

The Chief Officer Customs, Excise, Immigration and Nationality Service (Guernsey Border Agency) v Garnet Investments Ltd (2011)



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Allan Bell, University of Hong Kong

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Guernsey Cross Border Services v Garnet Investments Ltd (Appeal of Judicial Review – 01 August 2011)

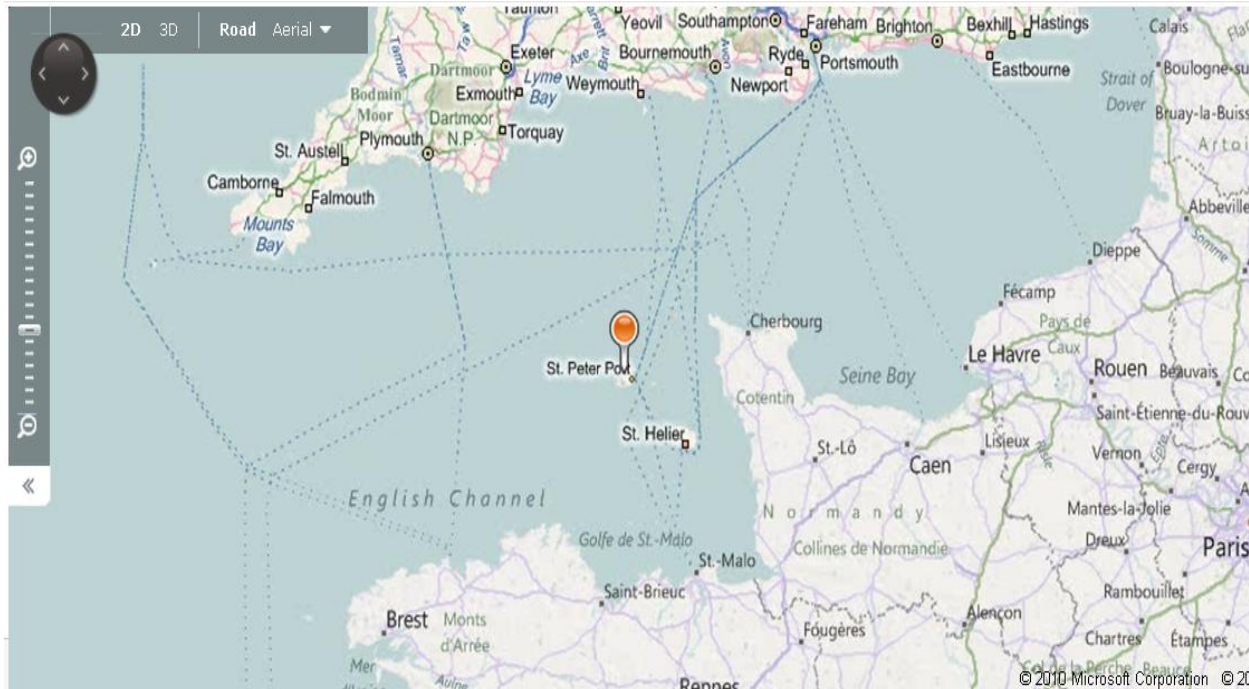
Objectives -> Implications of the *Garnet* decision for:

- informal restraint of suspected proceeds of crime in Common Law jurisdictions -> offshore financial centres
- operational issues -> MLAs with Indonesia
- domestic challenges faced by Indonesian Asset Recovery Regime -> Government of Indonesia



Guernsey Cross Border Services v Garnet Investments Ltd

Guernsey Legal Regime



Guernsey Offshore Financial Centre, UK

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Guernsey Cross Border Services v Garnet Investments Ltd

Guernsey Legal Regime

Special Features of the Guernsey Jurisdiction:

- Crown Dependency / Offshore Financial Centre
- hybrid jurisdiction; essentially Common Law with elements of the French civil code
- a number of different laws and measures aimed at preventing and detecting the laundering of the proceeds of crime and/or the financing of terrorism
- *Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999*



Guernsey Cross Border Services v Garnet Investments Ltd

Guernsey Legal Regime

Several criminal offences created by the Law

- offence of being involved in the control of property which is suspected to represent the proceeds of crime
- the “Offence” carries a maximum term of imprisonment of 14 years and an unlimited fine



Guernsey Cross Border Services v Garnet Investments Ltd

Guernsey Legal Regime

Obligations of Intermediaries/ Gatekeepers:

-> AML Regime

- where a person suspects that property may represent the proceeds of crime she must report it to the Financial Intelligence Service (the “FIS” – Guernsey Border Agency) and may request permission to deal with the property concerned
- If the FIS provides consent, the person has a defence to the Offence
- FIS ‘consent’ extremely important



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Guernsey Legal Regime

- What happens if the FIS refuses consent for the transfer?

= *Guernsey Cross Border Services v Garnet Investments Ltd*

The bank is put in the position where:

- if it effects the transfer it will commit the Offence, if all the other elements of the offence are present
- in such circumstances the practical effect of a refusal to provide consent is that the bank will not transfer the funds

= informal freeze without time limits / oversight



Guernsey Cross Border Services v Garnet Investments Ltd

Guernsey Legal Regime

If the FIS withholds consent, affected party has two options :

- (i) sue the bank – private remedy - no guarantee the claimant will be able to obtain his funds
- (ii) judicially review the decision of the FIS – public remedy - if it is considered that the failure to give consent was invalid



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

A Family Affair: Indonesia's Kleptocratic Regime

- Suharto family stole **USD 15-35 billion** of state assets over 32 years (March 1967 - 21 May 1998) estimated by the World Bank



- Hutomo Mandala Putra “**Tommy**” Suharto’s share of these ill gotten gains are estimated at USD 800 million



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

The Guernsey Connection

- 1994 – Tommy purchases 60% of Automobili Lamborghini S.p.A and Lamborghini USA from Chrysler LLC for approximately USD 40 million and eventually holds it via V Power Limited, a company he owns



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

The Guernsey Connection

- 1998 – May 21st - Tommy's father resigns amidst violent protests and ...



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

The Guernsey Connection

- **1998**- March - Garnet Investments Limited (“Garnet”), a company controlled by Tommy Suharto was incorporated in the British Virgin Islands
- **1998** - July - Tommy sells V Power Limited’s 60% shareholding in Lamborghini to Audi AG for US\$ 48 million
- **1998** - July - Garnet opened accounts with BNP Paribas (Suisse) SA (“BNP”) in Guernsey -> V Power Limited transferred US\$ 48 million to Garnet’s account at BNP Guernsey



BNP PARIBAS



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

Garnet Investments Limited : Chronology

- **2000** – Tommy convicted of corruption quashed later the same year
- **2001** – 26 July - Supreme Court judge **Syafiuddin Kartasasmita** was murdered in Kemayoran, Central Jakarta at 08:30 am. He was shot dead by two gunmen on a motorbike while driving his Honda vehicle to his office at the Court building in Central Jakarta
- **2002** – Tommy convicted of ordering the murder of Justice Syafiuddin
- **2002** – Tommy sentenced to 15 years' imprisonment. His sentence was later reduced to 10 years'. He left prison in 2006 for good behavior after serving 4 years



Justice Taufik, one of three judges who overturned Tommy's corruption conviction



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

Garnet Investments Limited : Chronology

- **2002** - October - Garnet issued instructions to BNP Guernsey directing them to transfer funds totaling approximately **€36.45 million** from the accounts. BNP refused to comply with these instructions
- **2002** - November - BNP notified the FIS of the transfer instructions and additionally informed the FIS, under its due diligence obligations that the account contained the suspected proceeds of crime. The **FIS refused consent** for BNP to act on the transfer instructions
- **2006** - March - Garnet issued **private proceedings** in Guernsey against BNP in relation to BNP's refusal to comply with instructions to transfer funds from the Garnet account



Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

Garnet Investments Limited : Chronology

- **2006** – October - Tommy was released from prison after serving 4 years
- **2007** - The **GOI was joined as a party** in the proceedings between Garnet and BNP since the issue was raised in those proceedings as to whether the funds held by BNP, being the possible proceeds of crime, could be subject to a constructive trust in favour of GOI
- **2007** - January - GOI obtained a civil freezing order in respect of the Garnet accounts. The Guernsey court determined that Tommy was the **sole beneficiary** of Garnet, and therefore had ownership of the funds. The court further accepted the need to freeze Garnet's account in order to provide an opportunity for the Government of Indonesia to show that these funds were proceeds of corruption



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Guernsey Cross Border Services v Garnet Investments Ltd

Case Background

Garnet Investments Limited : Chronology

- **2009** – January - Garnet had the civil freezing order lifted, upon reaching the 2 year cut-off period from the date of its execution → GOI failed at 4 separate causes of (corruption) realted against Tommy from 2007 - 2009
- **2009** - February - Garnet instructed BNP to transfer part of the Lamborghini funds to an account in Indonesia
- **2009** – March - Ozannes, a Guernsey law firm acting for Garnet, wrote to the FIS explaining why it should consent to BNP making the transfer
- **2009**: - June - FIS informed Ozannes that BNP “...has been refused consent to make payments requested by Garnet from its account at the Bank.”



Guernsey Border Agency



Guernsey Cross Border Services v Garnet Investments Ltd

The Judicial Review: (06 September 2010)

Garnet Investments Limited : Chronology

- **2009** – September - Tommy deposes that the funds in question arose “...from the sale by my of other assets, which I already held.” Among those assets were shares in Lamborghini
- **2009** – October - **Garnet applies for judicial review** of the FIS’ decision not to give consent
- **2010** – September - Judicial review of the FIS decision not to give consent
- **2011** - 14 February - Lieutenant Bailiff Newman QC gave **judgment in favour of Garnet** holding that the FIS decision not to grant consent was irrational and disproportionate, constituting an excessive interference with Garnet’s property rights and a breach of Article 1 of Protocol 1 to the European Convention of Human Rights

Lieutenant Bailiff Newman QC



Guernsey Cross Border Services v Garnet Investments Ltd

The Judicial Review: (06 September 2010)

Garnet Investments Ltd v The Chief Officer Customs, Excise, Immigration and Nationality Service (Decision: 15 February 2011)
Bench: Lt-Bailiff Catherine Newman

FIS No Consent decision quashed by Lt-Bailiff Catherine Newman on the grounds that it was:

- unreasonable in the **Wednesbury** sense
- Disproportionate and an excessive interference with Garnet's prima facie **property rights**
- unlawful and a **breach of Article 1 Protocol 1, Human Rights (Bailiwick of Guernsey Law 2000)** / European Convention on Human Rights - Every natural or legal person is entitled to the **peaceful enjoyment of his possessions**



Guernsey Cross Border Services v Garnet Investments Ltd The Judicial Review: (06 September 2010)

***Garnet Investments Ltd v The Chief Officer Customs, Excise,
Immigration and Nationality Service (Decision: 15 February 2011)***

Bench: Lt-Bailiff Catherine Newman

Obiter

“To go on continue 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.” (para 50)

Catherine Newman, QC



Guernsey Cross Border Services v Garnet Investments Ltd

The Judicial Review: (06 September 2010)

Garnet Investments Ltd v The Chief Officer Customs, Excise, Immigration and Nationality Service (Decision: 15 February 2011) Catherine Newman, QC

The FIS argued that the onus was for the customer to demonstrate that the funds did not represent the proceeds of crime. The court found that this was not the case:

“It is not the function of the FIS to arbitrate extra judicially on Garnet’s rights to the funds in [the Bank’s] accounts. ... these proceedings are not about resolving the question of whether the funds in the [Bank’s] 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 the power to make decisions which affect the lives and interests of citizens.” para 42 (b)

Catherine Newman, QC



Guernsey Cross Border Services v Garnet Investments Ltd

The Judicial Review: (06 September 2010)

Garnet Investments Ltd v The Chief Officer Customs, Excise, Immigration and Nationality Service (Decision: 15 February 2011) Catherine Newman, QC

Obiter

- the effect a refusal to grant consent = “**informal ‘freeze’**”
- specific reference to the importance of **the mandate between customer and bank**, and that interference with this is a serious matter
- mention of the importance of keeping a decision not to grant consent under review. A decision which is reasonable when originally taken may become unreasonable through the passage of time.
- ***FIS had not originated restraint proceedings against Garnet***
- trade-off between the need for effective anti-money laundering measures against the interference with the customer’s freedom



Guernsey Cross Border Services v Garnet Investments Ltd

The Appeal: (July 2011)

The Chief Officer Customs, Excise, Immigration and Nationality Service v Garnet Investments Ltd (Decision: 01 August 2011)

(Bench 3 QCs - Judgment written by Clare Montgomery QC)

The Court held:

- the Court should look behind appearances to investigate the realities of the situation complained of in order to ascertain whether the situation amounted to a **de facto expropriation**
- **temporary seizures do not constitute deprivations of property**
- the circumstances of the present case **do not amount to a lack of proportionality** between the overall aim of the States of Guernsey to tackle money laundering and the inability of Garnet to have access to its funds for the time being



Clare Montgomery QC



Guernsey Cross Border Services v Garnet Investments Ltd

The Appeal: (July 2011)

The Chief Officer Customs, Excise, Immigration and Nationality Service v Garnet Investments Ltd (Decision: 01 August 2011)

Obiter:

Mr Hutomo (Tommy), who is now in his mid 40's, states that he is unable to provide any further information in relation to the purchase of the Lamborghini shares, notwithstanding the fact that the acquisition of this asset must on any view have been a significant investment for a man who would then have been in his 20's when he might have been expected to be in control of his own business affairs. (para 3)



Guernsey Cross Border Services v Garnet Investments Ltd

The Appeal: (July 2011)

The Chief Officer Customs, Excise, Immigration and Nationality Service v Garnet Investments Ltd (Decision: 01 August 2011)

- Watch this space ->
- **2011** - September - within time Garnet applied to the Guernsey Court of Appeal for **leave to appeal to the Privy Council ...**
- Public interest in property rights v AML / informal freeze mechanism ?



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Guernsey Cross Border Services v Garnet Investments Ltd

Case Implications

Implications for Indonesian Asset Recovery Regime

Guernsey a Vicarious Jurisdiction for Indonesia ?

“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.” (para 56)

Lt-Bailiff Catherine Newman



Guernsey Cross Border Services v Garnet Investments Ltd

Case Implications

Implications for Indonesian Asset Recovery Regime

Court of Appeal Decision to Lift Freezing Order: 09 August 2007

- Court recognized that it was **unusual to refuse a freezing** order where there was both an arguable case and a risk of dissipation
- Court was troubled by what it regarded as a **lack of frankness on the part of the Government of Indonesia** and its complete failure to take any steps to freeze any of the assets of the Suharto family other than these proceedings in Guernsey
- Implication for AML regimes – critical for FIUs to have access to the Informal Freeze mechanism to be able to hold assets until a restraint order can be put in place. How to balance with property rights?



Guernsey Cross Border Services v Garnet Investments Ltd

Case Implications

Implications for the Indonesian Asset Recovery Regime:



- KPK
- AGO
- Police
- PPAATK – FIU



- Lack of co-operation between Indonesian Ministries and agencies having an Asset Recovery mandate presents serious challenges domestically and for foreign jurisdictions



Guernsey Cross Border Services v Garnet Investments Ltd

Case Implications

Implications for the Indonesian Asset Recovery Regime:

- current asset recovery cases, including **Bank Century** where the GOI has initiated MLA requests with 13 Jurisdictions including **Hong Kong** and **Switzerland**
- Requirement for significant institutional reform of Indonesia's domestic agencies responsible for Asset Recovery
- Establish an Asset Recovery agency with a legislated mandate
- By definition, international Asset Recovery requires international collaboration there ->
- At an operational level, the best approach is **intensive informal communication and regular visits**



Terima Kasih! / Thank You!



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