWM to commission a report from Grant Thornton into the suitability of advice that SWM gave to 42 of its clients who made certain investments between 6 and 11 years ago. Grant Thornton in its report has concluded, of the sample of customers of SWM that it considered, that to a great extent the advice and hence the investments had been unsuitable. (iii) SWM did not wish to commission the report from Grant Thornton and expressed the view that Grant Thornton did not have sufficient expertise in the investments in question to make a valid judgment on the quality of SWM's advice. The Commission disagreed with this view and required SWM to commission Grant Thornton to prepare its report. (iv) On receipt of that report, SWM prepared what is referred to as "a management response" disputing material parts of the Grant Thornton report and opinion and submitted this response to the Commission. The Commission expressed the view, somewhat unsurprisingly, that it preferred the report of Grant Thornton which was independent to that of SWM which inevitably was not. (v) SWM then indicated that it wished to take further advice and that it wished to commission a report from another expert so that, depending upon what that expert said, it would have evidence to place before the Commission when it reviews the Grant Thornton report and when it reaches

any decision about SWM. (vi) The Commission has issued a number of directions some of which are disputed by SWM. SWM also dispute the Commission's interpretation of some of the directions that it has issued. The various concerns that SWM have had about the actions of the Commission have given rise to lengthy and sometimes strenuous correspondence. (vii) As a result of the findings in the Grant Thornton report the Commission has started a decision making process which might in some circumstances lead to the revocation of SWM's licence. Accordingly SWM wishes to place itself in a position to refute by evidence, if possible, Grant Thornton's conclusions. (viii) Amongst other directions issued by the Commission to SWM a number of directions are set out in a document entitled "directions issued pursuant to Article 23(1) of the Law and dated 22 nd October, 2015, ("the October Directions"). The October Directions 4. The October Directions are fairly wide ranging but the directions that are relevant to the present application are those set out in paragraph 1.3 under the heading "Communication to Clients". They provide as follows:- "1.3.1 SWM shall write to all 42 clients invested in either the Protected Assets TEP Fund (original and No. 2) and/or the Matrix asset based 2 Fund notifying them of the following: 1.3.1.1. The appointment of an independent reporting professional, pursuant to the Commission's notice issued under Article 32 of the Law, to conduct a dip sample review of investments in order to assess the suitability of investment advice. 1.3.1.2. In respect of the eight clients reviewed by the independent reporting professional, SWM shall notify them of the finding that the advice provided by SWM was deemed by the reporting professional to be unsuitable. 1.3.1.3. In respect of the remaining clients who were not subject to review, SWM shall notify them that their file was not reviewed however, the independent reporting professional concludes that a review is likely to determine the advice was unsuitable based on their findings of the eight clients reviewed. 1.3.1.4. Explain that there is currently ongoing dialogue between SWM and the Commission in respect of the matter. 1.3.2 SWM shall obtain the prior written consent of the Commission before sending the communication to clients. In that regard, SWM are required to produce the draft communication to the Commission no later than 4pm on Tuesday 27th October 2015. Having been agreed by the Commission, the communication should be sent to all 42 clients no later than 4pm on Friday 30th October 2015." 5. SWM seeks a stay of direction 1.3.2. The main basis for its application is that the direction from the Commission to SWM requiring it to write to its clients is, so SWM argues, premature. Inevitably the letter draws upon the findings of Grant Thornton which are extensively disputed by SWM as indeed is reflected in its "management response". If a letter is sent to clients in the terms required by the Commission at this point then, so SWM argues, inevitably clients will believe that SWM has mis-sold investment advice which is a matter that is substantially disputed by SWM. SWM will lose the confidence of its clients, perhaps unnecessarily, and inevitably claims against SWM would be encouraged when they may not in fact be merited. SWM's argument, in essence, is that any letters sent to clients should be balanced and therefore should await a further independent report which SWM wishes to procure but which, in effect, the Commission is preventing by refusing SWM access to its funds to pay for such a report and by requiring that the letter is sent to clients

at this point. 6. We have been shown correspondence between the Commission and SWM. We do not propose to refer to all of the correspondence which, as we have indicated above, may be characterised as, on some occasions, strenuous. 7. We note however that in the Commission's letter to SWM of 16 th October, 2015, the Commission says:- "SWM having mis-sold investments to clients should now make restitution of any losses suffered by those investors. The restitution of investors does not halt the process of the case proceeding through the decision making process, it would however be a significant mitigating factor as the case is considered in accordance with the Commission's decision making process. SWM should notify their PII insurers of potential claim from all 42 investors subject to the enforcement action. Please do not confuse making a notification with making a claim. In our experience late notification to a PII insurer can have a serious and detrimental impact on any claim that SWM may seek to make in relation to the 42 investors." 8. A number of matters are apparent from the paragraphs quoted above. Firstly there is a decision making process in train and at the end of that process the Commission will decide what, if any, action to take with regard to SWM. It could, in certain circumstances, withdraw SWM's licence. 9. Of more significance so it seems to us, is that the Commission appears to be proceeding on the basis that SWM has "missold" investments to clients. Whilst it is true that the Grant Thornton report indicates that the investments were unsuitable that report is hotly contested by SWM who wish to procure a further report to put in the balance against the Grant Thornton report. From the tenor of the Commission's letter, however, the Commission itself appears to be proceeding on the assumption that the Grant Thornton conclusions are unassailable. 10. Thirdly, the Commission appears to make the leap from the findings of Grant Thornton, heavily challenged as we have said, to the requirement that SWM should make restitution for losses suffered by investors. 11. We cannot but observe that the reader of the Commission's letter might reasonably assume that as far as the Commission was concerned the alleged miselling which is disputed by SWM was already established beyond doubt. 12. SWM's submission was that this was unfair and it had the legitimate concern that the JFSC's mind had already been made up. Furthermore by reason of the reluctance of the JFSC to permit SWM to commission its own report (see as to aspects of this SWM Limited -v- Jersey Financial Services Commission, Her Majesty's Attorney General third party

[2016] JRC 014). SWM was being placed into an untenable position. 13. As to the requirements of sending a letter and notifying SWM's PII insurers, counsel for SWM observes that insurers would nonetheless insist that they agreed the format of any letter; otherwise that would have effect on the insurance cover. 14. SWM also argue that to send a letter in the terms required by the Commission may be misleading to clients who may think that they were entitled to compensation on the basis of the conclusion in, what the legal representative of SWM characterised as a "one sided report". SWM further argues that to require SWM to write involves procedural unfairness as SWM must be allowed to put forward a defence. In essence SWM argues that to send a letter builds up an impetus for a finding by the

Commission at the end of its decision-making process that may be against the weight of available evidence. Lastly, SWM argues that to send a letter at this point would be prejudicial to its clients. The investments in question were made some 11 years ago in 2004 and the investments suffered as a result of the 2008 financial crash. Clients were kept updated, they knew of the losses, and SWM therefore argues that there is no prejudice to the clients in waiting until there is a more balanced evidential picture before writing to them. The few months that it might take would not make a difference. We were shown a number of exchanges by letter and by email in which SWM raises the points that it makes before us with the Commission. We do not need to go into the detail. Suffice to say that in our view, in its desire to procure its own evidence and to disclose information necessary for it to do so, SWM has not been assisted by the Commission. The correspondence reflects increasing frustration on the part of SWM which is met by bland or uninformative responses for the most part by the Commission. 15. Whilst we do not at this point need to determine where the rights and wrongs of this correspondence lie, it is difficult to see that any allegation of delay can be laid at the door of SWM. 16. In its submissions before us the Commission explained the view that it took of the Grant Thornton report and explained that it was only the affairs of eight investors who were investigated at length by Grant Thornton. Accordingly, as the Commission says, some 34 investors may well be ignorant of the issues relating to the investments that they were put into by SWM. The Commission views this as a serious matter and indeed we were handed a document which gave an indicated figure for the losses potentially incurred by the eight investors who were considered by Grant Thornton in the sum of £236,481. The Commission points out that the investments in question were really designed for experienced or expert investors and that all of the individual clients of SWM, who were put into the investments, were retail. It is, from the Commission's perspective, essential that the investors are aware of the contents of the Grant Thornton report. They are not sophisticated investors and they do not at this stage know how things have gone badly wrong. Furthermore, in respect of one of the areas of investment, insurance cover is not available and therefore any claims if successfully made would fall to be met out of the resources of SWM. 17. We understand the sensitivity of the Commission in the light of the Grant Thornton report which suggests that at least eight and very possibly significantly more clients of SWM have been sold by SWM investments which were unsuitable for them. However in our view it does not sit comfortably that SWM has effectively been blocked from seeking its own advice and counsel by the position taken by the Commission but, nonetheless, is required by the Commission to draw a damning report to the attention of its clients without the ability to challenge it. 18. We cannot see that there is any benefit in sending the letter required by the Commission at this stage. As we have already noted all of the investors will be aware of the loss that they have suffered - what they may not be aware of is that there is a report that suggests that in some manner SWM may be responsible to some extent for those losses. To send the letter now would, in our view, inevitably encourage claims against SWM where a fuller evidentiary picture may not. 19. We cannot escape the view that the Commission has not on this aspect and occasion dealt fairly with SWM in that it appears

on the correspondence to be preventing SWM from obtaining proper advice and from seeking evidence particularly in circumstances where the Commission is giving every indication, from the extracts of the letter set out above, that it has already decided that there has been misselling which inevitably would give rise to a successful claim in compensation. 20. However that is not what we are called upon to determine today. In our view balancing the interests of investors with fairness to SWM we are of the view that the letter is premature and should not at this point be sent. 21. A number of the directions of the Commission are under appeal and the appeal, amongst other things, will deal with the question of whether or not SWM can procure advice and independent evidence. 22. In our view the additional months that may pass in determining this should not cause material additional prejudice to the investors. In our view the balance was firmly in favour of delaying the sending of the letter required by the Commission and accordingly we made the order that paragraph 1.3.2 of the direction of 22 nd October, 2015, be stayed pending further order of the Court. Authorities SWM Ltd-v-JFSC

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