

Suspicious minds

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It has taken 15 years for Jersey's authorities to prosecute for failing to report potential money laundering under its proceeds of crime legislation, in a case shedding important light on its requirements for AML compliance.

AG v Jardine concerned the reporting offences under Jersey's Proceeds of Crime (Jersey) Law 1999 (similar to England's Proceeds of Crime Act 2002, Guernsey's Disclosure (Bailiwick of Guernsey) Law 2007, and Cayman's Proceeds of Crime Law 2008). Mrs Jardine was prosecuted on alternative counts for failing to report when either she actually knew or suspected money laundering, or, while carrying out a regulated financial services business, had reasonable grounds to know or suspect that a person was engaged in money laundering.

Background to the case

The case arose from an application for a St Kitts and Nevis passport. St Kitts runs a citizenship by investment programme. It outsources the administration of that programme, including handling applicant funds, to an immigration consultant, Henley & Partners.

In turn, Henley outsourced much of its office function to a Jersey trustco, STM Fiduciaire, which received and handled applicant funds. It also provided Mrs Jardine, STM's MLRO, as a director of Henley.

Problems began when Henley received an application from a Ukrainian local politician. STM carried out its usual KYC/CDD checks. It also received money in respect of the fee. However, this did not come from the applicant directly, but from a company in Belize via a Cypriot trustco. The Belize company was not obviously linked to the applicant, and so there was no evident link between the applicant and the funds remitted. Although the Cypriot trustco provided some explanation (the applicant was a lawyer, and had procured a client to pay on his behalf), this did not conclusively tie the applicant to the funds. As a result, Mrs Jardine and STM returned the funds to sender and the application was not proceeded with.

The prosecution case

Three years later, Mrs Jardine and STM were indicted for failing to report money laundering. The prosecution argued that application was made and funds paid on behalf of a PEP, which were automatically grounds for suspicion. Furthermore, it argued the Ukraine and former Soviet Bloc are notoriously corrupt. Next, it viewed acquiring a second passport by investment as a "passport for sale", again arguing this was automatically suspicious. Finally, it argued the lack of explanation for the origin and route of the funds, paid by a third party in Belize through Cyprus, was also suspicious.

The defence case

Mrs Jardine argued that she had carried out a risk-based assessment, as recommended by the JFSC. STM had not only collated KYC/CDD information, but acted on it and researched around it, e.g. by consulting Worldcheck, which came back clear. There were also plausible explanations for the routing of funds: there were restrictions on making dollar payments or maintaining an

account outside the Ukraine. Having taken this into account, Mrs Jardine could show she had considered the available information and whether it increased or decreased the risk of money laundering. Having done so, she concluded there was no money laundering but only a loose end as regards whose money STM had actually received.

The Court's decision and the future

Happily for Mrs Jardine and STM, the Court acquitted them of any offence. Less happily for the rest of us, it gave no reasons for that decision because Mrs Jardine succeeded at her trial, so the result was a simple "not guilty" verdict.

It is legally possible to be guilty of failing to report suspicions of money laundering, even if it turns out there was actually no underlying money laundering to report. This is because the thrust of the legislation requires suspicious circumstances to be reported to the relevant authorities. It is then their job to decide whether to investigate further or not.

In *Jardine*, the authorities showed they considered the threshold of suspicion required to trigger a report very low indeed, such as going so far as to suggest PEP status was enough.

However, the *Jardine* verdict suggests this is not enough, at least where the recommended "risk-based approach" is followed. This means going through the process of collecting the necessary CDD/KYC information. But it also means going through the process of then considering it, and what it actually shows. In Jersey, at least, where JFSC guidance was that a risk based assessment should be carried out, Mrs Jardine and STM could demonstrate they had done this and reached reasonable conclusions. They concluded there was no money laundering risk, and the prosecution could not show there was in fact any money laundering.

As for the future, Jersey's first prosecution has shown what does not constitute reportable reasonable grounds. It may take a second or third to calibrate exactly what does. Meanwhile, demonstrating a considered, risk-based approach remains the best way to avoid featuring in any such future case.

For more information please contact:



Nuno Santos-Costa

Partner // Jersey

t: +44 (0) 1534 601731 // e: nuno.santoscosta@collascrill.com