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Hazel Liang v RBC Trustees (Guernsey) Limited - next steps

MARCH 2019

Last year we wrote about the main judgment in this case in which, for the first time, the Royal Court of Guernsey had to deal with the consequences of Guernsey's law enforcement, the Financial Intelligence Service (**FIS**), giving "no consent" to a proposed transaction under Guernsey's anti-money laundering regime. The Royal Court has recently had to revisit some of the issues raised in the case in order to assist the parties to move forward.

Background

In summary, Ms Liang, the beneficiary and 'economic settlor' of The Lavender (2009) Trust (**Trust**), had brought a private law action against RBC Trustees (Guernsey) Limited (**Trustee**), the trustee of the Trust, after her requests to terminate the Trust and distribute the assets to her had been denied. The Trustee had filed a Suspicious Activity Report with the FIS as a result of open source information relating to Ms Liang's husband, Songxiao Li, from whom she was, by then, separated. The Trustee sought consent from the FIS to terminate the Trust, which was refused.

Ms Liang sought declarations from the Court that the assets introduced into the Trust were her assets and that the Trustee was a bare trustee for her; and, a Court order that the net assets held on trust be paid or distributed to her.

Decision in the main judgment

The Trustee (the Defendant) satisfied the Deputy Bailiff that it had the requisite suspicion that the trust funds were the proceeds of crime so it fell to Ms Liang (the Plaintiff) to satisfy the judge as to the provenance of all assets settled into the Trust. Ms Liang was not able demonstrate provenance for all assets and accordingly he refused to make the orders she sought. Details of the decision made by the Deputy Bailiff can be found in our Insight here.

As the Deputy Bailiff highlighted in his postscript to the main judgment, an unfortunate consequence of Guernsey's current anti-money laundering regime is that the assets in the Trust were then in limbo – Ms Liang had been unable to establish the provenance of all the trust assets and the Trustee would risk prosecution if it were to wind-up the trust and pay away without FIS consent.

Resolution of the outstanding issues

At a further hearing in December 2018, counsel for the Trustee indicated that his client would welcome clarity from the Court as to what could now be done as a result of the main judgment in considering making any

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further distributions to the beneficiaries of the Trust. The Deputy Bailiff asked the Trustee to provide a full set of statements relating to Lavender (2009) Holdings Limited, the Trust's holding company, which were duly provided by the Trustee.

On provision of further information, the Deputy Bailiff proceeded to carry out an exceedingly detailed analysis of the assets that had been settled into the Trust and how they were invested, sold and converted into other assets. One of the issues he had identified in the main judgment was the absence of any evidence from Ms Liang as to how cash she held in a bank account turned into corporate bonds and other securities held in the Trust. In addition, the effect of the distribution of US$2.5 million made to Ms Liang in March 2013 following FIS consent to that distribution (and how much of it consisted of funds originally settled by her) was unclear. The objective of the judge's analysis was therefore to identify how much of the remaining trust fund could be traced to assets settled into the Trust by Ms Liang (and therefore were untainted by the proceeds of crime) and could be distributed.

The Deputy Bailiff said his analysis was not necessarily the same as a forensic accountant would perform but rather was "a layman's review" to avoid the additional expense and possible delay of instructing a professional to do the job.

The relief granted in the supplementary judgment

The Deputy Bailiff concluded by making declarations in respect of the assets that could now be used by the Trustee if it were minded to make any further distributions from the Trust as a result of the main judgment, such assets being those found to be untainted by the proceeds of crime following his thorough analysis of the financial statements. In making his declarations, the judge said he was satisfied that the declarations in the form given were for the benefit of both parties.

Notably the Deputy Bailiff stated in the judgment that he appreciated that declarations cannot bind anyone other than the two parties but he would like to think that any decisions by the Trustee in relation to the Trust "would be respected by those who might otherwise have reason to pursue the Defendant for any alleged wrongdoing". This echoes his postscript comments in the main judgment that the Trustee would be reliant on the Law Officers not taking action should it decide to make further distributions, notwithstanding the relief granted by the Court which may not of itself offer the Trustee full protection under Guernsey's existing anti-money laundering regime.

This case is another example of the pragmatic, commercial, fair and reasoned approach taken by Guernsey's Courts. The Deputy Bailiff balanced the competing interests of Ms Liang, an individual who claimed to be "an innocent victim by association", and the Trustee, a regulated financial services business with anti-money laundering obligations and fiduciary duties to fulfil, and having in mind the requirement to preserve the island's reputation as a well-regulated international finance centre.

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