

Supplementary judgment dealing with the form of relief that should be granted to the Plaintiff in light of further information provided by the Defendant.

[2019]GRC006

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

HAZEL LIANG (formerly known as Hui Lui)

Plaintiff

-and-

RBC TRUSTEES (GUERNSEY) LIMITED

Defendant

Date of hearing: 13th December 2018

Judgment handed down: 12th February 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff:

Advocate A C Williams

Counsel for the Defendant:

Advocate M G A Dunster

Introduction

1. This judgment is supplementary to the main judgment in this action, which was handed down on 10 May 2018. It deals with the form of relief that should be granted to the Plaintiff in light of further information provided by the Defendant as to what happened to the assets introduced into the The Lavender (2009) Trust and, in particular, the effect of the distribution of US\$2.5 million made to the Plaintiff in March 2013 as a result of the letter from the FIU dated 8 March 2013 giving the Defendant consent to make it. It results from the further submissions of Counsel that I indicated in para. 77 of the main judgment I would be prepared to entertain.
2. I have had the benefit of an Affidavit sworn on 14 September 2018 by Mark Amies on behalf of the Defendant, to which certain documentation was exhibited. During the course of the hearing on 13 December 2018, Advocate Dunster quite understandably indicated that the Defendant would welcome as much clarity as the Court could provide as to what could now be done as a result of the main judgment in considering making any further distributions to the beneficiaries of the Trust. Accordingly, I asked him to provide a full set of account statements relating to Lavender (2009) Holdings Limited (“Lavender Holdings”), from which I would attempt to undertake the type of analysis that I had explained at the hearing I had begun to undertake on the statements that were exhibited to Mr Amies’ Affidavit. I should add that the exercise I have engaged in is not necessarily the same as a forensic accountant

would perform, but is a layman's review. I agreed with the parties that the additional expense, and possibly delay, that would follow from instructing a professional to undertake this exercise could be avoided in this case. What I have done is broadly similar to the explanation given by Mr Amies as to the approach the Defendant suggests could be taken, but I have gone into greater detail and so reached slightly different outcomes.

The issues

3. The first area on which the parties did not agree relates to how to regard the consent given by the FIU in 2013. Advocate Williams suggested that the Plaintiff could benefit from the whole of the distribution being treated as covered by this consent. In other words, it should be regarded as additional to the manner in which the Plaintiff can now benefit from the judgment I gave last May because it enabled the Defendant to distribute to the Plaintiff assets from the Trust that would now be regarded as falling within those assets that were derived from the proceeds of crime. In order to distinguish between those assets introduced by the Plaintiff into the Trust from sources I found that were not tainted as being the proceeds of crime, and those that were, the two tranches of shares in Lavender Holdings gifted to the Trust in July and October 2010 from cash payments (ie, the 957 and 110,899 shares) will be referred to as "the Cash Shares" and the remainder will be referred to as "the Securities Shares". The alternative was to do either what I indicated at para. 75 of the main judgment, with the Plaintiff having to give credit for the fact that the whole of the distribution must have come from assets that were not the proceeds of crime, or analyse what actually happened with a view to identifying how to allocate the parts of the distribution between the Cash Shares and the Securities Shares.
4. At the hearing, Advocate Williams acknowledged that the transactions shown by the statements and reflected in the ledgers maintained which Mr Amies also exhibited did not support the Plaintiff's primary case that the whole of the earlier distribution of US\$2.5 million could be regarded as having come from the Securities Shares and so he encouraged me to conclude that as much of the distribution as possible should be covered by the Securities Shares so that the amount now available to distribute from the assets covered by the judgment would be as large as possible. Advocate Dunster agreed with the form of analysis that I indicated I was minded to follow. At the same time, both Advocates were content with the approach suggested by Mr Amies, who pointed out that US\$1,305,919.68 of cash used by the Plaintiff to purchase the Lavender Holdings shares in October 2010 had been deposited into the US Dollar Account and so perhaps could be treated as the amount of the original cash that formed part of the distribution to her in March 2013.
5. The second issue arises from the fact that the Defendant Trustee's remaining holding of Class B preference shares in Lavender Holdings was redeemed on 23 September 2013. Thereafter, Lavender Holdings has held the securities and other assets representing the bulk of the Trust's assets on bare trust for the Trustee. Accordingly, if the Defendant is to make any distribution to a beneficiary of the Trust it would assist it to know the assets held on that bare trust to which it can properly have recourse for that purpose.

Further facts

6. As Mr Amies explains, the Trust acquired all 100 Class A shares in Lavender Holdings and continues to hold these. They represent, in effect, the proceeds of the original US\$100 settled into the Trust by the Plaintiff's uncle.
7. The Plaintiff purchased Class B preference shares in Lavender Holdings and gifted them to the Trust. There was, however, only a single share certificate issued to the Plaintiff on 8 July

2010, albeit that 957 of the shares were Cash Shares and 95,184 of the shares were Securities Shares. Upon the Plaintiff gifting those shares to the Trust, Lavender Holdings cancelled the share certificate in the Plaintiff's name and issued a new share certificate showing the Defendant's holding. On 29 October 2010, Lavender Holdings followed the same course of action. A combined share certificate was issued to the Plaintiff for 271,686 shares, being the 110,899 Cash Shares and 160,787 Securities Shares, which was then cancelled and replaced with a share certificate in the Defendant's name. At this stage, the Defendant held two share certificates totalling 367,827 shares. When 25,000 Class B preference shares were redeemed on 28 March 2013, so as to make the distribution of US\$2.5 million to the Plaintiff, Lavender Holdings cancelled the Defendant's two share certificates and issued one for the combined remaining holding of 342,827 shares. Those shares were redeemed on 23 September 2013, with the result that the Defendant as Trustee no longer holds any Class B preference shares.

8. There are two accounts held by Lavender Holdings with RBC Dominion Securities Inc. One is a US Dollar Account and the other a Canadian Dollar Account.
9. It was the Canadian Dollar Account that was opened first on 1 July 2010 and into which the cash sum of CAD100,000 was transferred on 8 July 2010. It was this payment that was used by the Plaintiff to buy the 957 Cash Shares she then gifted to the Trust. Prior to that, on 2 July 2010, this account received two transfers of securities. The asset summary on the account statements helpfully distinguishes these by describing one as "Common Shares" and the other as "Mutual Funds". CAD68,334.78 of the cash was withdrawn on 15 July 2010, leaving a balance of CAD31,665.22. I understand that the withdrawal represents the Trust set-up costs. That cash balance remained the same until October 2010, which was when CAD10 million was introduced in cash by the Plaintiff. Prior to that, on 18 October 2010, the original security described as Mutual Funds was sold. The Common Shares were retained. The Securities Shares issued to the Plaintiff and gifted to the Trust were a mix of what was described in the account statement as "Fixed Income", Mutual Funds and "Foreign Securities". The Foreign Securities involved were 100,000 shares in China Biologic Products Inc. ("China Biologic").
10. The US Dollar Account had a zero opening balance on 1 October 2010. On 25 October 2010 US\$5,195.27 was received from Lavender Holdings' Canadian Dollar Account. I understand that this was the mechanism by which the fees payable to the Trustee were taken from the Trust assets. As Mr Amies has explained, it is a pattern that is largely followed from that time onwards. On 28 October 2010, the securities introduced into the US Dollar Account were both described as "Common Shares". One of the two securities was 50,000 shares in China Biologic. In addition, as already mentioned, there was a cash transfer in of US\$1,305,919.68.
11. Pausing at this point, (because by this time the Plaintiff had gifted to the Trust her Class B preference shares in Lavender Holdings, meaning that the Trust assets had crystallised), those 367,827 shares had been purchased by the Plaintiff through a mixture of cash and securities prior to being gifted by her to the Trust. Some of the cash had been paid out to meet Trust expenses. There had been a small amount of interest received into the Canadian Dollar Account (CAD59.95). However, the balance of the cash (in both currencies) and the securities held could be seen as having their roots in the transfers that had been made by the Plaintiff for the Cash Shares and the Securities Shares. Although it is not an exact science, by looking at the transactions each month, I think a reasonably clear picture emerges as to what has happened to the various assets of Lavender Holdings and so it is possible to equate those events so as to ascertain whether, despite the intermingling of the Class B preference shares, it was a transaction involving something that was originally cash or originally securities. Because I am determining these matters on the balance of probabilities, I have not been looking for certainty, but what I consider to be more likely than not to have happened.

The 2013 distribution

12. Because the 2013 distribution was made from the US Dollar Account, I have looked to see how the cash balance on that account rose to enable that distribution to be made. The statement for the period ending 28 March 2013 shows that the cash balance was already in place before the end of the preceding month. The February 2013 statement shows that there was a small amount of interest earned and a transfer out of some expenses. The statement as at 30 November 2012 shows that there was no cash in the account, but only Common Shares and Mutual Funds. At that time, there were 150,000 shares in China Biologic and a holding of 16,723.717 in Fidelity Special Situations (“Fidelity”). It follows, therefore, that all the cash used for the distribution was generated into this account from 1 December 2012 onwards. What happened was that all 150,000 shares in China Biologic were sold and the holding in Fidelity remained unchanged. The China Biologic shares were sold at different prices on 17, 18, 27 and 31 December 2012 and on 2, 4, 15 and 16 January 2013. There was also a small amount of interest received on 22 January 2013. I am satisfied that the cash used for the distribution came in its entirety from the sale of the China Biologic shares, which means it is necessary next to see how those shares were acquired.
13. All 150,000 China Biologic shares were bought in March and April 2011. Thereafter, there were no sales of that holding until they began in December 2012. The February 2011 statement shows a cash balance of US\$1,105,731.02 plus a holding in Fidelity of 81,343.565. China Biologic shares were bought in two tranches in March 2011 and in seven tranches in April 2011. The price per share varied. The March 2011 statement shows that some of the cash balance was used to buy those two tranches, the only other transaction being the addition of a little interest earned on that cash balance. At the start of April 2011, three tranches of shares were purchased on 1 April 2011 before US\$404,655.24 was deposited from the Canadian Dollar Account on 5 April 2010. The cash balance had dropped to US\$315,128.32 as a result of buying these first three tranches. I am, therefore, satisfied that all of these have come from the US Dollar Account cash balance. Although the transfer of monies from the Canadian Dollar Account increased the balance, the next tranche of shares purchased on 6 April 2011 cost US\$1,185,641.45, which exceeded the amount represented by the remaining cash balance and this transfer. However, US\$500,000 was generated by selling part of the holding in Fidelity, which was received on 8 April 2011. This left sufficient in cash to pay for the fifth tranche of China Biologic shares on 11 April 2011. The final two tranches on 14 and 15 April 2011 resulted in a negative balance until a further US\$340,000 was generated by selling another part of the holding in Fidelity. The consequence of those two sales of Fidelity was that the holding reduced to 17,213.988.
14. Returning to the cash and securities that were in the US Dollar Account at the end of October 2010, one of the reasons why I have not simply accepted the approach suggested by Mr Amies is that the November 2010 statement shows that, although a small amount of interest was received, there was a wire transfer out for expenses, and so the securities remained the same but the cash balance reduced to US\$1,297,044.50. On 14 December 2010, the 50,000 China Biologic shares were sold and on 29 December 2010 the other security was sold. This meant that, with the addition of a little amount of interest, by 31 December 2010 the cash balance rose to US\$2,125,120.34. The statement also shows a trade for future settlement to acquire a holding of 81,343 in Fidelity for US\$1 million. When that trade settled on 4 January 2011, it resulted in a fraction of a share/unit as well. Given that the sale proceeds of the two original securities were US\$827,883.79, it follows that some of the original cash balance must have found its way into the Fidelity holding.
15. It is difficult to be precise on this issue because of how, if at all, to distinguish between the interest earned on the original cash and the cash generated from selling securities, but the

proportion of the Fidelity holding that could be said to be attributable to the original cash used to supplement the sale proceeds of the securities results in a holding of only approximately 14,000 in Fidelity coming from that cash. This is lower than the holding in Fidelity remaining after the sales to generate funds to purchase the latter tranches of China Biologic shares. One possibility would be to regard the whole of that part of the holding representing the Plaintiff's original cash continuing to be held. If so, it would mean that the whole of the Fidelity sale proceeds fall to be treated as having derived from the Securities Shares. Another possibility would be to regard all 14,000 or so of the Fidelity holding as then having been sold to generate cash to buy shares in China Biologic so that a greater number of the China Biologic shares can be said to have derived from original cash. In circumstances where there is no indication as to what was in the minds of those performing these transactions, I am satisfied that the proper approach should be to look at these small number of transactions as if the proportions represented by the source of each side of the monies were carried through each time. As a result, because it is clear enough that the entire proceeds of sale of the original securities were re-invested in Fidelity, I am satisfied that approximately 82.8% of the holding in Fidelity should be regarded as attributable to the Securities Shares, with the remainder being regarded as attributable to the Cash Shares. This means that, when US\$500,000 was received on 8 April 2011, I will regard US\$86,057.46 of it as representing the proportion derived from selling that part of the Fidelity holding paid for with the balance of the original cash (and the odd dollars above US\$86,000 results from using a larger number of decimal points). It also means that, when US\$340,000 was received on 18 April 2011, I will regard US\$58,518.15 of it as representing the proportion derived from selling the part of the Fidelity holding paid for with the balance of the original cash. Aggregating those two amounts, of the US\$840,000 received, US\$144,575.61 can be treated as coming from the original cash, with the remainder being attributable to the Securities Shares. I will return to what that means for the acquisition of the shares in China Biologic after looking at the source of the transfer made from the Canadian Dollar Account.

16. The statement for the period ending 29 April 2011 shows that the only cash remaining in the Canadian Dollar Account was the interest added after the withdrawal to effect the transfer on 5 April 2011 to the US Dollar Account. In other words, this account was emptied of its cash at that point, so it is necessary to consider the source of that cash balance.
17. The cash balance had crystallised on 29 October 2010, after the events I have already mentioned, at CAD15,258,853.39. However, it dropped to CAD260,318.84 by 31 December 2010 because some securities were acquired. The November 2010 statement shows that the Common Shares originally gifted were still held and the Fixed Income, Mutual Funds and Foreign Securities added on October 2010 continued to be held. Under the Mutual Funds, CAD10 million in value has been added. The statement shows a trade for future settlement for CAD5 million. In total, therefore, CAD15 million of cash was converted into securities, which shows that the balance in cash is mostly the balance of the proceeds of sale of the original security. Of course, some of it represents the balance of the original cash injection of CAD100,000.
18. As I have noted, the cash balance before the transactions in October 2010 was CAD31,665.22. Interest was received on 22 October 2010 (CAD59.95). However, I have noted that there was no interest paid prior to that date, and so regard this interest as accruing as a result of the receipt into the account of the sale proceeds of the original security on 18 October 2010. There was a withdrawal on 25 October 2010 for expenses of CAD5,341.78. There was also a wire transfer fee of CAD30 paid on 29 October 2010. I am inclined to view that fee as being paid in relation to the deposits made on 28 October 2010 and so coming off the overall cash deposits. Because of the fees and expenses being taken from whatever cash balance is available, before having to consider liquidating some securities to make it, on a

balance of probabilities, I will also treat that payment as coming from the cash balance at the start of the month. Accordingly, the position at the end of October 2010 is that the original cash in hand had reduced to CAD26,293.44.

19. The interest paid on 22 November 2010 was CAD1,131.62. I think it is appropriate to apportion that amount between what was in the account as a result of the proceeds of sale of the original security and what had been deposited in cash. The very approximate division is one-third to two-thirds (and more precisely is 34.29% to 65.71%). Using these proportions, I will add CAD388.03 of the interest to the sale proceeds of the security and CAD743.59 to what had always been in cash.
20. The CAD15 million spent on securities on 30 November 2010 and 1 December 2010 is what then reduces the cash balance significantly. Although it is possible that the proceeds of sale of the original Mutual Funds security could have been applied to acquiring some of those Mutual Funds on 30 November 2010, because of the round numbers used totalling CAD10 million, I prefer the conclusion that those additional securities were acquired using the CAD 10 million in cash, with the sale proceeds remaining in their cash form for a further day and being used to acquire the further Mutual Funds holding then. The different securities each helpfully have their own identifying code. I will refer to them as necessary in more detail in due course. Interest of CAD363.83 was received on 22 December 2010. A wire transfer fee of CAD30 was paid on 2 December 2010. I will treat that fee as associated with the acquisition of the securities from the sale proceeds of the original security and so payable from that part of the cash balance. I will apportion the interest received in the same manner as the preceding month, which means that the October cash balance, plus November and December's interest had become CAD27,161.79. The remainder of the ongoing cash balance represents, in my view, the product of the sale of the original security.
21. January 2011 was a quiet month. A small amount of interest was received along with some dividends, which appear to have been re-invested. February 2011 was similar.
22. On 1 March 2011, the other original security was sold. It generated CAD5.2 million. CAD 5 million was used to buy two securities on 1 and 3 March 2011 respectively. CAD2 million was invested in another holding under the Mutual Funds heading and CAD3 million into a separate holding under Fixed Income. On 21 March 2011 one of the other Mutual Funds holdings was sold for a little under CAD3 million and on 29 March 2011 a different Mutual Funds security was purchased for CAD3 million. By 31 March 2011, the cash balance had risen to CAD391,584.88. The additional cash needed to meet the shortfall between the sale proceeds and the acquisition price of the "swap" of security late that month was greater than the ongoing cash balance of the original deposit of cash. Indeed, on the analysis that I have undertaken, a small amount of what was used for the purchase on 29 March 2011 must have come from sale proceeds of the original security because the "pure" cash element was insufficient on any analysis to make up the shortfall. However, it is de minimis in the scale of things so I propose not to try to work that forwards and instead treat the sale and purchase as if it were a direct replacement.
23. The main consequence, however, of this analysis is that the entirety of the cash balance on 5 April 2011 that was then transferred to the US Dollar Account to part-fund the acquisition of China Biologic shares cannot, in my opinion, be treated as having come from the cash introduced by the Plaintiff into Lavender Holdings. Instead, the whole of that amount comes from the sale proceeds of the securities that she originally introduced.
24. What this means is that the acquisitions of shares in China Biologic in March and April 2011 were funded as follows. Those purchased in March and on 1 April 2011 all clearly resulted

from using what was left of the Plaintiff's original cash payment into the US Dollar Account. Consequently, these 51,191 shares, when sold, were all from original cash. On 6 April 2011, 76,249 shares were acquired. The total amount paid was US\$1,185,641.45, of which US\$1,181,859.50 appears to have been the purchase price. I am satisfied that it is appropriate to regard the remaining cash, being US\$315,128.32, as being used in its entirety as part of the funding. The money transferred from the Canadian Dollar Account, none of which was derived from original cash, was also used. The balance of the purchase of these shares was, therefore, from the US\$500,000 from the first sale of part of the Fidelity holding. As I have found, US\$86,057.46 of that amount can be treated as coming from what was originally cash. Accordingly, the maximum amount that was spent on this tranche of shares from what was originally cash was US\$401,185.78. Upon receipt of the US\$500,000, the balance remaining was US\$34,142.11. In other words, this amount is either all from the original cash, all from the sale of securities, or a mix. A similar issue arises in relation to the second sale of part of the holding in Fidelity. The final three tranches of China Biologic shares cost US\$357,922.63. This means that some of the balance as at 8 April 2011 was used for these further acquisitions and so, after all the China Biologic shares had been purchased, there was a cash balance of US\$16,219.48. Because the account went into debit from time to time, interest of US\$259.93 was charged on 25 April 2011 and interest on the balance of US\$35.93 was received. However, these adjustments post-dated the acquisition of shares and so only affect the ongoing cash balance and not the acquisition costs. In turn, this means that, in order to leave the cash that was there after the second sale of part of the Fidelity holding, US\$823,780.52 was spent on buying China Biologic shares.

25. I take the view that the fairest analysis involves apportioning those elements of the sales of the Fidelity holding that came from what was originally cash and what was originally from securities in order to reach a figure for how much from a cash-origin was put into these China Biologic shares. The proportion relating to original cash of what was sold in April 2011 is approximately 17.21%. What that means is that the total amount that I can attribute to being used on 6 April 2011 when 76,249 China Biologic Shares were purchased coming from original cash is US\$395,308.90. The remaining part of the purchase price was from sale proceeds of original securities. This represents very approximately one-third of the total purchase price for those shares. As a result, I am satisfied that I should regard 25,422 of those shares as deriving from original cash. The final three tranches of shares purchased were at differing prices, but totalled 22,560 shares. The total purchase prices aggregate to US\$357,922.63, of which US\$61,603.43 represents the proceeds of selling the second part of the Fidelity holding that was originally derived from cash. This means that a further 3,882 of the China Biologic shares can be regarded as having a cash origin. Because both of these acquisitions result in fractional share acquisitions which, when combined, produce a further share, I will add that extra share to the total of the shares in China Biologic that came from an original cash source.
26. Adding all those acquisitions together, of the 150,000 shares in China Biologic, 80,496 seem to me to have come from an original cash source and that cash source has been shown to have been in the US Dollar Account at the outset. On that basis, the remaining 69,504 shares have their origins in the securities used by the Plaintiff to purchase the Securities Shares before they were gifted to the Trust and it matters not whether that was originally in the US Dollar Account or the Canadian Dollar Account.
27. The split between these two holdings of China Biologic shares must then be used to work out how much of the sale proceeds were from original cash (and so now subject to the terms of the main judgment) and how much from securities and so covered by the FIU consent. The sales of the shares in China Biologic were also transacted at different rates. I find it impossible to do anything other than treat each batch sold as being split between these two

elements proportionately and so divide the total proceeds of sale, which were US\$2,554,656.49, in those proportions. This means that US\$1,183,725.63 was received for the sale of the shares with a securities origin. Although a small cash balance remained after the distribution on 19 March 2013, I take the view that the simplest approach is the most likely and that is to treat the whole of that cash balance as being from what was originally cash. I do so because there had been cash in the US Dollar Account originally and the amount after the distribution was of a similar order to that before the China Biologic shares were acquired, especially if making an allowance for the accrual of interest from time to time. It would, I think, be unnecessarily complicated to attempt any further apportionment.

28. This means that, in my judgment, the FIU consent attaches to US\$1,183,725.63 of the distribution of US\$2.5 million, because that is the amount that is not covered now by the benefit of my decision in the main judgment. Accordingly, when the March 2013 distribution was made, the remaining US\$1,316,274.37, which I find was the product of the cash that the Plaintiff originally introduced into Lavender Holdings and to which the benefit of my main judgment attaches, was received by her at that time, albeit now on the basis of the main judgment rather than by reference to the FIU consent. Because that amount has already gone from the Trust assets, it follows that there is now no need to undertake any further exercise involving her having to give credit in any subsequent distribution for any amount. This follows from my conclusion that in broad terms the element of cash that she contributed into the US Dollar Account has already been returned to her, but it is not the identical amount introduced because of the use that has been made of it in the meantime.
29. Another way of looking at this is to treat what happened as if it were the redemption of the 25,000 Class B preference shares. In effect, it would mean that, of the 111,856 Cash Shares, 13,163 (allowing for rounding) were redeemed to effect the distribution and 11,837 of the Securities Shares were redeemed. Accordingly, when the remaining Cash Shares were redeemed on 23 September 2013, there were 98,693 shares involved in that transaction, with the rest relating to the redemption of the Securities Shares.

The redemption of the Class B shares

30. By 23 September 2013, in relation to the US Dollar Account, the position is fairly straightforward. A payment in respect of expenses was wired out on 15 April 2013, reducing the cash balance. The holding in Fidelity was reduced by a further sale on 11 July 2013, enabling more expenses to be wired out the next day. This reduced the cash balance to zero. On 9 August 2013, a transfer from the Canadian Dollar Account was made to enable expenses to be paid, with the result that the cash balance remained at zero. All this meant that at the date when the shares were redeemed, the US Dollar Account contained a holding of 16,280.69 in Fidelity. Using the same proportion between original cash and securities to which I have already referred, some 82.8% of this holding is associated with what was originally securities.
31. Turning to the Canadian Dollar Account statements, I have concentrated on the various holdings in securities. As I have already mentioned, some of these I regard as being directly associated with what was introduced into Lavender Holdings by the Plaintiff as cash and others as being those derived from what had originally been put in as securities. By attempting to track each of the holdings, using their identifying codes, it is possible to work out which of them remained in place at the time the Trustee redeemed the shares.
32. I have already explained that the CAD10 million in cash from the Plaintiff appears to have resulted in the purchase of six different securities, with the other elements of the portfolio being transfers in of securities from her. Under the heading Mutual Funds, one holding of approximately CAD5 million (with code CBL261) was transferred in. The replacement for

what had originally been transferred in as securities and then sold and replaced, also with an approximate value of CAD5 million, had code MER623. The changes in March 2011 related in part to switching from Common Shares to CAD2 million in Mutual Funds (RBC1070) and CAD3 million under Fixed Income, both of which, therefore, were originally from the securities side of the portfolio. The transactions that happened at the end of that month for approximately CAD3 million, though, I am treating as a swap from one Mutual Fund purchased from part of the cash (MFC3169) to another security (MER627). At this time, there was no holding in MFC3169, although a further investment in a security with that code was subsequently made.

33. Thereafter, on 17 May 2011, two of the cash-related holdings, each of approximately CAD1 million, were sold. On 3 June 2011, a new holding for CAD2 million under the heading Fixed Income was acquired. Again, it seems to me that this holding can be regarded as a direct replacement for the two cash-related holdings. By this stage, the portfolio was split between the three holdings under Fixed Income, only one of which, valued at approximately CAD2 million had been acquired through selling Mutual Funds securities that had been acquired as a result of the Plaintiff's cash, the seven Mutual Funds securities, four of which represented securities purchased using the cash the Plaintiff introduced (AGF498, AGF4316, MFC4227 and MER627), and the holding of China Biologic shares.
34. On 14 December 2011, 30% of the China Biologic shares were sold for CAD353,004.22. These sale proceeds were kept for a time in cash. On 20 December 2011, a dividend of CAD100,000 was received in respect of MER623 (and so attributable to the Securities Shares part of the portfolio). The cash balance was further increased through receipt on 3 June 2012 of interest of CAD100,000 in respect of the CAD2 million holding under Fixed Income purchased a year earlier (and so attributable to the Cash Shares part of the portfolio). CAD500,000 was then used to make a further investment into AGF4316 on 17 July 2012. Given the proximity in time with the interest received the previous month, I am satisfied that I should regard the whole of the CAD100,000 as forming part of this purchase, but the remaining CAD400,000 has been derived from the original securities rather than from the Plaintiff's cash. Because the holding in AGF4316 was originally CAD2 million, it seems to me that I should broadly regard that as now being CAD2.1 million.
35. October 2012 saw a further round of changes to the portfolio. The security CBL261 was sold on 1 October 2012 for CAD4,847,432.08. In its place, on 2 October 2012, CAD2 million was used to buy AGF296, CAD1 million was used to increase the holding in AGF4316 and CAD1.8 million was used to purchase a new holding in the security with code MFC3169. I am satisfied that each of these holdings should be regarded as direct replacements for the sale of what had been introduced by the Plaintiff into the securities side of the portfolio. The increase in AGF4316 resulting from investing what was originally in the securities side of the portfolio means that the proportion between cash and securities is CAD2.1 million to CAD1.4 million, which neatly produces an approximate ratio of 60% to 40%. On 30 October 2012, the Fixed Income holding introduced by the Plaintiff in October 2010 was sold for a little over CAD9.5 million. On 31 October 2012, a new Mutual Funds holding (RBC1123) was purchased for CAD5 million. On 1 November 2012, a further CAD2 million was invested in RBC1123 and CAD1 million into a new security (ATL1202). There was another trade for future settlement indicated to use CAD1.6 million, but it is difficult to see what happened in that regard. The cash balance remained higher than would have been the case if this had taken place, but there is reference to the receipt of a dividend which was then re-invested but then reversed. The cash position implies that no further security was acquired at this time.
36. The remaining 70,000 China Biologic shares were disposed of in a series of transactions in November 2012, with the sale proceeds being held in cash. Accordingly, by the end of 2012,

there were two Fixed Income holdings, one of which (representing approximately CAD2 million) can be traced back to the Plaintiff's cash and there were ten Mutual Funds securities, of which three can be traced back to being exclusively from the Plaintiff's cash (AGF498, MFC4227 and MER627) and 60% of AGF4316.

37. On 22 April 2013, a new security (MFC3770) was purchased for just over CAD2½ million, thereby reducing the cash balance almost to zero. Because what was held in cash was, in my view, the product of selling what were originally securities, I am satisfied that this new security should be treated as forming part of the securities side of the portfolio. When monies needed to be transferred out, eg, on 12 July 2013, it was achieved by selling a small amount of this new holding, meaning that, by 23 September 2013, the position in relation to the cash side of the portfolio was unchanged, ie, it was the holding of approximately CAD2 million under the Fixed Income heading, plus all of AGF498, MFC4227 and MER627, plus 60% of AGF4316.
38. Accordingly, when the Defendant redeemed the remaining 98,693 Class B shares that transaction can, on this analysis, be regarded as involving returning those securities that have been shown to have been held throughout after being purchased using the cash introduced by the Plaintiff (AGF498 and MFC4227) or where they are traceable from those original purchases, in whole (MER627) or even though there has been some intermingling (ie, 60% of AGF4316 and 17.21% of Fidelity). As a result, Lavender Holdings has in principle been holding these elements of the securities in the two Accounts on bare trust for the Defendant as Trustee following the redemption of the Cash Shares.

Position since share redemption

39. On 23 October 2013, US\$67,803.18 from the US Dollar Account was converted into Canadian dollars and transferred to the Canadian Dollar Account. In order to fund that and what appears to be an expenses payment, some of the holding in Fidelity was sold, leaving a small cash balance. Thereafter, the cash balance was maintained at zero with payments out being made either by transferring in funds from the Canadian Dollar Account or by selling off the required amount of the holding in Fidelity. As a result, the size of the holding in Fidelity has reduced to what it is on the latest statement at 30 November 2018. Although it might be possible to treat the payments out as being made from only that part of the holding that is derived from securities, thereby increasing the percentage of the holding in Fidelity representing what was originally introduced as cash, that strikes me as being unrealistic and so the simplest outcome is to stick with the percentages identified earlier. This means that what is still held in Fidelity in the US Dollar Account could be liquidated up to 17.21% of it in order to fund any subsequent distribution as a result of the findings in the main judgment. However, this is only going to produce a very small proportion of what is held by Lavender Holdings in respect of redeeming the shares.
40. Turning to the Canadian Dollar Account, there is, of course, the corresponding receipt on 23 October 2013 from the US Dollar Account, matched with a transfer out the same day in that amount. On 29 October 2013 the statement shows that the two Fixed Income holdings were "delivered" to the Royal Bank of Canada, Toronto. As a result, the portfolio became just the Mutual Funds holdings and the total value of the assets in this account dropped by approximately CAD4.2 million. No explanation is given as to what has happened to those two holdings. In relation to the holding of approximately CAD2 million, which had a due date of 6 July 2016, this represented a part of the overall assets of Lavender Holdings from the Plaintiff's original cash. If it still exists, or if it is now identifiable as a replacement asset held outside of these two Accounts, perhaps through following a similar exercise to that undertaken in this judgment, then I would regard that asset (or those assets) as available to the

Defendant in the event of making any distribution from the Trust. Unless the parties are unable to agree, in which case further submissions in writing can be made, I now leave it to them to work out what has happened to this element of the Trust assets that, on my analysis, was being held for the Defendant by Lavender Holdings and can add nothing further to the form in which this element of the overall assets from the Cash Shares now exists.

41. Dividends were received in respect of two of the securities on the securities side of the portfolio in November and December 2013 respectively. This was held in cash and used to discharge expenses until a further CAD400,000 was invested in MFC3770 on 18 July 2014. Once again, when the cash balance needed to be topped up, an appropriate amount of the MFC3770 holding was sold. A further dividend of CAD100,000 was received in December 2014. On 2 October 2015, the holdings with codes MFC3169 and MFC3770, both of which were in the securities side of the portfolio, were sold and in their place a single investment in identical amounts made in MFC6137, which was then used in the same way as MFC3770 had been to sell off small amounts to generate the required cash for expenses.
42. On 10 November 2015, the holding with code MER627 was sold for CAD3 million. This amount was invested in a further tranche of MFC6137. This produced an intermingling of what was originally from securities and what had been segregated as originally from the Plaintiff's cash. The quantity of MFC6137 after this acquisition was just over 750,000 shares/units, of which approximately 300,000 represented what was acquired with the proceeds of selling MER627. For the sake of simplicity, although the numbers do not split quite as accurately, this means that 40% of the MFC6137 holding can be regarded as deriving from the Plaintiff's cash. There was a further dividend of CAD100,000 in December 2015, which was used as previous such receipts had been.
43. On 10 March 2016, one of the securities purchased in March 2011 using proceeds from the original Common Shares element of the portfolio was sold for just over CAD2 million, with the entirety of the sale proceeds being used to make a further investment in MFC6137. This meant that the proportion of this holding that could represent the part of the holding coming from the sale and re-investment of MER627 dropped to closer to 30%.
44. There were some further swaps in the securities held that took place on 16 December 2016. Each time, the proceeds were re-invested in identical amounts. AGF 296 was switched into AGF1203, AGF498 was switched into AGF1221, AGF4316 was switched into AGF1204 and MFC4227 was switched into MFC6016. A small holding of AGF4316, most likely as a result of a dividend being re-invested and not included in the switch made at that time, continued to be held and, on the same basis as before, it is in the proportion of 60% derived from cash and 40% derived from securities. Also on 16 December 2016, MER623 matured at CAD5 million and, with an extra CAD97,500, this was re-invested in a further amount of MFC6137. This month saw the typical dividend receipt of CAD100,000 as well, most of which was used for that further investment. The addition of just over 500,000 extra units in MFC6137 resulted in the cash-related element of the holding being reduced again so that it by that stage stood at a little over 20%.
45. Although the pattern of dividends being re-invested continued, there were no significant changes in the shape of the portfolio in the Canadian Dollar Account until 9 July 2018, when MFC6016 was switched into MFC6661. The statement suggests that the shares were surrendered and received through a merger where the amount involved was identical and so I am satisfied I can properly treat this new investment as a direct replacement for the previous holding. There were further changes in August 2018. Five of the eight holdings remained the same. The small remaining holding in AGF4316 was switched to a holding in AGF293. AGF1203 appears to have been switched to AGF1220 and AGF1204 appears to have been

switched to AGF1259. In each case, the statement refers to shares being surrendered and received through merger and so I will treat them as direct replacements.

46. The final statement I have seen is up to 30 November 2018. Of the eight securities that had existed immediately before then as a result of the changes I have described, just one (RBC1123) had changed, having matured, with the consequence that just over CAD7 million is now held in cash. This is not a problem because that security had been acquired from the proceeds of the Securities Shares. Of the remaining seven securities, I am satisfied that AGF1221 is a direct replacement for AGF498, which in turn was one of the securities bought with part of the original CAD10 million from the Plaintiff. Similarly, MFC6661 is a direct replacement for MFC6016, which in turn was a direct replacement for MFC4227, which was also purchased using part of that CAD10 million. These are the two securities held today where I have not identified any intermingling and so take the view that the Defendant could take steps to liquidate those assets if minded to make any further distribution as a result of the main judgment (or effect a transfer in specie).
47. As I have explained, 60% of the holding in what is now AGF1259 can be tracked back to the original acquisition of AGF4316 using one-fifth of that CAD10 million cash and, for the same reason, 60% of the small remaining holding in AGF293 has those origins. Even though there has been intermingling, I take the view that it would be permissible for the Defendant to take steps to liquidate up to 60% of each of those holdings (or effect a transfer in specie) to enable any further distribution from the Trust to be made.
48. In relation to what is now MFC6137, the position is perhaps the least clear. The number of shares/units shown on the latest statement is just over 1.5 million. When MER627 was sold, approximately 300,000 of what was then about 750,000 shares/units came from that source. That was why I considered the appropriate proportion of that holding at that time to be attributable to the Plaintiff's original cash to be 40%. As I have already pointed out, each time further investments were made using funds that I find were derived from the securities side of the portfolio, the proportion that can be regarded as cash-related gets diluted. It would, in my view, be unduly complicated to attempt to analyse each transaction in detail because there has been a fairly consistent pattern of re-investing in the security when a dividend is received and so the best conclusion I can reach is by adopting a broadbrush approach. This has involved looking at each of the acquisitions that have diluted the proportion of this holding attributable to the re-investment of the sale proceeds of MER627 and then apportioning the re-invested dividends received according to the running percentages of the two elements of this holding each month from November 2015 to December 2016, at which point the holding became reasonably static, save for the occasional small sale to fund expenses, which I will treat as coming from the securities side anyway, and the re-investment of dividends received. Having said that the proportion from December 2016 was a little over 20%, on this slightly closer analysis, I am satisfied that a more accurate figure to use is 20.7%. Accordingly, I am prepared to find that 20.7% of the holding of just over 1.5 million shares/units in MFC6137 represents what is held as at the end of November 2018 on bare trust by Lavender Holdings in respect of the redemption of the Cash Shares.
49. What has become clear from tracking the various holdings in the Lavender Holdings' Accounts month-by-month is that the March 2013 distribution used up the cash introduced by the Plaintiff into what became the US Dollar Account. However, whereas I had initially thought that the Plaintiff would have to give some credit for what she received in that distribution, I am now satisfied that what was originally cash in the Canadian Dollar Account played no part in the 2013 distribution and can now be regarded as having been segregated from what was used in that earlier distribution. The assets that were used to effect the redemption of the remaining Cash Shares can be adequately identified for me to conclude

which of them continued to be those derived from the Plaintiff's cash, as distinct from those that form the securities side of the portfolio. Once those holdings were used to effect the redemption and were thereafter held by Lavender Holdings on bare trust for the Defendant as Trustee, those holdings have evolved in the manner described, but they have, in my view, remained adequately identifiable each time from the remainder of the portfolio so that the Defendant should now have sufficient clarity to know what can be done in the light of the main judgment.

50. Using the market values shown on the most recent statement for the Canadian Dollar Account, the sum of these holdings is a few thousand dollars above CAD10 million. Adding in the CAD2 million investment "delivered" to the Royal Bank of Canada in 2013 in whatever form it is now to be found, plus the small amount represented by the portion of the holding in Fidelity in the US Dollar Account, means that if all these assets were to be liquidated, an amount of approximately CAD12 million ought to be available to which the benefit of the main judgment will now attach.

Conclusions

51. For the reasons I have given, the declarations that I can now make in relation to the Trust assets are as follows:
 - (a) First, when the 25,000 Class B preference shares were redeemed in order to fund the distribution to the Plaintiff of US\$2.5 million in March 2013, US\$1,316,274.37 of that distribution is to be treated as forming part of the overall Trust assets that are attributable to the cash introduced into Lavender Holdings by the Plaintiff and so to which the benefit of the main judgment now applies. In effect, and approaching the question from a different angle, in order to effect the earlier distribution, the number of Cash Shares redeemed was 13,163, leaving 98,693 of the Cash Shares to be considered when those remaining Class B preference shares were redeemed approximately six months later.
 - (b) Secondly, when those remaining shares were redeemed, the assets in the Lavender Holdings' Canadian Dollar Account used in respect of those Cash Shares remaining comprised the whole of the holding with code AGF498, the whole of the holding with code MFC4227, the whole of the holding with code MER627 and 60% of the holding with code AGF4316, plus 17.21% of holding in Fidelity in the US Dollar Account, plus the Fixed Income holding of 2 million in quantity (appearing on the statements as RBC PPN BLUECHIP LEOS S. 86).
 - (c) Thirdly, the assets that could be used now if the Defendant is minded to make any further distributions from the Trust as a result of the main judgment are the whole of the holding with code AGF1221, the whole of the holding with code MFC6661, 60% of each of the holdings with codes AGF1259 and AGF293, 20.7% of the holding with code MFC6137, and 17.21% of the holding in Fidelity in the US Dollar Account, plus whatever now represents what had been that holding of 2 million under the Fixed Income heading, as delivered to the Royal Bank of Canada on 29 October 2013.
52. I am satisfied that it is just to make these declarations in that form for the benefit of both parties. I appreciate that these declarations cannot bind anyone other than the two parties, but I have undertaken the exercise in the way I have with a view to providing the basis on which the Defendant can take any further decisions it may be minded to take in relation to the Trust and, if it follows the terms of these declarations, I would like to think that any such decision

would be respected by those who might otherwise have reason to pursue the Defendant for any alleged wrongdoing.