CAREY OLSEN

Liang v RBC Trustees (Guernsey) Limited

SARs and private law actions – the 'chilling effect' of Guernsey's AML legislation in practice

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Carey Olsen partner Mark Dunster and counsel Simon Florance consider the recent judgment in Liang v RBC Trustees (Guernsey) Limited – the first time a private law action of this kind has been brought in the Guernsey courts by a person denied access to assets as a result of a Suspicious Activity Report (SAR) – and highlight the lessons to be learned from the case.

On 10 May 2018, the Royal Court of Guernsey handed down its judgment in *Liang v RBC Trustees (Guernsey) Limited*. This was the first private law action brought by a person denied access to assets as a result of a SAR made to Guernsey's Financial Intelligence Service (the FIS).

This kind of private law action was foreshadowed by the Guernsey Court of Appeal in an earlier decision[1], as a by-product of the "*chilling effect*" of Guernsey's anti-money laundering legislation; namely The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the POC Law).

Unlike its English counterpart, there is no mechanism under the POC Law whereby the FIS is deemed to consent to a transaction if they take no action within a certain period (7 days in England). The upshot is that funds can be effectively "frozen" if a SAR is lodged and the FIS do not provide consent to the funds being accessed by their owners or a third party.

The FIS can simply refuse to provide its consent, and then do nothing more. In stark contrast to the English regime where the responsibility of taking action (and quickly) falls squarely on the authorities' shoulders, the Guernsey legislation effectively renders the financial institution the *de facto* enforcement agency.

On one view, this creates an unacceptable situation as assets can be left in limbo indefinitely unless their owner brings court proceedings against the financial institution holding them. That institution is also placed in an unenviable position as it bears the brunt of its client's frustration, particularly given the institution cannot (at least initially) explain the reason for refusing the client's otherwise lawful instructions.

Although *Liang* is the first decision on a private law action of its kind in Guernsey, no doubt there are many others in the same position as Ms Liang and more actions will appear in the Court's list. This is particularly so given that the Guernsey Court of Appeal has indicated that such an action is the most appropriate course to take[2].

Background

The factual background of the case is not overly significant. In short:

- Ms Liang is a beneficiary to a discretionary trust administered by RBC Trustees (Guernsey) Limited (**RBC**) known as the Lavender (2009) Trust (the **Trust**).
- In 2011, RBC became aware of information that Ms Liang's now estranged husband, Mr Li, was wanted by the Hong Kong authorities for questioning in relation to alleged property fraud.
- Mr Li was on the Hong Kong's wanted list as he had left the jurisdiction and the investigations were pending.

1 The Chief Officer, Customs & Excise, Immigration & Nationality Service v Garnet Investments Limited (6 July 2011)

2 Ibid.

Given that alleged fraudulent transactions had been for the benefit of a company that had settled money into the Trust, RBC made a SAR to the Trust in 2011.

- In 2013, Ms Liang requested that RBC terminate the Trust and distribute the Trust funds. In light of the SAR, RBC was unable to comply and (due to the tipping-off offences) to inform Ms Liang as to the basis for non-compliance. Any compliance officer will be very familiar with this scenario.
- Eventually, the FIS allowed RBC to disclose the basis of its suspicion to Ms Liang. The FIS also allowed the fact of its "no consent" decision to be made known to the client. RBC entered into a dialogue with Ms Liang with a view to obtaining further and independent evidence to show the provenance of the Trust funds was not the proceeds of crime. Unfortunately, Ms Liang was reluctant to provide the information.

Ms Liang's first set of advocates initially brought an application under the Trust (Guernsey) Law, 2007 seeking (interestingly) an order requiring RBC itself to bring an application before the Court for directions as to how it should act in the circumstances. This application was subsequently abandoned by Ms Liang in favour of the private law action.

Although RBC sought to take a neutral position throughout the proceedings, it was expected to assist the Court by presenting relevant evidence and testing Ms Liang's case. This is the nature of Guernsey's adversarial system of litigation. RBC, through its staff but crucially through its advocate, had to take on the role that a prosecution authority might be expected to undertake.

Essentially, the Deputy Bailiff found that RBC was reasonable in holding its suspicion upon which the SAR was based. However, although sympathetic to the position that Ms Liang found herself in by virtue of the Guernsey legislation, the Deputy Bailiff found that she had only established that a part of the Trust funds were not the proceeds of crime.

The Deputy Bailiff was critical of Ms Liang's reluctance to provide information (which she should have been capable of providing) to show that the funds were clean. This is a useful reminder to any person who finds themselves in Ms Liang's position, or acting for them, to provide whatever information or documents they possibly can to establish the provenance of funds once a suspicion is properly raised. The financial institution does not wish to be in the position any more than its client, and would welcome the opportunity to have the "no consent" lifted by the FIS. Taking a defiant or uncooperative approach can only lead to the position in which Ms Liang found herself; i.e. a costly and time consuming court action.

Apart from confirming that the private law action is the appropriate approach, perhaps the most interesting or useful finding in the judgment was in relation to the burden of proof. The judgment did not make new law on this point, but rather confirmed the current position as set out in the Deputy Bailiff's previous decision in *Jakob International Inc. v HSBC Private Bank (CI) Limited*[3].

3 1 July 2016

In *Jakob*, the Deputy Bailiff concluded that a defendant (ie. the financial institution) first has the burden of establishing its suspicion to justify not following the client's instructions. Once a defendant has demonstrated that suspicion, the burden of proof then shifts to the plaintiff (ie the client) to establish on the balance of probabilities that the provenance of the funds are not the proceeds of crime.

At trial, Ms Liang's advocate sought to revisit the Deputy Bailiff's finding in *Jakob* by arguing that the whole of the burden in the proceedings should fall on a defendant. That is, a defendant should not only have to prove reasonable suspicion, but also prove that the provenance of the funds were the proceeds of crime.

The Deputy Bailiff gave this argument short shrift, and accepted the arguments of RBC's advocate (Mark Dunster of Carey Olsen) that this would place an unnecessary and unreasonable burden on a defendant. A defendant as a financial institution does not have the investigatory powers of a regulatory authority, and does not possess (or have access to) the information that the plaintiff does in relation to the provenance of the funds.

Conclusion

Accordingly, what lessons can be taken away following *Liang*?

- Where a financial institution or an MLRO thinks there is a possibility (which is more than fanciful) that a relevant fact exists giving rise to the suspicion, then that is sufficient for an SAR to be lodged.
- When faced with a financial institution refusing to allow access to funds on the basis of a "no consent" from the FIS, it is on a client to be as forthright and cooperative as they can to show that the provenance of funds are clean. If the funds are clean, nothing is achieved by being secretive as to their source.
- The MLRO's role does not end with the lodging of the SAR. He or she must continually review the matter and whether it is remains reasonable to hold the suspicion.
- A MLRO must be prepared to attend Court and be cross-examined about the basis of his or her suspicion. An organisation must bear this in mind when appointing a MLRO, to ensure that the person selected is capable and robust enough to stand up in Court.
- The organisation must have legal representation who are not only aware of the commercial/regulatory position, but also have sufficient trial experience to be able to meaningfully cross-examine the client and any other witnesses called. This is necessary to both protect the organisation about the making of the SAR, and also to fulfil the duty to the Court to test the client's evidence.

Carey Olsen's Mark Dunster and Simon Florance successfully represented RBC throughout the proceedings, including at trial.

Authored by partner Mark Dunster and counsel Simon Florance, an original version of this article was first published in Compliance Matters.

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