



Liang v RBC Trustees (Guernsey) Limited
Royal Court
10th May 2018

JUDGMENT
20/2018

Application by the plaintiff, a beneficiary of a trust, that the assets held in the trust belong to her, and a further declaration that the Defendant is a bare trustee for the Plaintiff, and an order that the net assets held on trust be paid or distributed to her.

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

HAZEL LIANG (formerly known as Hui Lui)

Plaintiff

-and-

RBC TRUSTEES (GUERNSEY) LIMITED

Defendant

Dates of hearing: 15th and 16th (a.m. only) May 2017

Judgment handed down: 10th May 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff:

Advocate A C Williams

Counsel for the Defendant:

Advocate M G A Dunster

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007

The Royal Court Civil Rules, 2007

The Chief Officer, Customs & Excise, Immigration and Nationality Service v Garnet Investments Limited [2011-12] GLR 250

Jakob International Inc. v HSBC Private Bank (CI) Limited (1 July 2016; [2016] GLR N-6)

Lewin on Trusts (19th ed.)

The Proceeds of Crime Act 2002

The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999

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

R v Da Silva [2007] 1 WLR 303

K Ltd v National Westminster Bank plc [2007] 1 WLR 311

The Disclosure (Bailiwick of Guernsey) Law, 2007

Gichuru v Walbrook Trustees (Jersey) Ltd. 2008 JLR 131

The Royal Bank of Scotland plc v Chandra [2010] EWHC 105 (Ch)

Phipson on Evidence (18th ed.)

Webb v Chief Constable of Merseyside Police [2000] QB 427

Chief Officer of the States of Jersey Police v Minwalla 2007 JLR 409

Introduction

1. The principal relief sought by the Plaintiff in this action, Hazel Liang (as she is now known, having previously been known as Hui Lui), is for a declaration that the assets introduced into The Lavender (2009) Trust (“the Trust”), of which she is a beneficiary and the Defendant, RBC Trustees (Guernsey) Limited, is the trustee, were her assets, a further declaration that the Defendant is a bare trustee for the Plaintiff, and an order that the net assets held on trust be paid or distributed to her. This is the first time, so far as this Court is aware, that the consequences of there being a “no consent” from law enforcement for a proposed transaction under the legislative regime for anti-money laundering (“AML”) have resulted in there being a trial of a private law action between the person claiming an asset and the institution holding it. However, the Advocates for the parties, Advocates Williams and Dunster respectively, are broadly agreed about the principles that fall to be applied. (Advocate Williams was instructed by the Plaintiff in place of Advocate Newman prior to the trial. Advocate Newman had pleaded the Plaintiff’s case.) This is my reserved judgment in this action.

Background

2. The dispute between these parties, if it can properly be described in that fashion, given that the Defendant has indicated throughout that it is adopting as neutral a position as it can, has followed rather an unusual procedural course.
3. The Plaintiff initially made an application dated 10 September 2014 seeking directions pursuant to sections 69 and 71 of the Trusts (Guernsey) Law, 2007 to force the Defendant to apply for directions under that Law as to how it should act in the circumstances in which it found itself. The Plaintiff swore an Affidavit in support of that application on 3 September 2014. In response, a senior manager of the Defendant, Paul Rogers, swore an Affidavit on 31 October 2014 and further documentation was adduced as exhibited to an Affidavit of Advocate Sam Dingle, sworn on 16 December 2014. That application currently stands adjourned sine die, because it has been overtaken by the present action.
4. The Cause in this action was tabled on 4 December 2015. Paragraph 3 asserts that:

“The Plaintiff transferred her own assets to the Trust, and no other assets have been contributed to the Trust. The formal settlor of the Trust was Tongda Lui, but the Plaintiff is the true economic settlor.”

The Plaintiff wanted the Trust terminated. She understood that the Defendant was working towards meeting her request, until her advisers in Canada, Borden Ladner Gervais LLP (“BLG”), were informed by a letter dated 7 November 2013 that there was a problem. As is often the nature of these cases, the amount of information provided was rather limited until agreement from law enforcement to explain in more detail had been given. The absence of consent from law enforcement continues to be an impediment to the Defendant taking the steps to terminate the Trust requested by the Plaintiff.

5. Les Defences were tabled on 15 January 2016. They refer to a Suspicious Activity Report (“SAR”) being filed with the Financial Intelligence Service (“FIS”) on 17 August 2011 as a result of open source information relating to the Plaintiff’s husband, Songxiao Li. Subsequently, the Defendant sought consent to terminate the Trust, which the FIS refused to provide. The Defendant also refers to the occasions on which it has suggested to the Plaintiff

that she explain more fully the source of the funds that constitute the trust assets and queried why she has given inconsistent versions of the sources, as well as offering the option for her to appoint an independent accounting firm to provide a report in respect of the provenance of those funds. The suspicion that the Defendant had when making the SAR has not been allayed by anything that has taken place since. The Defendant is unable to carry out the Plaintiff's wishes because of the width of the obligations imposed upon it by the AML legislation.

6. The Plaintiff's Réplique, dated 4 March 2016, denies that the Plaintiff has given inconsistent accounts about the sources of the trust assets. She suggests that, to the extent that the Defendant remains suspicious about the provenance of the funds, that suspicion is not reasonable or justified.
7. During the course of progressing matters towards a trial, the Defendant raised a request for further information pursuant to rule 60 of the Royal Court Civil Rules, 2007. This arose in the context of certain documents and the evidence on which the Plaintiff was relying. The first relates to a Private Client Fiduciary Services – Confidential Information Form for Private Clients ("the Form"), querying whether the document records incorrect information and if so, how it came to be recorded in it and the Plaintiff signed it. The second relates to a letter dated 19 July 2011 from BLG to the Defendant and how the instructions set out therein came to be given. The third relates to a letter dated 1 February 2012 from Huen & Partners to another entity within the RBC Group, querying the accuracy of some of what was set out and when it first came to the Plaintiff's attention and why she did not clarify any error therein. The final matters related to what had been included in her Affidavit about a couple of corporate entities to which she had referred.
8. In the Plaintiff's responses dated 31 January 2017, she first explains that the Form was filled in by Josephine Chang, working for Rosy Shang, who undertook the task of "onboarding" the Plaintiff for the RBC entity involved and also the task of obtaining information from Mr Li in 2009. This was done in English despite neither the Plaintiff nor Mr Li being conversant in English. She trusted those assisting her to have completed the forms as required. The Plaintiff was unaware that the form was incomplete until after she learnt that there was a problem with giving effect to her wish to terminate the Trust. In respect of the instructions given to BLG, the Plaintiff suggests that it was the Defendant rather than her who gave them to BLG. As she did not see the letter, she was not in a position to contradict what it stated. In relation to the Huen & Partners letter, the Plaintiff notes that they were Mr Li's lawyers, not her lawyers, and she does not recall seeing the letter before. However, she accepts that it accurately states that funds were transferred from Happy City Holdings Limited ("Happy City") to RBC. In terms of her sources of wealth, she explains how the family had diverse interests, one of which was China Environmental Holdings Limited, and that when she moved to Canada with her son, and separated from Mr Li, the assets managed for the family were used to provide her with some child and spousal support and her share of those family assets. She then explains why it is that she does not have documents relating to events more than seven years earlier, including in relation to the shares held in E-House (China) Holdings Limited ("E-House").
9. At the trial last year, the Plaintiff was assisted by an interpreter and all her evidence was given in Mandarin and interpreted. She confirmed the truth of her witness statement dated 10 May 2016, through which she incorporated her Affidavit (and she also wished the Affidavits of Mr Rogers and Advocate Dingle to be taken into account as part of her case). She was cross-examined by Advocate Dunster as a means of testing the case the Plaintiff was advancing, but perhaps not to the extent that is more normal in truly adversarial proceedings. The two witnesses for the Defendant, Mandy Langmead and Maria Le Billon, both confirmed the truth of their witness statements, dated 6 May 2016 and 20 February 2017 respectively. They were

not cross-examined by Advocate Williams on the basis that the Plaintiff has no issue with there having been a suspicion about the source of the funds at the time the SAR was made and he could comment on the suspicion held now without asking any questions of them.

10. One aspect that became apparent during the questioning of the Plaintiff by Advocate Dunster is that she might have been able to gain access to more documentary material than she had produced to date, arising from her saying she had not realised the significance of doing so. Accordingly, when I reserved judgment at the end of the hearing, I indicated that, if the Plaintiff wished to do so, there was an opportunity to file more material relating to the provenance of the funds if she considered it helpful to supplement what was already before the Court. I regarded this as equivalent to adjourning the hearing with the possibility that the Plaintiff would seek to re-open her case. In the event, Advocate Williams provided further documentation under cover of a letter dated 9 June 2017. Advocate Dunster was given the option of commenting on it and did so by letter dated 22 June 2017. As I result, I caused enquiries to be made of Counsel as to whether the Court should re-convene to hear further evidence, eg, the Defendant questioning the Plaintiff about these documents. After further exchanges, the position was reached whereby neither Advocate wanted the Court to re-convene. This was clarified in letters from Advocate Dunster and Advocate Williams on 20 July 2017 and 7 September 2017 respectively. It was only at this point that I was ready to consider my reserved judgment in this case and unfortunately other matters have delayed the time at which I could do so, for which I apologise to the parties.

Legal principles

11. Before turning to the facts, I can usefully set out the legal framework against which those facts are to be assessed. Counsel are agreed that the starting point is *The Chief Officer of Customs & Excise, Immigration & Nationality Service v Garnet Investments Limited* [2011-12] GLR 250 and then the way that I addressed some of these principles more recently in *Jakob International Inc. v HSBC Private Bank (CI) Limited* (1 July 2016; [2016] GLR N-6).
12. In the *Garnet* case, the Court of Appeal left open the possibility of seeking to bring judicial review proceedings against the refusal by law enforcement of consent to a transaction, but indicated a preference for a private law action, which is why this course has now been followed by the Plaintiff (see para. 58):

“The appropriate remedy for a person in the position of Garnet is to bring proceedings against the person or entity holding the funds. This enables the status of the funds to be determined by a court in circumstances where (unlike in public law proceedings) evidential issues may be fully explored and the fund owner and the fund holder represented.”

Although the present proceedings relate to a trustee-beneficiary relationship, Counsel are agreed that the same principles as those set out in a banker-customer relationship can be applied. In that regard, Advocate Williams has referred to para. 46-151 in *Lewin on Trusts* (19th ed.):

“Trustees who have accepted trust assets without knowledge or suspicion that they are the proceeds of crime may later become aware, or correctly suspicious, that assets in their hands are such proceeds. From then on (but not before), the property is criminal property within the meaning of the 2002 Act, and the trustees must make an “authorised disclosure” under section 338. If they do so as soon as they become aware or suspicious that the property is the proceeds of crime, the trustees will not be guilty of any offence under sections 327, 328 or 329.”

13. The references to the Proceeds of Crime Act 2002, which creates a different regime in the United Kingdom from that under earlier legislation, on which the Guernsey statutory provisions have been based, now involving a moratorium period after the disclosure, following which there must either be action to restrain or there is deemed consent to the transaction, can be substituted here with references to the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999. Section 39 of that Law creates the offence of assisting another person to retain the proceeds of criminal conduct. It is this offence that the Defendant runs the risk of committing if it carries out the Plaintiff's wishes without the consent referred to in subsection (3). The whole section provides:

“(1) Subject to subsection (3), if a person enters into or is otherwise concerned in an arrangement whereby –

- (a) the retention or control by or on behalf of another person (called in this Law “A”) of A’s proceeds of criminal conduct is facilitated (whether by concealment, removal from the Bailiwick, transfer to nominees or otherwise), or*
- (b) A’s proceeds of criminal conduct –*
 - (i) are used to secure that funds are placed at A’s disposal,*
 - (ii) are used for A’s benefit to acquire property by way of investment,*

knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person’s proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represents in his hands his proceeds of criminal conduct.

(3) Where a person discloses to a police officer a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a police officer any matter on which such a suspicion or belief is based –

- (a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if –*
 - (i) the disclosure is made before he does the act concerned and the act is done with the consent of the police officer (and in this case the person doing the act shall incur no liability of any kind to any person by reason of such an act), or*
 - (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it, and*
- (b) the disclosure –*

- (i) shall not be treated as a breach of any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or contract or otherwise, and
- (ii) shall not involve the person making it in any liability of any kind to any person by reason of such disclosure.

(4) In proceedings against a person for an offence under this section, it is a defence to prove –

- (a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct,
- (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1)(b), or
- (c) that –
 - (i) he intended to disclose to a police officer such a suspicion, belief or matter as is mentioned in subsection (3), in relation to the arrangement, but
 - (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a)."

14. As a consequence of this provision, in Garnet (at para. 41), 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, BNP.” Advocate Dunster submits that the position of the Defendant is the same in the present case. The underlying rationale had already been referred to in Garnet as follows:

“25 The width of the s.39 offence is clearly intended to have a powerfully dissuasive effect on money laundering activity and to restrict the ability of money launderers and criminals to introduce the proceeds of crime into the financial system of Guernsey or to facilitate the transfer of such proceeds out of Guernsey.

26 In our judgment, in the context of this very wide ranging offence, the consent regime in s. 39(3) of the Guernsey Proceeds of Crime Law serves two purposes. First, the existence of the consent regime provides a strong incentive to persons who are suspicious of funds to report those suspicions before any transaction is effected. Unlike other parts of the United Kingdom (see, for example, ss. 330-332 of the Proceeds of Crime Act 2002 (“POCA”)), Guernsey does not have a general offence of failing to disclose possible money laundering.

27 Secondly, the consent regime gives the police the operational freedom to grant relief from criminal liability in circumstances where it is considered to be in the interests of law enforcement to do so. Thus consent may be granted to avoid a suspected criminal becoming aware of the suspicions that are harboured in relation to him. This objective is also reinforced by the existence of offences in connection

with tipping off (see s.41). Consent may also be granted so as to permit a controlled transfer to take place so that funds can be traced for investigative purposes.”

15. Against that background and a full analysis of the other cases to which I was referred in the *Jakob International* case, I indicated that there were two areas where a person seeking access to funds otherwise subject to a law enforcement “no consent” could get relief, the first being to question whether the person or institution concerned could establish that it had the requisite suspicion that the funds were the proceeds of crime, and the second being to prove that the provenance of the funds was not so tainted. Counsel are agreed that these are the two issues in this case. There is no dispute between them that the Defendant bears the burden, to the civil standard, to show that there is suspicion. They are not agreed, however, on where the burden lies in respect of the provenance of the funds.

Suspicion

16. At para. 39 of the *Jakob International* case, I indicated that “*It is likely, on the basis that the approach in the Shah case is adopted in Guernsey, that the Defendant will have the burden of establishing its suspicion as a primary fact in order to justify not following the customer’s instructions.*” In my judgment, the present case demonstrates why that is the correct approach. In *Shah v HSBC Private Bank (UK) Limited* [2010] 3 All ER 477, Longmore LJ noted (at para. 24) that “*It must be remembered that it is for the bank to prove that it suspected Mr Shah to be involved in money laundering.*” This makes sense because it is the person or institution holding the funds to which the other person wants access who has raised the suspicion with law enforcement resulting in the chilling effect of the legislation creating the impediment to giving effect to that person’s wishes. The only person capable of explaining how the suspicion arose and, more importantly, why it still subsists, is the person asserting that there is suspicion.
17. Because the Plaintiff’s primary case is that the Defendant fails to discharge this burden relating to suspicion, Advocate Williams has referred to a number of cases that deal with this aspect. The first is a passage from *R v Da Silva* [2007] 1 WLR 303, which I cited in the *Jakob International* case (at para. 34). At para. 16, Longmore LJ stated:

“What then does the word “suspecting” mean in its particular context in the 1988 Act? It seems to us that the essential element in the word “suspect” and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be “clear” or “firmly grounded and targeted on specific facts”, or based upon “reasonable grounds”. To require the prosecution to satisfy such criteria as to the strength of the suspicion would, in our view, be putting a gloss on the section. We consider therefore that, for the purpose of a conviction under section 93A(1)(a) of the 1988 Act, the prosecution must prove that the defendant’s acts of facilitating another person’s retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. We consider that, if a judge feels it appropriate to assist the jury with the word “suspecting”, a direction along these lines will be adequate and accurate.”

The essential test was repeated in another judgment of Longmore LJ eight days later in the context of a civil case (*K Ltd v National Westminster Bank plc* [2007] 1 WLR 311, at para. 16: “*he or she must think that there is a possibility, which is more than fanciful, that the relevant facts exist*”).

18. Advocate Williams further refers to para. 17 in the *Da Silva* judgment:

“The only possible qualification to this conclusion, is whether, in an appropriate case, a jury should also be directed that the suspicion must be of a settled nature; a case might, for example, arise in which a defendant did entertain a suspicion in the above sense but, on further thought, honestly dismissed it from his or her mind as being unworthy or as contrary to such evidence as existed or as being outweighed by other considerations. In such a case a careful direction to the jury might be required. But, in our view, before such a direction was necessary there would have to be some reason to suppose that the defendant went through some thought process as set out above.”

He suggests that this shows that the time at which the suspicion must be held is now and not only historically. Advocate Dunster accepts that proposition and I agree, but I do not think that the content of this para. 17 is what leads to that conclusion. In my view, what Longmore LJ was addressing was a case where a person is facing trial for a money laundering offence and seeks to run the defence that closer analysis of the position meant that any suspicion that initially existed had been allayed. In other words, there is an assertion from the person holding the funds that such a thought process was undertaken and led to there being no suspicion, and probably no SAR. The approach in a criminal trial, directing the arbiters of fact, is not necessarily going to be the same as in a civil case. What is more relevant is the reference in para. 16 of the *K Ltd* case that “*the suspicion so formed should be of a settled nature*”, from which I take this to be a reference to the situation where there is some justification to change the stance on suspicion, perhaps following further information coming to light, all as part of the institution’s ongoing obligation to keep matters under review. Had there been no suspicion in the present case, the Defendant would already have complied with the Plaintiff’s request to terminate the Trust. The disclosure made to law enforcement by the Defendant is not being questioned by the Plaintiff; she acknowledges that the open source material giving rise to it justified making the disclosure because the Defendant had reasonable grounds for knowing or, probably more accurately, believing or suspecting that the trust assets originated from Mr Li’s assets and so were the proceeds of criminal conduct, from which the obligations under the Disclosure (Bailiwick of Guernsey) Law, 2007 arose. The issue in the present case is more about whether the further information that the Defendant now has, and possibly the passage of time without any action being taken in respect of the trust assets, means that it can no longer hold the suspicion it previously had. This would be most relevant if it had acted to terminate the Trust without consent and then faced prosecution.

19. The problems surrounding how evidence of suspicion can be tested are also alluded to in the *K Limited* case (at para. 20):

“... any cross-examination of a bank employee would, in fact, be almost as pointless as cross-examination of a bank’s solicitor. Once the employee confirmed that he had a suspicion, any judge would be highly likely to find that he did indeed have that suspicion. Any cross-examination would be bound to decline into an argument whether what the employee thought could amount in law to a suspicion, which is not a proper matter for cross-examination at all.”

In response to a submission that this made it all too easy for banks to assert the existence of a suspicion, Longmore LJ continued (at para. 21):

“The answer to this submission is twofold. (1) The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspects or he does not. If he does suspect, he must (either himself or through the bank’s nominated

officer) inform the authorities. (2) The provisions of the statute permitting only the bank's professional legal adviser to make a disclosure on its behalf, and then only for the purpose of court proceedings, cannot be sidestepped."

The pointlessness of cross-examining on suspicion appears to have influenced Advocate Williams' approach to the case, and I quite understand his decision not to cross-examine the Defendant's two witnesses. He also refers to the summary given at para. 46-024 of *Lewin on Trusts*, which includes that "*We do not consider that mere general mistrust of the source of the property would amount to the kind of suspicion required. Nor will reasonable grounds for suspicion suffice in the absence of actual suspicion.*"

20. In relation to the issue of suspicion, I have, therefore, reminded myself that the Defendant bears the burden, on the balance of probabilities, of satisfying me that there are still relevant facts on which to base the suspicion about the source of the funds in the Trust, 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

21. Turning to that second element, Advocate Dunster relies on how I dealt with this in the *Jakob International* case (at para. 40):

"... once the Defendant demonstrates that there was suspicion, the Plaintiff is still able to succeed by establishing to the required standard that the provenance of the funds in the account is such that they are not the proceeds of crime."

However, Advocate Williams submits that the burden should rest with the Defendant rather than the Plaintiff, relying on the way in which the Court of Appeal questioned what had been said on this issue in the Royal Court of Jersey in *Gichuru v Walbrook Trustees (Jersey) Limited* 2008 JLR 131. That doubt is set out in para. 60 of the *Garnet* case:

*"Although the matter was not fully argued before us, we have some doubts as to whether the statement of the Deputy Bailiff of Jersey in *Gichuru v Walbrook Trustees (Jersey) Ltd.* 2008 JLR 131, at para. 34) to the effect that the burden of proof in such an action will necessarily lie upon the customer is necessarily correct. The location of the burden of proof seems to us to depend upon the precise terms of the contract between the bank and the customer. If the bank's defence is that an instruction would cause it to commit a criminal offence (as opposed to merely being exposed to the risk of committing a criminal offence), the burden would appear to be on the bank to prove that."*

22. The passage to which the Court of Appeal referred in *Gichuru* (at para. 34) reads:

"During the hearing, the Attorney General submitted that the burden lay upon the customer to prove on the balance of probabilities that the funds in question were not the proceeds of criminal conduct, whereas Mr. Young submitted that the burden lay upon the financial institution to prove to the same standard that the funds were the proceeds of criminal conduct. During the hearing, I asked for supplemental written submissions to be filed on this topic. Having considered the oral and written

submissions, I have concluded that the burden of proof lies upon the customer. My reasons are as follows:

(i) *In Izodia PLC v. Royal Bank of Scotland Intl. Ltd. 2006 JLR 346, at para. 89, the court summarized the position as follows:*

“Phipson on Evidence, 16th ed., para. 6-06, at 127 (2005) describes the general principle as being that, so far as the persuasive burden (also known as the legal burden) is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. It also goes on to point out that, in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form. Thus, an allegation of a failure to take reasonable care is in fact a positive allegation of negligence. It seems to us that, in the case where a customer sues a bank in debt, the starting point is that the customer alleges a debt. Suppose that he originally put in £100, he must bear the burden of showing that a debt was originally created in that sum. However, once the customer has done that, if the bank then asserts that, although there was a debt of £100, it no longer owes that sum because it has paid away £50, it is the bank that is asserting the affirmative.”

(ii) *Transposing that principle to a case of this nature, the customer must first prove that, for example, he has money in a bank account and has demanded payment. Having proved that, the burden then switches to the bank to show why it should not pay. In a case of this nature, the bank does that by proving on the balance of probabilities that it has the requisite suspicion, which then entitles it to refuse to pay unless the police consent or the court so orders.*

(iii) *Once the bank has proved the necessary suspicion, the customer can only overcome that by asserting an affirmative, namely that, despite the bank’s suspicion, the funds are in fact not the proceeds of criminal conduct. In accordance with normal principle, the burden must revert to the customer to prove that on the balance of probabilities. I accept that, in a case which is not concerned with money laundering, a customer does not normally have to prove that his funds are not the proceeds of criminal conduct before he can demand them. However, where a bank has made an SAR, the position changes and, in order to overcome the fact that the bank has developed the requisite suspicion, the customer must show that the funds are not the proceeds of criminal conduct and this he must do on the balance of probabilities.*

(iv) *This approach would seem to be consistent with that adopted in Amalgamated Metal, where, at an earlier hearing, when declining to grant an interim declaration that the funds were not the proceeds of criminal conduct, Ouseley, J. said (quoted at [2003] 1 W.L.R. 2711, at para. 11), that-*

“it is not enough in order to persuade a court to exercise its discretionary jurisdiction for [the financial institution] to say that it has no evidence to the effect that [the customer] has been engaged in criminal conduct and to contend that the suspicions of the police have not yet ripened into firm evidence. The absence of criminality must be proved by positive evidence, rather than by the absence of evidence from [the customer] dealing with obvious suspicions being used alone to justify an assertion that criminality has been disproved.”

Tomlinson, J. went on (*ibid.*) to agree with that approach.

(v) *The fact that the effect of an order directing payment is to bar a prosecution against the financial institution and (if the funds subsequently turn out in fact to be proceeds of criminal conduct) possibly to require the financial institution to commit a criminal offence by making the payment, points strongly in favour of the burden of proof lying upon the customer so that, before making an order with such serious consequences, the court will at least have been satisfied on the balance of probabilities that the funds are not the proceeds of criminal conduct.”*

23. Advocate Williams submits that it is logical that the Defendant should have the entire burden on the basis that the Plaintiff is prima facie entitled to the funds, but the Defendant is raising an impediment to complying with the instruction (or, perhaps here, more appropriately a request to terminate the Trust). As such, the impediment means that the Defendant should have to prove that the funds are the proceeds of criminal conduct rather than the Plaintiff prove that they are not. He further suggests that this may be an arid consideration because the legal burden does not shift but the evidential burden does, referring to the approach taken in undue influence cases where it is the totality of the evidence that matters (and in doing so he draws on para. 121 of *The Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch)). He also highlights a short point in para. 6-55 of *Phillips on Evidence* (18th ed.) that “*if a serious allegation is made then more cogent evidence may be required to overcome the unlikelihood of what is alleged*”.
24. Advocate Williams further refers to *Webb v Chief Constable of Merseyside Police* [2000] QB 427 in support of the proposition that, because the Plaintiff’s title to the property is unimpeached, she should get her money back. That case was dealing with a different context, though, because money had lawfully been seized by the police on suspicion that it constituted the proceeds of drug trafficking, but there was subsequently no conviction or no drug trafficking enquiry. The appeal overturned the first instance decision that the return of the money could not be ordered because the property had been obtained by illegality. In that case, the money was in the hands of a public authority when there was no longer any lawful reason for the public authority to retain it. To have refused to order its return would amount to the expropriation of property for which there was no statutory authority. I take the view that this case is of no real assistance to the Plaintiff because the circumstances with which it deals are so far removed from the situation of a trustee. The first point to note is that the Defendant is the legal owner of the trust assets. When they were settled into the Trust, they ceased to form part of the Plaintiff’s estate. There may be a mechanism by which those assets can be returned to her under the terms of the trust arrangements, ie, as an appointment to her, but this is quite a different situation from where property, including money, has been seized as part of a criminal investigation.
25. Advocate Dunster suggests that to adopt this submission on behalf of the Plaintiff would result in financial institutions being in an impossible position. The institution would comply with its obligation to make disclosure of its suspicion by filing a SAR. If there is then no consent to the transaction requested of it, the institution would not comply and wait for the party seeking action from it to bring proceedings. Whilst it is perfectly sensible for the institution concerned then to have to establish, to the civil standard, that it has the suspicion that means it would be exposed to the risk of committing an offence unless there is consent (or if the Court eventually finds in favour of the plaintiff), because the suspicion is something affirmative it is advancing, ie, the impediment to which Advocate Williams refers, were it then to have the burden of proving, again to the civil standard, that the funds are the proceeds of criminal conduct, it will struggle because it does not know all the details of the sources of those funds beyond what it has been told and so would be unable to advance the evidence that goes to the heart of the issue that the Court has to determine. Further, there is no means by

which the institution is able to require explanations because it is not in the same position as law enforcement. Accordingly, the reality of the situation is that the only person who can explain where the funds have originated from is the person who placed those funds in the hands of the institution. It would be inappropriate to require the institution to do more than it can in discharging its burden in relation to its suspicion.

26. In my judgment, Advocate Dunster is right. I find the reasoning given in *Gichuru* (*supra*) persuasive and equally applicable to the present case. It also follows from the comment of the Royal Court of Jersey in *Chief Officer of the States of Jersey Police v Minwalla* 2007 JLR 409 (at para. 24), that a court is considering whether to find on the balance of probabilities that the funds are not the proceeds of crime. Similarly, it follows from the position described in *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] 1 WLR 2711, to which I referred in the *Jakob International* case. In my view, this formulation puts the finding in the negative and so indicates where the burden of proof lies. The statutory scheme is that an institution can protect itself by seeking law enforcement consent where it has suspicion. If it had no suspicion, it would act without needing to seek such consent. Because it has the evidence giving rise to that suspicion under its control, it is apparent why it must discharge the burden on that question. If it also had to prove to the civil standard that the funds are tainted by criminal conduct, this would escalate what it has to be aware about beyond establishing suspicion. All of a sudden, it would be required to prove its level of knowledge. In my view, this would be to add an unwarranted gloss on the statutory language. There is, I think, a difference between how the funds reached the institution, ie, the last step, and any explanation given about provenance at that time and thereafter, and the wider issue of how far back one needs to go to be satisfied that the funds are not the proceeds of criminal conduct. The latter are matters under the control of the person asserting the affirmative that the funds are not the proceeds of criminal conduct. 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. Accordingly, I see no reason to depart from the indication I gave in *Jakob International* (*supra*) on where the burden lies. I am satisfied that the proper approach is to require the Plaintiff to discharge the burden of proof in respect of provenance.

Facts

27. The Plaintiff studied in Beijing and then worked there in various jobs. She married on 16 November 1991. Her son was born in 1995. She separated from her husband in August 2010. Her own connection to Hong Kong was limited to short trips for holidays and business. She knew little about her husband's businesses in Hong Kong because her focus was on her own business in the People's Republic of China.
28. The Plaintiff's husband, Songxiao Li, had been a public servant until he went into business in the late 1990s. The main business of Mr Li was Neo-China Group (Holdings) Limited ("Neo-China"). Some of the background to his involvement in that company is set out in a circular dated 14 May 2010 concerning the possible subscription of shares by Novel Good Limited in Neo-China, which explains that Mr Li was a former executive director and chairman, but that he had resigned with effect from 22 August 2009. Shares in Neo-China had been suspended from trading on the Stock Exchange in Hong Kong on 22 January 2008, at the request of Neo-China, following the execution of a search warrant at its offices by the Hong Kong Independent Commission Against Corruption ("ICAC"). Mr Li had gained control of Neo-China in 2003. In the five years to 31 December 2009, the consolidated attributable net

tangible assets of Neo-China grew from HK\$149 million to HK\$6,073 million. On 19 January 2010, an agreement was made with Turbo Wise Limited, a company wholly owned by Mr Li, to sell a parcel of land, subject to certain conditions being met, for HK\$2.5 billion. As at 28 February 2010, Mr Li had given guarantees to Neo-China of approximately HK\$384 million. The list of substantial shareholders' interests has Mr Li listed as the beneficial owner of 0.12% of the shares and Invest Gain Limited, in respect of which Mr Li is regarded as the beneficial owner, as holding 54.05% of the shares. In the circular, the Plaintiff is also listed as being deemed to be interested in all of those shares, ie, 54.17% of Neo-China, because they are held, or controlled, by her spouse. The effect of the proposed transaction would be that the shares to be retained by Mr Li, both directly and through Invest Gain Limited, would represent 21.08% of Neo-China's total shares.

29. Both the Plaintiff and Mr Li had purchased apartments in Brisbane, Australia on 10 February 2006. Four of those apartments were in Mr Li's name and six of them in the Plaintiff's name. The Plaintiff referred to the possibility of her emigrating to Australia, which was under consideration at that time. In the event, that move was not made and she and her son moved to Canada instead. The property records, which were produced after the hearing, show that all of these apartments were subsequently sold between June and December 2009. It appears that all of the apartments had mortgages with Citibank Pty Limited secured against them. The numbers on the documents in respect of Mr Li (709357284) are all the same and the numbers for the Plaintiff (709357257) are also all the same and I infer that these are references to loan account numbers, although I am unable to ascertain whether they were obligations of each of them individually or perhaps joint obligations. Each mortgage appears to have been released on sale to the new purchaser of each apartment. Further, the Plaintiff has produced a few bank statements from her account with Commonwealth Bank of Australia from late 2009 showing some deposits that correspond with some of the numbers of the apartments, which support her explanation that the apartments produced rental income. These statements also show some significant deposits, which could well be related to the sales of the apartments taking place at the respective times. The Plaintiff further stated that she recalls that the apartments were sold for similar amounts to the purchase prices, ie, she made little, if any, profit. There are no documents showing where the sale proceeds went, although one statement shows that there was a withdrawal on 3 September 2009 of AUS\$2 million.
30. The Plaintiff has also referred to owning a house in Australia, and asserts that the sale proceeds were used by her when funding the Trust. However, no documentation in relation to such property ownership has been produced by her to support that contention and in her evidence she refers to this house in Cairns having been purchased in about 2000 and it was sold in 2002 or 2003, from which I infer that this was a much earlier transaction and so too far removed from the gifts she made to the Trust in 2010 to be relevant. In other words, even if these were her own funds, they were put to some other use prior to being gifted into the Trust.
31. The Plaintiff has also produced some documents relating to a transfer of CAD15 million to her RBC account in Vancouver on 13 July 2009. The document showing the receipt is not entirely clear because it sets out only deposits from February 2009 to April 2010. The corresponding balances in the final column appear to show that there must have been other transactions on the account. In particular, the amount deposited on 13 July 2009, described as "TT RAY-WELL LTD", must have resulted in a withdrawal of a very similar amount within two days. The Plaintiff has also produced some extracts from documents relating to a portfolio of Ray-Well Limited with Merrill Lynch International Bank Limited in Singapore. They comprise the cover sheet from the June 2009 statement and page 52 of 120 of the July 2009 statement for the same account on which the wire of CAD15 million to the Plaintiff at RBC is shown for 13 July 2009. (The letter from Advocate Williams dated 9 June 2017 explaining these documents refers to the Plaintiff having made a mistake in her evidence when she stated that the transfer had come from her sister-in-law to her through Happy City,

rather than directly from a company that the Plaintiff regarded as synonymous with her sister-in-law.)

32. The idea of the Plaintiff emigrating to Canada began in around 2006, when the forms required were obtained, and reached fruition in April 2009. At around this time, Mr Li was sent engagement letters by BLG. The first was dated 8 April 2009. It states that it was delivered by hand, which supports the Plaintiff's explanation that Mr Li came to Canada at that time with her and their son. It refers to giving advice "*on the establishment of a non-resident trust/foundation structure*". The second is dated 4 May 2009 and indicates that it was sent by e-mail. It refers to the firm having been retained to advise "*on the design and implementation of an internal estate and asset preservation plan in the form of a "simple" immigration trust structure ... to take advantage of the tax holiday granted by the Canadian government for first-time immigrants to Canada.*" On both occasions, the letter is signed by a partner of the firm, Peter Wong.
33. On 10 June 2009, Rosy Shang, an investment advisor with RBC Dominion Securities Inc in Vancouver, relayed a message she had received from Mr Li's assistant to *inter alia* Mr Wong:

"Mr Li has called me to let you know that he is ready to go for the "small" trust now. It will not be more than \$100m to start with. Please make sure that you bring all the documents for signing [sic] when you come to Beijing in a week's time. Please also be ready to answer all questions in relation to the fees of which Mr. Li would expect you to negotiate down to a minimum. For a "simple" and risk free structure, I do not think he is ready to pay too much on the fees, both legal and financial."

Ms Shang explained that she would be leaving for Beijing on 18 June 2009 and returning on 5 July 2009. She requested assistance with preparing the documents required, and she also made reference to discussing a complex structure, but that the size of this had halved to \$500 million. (I am inclined to infer that this is not a reference to Hong Kong dollars.) Mr Wong's response the same day was to attach copies of the retainer letters previously provided to Ms Shang and Mr Li, adding the comment that it was not possible to proceed further without being retained by Mr Li. It appears that the letter dated 8 April 2009 refers to the so-called "complex" structure and the letter dated 4 May 2009 refers to the "simple immigrant trust structure". The senior manager of RBC Wealth Management in Vancouver, Gregory Ward, forwarded this exchange to Colin Le Bachelet and John Hunter in St Peter Port.

34. On 20 July 2009, the Plaintiff signed a document that had been completed by Josephine Chang, who worked for Ms Shang, to which I have already referred as "the Form". The words written in respect of the entry stating "*Please provide us with information as to how and when your net worth was created or accumulated*" are "**PUBLICALLY LISTED REAL ESTATE DEVELOPMENT COMPANY, NEO-CHINA GROUP REAL ESTATE**". Ms Shang's details are inserted as the answer to whether there was a relationship with another arm of RBC, and Mr Wong's details are given in respect of taxation advice and legal advice.
35. A similar proforma Form, also said to have been completed by Ms Chang, signed by Mr Li, is dated 30 July 2009, but that appears to be an error because late on 20 July 2009 Ms Shang sent an e-mail to Mr Ward and Mr Wong:

"Great news! Mr Li's family has signed all documents today for the "simple trust"! We are going to fax you tomorrow. But only onething [sic] has been changed, it is now all under Mr Li's wife name Hui Liu.

For the complex one, Peter, do you have time on Thursday? Mr. Li and Ms Liu wants to see you. I fell [sic] we may can have a successful meeting, then they can sign this

one too. They want this one also under Ms. Hui Liu's name. Any problems for that? Those will be all in cash for \$500 million."

The Plaintiff also explained that she was with Mr Li throughout their visit to Ms Shang during his stay in Vancouver and that she drove him around because he does not drive. The form signed by Mr Li has a slightly different wording to the question about the creation or accumulation of net worth: "*NEO-CHINA GROUP (HOLDINGS) LIMITED*", with its stock code, and on the line below "*REAL ESTATE DEVELOPMENT ACTIVITIES IN PRC (CHINA)*".

36. There is a second form, also dated 30 July 2009, seemingly written in the same hand, signed by Mr Li which is headed as Private Client Fiduciary Services – Declaration of Source of Funds for Private Clients. It refers to Lavender (2009) Trust as the trust to which funds are to be transferred, with the value being US\$100 million, and the date of the proposed transfer being 30 May 2010. The entry against the request "*Please describe how and when the funds you are transferring to us were originally acquired*" is "*FROM MR. LI'S HONG KONG BANK ACCOUNT TO HIS WIFE, HUI LIU'S BANK ACCOUNT IN HONG KONG TO TRUST COMPANY ACCOUNT*".
37. The Lavender (2009) Trust was settled on 29 April 2010. The settlor was the Plaintiff's uncle, Tongda Liu. The initial funds settled were US\$100. The initial protector, who remains in office, is Advocate Russell Clark. The beneficiaries are the Plaintiff and her son. There is an unsigned document in the form of a draft letter of wishes indicating that there is a preference for any distribution to be made to the Plaintiff.
38. By way of a letter dated 19 July 2011 addressed to the Defendant, Mr Wong gave an opinion on the legal consequences of establishing the Trust. In doing so, he summarised his understanding of the facts, although the first one refers to Mr Li, as well as the Plaintiff and her son, having landed as a permanent resident of Canada on 5 April 2009, which does not appear to be accurate, especially when read with para. 1.3 ("*Throughout 2009, Mr. Li was physically present in Canada for less than 21 days and in 2010, Mr. Li was physically present in Canada for a very short period of time as well. In 2011 and to date, Mr. Li has not been physically present in Canada.*"). I do not find that Mr Li became a permanent resident of Canada in 2009 or subsequently, although it appears that nothing turns on that particular issue. However, there is also reference to Mr Li and the Plaintiff purchasing real property in which the Plaintiff and her son lived before moving to another purchased home. The summary of the facts continues:

*"1.8 On May 12, 2010, Lavender 2009 Holdings International Limited ("**Lavender Holdings**") was incorporated under the laws of the British Virgin Islands on May 12, 2010 with:*

- (a) RBC Corporate Services (CI) Limited and RBC Directorship Services (CI) Limited appointed as the sole directors of Lavender Holdings; and*
- (b) Damor Investments Limited ("**Damor**") subscribing for and being issued one Class A common share with a par value of USD1.00 each as nominee of the Trust pursuant to a Declaration of Bare Trust.*

1.9 On May 18, 2010, Damor transferred its Class A common share of Lavender Holdings to the Trust for USD1.00.

- 1.10 *On May 18, 2010, the Trust subscribed for 99 Class A common shares of Lavender Holdings with a par value of USD1.00 each for USD99.*
- 1.11 *On July 2, 2010, Ms. Liu transferred certain corporate bonds to Lavender Holdings in consideration of 95,184 Class B preferred shares having a par value of USD100 each of Lavender Holdings.*
- 1.12 *On July 8, 2010, Ms. Liu subscribed for 957 Class B preferred shares of Lavender Holdings for cash consideration.*
- 1.13 *On July 8, 2010, Ms. Liu made a gift of 96,141 Class B preferred shares of Lavender Holdings to the trust for no consideration.*
- 1.14 *On October 29, 2010, Ms. Liu subscribed for and was issued 110,899 Class B preferred shares of Lavender Holdings.*
- 1.15 *On October 29, 2010, Ms. Liu transferred certain securities to Lavender Holdings in consideration of 160,787 Class B preferred shares of Lavender Holdings.*
- 1.16 *On October 29, 2010, Ms. Liu made a gift of 271,686 Class B preferred shares of Lavender Holdings to the Trust for no consideration.”*

One of the assumptions made by Mr Wong is set out in para. 2.3 of this letter:

“Any property transferred by Ms. Liu to Lavender Holdings was, immediately before such transfer, the property of which Ms. Liu was the beneficial owner and such transfer was not made at the direction of, or with the acquiescence of, any other person. In particular, we confirm our instructions to assume that any property transferred by Ms. Liu to Lavender Holdings was acquired by her by way of gift from Mr. Li (within a relatively short period of time before Ms Liu made such transfer of property to Lavender Holdings) and that she was free to deal with such property as she saw fit. We confirm our instructions not to verify or examine the gift of property from Mr. Li to Ms. Liu and nothing in this letter should be construed in any manner whatever as our support or verification that Mr. Li did in fact make a gift of property to Ms. Liu or that such property does not constitute income or a benefit in the hands of Ms. Liu for the purposes of the Act. Finally, nothing in this letter should be construed as a determination or finding that Ms. Liu realized a capital gain or loss for the purposes of the Act when she transferred property to Lavender Holdings.” (bold in original)

- 39. Some of the facts in this letter repeat what had been written about the contributions to the Trust by Mr Wong in an e-mail to Paul Rogers, and copied to Mrs Langmead, on 5 February 2011. That e-mail further explained that *“we have no firm evidence or instructions from Mr. or Mrs. Liu that Mrs. Liu is acting as bare trustee or agent of Mr. Liu in carrying out the above transactions. In the absence of such firm evidence or written instructions, we must inevitably assume for purposes of preparing the above paperwork that Mrs. Liu is the legal and beneficial owner of the transferred assets immediately before such transfers”*. Mr Rogers enquired of Mr Wong on 20 July 2011 whether a copy of the tax opinion should be sent to the Plaintiff, but Mr Wong suggested by return that the letter should be kept in the Defendant's exclusive possession.

40. In the meantime, on 16 June 2011, Mr Li appeared on the ICAC's website as a wanted person. The case brief states:

“LI Songxiao, former Chairman of Neo-China Land Group (Holdings) Limited (NCG), CHE Hanshu and ZHANG Yaohui, both former Executive Directors of NCG, are wanted by the ICAC on suspicion of conspiring to make various fraudulent property transactions between NCG and some BVI companies, for the purposes of artificially inflating the profit and assets of NCG. This caused false representations to be made in the public announcements, circulars and annual reports of NCG between 2003 and 2007.”

On behalf of Mr Li, his barrister, Dr Gerard McCoy QC SC, wrote to the Commissioner of the ICAC on 5 July 2011 denying that Mr Li had been involved in any criminality.

41. As a result of Mr Li being flagged on Worldcheck as a match, the Defendant made a SAR to the Financial Intelligence Unit (“the FIU”, which is for the purposes of this judgment the same as the FIS to which I have already referred) on 17 August 2011. The Defendant had indicated that it had carried out its own researches on the match and repeated what was stated on the ICAC's website, before continuing:

“We are therefore concerned that the Lavender (2009) Trust, administered by RBC Trustees (Guernsey) Limited, was settled with assets which may have derived from fraudulent means, as detailed within the attached open source material.

Although RBC Trustees (Guernsey) Limited does not have the individual listed as a direct client, he is however the individual behind the structure's source of funds; the cash settled into the Trust emanated from the sale of his shares in NCG, representing 54% of the Company. The Beneficiary on record is the individual's wife and she has gifted 367,827 Class B Shares of USD100 per share, in Lavender (2009) Holdings International Limited to the Trust. It was however noted that Songxiao Li may contribute funds at a later date and then become an additional Settlor to the Trust. ...

At the time of entering into this relationship, the client was assessed and escalated to our Senior Management Committee, “Global Trust Advisory Board” and at this time, April 2010, the suspension of shares in NCG had been cancelled and comfort was established in respect of the investigations of the Independent Commission Against Corruption (ICAC).”

42. The Defendant sought further information about ICAC's investigation from Conrad Wan, a colleague of Dr McCoy at his Chambers in Hong Kong. The response on 5 December 2011 was given after Mr Li had instructed it could be sent. After setting out the background leading up to the proposed transaction to which reference has already been made by which Mr Li would sell some of his shares in Neo-China, Mr Wan explained:

“However, due to the ICAC investigation, this deal has to be approved by the Hong Kong Stock Exchange (HKSE). At that time, HKSE requested Mr. Li to appoint an independent account firm to conduct an extensive forensic accounting in relation to all property transactions made between Neo-China and other companies. As a result, Mr. Li appointed PricewaterhouseCoopers to prepare the said report to HKSE. After satisfying the findings in the said report, HKSE formally approved the said transaction on 24 June 2010. ...

On 16 March 2011, after 3 years investigation, the ICAC completed its investigation and submitted a report to Operation Review Committee (ORC), an independent committee monitoring ICAC's investigation in accordance with the law. The members of ORC committees including the representatives of Police Commissioner, ICAC Commissioner, Secretary of Justice. Two days after this ORC meeting, the staff members of Neo-China being questioned by the ICAC received a letter issued by the ORC. In this letter, it says that no further actions will be taken.”

Mr Wan also explained that no criminal prosecution against Mr Li had been commenced and that the ICAC had not *“made any restraining orders against Mr. Li's bank accounts or properties in Hong Kong after its 3 years' investigation.”* He noted that it was public knowledge that Mr Li had sold shares in Neo-China for which he received over HK\$1 billion. In response to the Defendant's enquiry as to whether *“any of the monies used to fund the first trust derived from the revenues or partial sale of Neo-China”*, Mr Wan replied *“No”*. In a subsequent letter dated 9 January 2012 from Mr Wan to the Defendant, he confirmed that *“The first trust you mentioned in your email dated 22 November 2011 belongs to Mr. LI's wife Ms LIU Hui not Mr. LI”*.

43. On 18 January 2012, the Defendant sought further information about Mr Li from Dr McCoy, including:

“Lastly, and as you may be aware, we are required to determine the source of funds that are transferred to us. In his email of December 5, 2011, Mr. Wan confirmed that none of the funds transferred to us to establish the first trust (which was in fact settled by Mrs. Lui, Mr. Li's wife, from funds transferred from Mr. Li) stemmed from the revenues of NCG or the proceeds of the sale of Mr. Li's NCG shares. This is, however, inconsistent with our understanding of the source of funds established at the time the trust was first created. Accordingly, we ask that you please arrange for Mr. Li to provide a clear and comprehensive statement confirming the actual source of the funds settled into the trust and the proposed source of funds for the second trust, in both cases supported by corroborating evidence where available.”

This enquiry elicited a response from Huen & Partners, Mr Li's solicitors in Hong Kong, in a letter to the Defendant dated 1 February 2012. Although the report prepared by PricewaterhouseCoopers could not be released to the Defendant, this letter explained:

“... we are of the view that the selling of Mr Li's shares on 25th June 2010 had been properly approved by the Hong Kong Stock Exchange and during the process of this approval it must involve other authorities like SFC and the ICAC.”

After repeating that no restraint had been placed on Mr Li's assets, the letter continues:

“For the first trust fund, the money was transferred from one of Mr. Li's Hong Kong Companys' Bank Account, namely Happy City Holdings Limited, to Ms LIU Hui's Bank Account in your bank. The business of Happy City is not related to any business of Neo China Land Group at all. We hereby provide the outward remittances advice for your reference (see annex 3).”

All but one of the remittances advices shows an amount of Hong Kong Dollars being transferred telegraphically from the same account of Happy City to the Plaintiff's account with RBC (and converted into Canadian Dollars). One of the beneficiary accounts differs from the others and shows a conversion into US Dollars. The amount remitted on 10 June 2010 was US\$2 million. The other remittances were for CAD2.55 million, CAD4.6 million, CAD5 million, CAD5 million, CAD5 million and CAD5 million (aggregating to CAD27.15

million) on 22 April, 14 June and 6, 16, 23 and 30 July 2010 respectively. The cost of these transfers to Happy City was a little under HK\$220 million.

44. On 7 March 2013, the Defendant relayed a request from the Plaintiff to make a distribution of US\$2.5 million to the FIU, indicating that it would then be the Defendant's intention to manage the relationship without extending it, keeping the allegations under review and allowing the Trust to run through to its natural expiry at the end of 2013. By a letter dated 8 March 2013 from the FIU, "*Based upon the information provided you have consent to continue or maintain the account(s) or other relationship and to make the detailed distribution to Hazel Liang.*" Accordingly, at a meeting of the Defendant as trustee of the Trust on 11 March 2013, it was resolved to make a payment of CAD2.5 million of the capital of the trust fund to the Plaintiff. (No explanation is given as to the reference to a different currency, although a minute of the Defendant as trustee dated 22 April 2013 refers to the Plaintiff being prepared to accept payment in US Dollars and there being a resolution to pay the Plaintiff US\$2.5 million.) Mr Rogers then wrote to Lavender (2009) Holdings International Limited on 17 May 2013 instructing that company to make the payment of US\$2.5 million directly to the Plaintiff because of the distribution the trustee had resolved to make.
45. By a letter dated 24 April 2013, the Plaintiff wrote to the Defendant asking it to consider "*making an irrevocable declaration pursuant to Clause 16 of the Settlement to declare that a suitable date (i.e. on or about January 1, 2014) earlier than the date referred to in the definition of the "Trust Period" be the date of the expiration of the Trust Period, and accordingly, that you consider carrying out all things necessary to terminate the Trust as of that suitable date.*" As a result, on 16 September 2013, the Defendant sought consent from the FIU to terminate the structure and make a final distribution to the Plaintiff. The response dated 6 November 2013 includes:

*"Based upon the information provided you **do not have consent** to terminate the structure of Lavender (2009) Holdings International Limited. Further you **do not have consent** to pay the funds maintained in the structure as per your consent request dated 16th September 2013."*

Mrs Langmead wrote to Mr Wong on 7 November 2013 informing him that she regretted to advise "*that an issue has arisen which makes it unlikely that we will be able to achieve the deadlines to which we were working.*"

46. It was at this point that Guernsey Advocates were instructed, through BLG, on behalf of the Plaintiff. The first response, from the Defendant's Advocates, dated 13 December 2013 explained that:

"RBC is constrained by making any distribution of the funds, as they are aware, from public domain information that:

- (a) *Ms Liang's husband, Songziao [sic] Li, former Chairman of Neo-China Land Group (Holdings) Limited ("NCG") is wanted by the Independent Commission Against Corruption ("ICAC") in Hong Kong on suspicion of conspiring to make various fraudulent property transactions between NCG and other companies, which is alleged to have caused false representations to be made in the public announcements, circulars and annual reports of NCG Between 2003 and 2007; and*
- (b) *There is no evidence that the investigation has been withdrawn."*

This led the Plaintiff's Advocates to refer to the way in which the Form had been completed, pointing out that it is factually incorrect:

"... when the Trust was originally settled she in fact told RBC that the source of her wealth to be settled on trust was the sale of shares in another Hong Kong listed company (with stock code 646), the sale of her house in Australia, and from the accumulation of income from her own businesses in China. ..."

As to section 5 of the Application Form ("Employment details"), in her original dealings with RBC Ms Liang referred them to her businesses in China in this regard, but the person at RBC she was dealing with suggested that as Ms Liang did not actually work in Canada, that for the purposes of the Application Form her occupation should be recorded as "HOMEMAKER"."

Following further exchanges, the Advocates for the Defendant wrote on 28 October 2014 that there was now authorisation to explain that *"Because of the changing story and lack of audit trail documents [the Defendant] was, and remains, suspicious in the strict sense of the Disclosure (Bailiwick of Guernsey) Law, 2007"* and that, having relayed these suspicions to the FIU, the FIU were also suspicious.

47. The Advocates for the Plaintiff wrote to the FIU on 10 November 2014. The response on behalf of the FIU came from the Law Officers of the Crown by way of a letter dated 14 November 2014. Reference is made in that letter to an arrest warrant for Mr Li issued in Hong Kong on 24 February 2011 and made public on 3 March 2011, which had not been executed because Mr Li remains outside the jurisdiction. On the basis of the material available in the public domain, the FIU was satisfied that the Defendant as trustee could hold an objective suspicion as to the provenance of the trust funds. In a letter dated 4 December 2014, the Plaintiff's Advocates questioned the consistency of the FIU's decision-making, having granted consent to the Defendant to distribute US\$2.5 million just months before refusing consent to terminate the Trust. In a response from the Law Officers dated 10 February 2015, it was explained that:

"The initial decision to grant consent in this case was taken by an officer who no longer works for the GBA.

The decision taken by him has however been reviewed by two senior officers experienced in this type of decision making. One of the officers conducting the review was the officer responsible for refusing consent on the second transaction. The second officer is the Head of the FIU.

Both of the officers have concluded that if they had been confronted with the initial request for consent on this case that they would (i) have handled it differently and (ii) refused consent."

48. The final exchange in correspondence relating to the provenance of the trust assets began with the Defendant's Advocates' letter dated 14 October 2015, in which Advocate Dunster requested the provision of *"appropriate evidence ... sufficient to dispel the subsisting suspicion"*, adding *"Whether or not your client wishes to instruct an independent accountancy firm to investigate the provenance of the Fund is entirely for your client"*. In due course, the Plaintiff's Advocates forwarded a copy of a letter dated 2 August 2016 from Duhaime Law in Vancouver, the contents of which were used in the Plaintiff's responses to requests for further information raised pursuant to rule 60 of the 2007 Rules.

Suspicion

49. In the light of all the evidence before the Court, I am satisfied that the Defendant has discharged its burden in respect of the suspicion it holds. As Longmore LJ pointed out at para. 20 in *K Ltd v National Westminster Bank plc* (*supra*), “Once the employee confirmed that he had a suspicion, any judge would be highly likely to find that he did indeed have that suspicion.” In the present case, Mrs Langmead and Ms Le Billon have both confirmed that the Defendant continues to be suspicious about the provenance of the funds that led to the assets now in the trust fund being gifted to the Defendant by the Plaintiff. Despite the efforts of Advocate Williams to persuade me otherwise, I find that the employees of the Defendant are justified in having that suspicion for the following reasons.
50. The initial source of information to which the Defendant can, in my view, properly have regard is the Form. I appreciate that the Plaintiff relied on someone else to complete that Form, but she did sign it. Because it refers to Neo-China, when considered in the light of the information that came to light about Mr Li, it forms the basis of the suspicion that led to the SAR in 2011. The Plaintiff has accepted that there was a properly-held suspicion about the source of the trust assets at that time. It does very much look as though those who were dealing with the Plaintiff and Mr Li in July 2009 were justified in thinking that the assets to be introduced into the Trust derived from Neo-China. Indeed, the primary relationship at that time appeared to be envisaged to be with Mr Li and not the Plaintiff. For example, had BLG regarded the Plaintiff as the firm’s client, the retainer letters would not have been presented to Mr Li in the way they were. The impression given in July 2009 was that funds would be routed from Mr Li’s bank account in Hong Kong to the Plaintiff’s bank account in Hong Kong and then to the Defendant. Everything provided to the Defendant at that time pointed towards Mr Li being the originator of funds then used by the Plaintiff in respect of the Trust.
51. When the Trust was established in April 2010, the position had, it seems, developed a little. Instead of two trusts, there was just one. The focus had shifted so as to concentrate on the Plaintiff and her son being the beneficiaries. If there ever had been a plan that Mr Li would become resident in Canada, that was no longer the intention. The transactions by which the Trust acquired shares in Lavender 2009 Holdings International Limited (“Lavender Holdings”) all took place in the summer and autumn of 2010 without any question being raised about how they were being funded. It was only on becoming aware in the summer of 2011 of Mr Li appearing on the ICAC’s website, that the link was made. On the basis of the information that had been supplied to the Defendant, largely from the Form and other documents completed in 2009, the connection to Mr Li was such that he was believed to be the person behind the Trust’s source of funds and there had been no other explanation offered to the Defendant to dispel this belief.
52. The responses to the Defendant’s further enquiries in 2011 and 2012 given by Mr Li’s lawyers did not provide the level of clarity being sought by the Defendant. The remittance advices showing transfers to the Plaintiff from Happy City did not eliminate the concerns that there was still too much of a connection to Mr Li whilst he remained a wanted person by the ICAC. Thereafter, the way in which the Plaintiff’s explanations have evolved and the absence of any supporting documentation led the Defendant to maintain its suspicions about the source of the funds used by the Plaintiff in 2010.
53. Advocate Williams has sought to meet these concerns by reference to the passage of time since Mr Li was listed as a wanted person with nothing happening. He also relies on the fact that Mr Li’s investment in Neo-China was, in any event, sold with the approval of the Hong Kong Stock Exchange and that the Plaintiff’s association with them stems from being treated as beneficially interested by virtue of Hong Kong law. If the price paid for those shares had been viewed as the proceeds of crime, there would have been some action taken to restrain

them in the hands of Mr Li. Accordingly, the absence of any action supports the Plaintiff's case that the funds used for the Trust's assets are not the proceeds of crime. Advocate Williams places further reliance on the consent given by the FIU in March 2013 to a distribution of US\$2.5 million to the Plaintiff as indicating that any suspicion was by then no more than fanciful.

54. As I have already sought to explain, I take the view that there is a difference between suspicion and knowledge. There must, of course, be something more than a vague feeling of unease (as it was termed in *Da Silva (supra)*) or mere general distrust, but the 1999 Law does not qualify the word "*suspicion*" by reference to it being clear, or even being based on reasonable grounds. If the assertion of there being a suspicion presently held could be shown to be perverse by reference to all the facts, I would find the suspicion had not been established by the Defendant. In such circumstances, the suspicion would not have been shown to be a real possibility, and so something more than fanciful, that the funds came from Mr Li, who is suspected of criminal conduct. However, the level of information that the Plaintiff volunteered to the Defendant up to the start of the trial was, in my view, consistent with what she stated in her Affidavit (at para. 27): "*I have not, however, set out the requested full explanation (with supporting documents) regarding the source of the funds for the Trust. This would be onerous, and has to a reasonable extent been dealt with in correspondence and now in this affidavit.*"
55. The Plaintiff's unwillingness to address fully the enquiries being made of her by the Defendant leads me to the conclusion that the Defendant did not get the level of co-operation that might have been expected from someone wanting the Defendant to terminate the Trust and that its suspicion about the assets in the Trust being the proceeds of crime had not been dispelled or at least allayed to the extent required. It is apparent that the consent received from the FIU in March 2013 did not remove the Defendant's suspicion thereafter. It would have been a bold move by it to have proceeded to terminate the Trust without seeking the FIU's consent where Mr Li continued to be listed as a wanted person on the ICAC website. It should have been a comparatively easy exercise for the Plaintiff to supply information that would demonstrate a suitable audit trail of where the assets in the Trust have their origins. Had that been produced, or had the Plaintiff agreed that someone else should consider the explanations and other material and report thereon, I imagine that the Defendant would have shared that with the FIU in seeking re-consideration of its stance about giving consent to the Trust being terminated. The absence of such co-operation by the Plaintiff supports the position of the Defendant, as does the ongoing shared suspicion apparently held by the FIU. Consequently, the Defendant has persuaded me that there continues to be a level of suspicion and the key issue is whether the Plaintiff has discharged her burden to persuade me that the funds are not the proceeds of crime.

Provenance

56. As I have just commented, there should have been an easy way to discharge that burden. In most instances, it would be straightforward for someone asserting that monies used by him or her in the past derive from a source that is untainted by criminal conduct. The transactions involved in the present case can be worked backwards from the information summarised by Mr Wong in his letter dated 19 July 2011. There has been no suggestion that he had made any error in the way he described the transactions concerned. There were two significant gifts by the Plaintiff to the Defendant of shares in Lavender Holdings to be held in the Trust. Those gifts occurred on 8 July and 29 October 2010. In total, the Plaintiff gifted 367,827 Class B preferred shares, each of which had a par value of US\$100, ie, the approximate value of these two gifts was US\$36.7 million. The manner in which the Plaintiff acquired these shares to be in a position to gift them to the Trust is a mixture of transferring certain corporate bonds and certain securities (albeit without any further identification by Mr Wong), as well as

paying cash. (Although para. 1.14 of the letter does not state expressly that the Plaintiff's subscription for 110,899 Class B preferred shares was for cash consideration, in similar fashion to the manner stated expressly in respect of the 957 shares for which she subscribed on 8 July 2010, as set out in para. 1.12, in the absence of any other description, I find that the acquisition of these shares must have resulted from a cash payment.) What this means is that on 2 July 2010, the Plaintiff most probably paid US\$95,700 in cash for some shares and on 29 October 2010 she paid a little over US\$11 million for some more shares. The remainder of the shares, equating to more than US\$25 million, were acquired in two tranches using corporate bonds on 8 July 2010 and certain securities on 29 October 2010.

57. Lavender Holdings is a BVI company. It is a little surprising that neither party has adduced any real information about that company. As far as I can ascertain, the Defendant is the sole shareholder in Lavender Holdings. Entities within the RBC group are the directors of Lavender Holdings. I imagine that Lavender Holdings will have some information about the basis on which it issued the Class B preferred shares to the Plaintiff in 2010, which might assist in identifying what the "*certain corporate bonds*" and the "*certain securities*" were that were transferred by the Plaintiff in exchange for the shares. Similarly, if the account from which the cash used was an account with an RBC entity, I am surprised that that has not been identified, if only as a means of assisting the Plaintiff in her effort to explain the origins of the funds used. I do not intend to be critical of the Defendant in this regard because the onus is on the Plaintiff to have sought whatever assistance she could from the Defendant and any of its associated entities. The absence of a clear audit trail is not, of course, fatal to the Plaintiff's case, because I have reminded myself that I am determining the provenance of the funds used on the balance of probabilities, but I mention these aspects of how the Plaintiff has presented her case to demonstrate that it should have been easier to explain that the provenance of the funds is distinct from the indication given prior to the Trust being established that there would be monies provided to her by Mr Li for this purpose, with the consequential spectre of his wealth being derived from Neo-China, about which suspicions remain.
58. Instead, the approach of the Plaintiff has been to distance herself from Mr Li in this respect, and in any event refer to the greater likelihood that even if Mr Li is a wanted person in Hong Kong, any proceeds of the sale of his shares, held both directly and indirectly through Invest Gain Limited, are not today to be regarded as the proceeds of criminal conduct, and further to identify how she herself generated the funds that she used when acquiring the Class B preferred shares in Lavender Holdings before gifting them to the Defendant to hold on the Trust. I recognise that the Plaintiff is able to discharge the burden she bears if she can show that she independently owned property that was used to fund the Trust's assets and that it was that property that was used by her for this purpose. If there remains, on balance, some linkage to Mr Li, then she may still succeed if on balance the lapse of time without action against Mr Li's assets points away from those assets being regarded as the proceeds of criminal conduct.
59. The transfers effected in 2010 from Happy City to the Plaintiff's accounts with RBC in Canada all appear to be cash transactions. In other words, none of these transfers passed into the Plaintiff's hands any corporate bonds or other securities. The implication is that some further step was taken by the Plaintiff to acquire bonds and securities, but no details of any such transactions have been given. The amounts received by the Plaintiff were US\$2 million on 10 June 2010 and a total of CAD27.15 million starting on 22 April 2010 and ending on 30 July 2010. I have noted that the Hong Kong Stock Exchange approved the sale of the shares in Neo-China so that the transaction completed on 24 June 2010. Accordingly, the first transfers arose before that sale took place, so it cannot be suggested that all of this money received by the Plaintiff derived from the sale itself. It is not entirely clear to me who owns or controls Happy City, however the letter from Mr Li's solicitors, Huen & Partners, dated 1 February 2012 indicates that these monies were "*transferred from one of Mr. Li's Hong Kong*

Company's Bank Account, namely Happy City Holdings Limited”, from which I find that this company was sufficiently linked to Mr Li to treat the source of these funds as coming from him, rather than being generated by the Plaintiff independently of him. However, I also accept the explanation offered by Mr Wan and others that Happy City was a distinct entity from Neo-China. The Plaintiff’s evidence is that Happy City was wound up in 2011 and so she has been unable to get any of the historic records in relation to it. She further explained that Happy City held shares in China Environmental Holdings Limited and that it was the sale of shares in that company which led to the funds remitted to her from Happy City, which was intended to support her and her son. (Her explanation in evidence that Happy City also held the shares in E-House was clarified in Advocate Williams’ letter that she was mistaken about this, because those shares were in her sister-in-law’s portfolio with Merrill Lynch, which was actually held through a corporate entity.)

60. Prior to these transfers in 2010, the Plaintiff had received CAD15 million on 13 July 2009 by way of a wire transfer from Ray-Well Limited’s account with Merrill Lynch. Once again, this appears to have resulted in a cash credit in the Plaintiff’s Canadian dollar account with RBC, as shown on the record of deposits between 2 February 2009 and 21 April 2010 provided under cover of the letter from Advocate Williams dated 9 June 2017. (The final entry on that document is the receipt of the first transfer from Happy City.) I understand that it is this amount that represents what the Plaintiff obtained for selling her interest in E-House. The investment in E-House was made in 2006 and was for approximately US\$3 million, although the funds used were not from an account in the Plaintiff’s name and she did not know whose account was used to transfer these monies to her sister-in-law, but it was from the portfolio of wealth owned for use by the family. The Plaintiff referred to the shares having been sold for more than US\$20 million. I understand that the exchange rate in 2009 between US dollars and Canadian dollars was mostly a little above 1:1, but not by much, meaning that US\$20 million would have been very approximately CAD21 million. Accordingly, the CAD15 million transferred to the Plaintiff on 13 July 2009 cannot have been the full amount received on that sale. The Plaintiff also referred regularly to the manner in which Chinese family wealth is treated as collectively owned, rather than something being owned individually, which would hurt the feelings of other family members, and from which I form the impression that what the Plaintiff now claims to have been her share results from her extracting monies at around the time of her move to Canada and her separation from Mr Li. Indeed, her responses to the Defendant’s Request for Further Information pursuant to rule 60 refer to multiple sources of wealth “*which were co-mingled*” and which were managed by “*the family’s professional wealth managers*”, to whom investment decisions were left.
61. Those answers also refer to real property. The six apartments in Brisbane were sold by the Plaintiff in the second half of 2009. Accordingly, it is, in my view, quite feasible that the net proceeds were available to her to fund the assets gifted to the Trust. The difficulty arises in trying to assess what those net proceeds could have been. The records provided under cover of Advocate Williams’ letter dated 9 June 2017 do not, as far as I can ascertain, indicate any sale prices. As I have already noted, each of the six apartments appears to have been provided as security for a mortgage. The Plaintiff’s evidence is that they were sold sequentially for \$2.4 million (although the currency to which she refers is not entirely clear), which would average at \$400,000 per apartment. The statements the Plaintiff has produced relating to her account with the Commonwealth Bank of Australia show deposits on 22 July 2009 and 4 August 2009 of approximately AUS\$450,000 and 430,000 respectively. There was an earlier deposit on 3 July 2009 of just over AUS\$1.46 million. There was a withdrawal of AUS\$2 million on 3 September 2009, with the record of deposits into her RBC account showing a receipt of a little over CAD1.81 million on the same day, which appears to me to be about the right amount for the rate of exchange at the time.

62. The Plaintiff has also referred to the business in the People's Republic of China with which she was involved. These businesses were involved in real estate. Although she was not the only beneficiary of the profits of the six or seven companies with which she was involved, the various projects sometimes made very significant profits of upwards of RMB1 billion. (She explained that the exchange rate for the Renminbi in 2004 was approximately seven to each US dollar.) She estimated that her share of these business ventures could have been approximately RMB100 million (and so approximately US\$14 million).
63. When the Plaintiff gave her evidence, I did not form the impression that she was deliberately setting out to mislead or be evasive about what was being put to her. It is often more difficult to assess a witness giving evidence through an interpreter because the inflections of voice and expressions used cannot be directly related to any particular words or phrases in the answer eventually given by the interpreter, and my assessment of the Plaintiff's evidence falls into that category. To the extent that she explained the provenance of the funds now in the Trust, I regard her as being as open about these matters as she could be. It is inevitable that her explanation about the proceeds of sale of the shares in E-House having been transferred to Happy City and then transferred to her has some impact on the overall impression I have of her credibility. She confirmed that the money used to fund the Trust mainly came from the sale of those shares. In stating that, she was advancing the position that the bulk of the monies used came from Happy City, as shown on the remittance advices. Following Advocate Williams' letter dated 9 June 2017, the Plaintiff is now drawing a distinction between the amount of CAD15 million received by her from Ray-Well Limited, which she now indicates, albeit not in sworn evidence, derives from the sale of shares in E-House and the larger aggregate amount remitted by Happy City, which must, therefore, come from some other source. Her original evidence was to the effect that Happy City was no more than a conduit for funds emanating from the sale of the E-House shares, but she now accepts that she was mistaken because she had forgotten that the funds were transferred directly from Ray-Well Limited to her, without making any use of the account of Happy City. Further, I find that her explanation during her cross-examination that Happy City had been used for this purpose was an attempt at justifying the rationale that there was no reason to regard the use of Happy City, a company of Mr Li's, in any adverse manner because it was simply a case of money going in and then coming out. It was also a reason why she could not source documents showing those transfers. Whilst I do accept that the Plaintiff had forgotten about these matters, I find that her explanation, from which she now recants, leaves me wondering how much of the rest of her evidence she has given because it is convenient as an explanation rather than based on sound fact, especially where there is no documentary material.
64. Looking at the Plaintiff's various explanations about the funds to which she had access in 2010, the total could be as high (approximately) as US\$16 million and CAD44 million. (These are the amounts derived from the Plaintiff's business profits from her Chinese enterprises, the transfer from her Australian Bank account, representing her net proceeds when selling the apartments, the transfers from Ray-Well Limited and from Happy City.) It follows that, were I to accept that the entirety, or even the bulk, of these amounts were not tainted by any association with Mr Li and so not the proceeds of criminal conduct, I could decide to make the primary declaration she seeks, on the basis that approximately US\$36.7 million is involved. However, on considering all of the material placed before me and taking into account the Plaintiff's evidence, I find that I cannot reach that conclusion.
65. There has, in my view, been insufficient clarity as to the various stages of the Plaintiff's personal wealth generation. When the six apartments were purchased in 2006, there has been no evidence of what funds were used for that purpose. On balance, I am inclined to believe that this would have been pooled family wealth and, even if some form of tracing exercise could be conducted, it is most likely that the profits of any business with which the Plaintiff was involved (in respect of which there has also been a paucity of evidence) would turn out to

be the source. Accordingly, even if I were to treat the CAD1.81 million received by the Plaintiff into her RBC account on 3 September 2009 as not being the proceeds of criminal conduct (and on the balance of probabilities I would be inclined to reach that conclusion), there would be an element of double-counting in the aggregate figure to which I have just referred. What this means is that I am not persuaded that I should accept without more ado the Plaintiff's assertion that she contributed approximately RMB100 million to the family's wealth, because there has been no satisfactory explanation provided to this Court about that. The Plaintiff mentioned during her cross-examination that she had provided information about those companies to BLG in 2013, however I am not aware of any such information forming part of her case in these proceedings. Accordingly, the amount that I am satisfied can be regarded in 2010 as representing funds in the Plaintiff's hands prior to gifting assets to the Trust in 2010 and partly derived from her Chinese businesses is the amount shown on the bank statements as being transferred from Australia in 2009. I have noted that there are also two deposits totalling approximately CAD2 million made on 13 and 15 January 2010, which in the same fashion as the transfer on 3 September 2009 refer to them being telegraphic transfers from the Plaintiff, but the bank statements from her Australian account only go up to the end of November 2009 so I cannot draw the conclusion that there are further sums relating to apartment sales. Moreover, the Plaintiff herself said that the aggregate sales prices were approximately \$2.4 million, which rather implies that those transfer must relate to something else.

66. In passing, I can comment on the selective nature of the documents the Plaintiff has produced. Being shown a list of deposits into her Canadian dollar account with RBC is of some assistance but I am afraid that it only paints a partial picture of what was occurring in 2009 and 2010. Although the purpose of the two-page document was to show the receipt of monies transferred by Ray-Well Limited, the balance on 15 July 2009, just two days later, had dropped by almost the amount of the CAD15 million deposited. No explanation has been offered as to where those monies went. Further, there are other significant deposits, again without any explanation. Accordingly, I find that the document begs more questions than it answers and leaves me feeling that the Plaintiff's financial affairs in 2009 and into 2010 remain shrouded in some mystery. I have formed the overall impression that the Plaintiff wishes to disclose as little as she thinks she needs to, which may well result from her cultural background, and so she is the author of her own misfortune in failing to persuade me that the provenance of the funds has been adequately demonstrated.
67. In relation to the shareholding in E-House, which resulted in payment of CAD15 million to the Plaintiff, despite the misremembered routing of those funds to her, I am content to find that this amount is not to be regarded as the proceeds of criminal conduct. Although the exact source of the funds used for the acquisition of the shareholding in E-House is a little muddled, I am satisfied that this is another investment that can properly (on the balance of probabilities) be regarded as arising from the earlier business activities of the Plaintiff. As I have already commented, the amount she receives appears to be only part of the final sale price. However, I am persuaded that if there was, as seems to have been the case, some split between what she received and what was left elsewhere in the family's finances, this more likely than not arises from the different contributions that were made to the original acquisition of the shares. Having regard to the Plaintiff's estimate of her personal contribution through her Chinese businesses, I am satisfied it is appropriate to treat the amount she received as a return on her personal investment.
68. I realise that in referring to the six Australian apartments and the financing of the Plaintiff's part of the E-House shares I am not accounting for the entirety of her estimate about having made approximately US\$14 million profit from her Chinese business ventures. However, on the material before me, I regard her estimate as lacking support, save for in these instances. I have noted her reference to having provided material to BLG in 2013 about her Chinese

businesses but, for whatever reason, that material has not been adduced in this action, so I am minded only to make findings on the basis of where I can see some form of connection with subsequent assets, which is the reason why I am treating these two investments as flowing from her personal wealth and disregarding any further profit she claims to have realised.

69. That leaves the remittances in 2010 from Happy City as being either free from Mr Li and something that the Plaintiff can properly claim to represent her own monies, or the amounts involved are so inter-linked with Mr Li that they need to be viewed in that context. Now that the Plaintiff has switched her explanation of how the E-House share sale funds were received by her, I find that there has been no satisfactory explanation by her as to why these monies were transferred from Happy City to her. Her reference to China Environmental Holdings Limited, almost in passing and without any further elaboration, does not satisfy me that I should conclude that some or all of the funds remitted from Happy City comprise a further element of the Plaintiff's own independent personal wealth. I think it is possible that these amounts represent the monies paid to her for her own support and also for support of her and Mr Li's son. As I have already noted, some of the remittances were made before the sale of Mr Li's shares in Neo-China. However, there is a sufficiently proximate link between that sale and the series of remittances and the funding of the shares in Lavender Holdings that were gifted to the Defendant to hold in the Trust for the spectre of Mr Li's involvement to loom over these amounts. When coupled with the evidence of the Plaintiff that the bulk of the assets she used to fund the Trust came from Happy City, I find myself unable to accept the Plaintiff's primary case that the funds she used were all her own. On the evidence I have considered, the highest I can reach is approximately CAD17 million, which is less than half of the funds she used.
70. I must, therefore, consider the Plaintiff's secondary submission relating to provenance, which turns on the staleness of the investigation into Mr Li by the ICAC and the absence of any steps taken by the authorities, whether in Hong Kong or elsewhere, to restrain his access to funds. Although the investigation against Mr Li does not appear to have progressed, the evidence shows that he remains on the ICAC's website as a wanted person. The Plaintiff's evidence was that she understood Mr Li had not been to Hong Kong since he appeared on the wanted person list. In Mr Wan's e-mail dated 5 December 2011, he explained that if Mr Li were to go to Hong Kong "*he will be interviewed by the ICAC for no more than 48 hours*". There has been no suggestion that the position today is any different from this. Accordingly, although there has been no progress, the investigation remains as "live" now as it was in 2011 when the Defendant made its SAR. Further, the Plaintiff has not advanced the position that there has been any diminution in the willingness of the ICAC to pursue Mr Li were he to enter its jurisdiction, nor has there been any evidence led as to any difficulties after the passage of so much time in taking some steps against Mr Li.
71. The best argument the Plaintiff has in relation to Mr Li is the point made by his lawyers that no steps have been taken by the ICAC to obtain any restraining order against Mr Li's bank accounts and properties in Hong Kong. This factor is particularly pertinent to the sale by him of shares in Neo-China in 2010. There are, however, a number of difficulties associated with these contentions. I have not seen any evidence that shows that Mr Li had any assets in Hong Kong by the time he was listed on the ICAC website as a wanted person. In the absence of anything over which a restraint order could be sought domestically in Hong Kong, the force of the argument that the ICAC's inactivity can be viewed as it being disinterested in preventing Mr Li engaging in transactions with his assets diminishes significantly. It would entail the ICAC seeking assistance from some other jurisdiction where it is known that Mr Li holds assets and it remains unclear on the material before me whether this has happened at all and, if so, what the outcome was. As a result, I do not find myself able to regard the absence of steps taken in relation to Mr Li as positively as it was suggested by *inter alia* Mr Wan. The Plaintiff has acknowledged that a large portion of Mr Li's family's wealth arises from his

involvement with Neo-China. The effect of the co-mingling of monies means that it becomes harder to identify monies that are not infected by the suspected criminality of Mr Li. The indications given on the Form as to the sources of wealth to be used for the Trust have not, in my view, been completely displaced by the further information being advanced by the Plaintiff.

72. Whilst I appreciate the difficulties faced by the Plaintiff, very little evidence about Happy City has been given in these proceedings. This may result from the fact that, during her evidence, the Plaintiff appeared to be at pains to advance Happy City as the conduit for the monies derived from the sale of the E-House shares, and that position has now changed. If it was merely a conduit, little needed to be known about it, but as the provider of the bulk of the monies now in the Trust, more detail would obviously be helpful and arguably necessary. Consequently, I am left in the position of the majority of the funds to which the Plaintiff refers as the source of the funds now in the Trust coming from an entity that has been described as one of Mr Li's companies, which leads me to the conclusion that, on balance, the provenance of those funds turns on where Mr Li got them. If Happy City was a company entirely distinct from Neo-China, with a clear enough trail showing that its initial funding and all its monies thereafter were separate from anything Mr Li derived from Neo-China, and there are no assumptions, similar to those in the 1999 Law, by which those monies would be caught or, if there are, those assumptions can be rebutted, again to the civil standard, there is a route towards demonstrating, again on balance, that they were not the proceeds of criminal conduct in 2010 when transferred to the Plaintiff. However, until that extra information is provided, the Plaintiff has not, in my judgment, managed to discharge the burden on her in respect of the provenance of the monies remitted from Happy City to her in 2010.
73. This analysis leads me to conclude that not all of the assets introduced into the Trust benefit from not being the proceeds of criminal conduct or, putting it 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 source that is untainted by criminal conduct. That conclusion does not mean that it is impossible that a different conclusion could be reached in the future because my principal reason for rejecting the Plaintiff's claim is that she has not discharged her burden in respect of the provenance of all of those funds. Put simply, the various explanations given by her coupled with the absence of some paperwork, especially where I take the view that the paperwork should have been capable of being produced, leave the balance tipped against her, although I recognise that it is quite a finely balanced decision on the present facts. It is not sufficient that the funds used were legally and beneficially her funds at the time the Class B preferred shares in Lavender Holdings were acquired. It involves a more far-reaching exercise to look a little further back than that final transaction in 2010. This means that the assumptions made by Mr Wong and the basis of whose instructions they were do not matter, although I would find it more likely than not that the letter to the Defendant should be read as if the reference to "instructions" was to instructions from the Defendant, because Mr Wong then said the Defendant should not provide a copy to the Plaintiff, although in his e-mail of 5 February 2011 he was obviously referring to instructions from Mr Li or the Plaintiff, as opposed to any instructions from the Defendant. It seems that Mr Wong has worked for more than one person in relation to the Trust and this may be why there has been some confusion as to the source of the instructions to which he refers. Further, although I have taken into account the granting of consent by the FIU in March 2013 to the distribution of US\$2.5 million as an aspect supporting the Plaintiff's contentions, it is only one further factor pointing away from the funds being the proceeds of criminal conduct and does not compel me to conclude that the remaining funds in the Trust have not been shown to be separate from anything that is covered by Mr Li's past association.
74. The conclusion I have reached, therefore, is that some of the funds that were introduced into the Trust by the Plaintiff have been shown by her to trace back to her own monies. In

particular, I am satisfied that the Plaintiff has discharged her burden in relation to her portion of the E-House shares and the monies clearly remitted from Australia to Canada. This is a total of approximately CAD16.81 million. As regards the other sources to which the Plaintiff has referred, she has not persuaded on the basis of what she has said about them and the documents she has produced in these proceedings that I should treat them as having been hers, in the sense of hers before the final transfer to her. In particular, I am not currently persuaded that the remittances from Happy City have been shown to be distinct from anything in which Mr Li was involved. What this means in the context of this action is that I am unable to make the declaration that the Plaintiff seeks.

75. I have also considered whether I can make some other form of declaration that will be of partial assistance to the Plaintiff. I will invite further submissions on that point shortly, but the absence of any evidence from the Plaintiff as to how whatever assets she held as cash in a bank account (which is as far as the evidence presently takes me) turned into corporate bonds and other securities may mean that I am limited to considering the Class B preferred shares purchased for cash consideration, ie, the 957 and 110,899 shares acquired by her in July and October 2010 and then gifted to the Defendant to hold in the Trust. I imagine as well that the Plaintiff will have to give credit for the US\$2.5 million previously distributed to her. If Advocate Williams can persuade me that there is some relief to which the Plaintiff should be entitled on the basis of these findings, there will be some appropriate orders made.

Bare trust

76. In the circumstances, I can deal quite briefly with the Plaintiff's contention that the partial completion of the instructions to terminate the Trust mean that the assets that were in the Trust are now held on bare trust for the Plaintiff (see para. 14 of the Cause). In her Affidavit, the Plaintiff refers to Lavender Holdings redeeming all the remaining Class B preferred shares "*for the price of approximately \$34m, and this price was met by the transfer by Holdings of its Canadian securities to the Trust; this was effected by Holdings agreeing to hold the Canadian securities on bare trust for the Trust. The balance of Holdings' assets were transferred to the Trust's RBC Guernsey account.*" My understanding of the position is that there are still assets formally owned by Lavender Holdings and that that company remains wholly owned by the Defendant as trustee of the Trust. Although this issue was not addressed in any detail during the hearing, I am inclined to find that the Defendant could, if it wished, take into its direct ownership the assets that are currently within Lavender Holdings but that, until it does, the assets of the Trust include the Defendant's ownership of Lavender Holdings, which I also regard as meaning that the Trust itself has not yet disappeared through termination, albeit that there may be an intention, when permissible for the Defendant to give effect to the Plaintiff's wish that the Trust be terminated by a final distribution to her of all of its assets, for that to happen. I am, therefore, not persuaded that I should make the second declaration sought by the Plaintiff that the Defendant is a bare trustee for her.

Conclusion

77. For the reasons I have given, I will, subject to further submissions on any appropriate alternative form of relief, dismiss the Plaintiff's action for the explicit forms of relief she has sought. I am surprised that the Plaintiff apparently did not appreciate the importance for her of providing as much documentation as would have been helpful and that she regarded the full explanation that was sought by the Defendant as a means to avoid these proceedings as "*onerous*" and putting her to "*further trouble and expense*". The provision of snippets of information in the form of partial documentation may well be the key factor leading to the conclusions I have reached. Although I found the Plaintiff's evidence rather sketchy, it was mostly believable and I have been as generous as I properly can in deciding that she has discharged her burden in relation to the two transfers I have explained. I get the impression

that, in the light of this judgment, the Plaintiff may well delve deeper than she has into historic records, or seek evidence from others, with a view to trying to fill the holes that I have identified might be capable of being filled. However, that would be for a different claim and I can only assess the evidence that has been given in this action, hence the outcome.

78. I will also invite Counsel to make their submissions on what the order as to costs should be and direct that there now be liaison with the Greffe to identify when the action can be re-listed for the purposes of these further submissions.

Postscript

79. Given that this is the first private law action relating to assets in respect of which law enforcement has maintained its “no consent” to have come on for trial, it might be regarded as premature to comment generally on the effect of the regime under the 1999 and 2007 Laws. However, I will do so because I do have a degree of sympathy with the position in which the Plaintiff finds herself. Her inability to advance sufficient evidence to discharge the burden that rests on her about the provenance of the assets now held in the Trust means that those funds are in some sort of limbo. This is hardly satisfactory, although the degree of sympathy I have expressed is somewhat tempered by the Plaintiff’s reluctance to divulge more information than she already has and the strange course of action she initially took, which account for why the assets of the Trust have been in limbo for so long.
80. At para. 24 in *Chief Officer of the States of Jersey Police v Minwalla* (*supra*), the Royal Court of Jersey identified that “*If, contrary to our view, 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 not the proceeds of crime, this would mean that an informal freeze could continue indefinitely without any judicial supervision.*” The comment was also made about the need for common sense and reality to be used, recognising that an order may not of itself confer full protection but that the Law Officers, as the prosecution, should recognise the consequences of acting in accordance with it. The Defendant in this action would face the same dilemma and so be reliant, to the extent that the Plaintiff obtains some relief, on the Law Officers not prosecuting.
81. Whether it is appropriate to describe the position as an “*informal freeze*” or better to describe it as the “*chilling effect*” of the “*impact of the width of the criminal law*” as the Court of Appeal did in the *Garnet* case (*supra*), the consequences for someone in the position of the Plaintiff show how difficult the position can be. She is caught by association with Mr Li, the man from whom she says she is formally separated, although I understand that this means that in law they remain husband and wife. I do not believe there has been any adjudication on the division of the family’s assets on that separation, and all that has been done has been done by agreement between them. Accordingly, the opportunity for some other jurisdiction to look at how to regard Mr Li’s position has not arisen. Moreover, because of the passage of time, with their son now being an adult, it also appears that the Plaintiff has little contact with Mr Li. The task for the Plaintiff in obtaining information about Mr Li’s past business interests will inevitably present hurdles to her that would not be encountered if the allegation of criminal conduct was made against her directly.
82. It is now more than 15 years since the legislative framework in the United Kingdom was changed. The analysis of the position in that jurisdiction is helpfully dealt with at para. 22 of the *K Ltd* case (*supra*) in a positive way:

“The truth is that Parliament has struck a precise and workable balance of conflicting interests in the 2002 Act. It is, of course, true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious

interference with the free flow of trade. But Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money-laundering to run rife in the commercial community. The fact that the interference lasts only for seven working days in which we were told were the majority of cases and a further 31 days only, unless the relevant authority goes to the length of applying to the court for a restraint order when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited. Many people would think that a reasonable balance has been struck. That reasonable balance avoids the difficulties, raised by the previous statutory provisions (contained in section 93A to 93D of the Criminal Justice Act 1988, where no time limits were incorporated), and discussed in Governor and Company of the Bank of Scotland v A Ltd [2001] 1 WLR 751 and Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] 1 WLR 2711.”

It is difficulties of the type that were alluded to in that passage that have been faced by the Plaintiff here. It is not for this Court to offer any view on whether the present position should be changed. That is quite clearly a matter for political judgment and those in authority may well regard the current legislative framework as entirely sensible and, if not, then where the balance should lie between the free flow of trade, particularly in the financial services sector, and the proper mechanisms by which law enforcement act, both for domestic purposes and in rendering assistance to equivalent bodies elsewhere, are issues squarely within the political domain. If there is to be any scrutiny of the current legislative framework, though, this case potentially offers an example of where someone who claims to be an innocent victim by association is forced to prove something without necessarily having access to all the material to which those in law enforcement, if they had to act at some appropriate point to put the assets under restraint or leave the financial institution to conduct its business as instructed or requested, would probably have greater access.