

Hazel Liang v RBC Trustees (Guernsey) Limited

June 2018

For the first time, the Royal Court of Guernsey has 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 through a private law action being brought by a person claiming an asset against the firm holding it.

Background

Ms Liang wanted to terminate The Lavender (2009) Trust of which she was a beneficiary and claimed to be the 'economic settlor'. RBC (Guernsey) Limited was the Trustee of the Trust.

Ms Liang understood that the Trustee was working towards meeting her request to terminate the Trust, until her Canadian advisers were informed that there was a problem. The FIS agreed that an explanation of the problem be given to Ms Liang to the effect that a Suspicious Activity Report had been filed 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. In the absence of consent an impediment continued to the Trustee taking the necessary steps to terminate the Trust.

The Trustee on occasion asked Ms Liang to explain more fully the source of funds of the Trust assets, questioned why she had given inconsistent versions of the sources, and offered her the option to appoint an independent accounting firm to provide a report on the provenance of those funds. By the time of the Court hearing, the Trustee's suspicion had not been allayed.

Ms Liang sought relief from the Court in the form of:

- a declaration that the assets introduced into the Trust were her assets;
- a declaration that the Trustee is a bare trustee for her; and
- an order that the net assets held on trust be paid or distributed to her.

The Trustee indicated throughout that it was adopting a neutral position. The trial was heard by the Deputy Bailiff, who importantly also heard *Jakob International v HSBC*, the other recent case considering the impact of Guernsey's Proceeds of Crime laws on financial services relationships.

During trial Ms Liang was assisted by an interpreter. All her evidence was given in Mandarin and interpreted. It became apparent during questioning that Ms Liang may have been able to gain access to more documents than she had produced, but did not realise the significance of doing so.

Ms Liang was given the opportunity to file more material on the provenance of the funds, if she thought it would be helpful to supplement the information already before the Court (equivalent to adjourning the hearing with the possibility to re-open the case). After further exchanges, it was decided that the Court would not be reconvened and judgment was given.

Legal Framework

The judge referred to the *Garnet* case in the Court of Appeal. In all but closing off the prospect of judicially reviewing 'no consent' decisions, the Court of Appeal in *Garnet* indicated a preference for a private law action, that being the course followed by Ms Liang.

As explained by the Deputy Bailiff, in *Garnet* the Court of Appeal was able to point out that *it is not the FIS that is denying Garnet access to its property and preventing judicial oversight; it is the impact of the width of the criminal law and its chilling effect upon the person holding the fund, namely [the bank]*.

The Deputy Bailiff indicated that there were two areas where a person seeking access to funds otherwise subject to FIS *no consent* could get relief:

- to question whether the person or institution concerned could establish that it had the requisite *suspicion* that the funds were the proceeds of crime;
- to prove that the *provenance* of the funds were not so tainted.

While the parties agreed that it was for the Trustee to establish that it had the requisite *suspicion* that the funds were proceeds of crime, they were not agreed on where the burden lay in respect of the *provenance* of the funds.

Suspicion

The Deputy Bailiff gave the test of suspicion as being:

"the Defendant bears the burden, on a balance of probabilities, of satisfying [the judge] that there are still relevant facts on which to base the suspicion about the source of the funds in the Trusts, where there is more than a fanciful possibility that those funds are the proceeds of criminal conduct. Further, for a valid suspicion to be held, it must go beyond mere general mistrust. If the Defendant fails to establish that suspicion exists, it follows that the Plaintiff is entitled to succeed. However, if suspicion is established, the Court moves on to consider the provenance of the funds."

Provenance

The Deputy Bailiff affirmed his indication in *Jakob International* that it is for the Plaintiff to discharge the burden of proof in respect of provenance of funds.

He explained the shift in the burden between suspicion and provenance:

"A plaintiff will establish a prime facie case to have the instruction or request made to the institution complied with. A defendant will raise an impediment to being in a position to comply, which will be the combination of the suspicion held and the absence of law enforcement consent. In order to overcome that impediment, the plaintiff will have to prove that the position is that the suspicion is unfounded because the source of the funds is not tainted in the manner believed or suspected."

The Deputy Bailiff agreed with the Trustee's advocate that the financial institution would struggle to prove, to a civil standard, that the funds are the proceeds of criminal conduct, because it would not know all the details of the sources of funds beyond what it had been told and *so would be unable to advance the evidence that goes to the heart of the issue the Court has to determine*; and, it has no means of requiring explanations because *it is not in the same position as law enforcement*. Further, any explanation given about provenance of funds are matters under the control of the person asserting that funds are not the proceeds of criminal conduct.

The Decision

In this case, the judge was satisfied that the defendant had discharged its burden of the suspicion it held.

However, with regard to discharging the burden of provenance, he found insufficient clarity as to the various stages of the Plaintiff's personal wealth generation. In particular, the effect of co-mingling of monies meant that it became harder to identify monies not infected by the suspected criminality of Mr Li. He concluded that:

"not all of the assets introduced into the Trust benefit from not being the proceeds of criminal conduct or, put in another way, that the Plaintiff has persuaded me that only some of the trust assets, rather than all of them, as she wished, derive from a sources that is untainted by criminal conduct."

The Postscript

Somewhat unusually, but of great interest to all Guernsey financial institutions and their advisers, the Deputy Bailiff added a postscript commentary as to the effects of Guernsey's anti-money laundering regime under *The Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law, 1999* and *The Disclosure (Bailiwick of Guernsey) Law, 2007*.

Of significant note, the Deputy Bailiff referred to the Jersey *Minwalla* case, that:

"if ... the Court were held to have no ability to make an order for payment where it has found on the balance of probabilities that the monies are no the proceeds of crime, this would mean that an informal freeze could continue indefinitely without any judicial supervision,"

and commented that RBC (Trustees) Limited would face the same dilemma and be so reliant, to the extent that Ms Liang obtained the relief, on the Law Officers not prosecuting. The Court not being able to grant a statutory defence is a real problem for financial services businesses caught in this situation. The only formal effect of the declaration as to provenance is to more securely fasten financial services businesses between the rock and hard place in which they were lodged. It is entirely unsatisfactory that financial services businesses must rely on the prosecuting authorities' good grace to extricate themselves from it. It is to be hoped that, with the Deputy Bailiff's urging, this situation is corrected by the issuing of formal prosecution policy guidance, if not legislation, in the very near future.

The judge also expressed sympathy for Ms Liang's inability to advance sufficient evidence to discharge the burden on her to establish the provenance of the assets now held in the Trust that means that those funds are in *some sort of limbo*. He observed that for someone in the position of Ms Liang, the *informal freeze* could be very difficult. She is formally separated (not divorced) from Mr Li, and now that her son is an adult, appears to have very little contact with him. The task of getting hold of information on Mr Li's business interests would present hurdles that would not be present if the allegation of criminal conduct had been made against her directly.

Of course, as noted by the Deputy Bailiff, the FIS does have the power to obtain the sort of information required to make an informed decision on the question of provenance. It also has the power to grant legally effective consent to the financial services business to

transact, having made such appropriate enquiries. In the absence of legislative or policy intervention, perhaps the FIS might consider exercising these powers.

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