

UPDATE

AML "No Consent": Suspicion and Provenance Challenges.

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Liang v RBC Trustees (Guernsey) Limited 20/2018 is the first Court consideration of a private law claim made for refusal to transfer assets due to an AML "no consent". While the Court declined to order the transfer of all assets it confirmed useful principles and gave an indication of how an aggrieved party may seek to make a case to have their assets released.

The Facts

The case concerned a claim made by the Plaintiff in connection to The Lavender (2009) Trust (Trust). The Defendant is the trustee of the Trust. The Plaintiff sought to terminate the Trust to have the net assets held on trust returned to her.

Anti-money laundering (AML) considerations prevented the Defendant from acting on the Plaintiff's instructions. The Defendant filed a Suspicious Activity Report (SAR) with the Financial Intelligence Service (FIS). The SAR is related to open source information relating to the Plaintiff's husband, Songxiao Li (Mr Li). Mr Li is wanted in Hong Kong on suspicion of fraudulent conspiracy.

Having raised the SAR, the Defendant sought consent from the FIS to terminate the Trust. That consent was not provided.

Suspicion & Provenance

By reference to previous cases¹ the Court confirmed that a party seeking access to funds subject to law enforcement "no consent" could get relief on two grounds.

1. Suspicion

The Plaintiff may challenge whether the Defendant holds a properly formed suspicion that the funds were the proceeds of crime.

The threshold for establishing suspicion in Guernsey is the *Shah* standard.² The Defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. This is not a high threshold, but a vague unease is not sufficient.

The onus of proof is on the Defendant to show that it is more likely than not that there are still relevant facts on which to base suspicion about the source of the funds in question, where there is more than a fanciful possibility that those funds are the proceeds of criminal conduct.

¹ Specifically Counsel *The Chief Officer of Customs & Excise, Immigration & Nationality Service v Garnet Investments Limited* [2011-12] GLR 250 and *Jakob International Inc. v HSBC Private Bank (CI) Limited* (1 July 2016; [2016] GLR N-6).

² *Shah v HSBC Private Bank (UK) Limited* [2010] 3 All ER 477

2. Provenance

A Plaintiff may seek to prove that the funds in question are not tainted.

The question for the Court in such instances is whether to find that the funds in question are not the proceeds of crime. This puts the finding in the negative, and it follows that the burden of proof lies with the plaintiff seeking access to funds. The standard of proof is again the balance of probabilities, i.e. the more likely than not standard.

The points at which the burden arises and shifts were encapsulated by the Court at paragraph 26 of the *Liang* judgment:

In my judgment, the burden of proof properly shifts between the parties in this manner. A plaintiff will establish a prima 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.

Points for Practice

In this instance, the Defendant satisfied the Court that its suspicion was properly held. The Plaintiff was able to persuade the Court as to the legitimate provenance of some, but not all, of the funds in the Trust. The Court noted that its view may change if the Plaintiff were to return with additional evidence.

The case shows that law enforcement "no consent" does not mean the end of the line for a party seeking access to their assets. Cases turning upon whether suspicion is properly held will be rare. The threshold remains low and instances unable to satisfy it ought to be weeded out once the respondent obtains legal advice. Provenance arguments provide more fertile ground for challenge. The *Liang* case showed that the success of such challenges will turn upon comprehensive and cohesive evidence.

The Court expressed some sympathy for the difficulties which some parties, including Ms *Liang*, will face in compiling that evidence. Those who are "innocent victims by association" may struggle to put a positive case on the provenance of funds. Difficulties may be exacerbated by the passage of time and where relations with those holding probative evidence have soured.

Parties facing a "no consent" would therefore be well served in seeking to compile evidence with as much detail as possible as to provenance. Armed with that they may seek to persuade the institution holding their assets to act on their instructions; or the FIS to grant consent; or ultimately the Court to order that their instructions be complied with.

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