

Action by settlor/beneficiary for a declaration that the funds held on Trust were not proceeds of criminal conduct for the purpose of offences under Part II of the Criminal Justice

(Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999.

[2024]GRC075

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

RICHARD TUCKER LOERO

Plaintiff

v

CREDIT SUISSE TRUST LIMITED

Defendant

**Dates of hearing: 15 - 19 April 2024
Judgment handed down: 6 November 2024**

**Before: Jessica E Roland, Deputy Bailiff
Jurats Steven John Morris, Paul Martin Burnard and James Robert Toynton.**

Counsel for the Plaintiff: Advocate B. de Verneuil-Smith

Counsel for the Defendant: Advocate M. G. Dunster

Legislation, texts and cases referred to:

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

The Disclosure (Bailiwick of Guernsey) Law, 2007

The Royal Court (Reform) (Guernsey) Law 2008

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

Liang v RBC Trustees (Guernsey) Limited 2018 GLR 189

L, M, N and Mrs B v Credit Suisse AG (Guernsey Branch) [2023] GRC026

Introduction

1. The Plaintiff (“RTL”) is the settlor and beneficiary of a trust known as the Fraternite Trust (“the Trust”) constituted by a declaration of trust dated 23 July 2010 (“the Trust Instrument”). The Defendant (“CST”) is a Trust company in Guernsey licensed to provide fiduciary services, regulated by the Guernsey Financial Services Commission and is trustee of the Trust. RTL sent, under cover of the letter dated 26 May 2021, a Deed of Revocation seeking to revoke the Trust in its entirety (the “Deed of Revocation”). On 12 July 2022, CST informed RTL that due to “*legal and regulatory reasons*” CST was unable to accede to the revocation request and suggested RTL seek legal advice.

2. Proceedings were issued by RTL on 21 October 2022. The defences which were filed on 16 November 2022 set out that on 20 August 2021, CST had made a disclosure to Guernsey's Financial Intelligence Unit (the "FIU") in relation to the Trust, pursuant to CST's statutory obligations to do so under Section 1 of The Disclosure (Bailiwick of Guernsey) Law, 2007. The disclosure was in the form of a suspicious activity report filed electronically by CST on THEMIS, being the FIU's portal for such disclosures (the "SAR").

3. The SAR states:

"The Fraternite Trust is a revocable trust and [RTL] has recently formally revoked the Trust. The Client's records are currently marked for review and remediation and before acting on the revocation, we have carried out a review of information available on the client and associated SoW and SoF. We note that the information provided is not complete. The client has been asked, via the Relationship Manager, to provide additional information and details. He has, we understand, declined to provide anything further. Whilst we cannot rule out that the client simply 'can't be bothered' to provide further information as he has revoked the trust, we cannot be certain that the proceeds held within the trust do not have a criminal origin due to the lack of complete information.

According to our records [RTL] obtained a degree in 1982 (aged 26yr). From 1980, when he was 24, he seems to have been working in the University founded by his grandfather as a teaching assistant. It is also noted that he was gifted his grandfather's shareholding in the University in 1981. In 1985 it appears that the settlor became the director of the University. This appears to be a considerable jump from teaching assistant and particularly given this is only 3 years after obtaining his degree. Sometime between 1985-1987 he acquired the other 75% shareholding of the University. There appears to be no corroboration available for the acquisition. A value of the gift of US\$60m has been given but there is no independent corroboration. Further, a value of US\$49m has been ascribed to accumulated income over 7yrs as a director with a salary of US\$7m. Open source information gives the highest salary for a University president in the US in 2017 as a little over US\$1m and in the UK this is considerably less are around GB£600k. An academic director, accordingly to 'glassdoor' earns on average GB£63K. Based on the information provided and in the absence of corroborating documents the aggregated 'income' figure of US\$49m appears implausible.

This relationship was transferred to us from our Zurich office when it ceased providing trust administrative services. The relationship start dated noted above relates to the start of the CST Group relationship.

4. Additional information was provided at the request of the FIU on 17 September which stated:

The Relationship Manager at Credit Suisse AG, who is the point contact for Mr Gustavo Alberto has given provided us with a timeline for his interactions with the client with regarding to the additional information and documentation that is required in respect of SoW/SoF. We are uploading a copy of an email dated 15 March 2021 where the client states he will not send anything further, and further discussions with him took place. The Client's reaction in not providing the information but asking for the structure to be closed and the assets transferred is a red flag with us especially when combined with the Client's associated jurisdiction, Venezuela. Venezuela is on the GFSC's Appendix I. The country is considered to be high risk for a number of reasons including drug production/trafficking, human trafficking and bribery and corruption risk. As stated in the original suspicion, the lack of additional information to make the information we do hold plausible has not been forthcoming and combined with the subsequent request to close the structure and the country risk has created the suspicion that the funds may have an element [off](sic) criminality.

5. On 25 October 2021, the FIU confirmed that CST did not have consent to release the funds.
6. In the intervening period, RTL has provided additional documentation and a number of reports however, although this information has been provided by CST to the FIU, the FIU have not provided their consent to the release of the funds. The FIU have advised CST that it did not have a criminal defence to one of the principal money-laundering offences under Section 38, 39 and 40 of The Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law, 1999 (“POCL”). The subjective suspicion of the MLRO at CST remains that the Trust funds in whole or in part, directly or indirectly represent the proceeds of criminal conduct for the purposes of Section 38, 39 and 40 of the POCL based on the facts set out in the SAR, and/or, due to the FIU’s refusal to grant consent to the revocation of the Trust and his request that the funds that form the Trust assets be remitted elsewhere.
7. In RTL’s repliche dated 23 October 2023, he acknowledged that the relevant officer of CST held a subjective suspicion at the time of the SAR. It was also accepted in the repliche that unless the FIU grants consent, which it has not done, RTL must satisfy the court, on the balance of probabilities, that the provenance of the funds in the Trust are not the proceeds of criminal conduct. Thus, by the time of the hearing the court was concerned only with the provenance of the funds in the Trust.
8. This judgment has been prepared in accordance with the provisions of Section 16(5) of the Royal Court (Reform) (Guernsey) Law 2008, (“the 2008 Law”). I did not sum up to the Jurats in open court, but instead retired with them, as I am permitted to do under Section 14(2) of the 2008 Law. I reminded the Jurats of their respective roles. I am the sole judge on questions of law and procedure, and the Jurats are the sole judges on question of facts. The Jurats must accept my directions on the law and follow them. I directed the Jurats to have regard to the whole of the evidence presented to the court and to form their own judgements about the oral and affidavit evidence and the exhibits thereto, and which evidence each of them regarded as reliable and accepted and which is not. I directed that the facts of the case are the Jurats’ responsibility. If at any time I appeared to express any views concerning the facts, or emphasised any aspect of the evidence, the Jurats were not to adopt these views unless they agreed with them. When it comes to the facts of this case, it is the Jurats’ judgement alone that counts. I directed the Jurats that the standard of proof is on the balance of probabilities and that the burden of proof is on RTL throughout. To establish something on the balance of probabilities means to prove that something is more likely so than not so.
9. On the final day of the hearing, after retiring with the Jurats I gave the decision of the court to the parties and confirmed that the findings are the unanimous findings of the Jurats. I reserved judgment and this is the judgment setting out the basis of the decision.

The Law

10. The parties agreed that, RTL having accepted that the relevant officer at CST had the requisite suspicion, the right approach following *The Chief Officer, Customs & Excise, Immigration and Nationality Service v Garnet Investments Limited 2011-12 GLR 250* was for RTL to prove, on the balance of probabilities, that the provenance of the funds in question was legitimate, i.e. that the funds were not the proceeds of criminal conduct.
11. The approach to be taken in an action such as this is as set out by Deputy Bailiff McMahon (as he was then) in *Liang v RBC Trustees (Guernsey) Limited 2018 GLR 189*

"[A] court is considering whether to find on the balance of probabilities that the funds are not the proceeds of crime ... 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."

12. Criminal conduct is defined in Section 1 of POCL as “any conduct (a) which constitutes a criminal offence under the laws of the Bailiwick which may be tried on indictment or (b) which would constitute an offence if it were to take place in the Bailiwick.” Proceeds of criminal conduct is defined at section 4 of POCL as any property obtained by a person at any time, as a result of or in connection with criminal conduct carried on by him or another person. The proceeds of criminal conduct includes property in whole or in part directly or indirectly representing another person's proceeds of criminal conduct.

13. In considering what indirectly meant, the parties agreed that the approach taken by LB Marshall in the case of L, M, N and Mrs B v Credit Suisse AG (Guernsey Branch) [2023] GRC026 was the right one where she held as follows:

"In my judgment, the emphasis implied by the addition of the word "indirectly" must be aimed at preventing any argument that "representation" required that a formal tracing exercise between the relevant proceeds and the target funds (or an identifiable part of them) in the bank account should be possible. It allows that "representation" may be fairly discerned as a matter of common-sense impression, rather than by fulfilling a mechanical process, such as importing rules of legal or equitable tracing ...or the rule that funds cannot be traced through an overdrawn bank account."

14. CST through Advocate Dunster confirmed that if the Trust funds were declared by the court not to be the proceeds of crime, then CST would act on the Deed of Revocation without the need for intervention by the court.

15. Advocate Dunster took the role of testing RTL's witness evidence to assist the court in line with the procedure that has developed in previous similar matters and the court was very grateful for the role undertaken by him, which very much assisted the court in coming to its conclusions.

Agreed Facts

16. The following is taken from facts agreed by the parties prior to the hearing. RTL is a Venezuelan national and is ordinarily resident in the Dominican Republic. He is the 100% owner of the Instituto Universitario de Tecnologia Industrial Rodolfo Loero Arismendi (“IUTIRLA”).
17. The Trust is a discretionary revocable New Zealand Law governed trust established by declaration of trust dated 23 July 2010 by Credit Suisse Trust Limited in New Zealand as original trustee (“Original Trustee”).
18. The beneficiaries of the Trust include RTL, family members, IUTIRLA and a number of charities. The protector of the Trust was Aniello Nozzolino Servi and his successor is Carlos Alberto Peña Utrera pursuant to a deed of appointment dated 3 October 2023. New Zealand law remains the governing law of the Trust. The Trust fund of the Trust comprises a Barbados company called Fraternal Services Ltd, which holds a portfolio of investments. Throughout the lifetime of the Trust, RTL has requested and received a number of distributions in relation to real estate financing, personal expenses, gifts and money towards IUTIRLA.
19. By way of deed of appointment and retirement of trustees dated 2 June 2017, the Original Trustee retired and CST was appointed as the new Trustee of the Trust.
20. In 1978, RTL's grandfather, Rodolfo Loero Arismendi (“RLA”) obtained a presidential decree authorising the creation of IUTIRLA as part of a transformation of a school created in 1943 into a private technological university institute. IUTIRLA was established as a civil partnership between RLA, Bertha Nuñez de Loero (RTL's grandmother) (“BNL”), Rodolfo Loero Sánchez (“RLS”) and Francisco Armando Alarcón Fernández (“FAF”), each holding 25% of the ownership interests in IUTIRLA.
21. Pursuant to a purchase agreement dated 24 April 1981 entered into between RLA and RTL, RLA assigned his ownership interest in IUTIRLA to RTL for Venezuelan Bolivars 800,000, on the basis of a loan from RLA to RTL (which was never collected). This gave RTL one ¼ of the ownership of IUTIRLA at the age of 25. Pursuant to a purchase agreement dated 16 March 1984 entered into between FAF and RTL, FAF assigned his ownership interest in IUTIRLA to RTL for Venezuelan Bolivars 600,000 payable in installments with interest at 10%. The first installment was collected on 7 June 1984 and the last one on 7 June 1990. This acquisition was financed by profits from the University. In a purchase agreement dated 7 July 1985 entered into between BNL and RTL, BNL assigned her ownership interest in IUTIRLA to RTL for Venezuelan Bolivars 400,000. RTL paid Venezuelan Bolivars 320,000 at the time of purchase and the balance without any interest on 29 July 1986. This purchase was financed by RTL through profits received from IUTIRLA. Pursuant to a purchase agreement dated 24 March 1987 entered into between RLS and RTL, RLS assigned his shareholding in IUTIRLA to RTL for Venezuelan Bolivars 600,000. RTL paid Venezuelan Bolivars 60,000 at the time of purchase and the balance was paid by him to RLS without interest over five installments: (a) Venezuelan Bolivars 140,000 on 30 April 1987; (b) Venezuelan Bolivars 100,000 on 30 December 1987; (c) Venezuelan Bolivars 100,000 on 30 August 1988; (d) Venezuelan Bolivars 100,000 on 30 March 1989, and (e) Venezuelan Bolivars 100,000 on 30 September 1989. In this way, RTL had acquired 100% of the participation rights in IUTIRLA, wholly financed by profits from IUTIRLA (save for the original loan from his grandfather which was never collected).
22. RTL and IUTIRLA were able to freely choose what salary RTL was paid as an employee of IUTIRLA. RTL's current monthly salary is USD 2,000. With regard to distribution of profits, IUTIRLA's administration has the power to decide when to do this and the manner of recording such payment. Civil partnerships like IUTIRLA are not required to hold annual meetings for the purpose of considering whether to distribute profits. The distribution of profits is at the discretion of the civil partnership's management.

23. For Venezuelan income tax purposes, a Venezuelan civil partnership is not a taxpayer although it is a separate legal entity to its partners. Civil partnerships with legal personality do not pay income tax since the tax applicable to the civil partnership's income must be paid by its partners in proportion to their distributive share in the partnership.
24. Between the fiscal years of 1982 and 1990 the income tax laws in Venezuela provided that income of educational institutions could be exonerated by Presidential Decree. Between the fiscal years of 1991 and 2014, the income tax laws directly provided exemptions for education activities, therefore, the partners of IUTIRLA were exempted or exonerated from paying income tax with respect to income of the civil partnership until 2015.
25. The amount settled into the Trust in July 2010 was USD 42,060,852. The sum of USD 18,756,917 was distributed between 2010 to 2020, before the SAR was disclosed. No distributions have been made since the disclosure of the SAR. The value of the Trust fund as at 31 December 2023 was USD 32,001,412 held with Credit Suisse AG and Morgan Stanley.
26. In March 2021, CST requested additional information from RTL corroborating the origin of his wealth, his salary, current income and profession. RTL notified CST by email on 15 March 2021 that he wished to revoke the Trust, in accordance with clause 24 of the Trust instrument. CST notified RTL of the requirements for revocation. On 26 May 2021, RTL provided CST with a letter confirming his wish to revoke the Trust and enclosing the Deed of Revocation. He requested that the assets of the Trust be transferred to an account he held with Morgan Stanley.
27. On 20 August 2021, CST made the SAR on the basis of suspicion held by CST's MLRO. CST sought the consent of the FIU to transfer the funds to RTL's stipulated account and to close the Trust structure. On 24 August, the FIU requested further information from CST which was provided on 17 September 2021. CST sought consent to revoke the Trust again on 29 September 2021. The FIU advised CST on 25 October 2021, that it did not have consent or a criminal defence to one of the money laundering offences under sections 38-40 of POCL.
28. Since then, the FIU has refused consent for CST to transfer the funds currently held in trust to RFL's stipulated account and close the Trust structure on six further occasions.

The Evidence

29. No evidence was put forward by CST.
30. Three witness statements were provided by RTL (20 December 2023, 2 and 8 April 2024), and two witness statements were provided by Luis Antonio Garcia Arellano ("Mr Garcia") (13 December 2023 and 2 April 2024), who is the National Administrative Sub-Director of IUTIRLA. A witness statement was also provided by Jesus Alejandro Loreto dated 27 March 2024. Oral evidence was heard from all three lay witnesses on behalf of RTL with Mr Loreto being given permission to appear by TEAMS.
31. RTL was given leave to file two expert reports. The first report was by Professor Guillermo Gorrin Falcon, an expert in Venezuelan law. The second expert report with an addendum was prepared by Mr Mark Le Page, an accountant specialising in financial crime. Both experts gave oral evidence. With permission of the court, Professor Gorrin Falcon appeared by TEAMS and Mr Le Page gave evidence in person.
32. RTL was born and raised in Venezuela, although he now lives in the Dominican Republic. He has had permanent residence status and has been tax resident there since 2023.
33. He was raised by his mother and RLA. He comes from a wealthy Venezuelan family and the family wealth came from a variety of sources.

34. Initially, the capital of IUTIRLA was minimal since it had no premises of its own and started off with around 50 students with a single course. In 1981, RLA retired from academic activity and installed RTL as his academic successor. In 1983, RTL was designated as Academic Director of IUTIRLA, a position he maintains to this day. In 1983, RTL opened his first personal bank account with Merrill Lynch in Miami. Due to the significant devaluation of the Venezuelan Bolivar, a decision was made to diversify risk and to maintain a strong currency position by transferring funds into US Dollars. A transfer of USD 100,000 from the IUTIRLA bank account at Banco Mercantil Caracas was made to his personal bank account with Merrill Lynch with the approval of the then other partners of the University. This account was subsequently moved to Paine Webber & Co in the 1990s, when it was acquired by UBS International. As set out above, he became the sole partner of IUTIRLA in 1987. He said that IUTIRLA was a beneficiary of his will.
35. RTL was designated as General Executive Director of IUTIRLA in 1985, which was ratified by the Ministry of Education in 1986, a position he maintains to date. RTL's monthly salary differed depending on the activities of the University. Ranging from USD 300 per month when he started to an average of around USD 1,000 to 2,000. Due to the current economic crisis, his current monthly salary from the University is USD 2,000 but at IUTIRLA's peak, this salary was as much as USD 10,000 per month. The number of students increased rapidly to 36,000 students in 2008 at its peak. At this time the average tuition fee was USD 700 per student. In 2008, this represented a gross income of around USD 36.5 million and in 2009 gross income was USD 37.5 million. This gave a profit margin of USD 16,294,767 and USD 16,627,303 respectively (as amended by RTL's second affidavit and the expert evidence of Mark Le Page). He has paid and declared taxes since 1975 and up to the present date. However, as set out above before 2015 he was not paying any personal income tax liability on the profits of the University which were distributed to him, but only on the monthly salary as an employee from the University and other taxable income.
36. The numbers of students has declined due to the current worsening economic situation in Venezuela and from 2021 there have been only around 2,900 students. In November 2023, one of the university buildings was sold for a price of USD 1,200,000 to generate cash flow in the current deteriorated economic situation of Venezuela.
37. Due to the risk of kidnap, when RTL returns to Venezuela he hires private security to guard against him being kidnapped. Extortion is also a real problem in Venezuela. It is considered advisable for high net worth individuals in Venezuela to adopt a practice whereby their US dollar holdings or other large investments, are not held in their own names. This can be done by means of a number of different legal mechanisms, such as the use of an agent to open a given bank account or the use of a corporate holding structure. These types of measures reduce the possibilities of kidnappers and extortionists obtaining the information from public records and reducing the risk of leakages of information from Venezuelan bank clerks. This is what RTL has done and examples are set out in the document "*Tips on Portfolios Dr Richard Tucker*" which is exhibited to his second affidavit. These steps taken are all lawful under Venezuelan law, and none of the steps or arrangements violates any Venezuelan criminal, regulatory (including any exchange control regulations relating to the purchase of foreign currency and/or sending funds out of Venezuela) or tax laws. Holding structures are also used for estate planning purposes and investment protection purposes. There has been the additional threat of potential expropriations or nationalisations since Mr. Chavez was elected president in 1999. RTL said that there have been many expropriations, nationalisations and what he described as "*interventions and mistreatments*" of private property in Venezuela.
38. The authorities began investigations into the crime of civil rebellion into a number of people, including RTL, who were present when Pedro Carmona Estanga appointed himself President of Venezuela and issued the "*Act of Constitution of the Government of Democratic Transition and*

National Unity” on April 12, 2002. As a consequence, because he has been publicly identified by the Venezuelan authorities, RTL and his property is at greater risk of being the target of attack. He is also exposed because he is a successful and prominent educator who owns IUTIRLA. It is because of these risks he now lives in the Dominican Republic.

39. There is no legal obligation under Venezuelan law to retain business records for more than 10 years. RTL also said that due to floods, IUTIRLA, to the extent it has retained records more than 10 years old, only has records from academic and accounting material from 2000 onwards. He said that Mr Garcia had undertaken searches on behalf of RTL for the historic records. RTL also explained that from 2015 Venezuela has experienced an economic crisis with inflation reaching a record of 799.9% per year. Many foreign banks and financial institutions have withdrawn from Venezuela due to political and economic crises, which makes tracking down information or records from the relevant institutions relating to transfers that occurred nearly 40 years ago impossible.
40. RTL explained that although there have been past criminal investigations into his alleged role in the civil rebellion in 2002, these were dismissed. He was also implicated in the death of a public prosecutor as an “*intellectual perpetrator*” but was never charged or indicted for this. On 9 August 2005, relatives of the dead public prosecutor filed a complaint against RTL and others, for the alleged perpetration of the crime of homicide, as an “*intellectual perpetrator*”. This claim was rejected at first instance and on appeal. This claim was effectively reissued on 1 October 2008 but there was no individual action against RTL and this complaint cannot now be progressed due to the statute of limitations in Venezuela. He has, therefore, not been charged or convicted in Venezuela for the perpetration of any crime. He produced a certificate of criminal records from the Ministry of the People’s Power for Internal Affairs Justice and Peace which confirmed that he has no criminal record in Venezuela.
41. He also explained that in April 2022 when he arrived in Venezuela for a visit, he received informal word that there was a warrant for his arrest. He immediately presented himself voluntarily to the police. He was detained for a brief period by the police before appearing before the criminal court. The criminal court determined that the warrant for his arrest was falsified and ordered his release (copies of the court documentation were produced for the court). The criminal court also ordered an investigation into how the arrest warrant was falsified and was uploaded into the police’s information system. That investigation is still ongoing. RTL’s evidence, in relation to the criminal cases, was supported by the evidence of Jesús Alejandro Loreto, a partner of a Venezuelan law firm Loreto Abogados Penalistas, who have acted for RTL since 2022. He clarified in oral evidence that RTL has not been charged or convicted in Venezuela for any crime. He also confirmed what had happened to RTL in April 2022, in relation to the false arrest.
42. USD 42,060,852 settled into the Trust came from the profits RTL received from his ownership of IUTIRLA in his account from Wegelin & Co and the profits from investments (of the IUTIRLA profits) from Merrill Lynch and UBS International. This represented approximately 80% of his wealth. After settling the funds into the Trust he requested a USD 11 million distribution. This was his largest single distribution request. He says he did not realise at the time that this was unusual nor was he advised not to do this. The majority of the distribution, approximately USD 9 million was used to finance the construction of a villa next to his house in the Dominican Republic. The remainder of the distribution was to finance the holiday payments and bonuses for personnel at the IUTIRLA. The number of personnel employed at the University has varied throughout the years. He produced to the court the distribution requests he made between November 2010 and April 2011 (as well as documentary evidence for other distribution requests since then), in the form prescribed by the Original Trustee. These distribution requests detail the names of the bank accounts where money was taken from and the location of where the money was transferred to. These included intermediary accounts which

would then be forwarded to IUTIRLA. The money would be split and sent in this way to avoid corruption through the banking system in Venezuela.

43. RTL decided to revoke the Trust due to the high cost and poor service he said he had received from CST, in particular, the poor investment performance of the Trust assets and the delays and difficulties experience by him in obtaining distributions from CST when he requested them. He had had conversations with his financial advisers and he had spoken with his family about this in the past. He had originally discussed doing this 5 years before he actually tried to revoke the Trust. There was no issue for him about providing the due diligence information that had been requested by CST in 2021 to CST. When he was asked by one of the officers in an email to provide the information, he had asked his staff to collate the information, but then he decided to revoke the Trust. This is supported by the email sent by RTL to the relevant officer on 15 March 2021, where he said that he had asked his staff to *“start preparing a dossier with all the information requested...on the other hand.....it may be preferable to me to revoke the Trust (sic)”*. He said that he had understood from an officer of Credit Suisse Trust AG in Switzerland that it was not necessary for him to provide the due diligence because of his decision to revoke the Trust. In an email dated 18 March 2021 sent by this officer, he was advised: *“In case you have already made the decision to revoke it, then it is no longer necessary to send me all the requested information/documentation just confirm by email that you are going to revoke the Trust”*. RTL said he had no issue with providing the information requested as he has to provide this sort of information for other institutions including in the US and it is up to date. After the completed revocation documentation was sent to CST, there was no substantive communication back from CST for a long time.
44. He also holds another holding structure in the form of a Panamanian law governed foundation. He had set up the foundation in Panama in 2015. Putting his money in the Panamanian foundation had originally been the suggestion of one of his financial advisers. This made more sense than the Trust due to the common language, the geography and the costs. Although he did delay the decision to revoke the Trust after he set the foundation up, once he received information about the poor performance of the Trust assets he decided that he would revoke the Trust and transfer the assets to the foundation. He was assisted with this by his new financial advisers but it was his decision. He accepted that he did not have written advice from his financial advisers.
45. In answering a question from me, RTL admitted that no one had properly explained when he had settled the Trust, what a trust was, or how it operated, or that he was relinquishing ownership of the assets when he transferred them to the Trust. He did not really understand the concept of a Trust. Although at one point, RTL had understood that the Trust was located in Switzerland he accepted that, in fact, it was based in Guernsey, although he had relationships with Credit Suisse personnel based in Switzerland.
46. Mr Garcia is an accountant and has worked at IUTIRLA for 23 years. He has held a number of roles but is now the National Administrative Sub-Director of IUTIRLA. In this role he supervises and manages the National Treasury of IUTIRLA, as well as managing the National Human Resources Management and the Purchasing and Services area. He reports directly to RTL in his capacity as President, Executive General Director and owner of IUTIRLA. Mr Garcia confirmed that in RTL's capacity as President, Executive Director, and sole owner of IUTIRLA, RTL directs the institution and establishes the academic and administrative goals and strategies and its salary and the distribution of annual profits. The evidence of Mr Garcia is that between 2008 and 2022, IUTIRLA obtained total gross income of USD 218,629,643.33 from tuition fees.
47. As RTL is a sole owner there is no requirement for an external audit. He said that since he started working in IUTIRLA's Treasury area approximately 18 years ago, IUTIRLA has distributed to RTL between approximately 20% and 80% of the annual profits but with the

average amount being 25% to 30%, depending on the available cash flow. The profits have been used to making payments to satisfy RTL's expenses; or to repay IUTIRLA's expenses that RTL had assumed or have been sent in USD to RTL's bank accounts in banks outside of Venezuela. Mr Garcia detailed to the court the searches that he has undertaken on behalf of RTL, in order to find the historic records that have been produced to the court. He also explained that the storage of the records such as they are, has been in a very damp environment so although he did his best to retrieve them, they are in poor condition and accessing them is dangerous to health.

48. He said that RTL, historically, has had a salary of up to around USD 10,000.00 but the amount depended on the financial situation and cash flow of the IUTIRLA. Mr Garcia set out to the court the complicated procedure of how US dollars were obtained by the University and sent to RTL, although he said that it will have been other colleagues who have been primarily responsible for undertaking the purchasing of currency. The purpose of purchasing dollars was to move the money into a stable currency, as frequently as possible, due to the unstable nature of the Venezuelan Bolivar. A number of banks will have been used and through different currency intermediaries and corporate vehicles. There are a number of different campuses and although the banks are centralised in Caracas, different branches will have been used for this. He was unable to comment on RTL's personal tax situation now he is resident in the Dominican Republic.
49. Professor Guillermo Gorrin Falcon confirmed that Venezuelan law distinguishes between civil partnerships and commercial partnerships. He confirmed that in accordance with the notarial acts that he had been provided with, RTL is now the sole partner and owner of IUTIRLA having acquired all the participation rights representing the joint ownership held by the founding partners of IUTIRLA. Nevertheless, it remains a civil partnership. He also confirmed that as a civil partnership, IUTIRLA does not issue shares that oblige it to keep a shareholders' book and Venezuelan law does not require that it keeps any form of partners' ledger. With regard to the distribution of profits, IUTIRLA's administration has the power to decide when to do this and the manner of recording such payment. In terms of salary, Venezuelan law (nor the Articles of Incorporation/Bylaws of IUTIRLA) has not set any limits on the maximum salary or other benefits in cash or kind that IUTIRLA, as employer, and RTL, as employee, may agree upon. The amount of salaries and other benefits depends entirely on the free will of the contracting parties.
50. For Venezuelan income tax purposes, a Venezuelan civil partnership, such as IUTIRLA, although being a legal entity different from its partners, is not a taxpayer. However, the partnership must file an annual informative statement reporting its Venezuelan-source net taxable income. As of fiscal year 2000, this informative statement must also report on any foreign-source income for the partnership.
51. Each partner of the civil partnership must file an annual tax return reporting their participation in the distribution of the partnership's net income as Venezuelan-source gross income to the extent that the income is not exonerated or exempt from taxes. For the fiscal years 1982 to 1990, the Venezuelan Income Tax laws provided that the National Executive Branch could exonerate the income of education institutions, such as IUTIRLA, by means of a Presidential Decree. For the fiscal years 1991 to 2014, the Venezuelan Income Tax laws directly provided exemptions for educational activities such as those carried out by IUTIRLA (among other activities). This exemption was regardless of the actual level of profits made but was put in place to incentivise the education sector.
52. As of fiscal year 2015, the income tax benefits for educational institutions were eliminated. Consequently, as of that fiscal year, the income of the university and education institutions were subject to income tax payment and, if the educational institution is a civil partnership, such as IUTIRLA, taxable in the hands of the partner.

53. He also confirmed that he did not believe that there had been any breach in exchange control in moving the funds in and out of Venezuelan Bolivars. During the currency exchange control regime, between 2010 and 2012, he advised there was no longer an exception for “securities swap” transactions (which had been the case between 1999 and 2010). However, from the records he has considered for the provision of the expert evidence, IUTIRLA only made a single transaction for \$100,000.00 between 2010 and 2012, and, in his view, the documents do not lead him to conclude that this transaction would be a violation of the exchange control regime during that period. He also confirmed in cross-examination that even if it had been it will have been retrospectively de-criminalised in 2018.
54. He also confirmed that it was common for Venezuelan wealthy residents to use multiple bank accounts at different banks in different names, for their own safety.
55. In his expert evidence report, Mr Mark Le Page undertook a forensic analysis into the evidence produced by RTL of his wealth and confirmed that in his expert opinion the source of RTL’s wealth and the source of funds were from the profits received by RTL from IUTIRLA and investment of those funds. In coming to this view, he took into account the hyperinflationary nature of the Venezuelan economy, which makes applying meaningful values in Venezuelan Bolivars exceedingly difficult, as well as the absence of historic ledgers (which are not required under Venezuelan law). He said that Venezuela is deemed a high risk jurisdiction (category 1) by the Guernsey Financial Services Commission (which it does using external sources). This does not rule out accepting business from such a country but does mean that additional enquiries should be made by the institution. In answer to a question in cross examination, Mr Le Page considered the structuring of RTL’s finances was relatively simple. Applying standard industry practice and methodology which are set out in detail in his report, he had come to the conclusion that, on the balance of probabilities, the Trust funds are not the proceeds of crime. In his addendum report, he further confirmed that it remained his firm view that this was the case. He queried the filing of the SAR before reverting back to RTL to request the documentation. He said that he considered that the filling of the SAR at the time CST did so was unorthodox and outside of industry standards.

Discussion

56. The parties agreed that in order for the court to consider exercising its discretion to make the declaration sought by RTL that the Trust funds were not the proceeds of crime, it was necessary for the court to consider three questions:
- Question 1. Has RTL established, on a balance of probabilities, the source of the funds settled into the Trust?
- Question 2. If "yes" to question 1 above, has RTL established, on a balance of probabilities, that the funds settled into the Trust are not as a result of or in connection with criminal conduct carried on by him or another person (i.e. the proceeds of crime as defined in section 4(1)(a) of POCL)?
- Question 3. If "no" to question 1 above, regardless of the fact that RTL has not been able to establish the source of the funds settled into the Trust, has RTL established, on a balance of probabilities, that the funds settled into the Trust are not as a result of or in connection with criminal conduct carried on by him or another person (i.e. the proceeds of crime as defined in section 4(1)(a) of the POCL).
57. Advocate Dunster in his closing speech, whilst maintaining CST’s neutral position, identified those areas of the evidence which he said the court should consider carefully if RTL has shown, on the balance of probabilities, that the funds held in the Trust are not the proceeds of crime. He submitted that the court needs to decide whether or not it believes, to the requisite standard, RTL’s story in relation to his journey to wealth and his decision to revoke the Trust. He reminded the court that in determining the provenance issue, RTL must satisfy the court that the funds in

the Trust are not the proceeds of criminal conduct in any way, not just the matters raised in the SAR.

58. In accordance with the questions agreed by the parties, the Jurats first considered, on the balance of probabilities, what was the source of the funds settled into the Trust.
59. The only evidence before the court of the provenance of the funds which formed the assets of the Trust was the evidence produced by RTL. The Jurats found that the funds were settled into the Trust 2010. They were satisfied, on the evidence, that the source of the funds in the Trust were the profits from the IUTIRLA which were transferred legitimately to RTL, as owner of the IUTIRLA. The Jurats were satisfied that they could come to this conclusion on the evidence they had before them, without the necessity for further investigation or information. The Jurats considered that the documentary and oral evidence from RTL demonstrated that the quantum and the timing of the generation of profits from IUTIRLA was consistent with the settlement into the Trust. The Jurats also considered that the demeanour of RTL's witnesses demonstrated openness and honesty, in particular, the evidence given by RTL himself. By the arrangements for his will and his willingness to fund IUTIRLA's costs in difficult years, RTL also demonstrated an emotional attachment to IUTIRLA, which was consistent both with his evidence and with his family connection with the institution. The Jurats found the expert evidence of Professor Guillermo Gorrin Falcon compelling in understanding the civil partnership model of IUTIRLA and its ability to deliver high profits to the single partner in this case RTL. The expert evidence provided by Mr Mark le Page showed a careful analysis of the source and flow of the funds from the profits of IUTIRLA to the Trust and his clear and comprehensive evidence supported RTL's case. Where the documentary evidence chain was incomplete, the Jurats did not draw any adverse inferences from this, rather they were impressed with the significant documentary evidence from many years ago, and the efforts and cost that RTL had gone to, to demonstrate that on a balance of probabilities, the source of the funds is IUTIRLA.
60. As the answer to the first question was that RTL has established, on the balance of probabilities, what was the source of the funds settled into the Trust; it was necessary for the Jurats to consider the second question: has RTL established, on the balance of probabilities, that the funds settled into the Trust are not as a result of or in connection with criminal conduct carried on by him or another person (i.e. the proceeds of crime as defined in section 4(1)(a) of POCL).
61. Advocate de Verneuil-Smith maintained that there must be a conviction in order for there to be proceeds of crime. He urged the court to reject the general view described and accepted by LB Marshall's in her comments at paragraph 12 in (1)L(2)M.(3)N(4) Mrs B v Credit Suisse AG (Guernsey Branch) [2023]GRC026 that there is no requirement for an underlying conviction. He says that the provisions of section 4 of POCL which is entitled *Assessing the proceeds of criminal conduct* applies to the whole of the law including section 4 (2) and (3). Section 4 of POCL says:
4. (1) *For the purposes of this Law –*
- (a) *any property obtained by a person at any time (whether before or after the commencement of this Law) as a result of or in connection with criminal conduct carried on by him or another person are his proceeds of criminal conduct, and*
 - (b) *the value of his proceeds of criminal conduct is the aggregate of the values of the property.*
- (2) *Subject to subsections (4) and (5), the Court shall for the purpose –*
- (a) *of determining whether the defendant has benefited from criminal conduct, and*
 - (b) *if he has, of assessing the value of his proceeds of criminal conduct, make the required assumptions.*

- (3) *The required assumptions are –*
- (a) *that any property appearing to the Court –*
- (i) *to have been held by the defendant at any time since his conviction,*
or
- (ii) *to have been transferred to him at any time since the beginning of*
the period of six years ending when the proceedings were instituted
against him,
- was received by him, at the earliest time at which he appears to the Court to*
have held it, as a result of or in connection with criminal conduct carried on
by him.

62. The required assumptions require a conviction or criminal proceedings. In this case, as RTL has not been convicted of any crime nor have there been criminal proceedings against RTL, Advocate de Verneuil-Smith submitted that there can be no proceeds of crime. In any event, he submitted there are no allegations of alleged criminal conduct against RTL nor evidence of a connection between him and some other person who has been convicted or against whom proceedings have been commenced on the facts of this case. Therefore, even if a wider interpretation of proceeds of crime is used not requiring an underlying conviction, the evidence before the court is that the funds in the Trust are not the proceeds of crime whether directly or indirectly because there is no evidence that the funds are as a result of or in connection with criminal conduct, whether carried on by RTL or another person.
63. Advocate Dunster argued that the submission on behalf of RTL that there needed to be a conviction or criminal proceedings was a misinterpretation of POCL for these purposes. He urged me to direct the Jurats that neither were required in order for the test to be met for criminal conduct under POCL for this type of action.
64. I agree with Advocate Dunster. At section 52 of POCL, proceeds of criminal conduct are defined by reference to section 4 (1) (a) only. It does not refer to the subsequent sub-sections. Further sub-sections (2) and (3) of section 4 refer to the “*defendant*”. Defendant is defined in POCL at paragraph 51 (1) as a “*person against whom proceedings have been instituted, within the meaning of section 37(2), for an offence, whether or not he has been convicted*”. It must be remembered that the necessity for these proceedings is so that CST can rely on a declaration by the court in response to any allegation of one of the money laundering offences set out in section 38-40 of POCL. There is no connection to section 37(2). Therefore, it is not necessary to consider section 4 (2) and (3) and RTL is not a defendant. Rather, it is necessary for the court to consider whether there is property which has been acquired by criminal conduct as defined under section 1 of POCL i.e. by reference to conduct which constitutes as criminal offence under the laws of the Bailiwick which may be tried on indictment or which would constitute an offence if it were to take place in the Bailiwick. Interpreting criminal property as the proceeds of crime for this type of proceedings in this way is also in line with the obligations under the Disclosure Law at section 1 and the definitions of criminal conduct contained in that Law. I am, therefore, satisfied that the intention of the law in relation to sections 38 to 40 and its interaction with a claim such as this, is not to require an underlying conviction. I therefore directed the Jurats that, in order to conclude that the provenance of the funds are not the proceeds of criminal conduct, it was not only necessary for there not to have been a conviction, but they must be satisfied that the funds were derived not from criminal conduct, as defined under section 1 of POCL.
65. RTL has sought to demonstrate on the evidence that he has put before the court that, on the balance of probabilities, the funds are untainted by criminal conduct. I reminded the Jurats that whilst the burden of proof is on RTL, in considering this endeavour they may be minded to pay heed to the comments of LB Marshall about being sympathetic to the burden placed on RTL to surmount the evidential test, in particular, what she said at paragraph 140 of (1)L(2)M.(3)N (4) Mrs B v Credit Suisse AG (Guernsey Branch) [2023] (ibid)

“pay appropriate regard to the likely or apparent difficulties which such a plaintiff may be facing, in endeavouring to gather evidence from persons over which he or she has no control, who may have no incentive to assist, and which evidence may well, in any event have been lost with the passage of time and the destruction or loss of records”.

66. The Jurats found there was no evidence that the source of funds were the result of or in connection with criminal conduct. Whilst the Jurats recognised that the origin of RTL’s funds lay within a high risk country, there was no evidence of criminality. Rather, it appeared to the Jurats, in absence of any evidence to the contrary, that the SAR had been raised due to, what appeared to be, a mistaken belief that RTL had refused to provide information requested on the source of the funds. From the documentary evidence before the court, the Jurats concluded that this belief arose as a result of poor communication between the Swiss point of contact and the CST’s Guernsey team. I directed the Jurats to consider whether, on the balance of probabilities, they were satisfied that the funds are not the proceeds of criminal conduct in any way, even if not raised in the SAR. I further directed the Jurats that if there remained elements which they were not satisfied that they could come to a conclusion on the balance of probabilities, it was open to them to require RTL to provide further evidence rather than dismiss the claim. The Jurats were satisfied, on the balance of probabilities, having conducted a detailed analysis of the materials before them, considered the evidence, including the expert witness evidence and the large amount of documentation produced that the funds are not the proceeds of criminal conduct in any way and it was not necessary to require RTL to provide further evidence.
67. It was not necessary for the Jurats to consider the third question.

Conclusion

68. Having come to the conclusions set out above and having been directed by me that declaratory relief was a discretionary remedy, the Jurats unanimously came to the conclusion that it was appropriate to exercise the court’s discretion to make the first declaration sought in the amended Cause, namely that the Trust funds are not the proceeds of crime. As set out above, having discussed the nature of the remainder of the relief sought in the amended cause with counsel, no further order was necessary, on the basis that CST had confirmed that once it has the comfort of the Act of Court it would comply with the revocation of the Trust in accordance with the Deed of Revocation and the request by RTL to pay the funds away in accordance with his instructions.