UPDATE

JUNE 2018

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# Suspicious Activity Reports: Guidance for Institutions Holding/Dealing in Assets Suspected to Be Proceeds of Crime

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*Liang v RBC Trustees (Guernsey) Limited* provides guidance to trustees or administrators asked to make distributions or deal in assets they suspect may be the proceeds of crime, or banks or custodians receiving suspicious requests. The latest decision on the anti-money laundering legislative regime in Guernsey, *Liang* illustrates how institutions should address their suspicions, the requirements for filing suspicious activity reports, and the implications of involving the Financial Intelligence Service, as regards fund administration.

## The Facts

In its recent decision in *Liang v RBC Trustees (Guernsey) Limited* (20/2018), the Guernsey Royal Court considered, for the first time in the private law context, the effect of the anti-money laundering (**AML**) legislative regime on a trustee's ability to enter into a proposed transaction. Specifically, the Court examined whether a trustee could enter into a transaction where law enforcement had given "no consent" in response to a suspicious activity report (**SARs**).

The plaintiff in the case was a beneficiary of the trust and claimed to be the true economic settlor. She sought to have the trust terminated and its assets distributed to her. The defendant trustee had questions about the provenance of the funds (i.e., whether the plaintiff was the true economic settlor), however. In compliance with its AML obligations, the trustee filed an SAR with the Financial Intelligence Service (**FIS**), seeking FIS's consent to terminate the trust. FIS refused consent.

Ultimately, the Court found that the FIS "no consent" barred the trustee from taking the proposed course of action.

## Competing Interests

An Update prepared by Mourant's Abel Lyall and Sally French (available here) discusses the relevant principles, including burden shifting, the Court applied in assessing the trustee's suspicions against the beneficiary's evidence of the fund's provenance. The Update is particularly useful for parties seeking access to their assets – i.e., the necessary evidence, the pitfalls the plaintiff in this case experienced, etc.

It is also timely to consider the effect of the judgment from the perspective of those who hold or control funds and might find themselves on the other end of such a dispute. That could include a trustee or administrator which is asked to make a distribution or deal in assets which it suspects to be the proceeds of crime, or a bank or custodian which receives a suspicious request.

The judgment offers some helpful guidance, which we have set out below, on the legal position in relation to dealing with suspicion and SARs, as well as an examination of source of funds issues which may emerge where those suspicions arise. As well as considering that guidance, we have as ever sought to add some pointers as to how best manage that position from a practical perspective.

### What does the judgment mean for institutions in relation to suspicion and SARs?

The judgment confirms that an institution is entitled to refuse to comply with an instruction if it suspects it may require it to deal with the proceeds of crime. If it is subsequently sued for its refusal then the institution will need to show, on the balance of probabilities, that it held a suspicion at the relevant time that it was being called upon to deal with the proceeds of crime. In order to do that, the institution needs to show more than a sense of general mistrust – it must be able to point to specific relevant facts. However, provided it is able to do so, then its conclusions are unlikely to be second-guessed. This is nothing new but the confirmation is still welcome news for institutions in Guernsey.

### Practical Points about Suspicion and SARs

Some useful practical points emerge which need to be carefully considered:

- Ultimately, suspicion is held by individuals, so if an institution is challenged then it will, in the ordinary course, need to identify who the individuals were who held the relevant suspicion. Those individuals will need to identify why they were suspicious, and the institution will in turn need to explain its processes and how it acted on those suspicions.
- Evidencing that suspicion could ultimately necessitate the institution disclosing SARs which it may have filed as well as internal notes and records. That should not deter institutions from making SARs or creating internal records, but it does mean it needs to take care to ensure they are properly and accurately record the basis upon which suspicion is held, what factors were taken into account, and what actions are proposed. As ever, contemporaneous records are preferable and more likely to assist after the event when memories start to fail.
- Sometimes it is possible to foresee difficulties in the future. In such a case it is often a good idea to seek advice at the stage of dealing with a potential suspicion. Not only will that often result in a more robust process, it also offers the opportunity, where appropriate, to take advantage of privilege.
- Whilst an institution which acts honestly and properly is unlikely to find itself in difficulty, it is important to ensure that its actions could withstand a degree of scrutiny and enquiry. The discipline that induces will rarely be wasted.
- It's also helpful to have contractual provisions which make clear an institution is entitled to refuse to comply with any instruction which it considers may give rise to a criminal offence. That may seem trite but it is always helpful to set it out in black and white.
- The costs of dealing with these situations can on occasion be considerable – so those provisions should make clear that in such a case the institution is at liberty to pass on its costs of dealing with the issue to its customer.

### What does the judgment mean for institutions in relation to source of funds?

If the institution can show that it did hold a suspicion, then the burden will shift to the customer to show that the funds are not in fact the proceeds of crime. This will in practice involve a tracing exercise where documents (and in particular contemporaneous documents) are likely to be key. An institution can legitimately adopt a neutral position as to the outcome of that process (as the defendant did in *Liang*). That is very welcome news as in almost every case an institution will have no personal interest in the outcome, other than ensuring that it acts in a way which will not expose it to sanction.

### Practical Points about Source of Funds

Whilst confirmation of the ability to adopt a neutral position will likely be welcome news, it remains important to have regard to the following:

- Though it may be the customer who bears the burden, that does not mean the institution will have no role to play when considering the source of funds. It will likely be required to disclose all of its records, and to explain the view it has taken as to source of funds. Sitting on the fence is not always as easy as it may seem!
- That may involve the relevant individuals being cross-examined as to their understanding of where funds came from and questions of ownership.

- Careful attention needs to be paid when completing take on questionnaires and forms. Sections as to source of wealth and beneficial ownership can often easily generate formulaic or brief answers, which can come back to haunt those who complete them years after the event if they are not properly completed. Initial documentation is often a key factor in determining these issues. Experience also suggests that if these issues are not properly identified and dealt with at the take on stage, it can be extremely difficult, if not impossible, to resolve them subsequently.
- It is also important to be able to show periodic reviews and, where concerns have arisen as to the true source of nature of funds, when those concerns arose and how they were dealt with.
- If records are patchy, or explanations are weak, then that may attract interest from the regulator, and it always important to ensure that the regulator is kept informed about these issues when they arise.

Because of the peculiar and arguably outdated AML framework within which Guernsey currently operates these issues can provide real headaches for institutions which feel they are caught in the crossfire. It is possible to navigate them successfully, but as ever that often involves early detection of the issue, a recognition of the need to properly deal with it, and an experienced adviser to assist. The alternative can otherwise potentially be a lengthy, costly and embarrassing impasse.

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