COLLAS CRILL

"In the ordinary course of business"?

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A recent decision of the Jersey Royal Court in *SWM Limited v JFSC* has provided some useful guidance for companies or individuals operating under directions or consents from state regulators or bodies such as the Financial Intelligence Unit.

Please click here to read the full judgment, but in brief:

1. The case results from an investigation into SWM by the Jersey Financial Services Commission.
2. The Commission required SWM to commission a report by Grant Thornton (ie: SWM paid for it). SWM challenged GT's expertise, but nevertheless GT was appointed and the report was produced.
3. The JFSC had issued a direction to SWM that whilst the investigation was ongoing it shall refrain from making any payments that are not "in the ordinary course of business".
4. SWM then wanted to commission a report as a second opinion in order to rebut the report produced by GT.
5. The Commission resisted and argued that (1) such expenditure on a second report was not in the ordinary course of business and (2) in part resisted as its concern was to preserve assets of SWM to keep available (in accordance with its liquid asset requirements) for compensation to any of SWM's customers who may have been mis-sold asset and might have suffered a loss.
6. The Court found that one of the potential consequences of the steps taken by the Commission was that it may result in the end of SWM's business. The Commission's interpretation would have effectively denied SWM an opportunity to defend its business.
7. The Court was satisfied that SWM wanted the second report to defend its business and accordingly, while obtaining a report to rebut the Commission's expert report might be considered a "one-off" the Court accepted SWM's position that (1) the expenditure would not put it in breach of its liquid asset requirements and (2) that ordinary course of business does not preclude a single, one-off exceptional act; and that therefore obtaining the second report was "in the ordinary course of a business" operating in the regulatory framework.

This seems to us a fair and logical outcome. This decision demonstrates that where a company is faced with concerns about the interpretation of a consent or direction (particularly if the regulator disagrees with its interpretation) rather than simply proceed on its own accord and risk sanctions or criminal liability, it is able to apply to Court for guidance. This case also provides useful discussion of what "in the ordinary course of business" may mean as it is a commonly used phase in directions and consents.

To discuss this or any matter further please contact a member of the team.

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COLLAS CRILL

For more information please contact:



David O'Hanlon

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734259 | **e:** david.ohanlon@collascrill.com

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