

**WRITTEN QUESTION TO H.M. ATTORNEY GENERAL
BY DEPUTY M.R. HIGGINS OF ST. HELIER
ANSWER TO BE TABLED ON TUESDAY 17th JULY 2012**

Question

Will H.M. Attorney General –

(i) summarise for Members the legal arguments put forward by Jersey's legal representatives in the recent judicial review of the UK Government's decision to close the Low Value Consignment Relief on goods originating from Jersey and Guernsey and state where these arguments differed from the legal arguments put forward by Guernsey's legal representatives;

Answer:

The legal arguments put forward by Jersey are within the public domain. They may be found in the judgment of Mr Justice Mitting in the High Court in the case and at some length in an article about this case in the June 2012 edition (Volume 16 Issue 2 page 119) of the Jersey and Guernsey Law Review.

However, in brief, there were two Skeleton Arguments prepared for Jersey.

In the first principal Skeleton Argument Jersey argued:

- (a) That the LVCR exemption is mandatory and that the relevant EU law does not give a Member State discretion to act as the UK has purported to.
- (b) That no distortion of competition has been established.
- (c) That imported goods can be cleared from other third countries for free circulation in other Member States.
- (d) That the UK proposal was neither proportionate nor reasonable.

The need for a second supplementary Skeleton Argument arose because of a change in the UK's case and the need to challenge the new lines of argument. This involved

highlighting serious errors of principle as regards the construction of VAT legislation and HMRC's incorrect reliance upon RAVAS' written submissions and evidence. These were allegations which could only realistically be answered by Jersey's evidence. The arguments may be summarised as the following:

- (a) There is no vires in the relevant EU directive for a selective measure.
- (b) There is no general discretion to end the relief on the basis of distortion of competition.
- (c) That the meaning of avoidance and abuse is disputed and that the HMRC's and RAVAS' allegations that businesses had been put at a serious competitive disadvantage were unfounded.

With respect to (c) only Jersey could have reliably answered the allegations of circular shipping and split packaging put forward by RAVAS and relied upon by the UK. These and other points of evidence were vital with respect to interpretation of the relevant EU law.

Essentially, on the main legal points, Jersey and Guernsey's position on the law was the same.

Sometimes cases turn on arguments of pure law because all parties accept how the facts will fit into the Law once the legal position has been determined. Sometimes arguments are exclusively about facts and the legal position is clear. In this case, as in many, there were issues of both law and of facts. Sections (b), (c) and (d) of the principal Skeleton Argument were only possible at length (or at all) to advance with the extensive evidence submitted by Jersey. The regulated nature of Jersey's fulfilment industry meant that reliable evidence from industry could be provided to defeat the main threads of the UK's (HMRC's) case on the facts.

This application was time critical as the introduction of legislation to remove the LVCR exemption in the UK was imminent. In my view it was essential to advance both a strong legal argument and a strong argument on the facts to secure early leave to bring a judicial review application and an expedited hearing. This was itself very important as

the legal position needed to be established before the UK introduced the legislative proposals into parliament. The deployment of a strong legal argument and detailed facts enabled this to be achieved.

(ii) explain how many times Jersey's legal representatives appeared before the judge in this case and the number of hours these appearances entailed;

Answer:

Jersey's Leading Counsel and Junior Counsel both appeared before the judge at the High Court for two and a half days.

The majority of their representations were in written form, as is usual practice. Thus, the judge had in front of him all documents prepared or approved by both Counsel, including; the Detailed Grounds of Claim, evidence (including all witness statements), two Skeleton Arguments and legal authorities.

(iii) explain how many hours the lawyers representing Jersey are claiming for preparation of the case;

Answer:

Leading Counsel, Junior Counsel and PWC Legal are claiming 2104.5 hours in total for preparation of the case.

(iv) explain why he believes the cost of the Jersey's action has resulted in a legal bill of £656,370.67 just for the judicial review when the original estimate was £360,000 for all court actions;

Answer:

The original costs estimate was given at a preliminary stage of the instructions and before substantial work had been undertaken. It was, in my view, a best general estimate based on general principles and a knowledge of the nature of the case. It was always understood to be such. As the amount of information to be collated and the number of

witnesses to interview became clear, and the potential legal avenues that needed research and consideration also became clearer, the costs estimate was revised substantially upwards although it still remained an estimate. Litigation is a notoriously uncertain process and very often costs can increase due to unforeseen developments, as happened in this instance. Furthermore, Judicial Review, because of the need to put together a strong case on the initial application for leave stage, is particularly front loaded in terms of legal costs.

Of significance was the change in legal argument by the UK. This change was, as I understand it, largely a result of Jersey evidence defeating the original assertions. Of further significance was the grant of late permission to RAVAS (a retail industry pressure group) to make written and oral submissions, and an allegation of breaches of confidentiality undertakings made by Royal Mail.

The RAVAS intervention, their evidence and the UK's revised approach, prompted changes to the agreed Administrative Court directions and the ultimate production of the Jersey supplementary Skeleton Argument - the latter requiring further substantive research and evidence-gathering.

RAVAS made a number of last-minute attempts to gain disclosure of Jersey's evidence to their unnamed number of businesses and individuals across the UK purporting to be members of the organisation. For this reason, the data provided on a confidential basis had to be protected quickly, involving petitions to both HMRC and the Court, as well as the consequent work to redact the relevant material after RAVAS had been finally permitted to make their submissions and view each skeleton document.

Royal Mail made assertions of breaches of confidentiality undertakings between Jersey and HMRC, and thus Royal Mail. These accusations were later dropped but nevertheless required significant attention to prevent any threats of legal proceedings expanding.

(v) advise whether Jersey's legal costs are almost eight times the cost of Guernsey's action and, if so, explain why; and;

Answer:

I cannot advise whether or not Jersey's legal costs are approximately eight times those of Guernsey. I am aware of a suggested headline figure for Guernsey but I do not know if that figure is accurate or final. Further, I cannot say what the cost of internal resources and the effect on the other work of the Guernsey Law Officers' department might have been.

However, I am not surprised to find that Jersey's costs substantially exceeded those of Guernsey. There are good reasons for this.

Although Jersey's and Guernsey's legal actions were joined at the hearing, they were started independently and remained independent, different proceedings, reflecting the markedly different profile and history of the fulfilment industry in each jurisdiction. It was in the interests of Jersey to base its case on a both a strong legal and factual argument whereas Guernsey may have taken the view that Guernsey's case was best advanced by relying predominantly on legal arguments and not a careful analysis in evidence of its' fulfilment industry.

For Jersey's specific case, and to provide the best chance of securing leave to make an application for judicial review, an expedited hearing and a favourable judgement, it was appropriate to use EU and UK tax experts throughout and to prepare a strong evidential case. This in turn needed substantial resources and English procedural expertise to put together the affidavit evidence, provide procedural advice and to coordinate the application.

There were differences between Jersey and Guernsey that affected the best way to present their respective cases. Unlike Jersey, Guernsey has not possessed a legislative framework at any point with respect to Regulation of Undertakings Licences or market share voluntary restraints for fulfilment companies. As a result, they were not, as far as it is understood, in a position to rely upon producing substantial evidence of tight government regulation. It is understood that various companies existing in Guernsey originated in Jersey and exited the island in 2009 when Jersey made positive efforts to

reassure and work with the UK Government (HMCR). For these purposes, and for the successful progression of the case in its earliest stages, Jersey's ability to gather this evidence was essential in responding to HMRC's (and later RAVAS') lines of argument, namely, that our various industries were engaged in abusive practices and tax avoidance.

The subsequent reasoning in HMRC's skeleton argument then attempted to link such alleged avoidance and abuse to evidence of distortion of competition. The strength of Jersey's case on the facts led to this analysis being rejected by Mr Justice Mitting, the judge in the High Court hearing

As a result of Jersey's approach described above, its case and evidence when filed secured without the need for a hearing both the permission to proceed to judicial review and an exceptionally early hearing date, which, in my opinion, would not otherwise have been granted. It should be noted that when Guernsey made its application it was only given leave to proceed to a first interim hearing to decide whether its' case could proceed at all. It was the existence of Jersey's permission which subsequently allowed Guernsey to join the Jersey proceedings and latterly adopt the timetable in the Jersey case. Had Guernsey been proceeding alone then it would have faced a contested application for leave to bring the judicial review application at all and, had that been successful, may not have received the benefit of an expedited hearing. It is impossible to say what the outcome might have been but it is my view that the quality of Jersey's evidence secured both leave to proceed and an expedited hearing.

The essential Jersey evidence required to satisfy the grant of the expedited hearing could only have been gathered in the time available with the skills of a specialist legal team possessing the relevant expertise.

As mentioned at question (iv) above, when RAVAS became involved there was significantly more work involved for Jersey to protect the commercially confidential material provided by businesses in their witness statements. This was not an issue so much for Guernsey given they had not been in a position to rely upon this same level of commercial evidence.

The aforementioned accusations made by Royal Mail (that there had been breaches of confidentiality between ourselves and HMRC) were dropped. However, these required significant attention to prevent legal threats being acted upon.

In short, Jersey had a factually strong case to deploy in addition to the legal arguments. It deployed that case and secured an advantage as a result that met the need for an early hearing. It could only have done so in the time available by employing solicitors and counsel with the necessary expertise and evidence collating skills.

(vi) explain how much (in Pounds sterling) firms engaged in the fulfilment industry in the Island contributed to the cost of Jersey's legal action?

Answer:

In total fulfilment contributions to the cost of the legal action came to £85,000.00.