

Action by accountholders against Bank to prove provenance of funds in accounts were not and did not represent proceeds of criminal conduct for the purpose of offences under Part II of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999. Principles reviewed.

**[2023]GRC026**

**CIVIL ACTION NO. 2432**

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

**B E T W E E N:**

**(1) L  
(2) M  
(3) N  
(4) Mrs B**

**Plaintiffs**

**-and-**

**CREDIT SUISSE AG, (GUERNSEY BRANCH)**

**Defendant**

**BEFORE HER HONOUR HAZEL MARSHALL KC  
LIEUTENANT BAILIFF  
SITTING ALONE**

**Hearing dates: 12<sup>th</sup>-15<sup>th</sup> June 2023  
Judgment handed down: 11<sup>th</sup> July 2023**

**Advocate for the Plaintiff: Advocate N Robison  
Advocat for the Defendant: Advocate S Florance**

**Legislation and authorities referred to:**

**Legislation:**

*Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999 ss 38-40,  
Disclosure (Bailiwick of Guernsey) Law 2007 s 1  
Forfeiture of Money etc in Civil Proceeding (Bailiwick of Guernsey) Law 2007 ss 13, 59, 61*

## Authorities:

### Guernsey

*Chief Officer of Customs & Excise etc v Garnet Investments Limited* [2011-12 GLR 250]  
*Jakob International Inc v HSBC Private Bank (CI) Limited* (Royal Court Judgment 26/2016)  
*Liang v RBC Trustees (Guernsey) Ltd* (Royal Court Judgment 20/2018)  
*Liang v RBC Trustees (Guernsey) Ltd* [2019] GRC006  
*BD Limited v Investec Bank (Channel Islands) Limited* (unreported; Royal Court 29 December 2022)

### England and Wales

*Devaynes v Noble* 1816 2 Mer 572 (*Clayton's case*)  
*Re Hallett's Estate* (1880) 13 Ch D 696  
*Shah v HSBC Private Bank (UK) Ltd* [2010] 3 All ER 477

**This judgment was delivered in proceedings held in camera. This public version was directed by the court to be produced in the public interest, and it has therefore been anonymised to protect the proper privacy of those involved.**

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## J U D G M E N T

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### **This action**

1. The Plaintiffs are respectively the three adult children and the widow of AB, (“**Mr B**”) who died on 30 September 2015. They are the heirs to the estate of Mr B, I understand in equal shares. For convenience and with no disrespect, I will refer to them respectively as “**L**”, “**M**”, “**N**” (together, where appropriate, “**the children**”) and “**Mrs B**”. Collectively, I will refer to them as “**the B family**”, “**the Plaintiffs**” or “**the Heirs**”, as feels more natural in context.
2. The Defendant (“**the Bank**”) is the Guernsey branch of Credit Suisse AG, a bank which is licensed to carry on banking/financial services business in Guernsey.
3. The Plaintiffs hold (or held) five accounts with the Defendant Branch, four individual accounts and one joint account (“**the Accounts**”). The Accounts were opened after the death of Mr B, as a convenient mechanism for the receipt of monies coming to the Heirs from, or in right of, his estate. I understand that Guernsey was chosen as a convenient jurisdiction for this, for reasons of tax transparency and compliance purposes, because the Heirs were resident in different countries for tax purposes. The mechanism was that payments were made into the joint account (the “**Family Account**”) and were then divided appropriately and paid out into the individual accounts. Each Account had the capacity to receive funds denominated in US Dollars, Sterling, Euros, or Swiss Francs. I have said “or held” above because I have been told that, since the inception of these proceedings, the relevant funds in the Accounts have been transferred into investments elsewhere, so as to preserve value. That fact is not material for the purposes of this action and can be ignored.
4. By this action, as now proceeding, the Heirs claim against the Defendant:
  - (i) a declaration that the funds held in the above accounts are not the proceeds

- of criminal conduct for the purposes of the *Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999* (“**the PoC Law**”); and
- (ii) an order that the Defendant transfer to the Plaintiffs or to their order, the funds and investments held in such accounts.

5. The Bank maintains a neutral position as to the granting of the above relief, thus creating the rather strange position that, in practice, there is no actual dispute between the parties before the Court. The Bank does not, however, feel able itself simply to comply with the Plaintiffs’ instructions and pay the funds and investments out, and indeed, to transfer them out of the Bailiwick. This is because of the operation of provisions contained in the PoC Law and the *Disclosure (Bailiwick of Guernsey) Law 2007*, (“**the Disclosure Law**”) in the events which have happened, as I will explain below. The Bank has therefore declined to comply with the Plaintiffs’ instructions, not because it does not see them as valid, but because of apprehensions that if it did so, it might be vulnerable to charges of one of the criminal offences laid down in ss 38, 39 or 40 of the PoC Law.
6. The Plaintiffs have brought this action against the Bank, as the currently approved means for a customer to attempt to resolve this kind of unsatisfactory state of affairs. The action is what is now commonly known as a “private law action”, as I will again explain below, but I will refer first to the relevant statutory provisions.

#### **Legal framework.**

7. Within the suite of Guernsey Laws designed to combat financial crime the following are material here:
8. By s 1 of the Disclosure Law, which applies to financial services businesses such as the Defendant in this action, (and insofar as is relevant):

(1) *“A person must make a required disclosure as soon as possible if the conditions in subsections (2) and (3) are satisfied.*

(2) *The first condition is that he*

*(a) knows or suspects, or*

*(b) has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering or that certain property is or is derived from the proceeds of criminal conduct.*

(3) [The relevant knowledge came to him in the course of financial services business.]

(4) *Any person who fails to make a required disclosure .... commits an offence.*

(5) *A required disclosure is a disclosure of [the relevant information]*

*(a) To a nominated officer or a prescribed police officer or another FIU officer ....”.*

9. By s 17 (1) of the Disclosure Law,

*“ ‘another FIU officer’ means a member of the Financial Intelligence Unit who is not a police officer”*

and

“ *‘criminal conduct’ means any conduct which*

*(a) constitutes a criminal offence under the law of any part of the Bailiwick, or*

*(b) is or corresponds to conduct which, if it all took place in any part of the Bailiwick, would constitute an offence under the law of that part of the Bailiwick....”*

10. Ss 38 – 40 of the PoC Law lay down offences in connection with the proceeds of criminal conduct.

11. “*Criminal conduct*” is defined in s. 1 of the PoC Law as being

*“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 such an offence if it were to take place in the Bailiwick.”*

It is to be noted that there is no express requirement that such conduct should have resulted in a criminal conviction; the test appears to be simply descriptive of the relevant conduct. Since most crimes in Guernsey are triable on indictment, the qualification in (a) is wide.

12. Section 4 of the PoC Law provides that

*“(1) For the purposes of this Law –*

*(a) 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 are his proceeds of criminal conduct ...”.*

This sub-section is used expressly to provide the definition of “proceeds of criminal conduct” for the purposes of the PoC Law in general; see s 52 (1). Interestingly, as used in s 4 itself, it plainly assumes that there has been a criminal conviction: see s 4 (3) (a) (i). However, where the s 4 (1)(a) definition is deployed in Part II of the Law, relating to the anti-money laundering offences with which we are here concerned, it has apparently been accepted that no such restriction is imported. I was addressed on the basis that it was common ground that the phrase was a purely descriptive qualification.

13. It will be further noted that in respect of “foreign” conduct, the definition of “criminal conduct” in both the PoC Law and the Disclosure Law is a “single criminality” test, ie it depends on whether the conduct would be criminal if committed within the Bailiwick; it is not required, also, to be criminal in the jurisdiction in which it actually took place. This is different from the qualification for forfeiture of assets under ss 13 and 59 of the *Forfeiture of Money etc in Civil Proceeding (Bailiwick of Guernsey) Law 2007* (“**the Forfeiture Law**”). Where the relevant conduct took place outside the Bailiwick the provisions of that Law require that, to be “unlawful conduct” (defined to mean

“criminal conduct” see s 61 (1)), the conduct must have been criminal in the relevant foreign jurisdiction, as well being criminal if it had been committed in the Bailiwick: see s 61 (2).)

14. As regards the relevant offences laid down in the PoC Law, s 38 is probably the principal section. It relates to “Concealing or transferring the proceeds of criminal conduct” and provides:

“38 (1) ....

*(2) A person is guilty of an offence if, knowing or suspecting that any property is or in whole or in part directly or indirectly represents another person’s proceeds of criminal conduct, he*

*(a) conceals or disguises that property or*

*(b) converts or transfers that property or removes it from the Bailiwick.*

*(3) In subsections (1) and (2) the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights in respect of it.*

*(3A) Where a person discloses to a police officer a suspicion or belief that any property is or in whole or in part directly or indirectly represents another person’s proceeds of criminal conduct or discloses to a police officer any matter on which such a suspicion or belief is based, -*

*(a) If he does any act in relation to that property in contravention of subsection (2) he does not commit an offence under that subsection if –*

*(i) the disclosure is made before he does the act concerned and the act is done with the consent of the police officer (and in this case the person doing the act shall incur no liability of any kind to any person by reason of such act) ... ”*

*(3B) For the purposes of this section having possession of any property shall be taken to be doing an act in relation to it. ... ”*

15. Section 39 relates to “Assisting another person to retain the proceeds of criminal conduct” and provides:

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

*(a) the retention or control by or on behalf of another person (called in this Law “A”) of A’s proceeds of criminal conduct is facilitated (whether by concealment, removal from the Bailiwick,*

*transfer to nominees or otherwise), or*

*(b) A's proceeds of criminal conduct –*

*(i) are used to secure that funds are placed at A's disposal  
or*

*(ii) are used for A's benefit to acquire property by  
way of investment, knowing or suspecting that A is a person  
who is or has been engaged in criminal conduct or has  
benefited from criminal conduct he is guilty of an offence.*

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

Section 39 (3) contains similar provisions to those in s 38 (3A) for the protection of the person doing the act if he discloses it to a “police officer” and obtains “consent”.

16. Section 40 relates to the “Acquisition, possession or use of proceeds of criminal conduct” and provides:

*“40 (1) A person is guilty of an offence if, knowing that any property is,  
or in whole or in part directly or indirectly represents, the proceeds of  
criminal conduct, he acquires or uses that property or has possession of  
it.*

*(2) It is a defence to a charge of committing an offence under this section  
that the person charged acquired or used the property or had possession  
of it for adequate consideration....”*

Section 40 (5) contains similar provisions to those in Ss 38 (3A) and 39(3) for the protection of a person who does any act under subs 40 (1) if he has disclosed to a police officer a “suspicion or belief” that the relevant property is or represents another person’s proceeds of criminal conduct and the act is done with the consent of such police officer.

17. It will thus be seen that the various money-laundering offences in the PoC Law are very wide in their ambit. There are some slight inconsistencies and oddities in the drafting of the offences (eg that the offence under s 40 depends only on “knowing” and not alternatively “suspecting” criminal conduct as do the offences under ss 38 and 39, and the different way in which s 39 is drafted compared to ss 38 and 40) but the general intentment of the provisions is clear. In particular, it is clear that the intention is to catch “proceeds of criminal conduct” in a very wide sense. This is emphasised by the repeated use of the phrase “*is or represents, in whole or in part, directly or indirectly*” the proceeds of criminal conduct.

## **The problem**

18. There is, however one very unfortunate aspect of these provisions, viewed from the point of view of a person who becomes innocently embroiled in them because of allegations about the source of funds in his or her bank accounts or suchlike held in

Guernsey, of which he or she was unaware.

19. If a bank becomes aware, in the usual case probably from open source media reports which these days are generally monitored under regulatory requirements, of allegations being made as regards criminal conduct with which a customer or his funds may have some connection, then, as set out above, if such information raises the requisite degree of suspicion, the bank must make the necessary disclosure under the Disclosure Law, on pain of committing an offence. However, to avoid committing the further offence “tipping off” under s 4 of the Disclosure Law, it must not tell its customer that it has done so.
20. If it then receives an instruction from the customer to make a payment, it will not be able to comply with that instruction without committing an offence under ss 38, 39 or possibly 40 of the PoC Law. It will probably apply to the FIU for consent to carry out the instruction, although I am informed that nowadays the FIU is, somewhat coyly, unwilling to use the word “consent” in any reply which it makes to any such request. Instead it prefers the circumlocutory approach of informing the notice-giver that if it does the relevant act or makes the relevant payment, it either will or will not “have a defence” under the relevant sub-section.
21. If the bank receives such a “no consent” reply, it cannot obey the instruction without risking committing the offence and, once again it may not so inform its customer without risking committing a “tipping off” offence under s 41 of the PoC Law.
22. What will then happen is that the customer will find its instruction mysteriously being fobbed off, evaded or just plain disobeyed, until, eventually, it either takes proceedings against the bank for breach of mandate or gets the reply which appears to be acceptable that the instruction has been refused owing to “regulatory requirements”, from which it (or by this stage, probably, its lawyers) can deduce why the instruction is not being obeyed. The customer must then evaluate his position, as to how he may be able to obtain access to his money.

### **The authorities**

23. For the customer who believes himself innocent, the “no consent” response from the FIU creates something of an impasse, and this situation has produced four particular authorities in Guernsey.
24. In *Chief Officer of Customs & Excise etc v Garnet Investments Limited* [2011-12 GLR 250], Garnet held funds on behalf of the son of a former President of Indonesia in a bank in Guernsey. Suspecting that the funds might have been obtained illegally from the Indonesian Government when the President had lost office, the bank disclosed its suspicions to the FIS (precursor of the FIU) and was refused consent to transfer the funds out of the Bailiwick. This was despite a freezing order having been obtained previously but later discharged, and 10 years having elapsed with no criminal proceedings being instituted or investigations even being in train against the son or the customer. Garnet applied for judicial review of the FIS’ decision. LB Newman upheld this claim and directed the FIS to reconsider its decision, holding that it was irrational and perverse.
25. At first blush it seems perfectly reasonable to suggest that it is the FIS’ refusal of consent which is the cause of the customer’s being denied access to its funds, but on appeal, the Court of Appeal reversed this decision, holding that the FIS’ decision was

not irrational or perverse because Garnet had not submitted any evidence to allay the suspicions which had been entertained. Moreover it held that, whilst an application for judicial review of the FIS' decision was not unsustainable, the situation should be viewed on the basis that the real reason for the customer's being denied access to its funds was the bank's refusal to transfer the funds in the light of its own suspicions, and that consequently the appropriate response of the frustrated customer was to bring a private law action against the bank, in which the foundation for such possible suspicion could be and would be investigated in detail. This is the course which has given rise to the subsequent authorities.

26. In passing, but importantly, *Garnet* highlighted a particular problem with this aspect of the Guernsey anti-money-laundering regime, which is that there is no time limit, or requirement on the FIS (or FIU), which the customer can invoke, for it either to give its consent within a period or be deemed to have done so. In the equivalent English legislation, such a "no consent" response falls away after 31 days from challenge, which means that the relevant authority must make a decision, within that time, either to commence other proceedings such as for a freezing order, in which it will be required to reveal and make out its case, or to accept that the funds can be dealt with or removed from the jurisdiction. Unsurprisingly, (and it would have been an ambitious submission) the Court of Appeal in *Garnet* refused to imply any such time limit into s 39 (3) of the PoC Law, supporting this by reference to the situation in Guernsey – a small jurisdiction, where financial transactions were implemented less speedily than in the City of London, and investigative resources for the authorities were more limited – which it held was sufficiently different from the position in England and Wales that the absence of such a time limit was not necessarily unreasonable.
27. The Court of Appeal in *Garnet* stressed that the appropriate analysis of the situation was that there was a suspicion as to the legitimacy of the origin of the funds, entertained by the bank, which had not been allayed, and it was this which justified effecting what has been described as an "informal freeze" on them. The solution was therefore that, to obtain his funds, the customer must allay such suspicion, and this is the basis on which the industry has thereafter proceeded. But the problem for the claiming innocent "owner" of the funds, facing allegations that they represent the proceeds of someone else's criminal conduct in the past, is that he may have great difficulty in obtaining the evidence necessary to prove that the funds are not, in fact, tainted in this way, and this legal analysis places the burden of proof squarely upon him. If he is unable to obtain such evidence, the funds will apparently be subject to such an "informal freeze" indefinitely.
28. In *Jakob International Inc v HSBC Private Bank (CI) Limited* (Royal Court Judgment 26/2016) the bank refused instructions to transfer \$10Mn from the plaintiff company's account to a payee out of the Bailiwick because it had made a suspicious activity report to the FIU on discovering that a person authorised to operate the account (though not an actual director of the company) had been convicted of VAT fraud in Belgium. It had thereafter acted on the instructions of the FIU, which did not consent to the transfer of the funds but only to payment of the bank's fees. Confiscation action on the part of the Belgian authorities was expected.
29. The plaintiff company pursued a private law action against the bank. The bank applied to strike out the cause on the grounds that its clear defence to any claim for breach of mandate was that it could not comply with the mandate without committing an offence. However, the then Deputy Bailiff refused to strike out the action, noting that the course

taken by the plaintiff was effectively that which had been approved in *Garnet* (above), and that the justification for this was that the provenance of the funds, and hence the justification for any suspicion being entertained, could be investigated in such an action.

30. He held, following the approach laid down in the English case of *Shah v HSBC Private Bank (UK) Ltd* [2010] 3 All ER 477, that the approach to any such private law action, effectively for breach of mandate, would be two-stage. It would be for the bank to demonstrate that it had reasonably entertained the suspicion which will have caused it to make its report to the FIU in the first place, but that after that, it would be for the customer to demonstrate, on sufficiently cogent and credible evidence, that the funds in question were not the proceeds of crime. Whilst this might look like the impossibility of proving a negative, it would be achievable by the positive route of proving the actual provenance of the funds, and that this was innocent and untainted. The Deputy Bailiff further held that such an investigation was not amenable to strike out or summary judgment procedure.
31. This case thus established what has subsequently become the accepted route for an aggrieved bank customer to pursue in this situation, and in *Liang v RBC Trustees (Guernsey) Ltd* (Royal Court Judgment 20/2018) the first such private law action actually came to trial.
32. Mrs Liang was unable to obtain access to funds in her trust in Guernsey because suspicions about the source of her funds had been entertained by the trustee, owing to the apparent criminal conduct of her estranged husband, from whom it was believed that the funds could have emanated. The burden of proof in relation to the two stages of such an action (namely the trustee's proving the existence - and perhaps reasonableness - of its original suspicion, and the customer's then having to allay that suspicion by proving that the actual provenance of the fund was not tainted) was argued and examined in some detail, and the Deputy Bailiff confirmed his opinion as expressed in *Jakob*.
33. In his judgment, the Deputy Bailiff noted, at [26] that

*“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 crime...”*

This is a point to which I will need to return later.

34. In the event, Mrs Liang failed in this action, because she did not produce sufficient information as to the actual source of the funds as being her own assets, as she was claiming, and the Deputy Bailiff, having examined the information which she had produced, formed the view that there were too many gaps, but that she had, or could easily obtain, more information, and she had not done so partly because of not appreciating the importance of providing as much as she could, and partly because of feeling that the exercise was unwarranted and intrusive. As he had some sympathy for her position, though, he allowed her the opportunity to return subsequently with more information, and in a subsequent supplementary judgment (at [2019] GRC006) he allowed her application and made the declaration she sought, namely that a part of the funds in the trust were not the proceeds of crime. He noted even there, however, (at

[52]) that this declaration could not bind anyone but the actual parties, whilst expressing the obvious hope and belief that his decision would be respected by those who might otherwise have reason to pursue the defendant trustee for “wrongdoing”.

35. Before leaving the *Liang* decision, the Deputy Bailiff’s postscript to the first judgment, at [79] – [82] is worth noting. This is because of his recognition, in [81] in particular, of how difficult the situation may be for someone in Mrs Liang’s position, who is caught up in these anti-money laundering provisions because of association with someone else against whom allegations of criminal conduct are made, but who may have great difficulty in accessing the evidence necessary to demonstrate her own (or her funds’) detachment from any criminal conduct being alleged against such third party. At the end of this postscript, whilst stating that the absence of any time limit in the legislation on the effect of a “no consent” or “do not pay” instruction from the FIU was a political decision, he offered that case as an illustration of the problems faced by someone who claimed to be an “*innocent victim by association*” of these provisions, required to vindicate themselves with only the powers of a private individual to obtain information, rather than the wider powers which would be available to law enforcement.
36. The final case of note is *BD Limited v Investec Bank (Channel Islands) Limited* (unreported; Royal Court 29 December 2022), again a decision of the (by then) Bailiff McMahon. It is neither proportionate nor necessary to recite the intricate detail of this case here. It shows the Bailiff making, again, a meticulous analysis of bank accounts showing the source and history of funds paid into the plaintiff’s account, which was effectively operated on behalf of its ultimate beneficial owner, a Mr Stroll, between 2011 and 2015. The funds had come partly from the plaintiff’s previous bank account with Barclays and partly as funds paid to the plaintiff from a pension fund (“Monterey”), which was Mr Stroll’s pension fund and had received his income before it was terminated.
37. The exercise conducted by the Bailiff was to decide whether such funds could be regarded as the proceeds of criminal conduct, apparently in the light of three considerations said to give rise to the relevant suspicion. The first was seemingly that they had identifiably been fees payable in respect of Mr Stroll’s consultancy agreement with Global Palace (“GP”), an international online gambling company between 2007 and 2013. The second was that some such payments were income paid to Mr Stroll (via Monterey) by Cyber World Limited, a company in which he had been interested as a shareholder and director and apparently did work for, and which had rendered administrative services to GP until 2007, but which company had been convicted of unlawful gaming activities in 2006. The third was the fact Mr Stroll himself had been convicted in 1999 of an offence under Canada’s Competition Act in relation to the business activities in 1994-5 of a telemarketing company in which he was interested until he sold that interest in 1997.
38. The Bailiff was satisfied that the activities of GP were not criminal (see [53]). He also held that Mr Stroll’s evidence that the funds standing in the plaintiff’s name in the account were the proceeds of his savings during his working life did not justify finding that they were in whole or in part the “proceeds of crime” because of any suggested connection with the two noted convictions, (see [56] and [57]). He further held that in any event, the quantum of any such monies which could possibly be argued to be so attributable as a fraction of the whole sum under consideration, was so small that he could “*overlook [any] intermingling principle*” (see [58]). This point is material to certain of the submissions made in this case by Advocate Robison, acting for the Plaintiffs.

39. With that introduction regarding the relevant areas of law I therefore turn to the facts of this particular case.

### **History and facts.**

40. The following facts are either expressly agreed between the parties, or are taken from the evidence of M, who has sworn the leading affidavits in these proceedings, confirmed, to the best of their knowledge, by the other Plaintiffs.

41. Mr B was the original founder and the former CEO of the X Group of companies, a group of commodity trading companies, trading in the natural resources market. For context, the Group is now one of the largest companies in the world. Mr B founded the original company, X Group BBV in the early 90's. It became, at least for a time, the holding company of the Group as it expanded internationally. The Group now comprises several companies incorporated in various jurisdictions including, materially for present purposes, the Netherlands, Curaçao, and Country Z. Other companies brought subsequently into the Group trade under the name of "Company C". Company F, a Curaçaoan company, has also figured in the history as the, or an, ultimate holding company for the Group and probably other enterprises.

42. Mr B stepped back as CEO of the X Group when he became ill but remained as Executive Chairman until his death in 2015.

43. Following the death of Mr B, the Plaintiffs, as his heirs, opened the Accounts noted above in January 2017, for the convenient receipt and division of the funds inherited by them from his estate, as there mentioned. Funds in excess of US\$ several hundred million passed through the Family Account and onwards, equally, into the individual accounts, thereafter. (There were some individual adjustments to take account of individual circumstances, but those are not material at this point). The individuals were then able to transfer their own share of such funds onwards, for their own purposes. By mid-2021, a total of approximately US\$ 90Mn remained in the relevant Accounts. (There was also a sum of about £76,000 in M's portfolio, but it has been explained and demonstrated to my satisfaction that this was the product of previous currency exchange transactions carried out by him within his portfolio, with the original US\$ source being part of his share of the original US\$ several hundred million received into the Account in US\$, and so this fact can be ignored for present purposes.)

44. In August 2021, L wished to transfer her funds to a newly opened account in her own name with Credit Suisse in Zurich. Having opened the necessary account, she gave instructions to the Bank to make the transfer, in December 2021. These instructions were not complied with. Other transactions requested by M and N were also not complied with, or seemed to face difficulties and delay, even for small amounts. Eventually, in May 2022, after the Plaintiffs had resorted to instructing lawyers (Babbé) to take up the question of non-fulfilment of their instructions, the Bank revealed to them that payments out of the accounts were being blocked, due to "legal and regulatory requirements".

45. These proceedings were therefore commenced on 25<sup>th</sup> May 2022. They sought the above declarations and also, at the time, damages for breach of mandate, in not making the payments which had been instructed.

46. When the Defences were tabled in July 2022, it was formally revealed to the Plaintiffs

that the Bank regarded itself as unable to comply with the various instructions which the Plaintiffs had given because they had previously made a Suspicious Activity Report (“SAR”) to the FIU with regard to these Accounts (a copy of which was attached to the Defences), and had received notification in response to the effect that it did not have the FIU’s consent to make the requested payments.

47. The SAR which has given rise to this informal freezing (in effect) of the Plaintiffs’ funds was made by the Bank on 15<sup>th</sup> December 2021, prompted by its noting and monitoring the progress of the action in Country Z, mentioned below at para [49]. Its concerns had been confirmed by an enquiry via the Economic and Financial Crime Bureau from an “overseas authority” made on 22 February 2022, as to whether the Bank held any accounts for any of the Plaintiffs. This was presumed to be a prelude to a request for international legal/judicial assistance, and there had been a subsequent notification that the overseas authority was seeking restraint of any assets held by the Plaintiffs, although this had not and has never, in fact, happened. The Bank therefore pleaded that its suspicions held on the above basis, were justified and that it was accordingly not in breach of mandate, pursuant to its contractual terms and conditions.

### **The relevant alleged criminal conduct**

48. Whilst the identity of the overseas authority was not disclosed, it became fairly easy for the Plaintiffs to identify that it was the Country Z Federal Prosecutor’s Office, and that the enquiry, etc, had arisen from the following circumstances.
49. On 24 November 2020, the Federal Prosecutor in Country Z had filed a “Public Civil Action for Administrative Impropriety” against Company X1, (the Country Z branch of the X Group), four other Company X companies, (including X BBV), Company F, eight individuals – some based in Country Z and others not – including a Mr Y, who had been and still is in a senior role of the X Group, and the Plaintiffs as the heirs of the deceased Mr B. A certified translation of the text of this claim (which is 262 pages long) was put before the Court.
50. The essence of the action – it is to be noted that it is a civil action – was and is a claim that between May 2012 and October 2013, 31 transactions effected between Company X (I now use this label to refer compendiously to the relevant X group companies, these all being, I understand, held by Company X) and Company P, a Country Z state-owned natural resources company had been obtained and manipulated by an international corruption conspiracy, involving bribery of Company P officials. In return for corrupt payments, certain officials would inform Company X of the “best” bids from potential competing counter-parties to an intended purchase or sale which had been received by Company P, to enable Company X to submit a matching bid. Certain other officials would then, again in return for corrupt payments, ensure that Company X’s bid was preferred to that of the other third party bidder.
51. It was claimed that this activity should be viewed as having cost Company P (and thus, in effect, the Country Z state) approximately \$40Mn in total. I say “should be viewed” because the methodology by which this sum has been calculated has been the subject of extensive criticism, on all of legal principle, factual presumptions and general valuation grounds, in the evidence in this action. That sum is in fact the Country Z Prosecutor’s assessment of the profit made by Company X on the 31 trades which, it is therefore argued, equates to the loss suffered by Company P, and it is pointed out that it is difficult to see the logic of how this translates into any actual loss for Company P.

But ignoring this latter proposition, therefore, the Plaintiffs' expert evidence is also that the approximately \$40Mn figure is itself unsustainable as a valid calculation of Company X's profit; even assuming the facts of the alleged bribery to be proved, the actual amount of any profit to Company X would have been no more than approximately \$5Mn . I will have to return to this later where the detail is relevant.

52. Specifically, for present purposes, it is alleged that Mr Y and Mr B, whilst not themselves directly involved in the bribery, knew about it and concurred in this corrupt activity. In Mr B's case, this assertion appears to be based on allegations made in plea bargaining agreements made by other persons.
53. In terms of procedure, by an order of the Court in Country Z made on 4 November 2021, there has been a split of the action as regards defendants who are resident in Country Z and those who are not, the latter thus including the Plaintiffs. Therefore any action against them is to be tried under a separate action, but no such action has yet been served on the Plaintiffs. In addition, at that time, the Country Z Court rejected a claim by the Country Z Prosecutor to freeze the assets of the X Group up to an amount of approximately US\$ 200Mn odd and granted it only in the sum of approximately BR\$ 20Mn, which then equated to less than US\$ 5Mn.
54. It has already been remarked that this is not a criminal action in Country Z, but that that does not prevent any "proceeds" of the conduct complained of being the subject of money laundering offences in Guernsey, because the test for such offences is that the relevant activity would be criminal in Guernsey. It is accepted that the alleged activity of the Company X personnel which is described would constitute the indictable offence of bribery in Guernsey.

### **Progress of this action**

55. Returning to the progress of the private law action in this jurisdiction, the Plaintiffs took issue with various alleged assertions and effects of the Administrative Misconduct Proceedings in their Replique of 9 September 2022 and the Bank raised further points of contention in its Duplique of 7 October 2022. The matter proceeded towards trial, with relevant directions being given, including a direction for the expert evidence already mentioned.
56. Before the trial, the Plaintiffs agreed with the Bank to accept that the Bank's suspicion founded on the information available to it, was sufficient to justify the making of its SAR to the FIU at the time it was made. They therefore agreed not to pursue their claim in damages, and the issue of the adequacy of the Bank's alleged suspicion, (the first of the two issues to be determined under the *Jakob/Liang* principles) was therefore not required to be decided at the trial. This left only the issue of provenance, as to which the Plaintiffs accepted that the burden would rest upon them to prove to the court's satisfaction that the monies in their respective accounts were not the proceeds of "*any person's criminal conduct*" within the meaning of the PoC Law, to support their submission that the court should therefore make a declaration to that effect and should order the Bank to make the payments which it had been instructed to do.
57. It was also agreed that the Bank itself would adopt a neutral position with regard to arguments in the case; it would not itself seek to call any evidence, and would not cross-examine the Plaintiffs' witnesses, although its Advocate would ask questions designed to elicit further explanations, or to reveal any facts which the court might wish to take

into account in considering whether it could be satisfied that the Plaintiffs had discharged the necessary burden of proof. It would, of course, be in the Bank's interest that, if the Court were to rule in the Plaintiffs' favour, its decision should be demonstrably soundly based.

## **The trial and the evidence**

58. The trial in this matter came on before me on 12<sup>th</sup> June 2023 over four days. Advocate Robison appeared for the Plaintiffs. Advocate Florance appeared for the Bank and took the role described above. In effect, he acted as an *amicus curiae*. I record that this role was, in my judgment, very proper for him to adopt in all the circumstances, and his participation in the case, even though, therefore, of limited scope, was of great assistance.

### **Factual evidence**

59. Out of total payments made into the Accounts under the arrangements to distribute the inheritance of several hundred million, less than \$90Mn remained at the time of the FIU's "no consent" or "do not pay" instruction. On behalf of the Plaintiffs, M provided a lengthy witness statement, with supporting documents and schedules, listing the payments into the various Accounts, and tracing their provenance, and then what had happened to them. M explained that he had been the Plaintiff most closely concerned with the administration of the funds arising from his father's estate, and able, therefore, to assemble and provide such evidence. N, L and Mrs B each gave a confirmatory witness statement and produced a similar schedule in respect of their own Accounts. Mr Y gave a short witness statement concerning payments made by him under an agreement with Mr B as mentioned further below.

60. M attended the hearing and gave evidence in person, and his answers were probed and tested in some respects by Advocate Florance. M struck me as an open, honest and reliable witness, prepared to be perfectly frank in his answers, and in particular admitting where he did not know the answer. I have no reason to doubt the accuracy and reliability of any of his evidence.

61. That evidence was amply supported by documentation, as to which Advocate Robison took me through samples, evidencing the machinery and pattern of the transactions, and the source of the relevant funds.

62. M's evidence explains the history of Company X, outlined above, and then turns to the question of identifying the sources of the funds held in the relevant accounts. As already noted, his evidence and analysis, is not contested or questioned for accuracy. He explained and provided documentation supporting the partition arrangement for the division of the assets deriving from Mr B's estate, and the initial opening of the Accounts in January 2017.

63. From his extensive and detailed evidence, it emerged that the various sums in the Accounts could be attributed to four particular matters, for all of which virtually all the underlying documents have been provided. The description below ignores interest payments and suchlike made into the Accounts, as they would naturally acquire any "character" which could be attributed to the funds upon which they were being paid.

#### **(1) Payments by Mr Y to Mr B under share sale agreement.**

64. In January 2012, Mr B agreed to sell to Mr Y a significant number of shares in Company F, the ultimate holding company of the X Group, for the sale price of almost \$40Mn. The purchase price was agreed to be paid in annual instalments of approximately \$10Mn, starting in January 2014. There was thus an amount of approximately \$30Mn outstanding at the date of Mr B's death. This was recorded as a loan outstanding in the Partition Agreement between the Heirs, and the right to receipt was divided four ways among them. Mr Y made three further payments in partial discharge of the obligation under the share sale agreement in January 2018 and January 2019, received into the Family Account and then transferred, as to 25% each, to the Plaintiffs' respective personal Accounts. The 12 entries effecting this are clearly seen in those bank statements.
65. The remaining sums payable by Mr Y were transferred into the Plaintiffs' accounts with Credit Suisse Singapore. They therefore do not figure directly at present but come into the story later.

### **(2) Payments by Company F to buy back shares from Mr B**

66. Mr B was a shareholder in Company F. He had an agreement with Company F that insofar as his shareholding of "B" shares exceeded an agreed percentage of Company F's issued share capital Company F would buy the excess back from him, at the end of each group financial year (30 September) with the purchase price being paid over the following four years. There was an accounting mechanism for valuing the shares.
67. At the time of Mr B's death, he held shares in excess of his agreed basic shareholding, which were inherited by Mrs B, as acknowledged in the Partition Agreement, and which Company F agreed to buy back from her for an amount in the order of \$100Mn over subsequent years. The three children also inherited shares in Company F from Mr B, to be divided equally between them, and they sold back some of these to Company F with the price being payable over future years. Being in need of liquid funds, the Plaintiffs entered into a loan agreement with Company F on 15 December 2017, enabling them to draw down monies as a loan which were then to be credited against the price payable to them in future for the Company F shares being bought back. Of these drawdowns, each of the Plaintiffs received in the range of \$4Mn into their individual accounts with the Bank, on 28 November 2018. The Share Purchase Agreements with Company F were entered into by the three children on 14 February 2019 and the Set-off Agreements on 27 September 2021.
68. M exhibits a table of payments into his Account deriving from the above transactions and interest payable under terms of the Share Purchase buy-back agreements (also exhibited.) I am satisfied that differences between the payments received by Mrs B and the three children are accounted for by the differences between the numbers of their respective shareholdings in Company F. There is a difference of approximately \$5Mn between the receipt by L and the receipts by N and M, but I accept M's attribution of these, and I do not see any reason to suppose there is anything untoward about it.

### **(3) Proceeds of Mr B's shares in Company C1**

69. At the time of his death, Mr B owned Ordinary A shares in a Maltese company, Company C1, which itself held shares in Company C a company incorporated in Singapore but operating in Switzerland as a multi-national petroleum products trading company. The Plaintiffs inherited these shares in equal shares. Mrs B already had a

small shareholding in Company C1 shares on her own account.

70. In March 2021, the Plaintiffs each received “Investment Letters” from Company C1 offering proposals with regard to their investments in Company C. One of these was a proposal from X Group (who also held Company C shares) to buy shares in Company C from other Company C shareholders. The Plaintiffs elected to accept this offer and each signed a “Form of Indirect Offer Acceptance Letter” as required. The purchase was finalised in December 2021. M, N and Mrs B directed the payments for these shares to be paid into their Accounts with the Bank, but L had, by this time, encountered difficulty with her instructions to the Bank and arranged for her payment to be paid to her account with Credit Suisse Zurich.

**(4) Receipts from Credit Suisse in Zurich**

71. On 23 September 2020 each of the children receive US\$ several million into their accounts with the Bank, remitted from Credit Suisse Zurich. Tracing back through their Zurich Bank accounts, the statements on which have been exhibited, it can be seen that these were re-payments into the Bank in Guernsey, made from accounts in Zurich into which they had earlier (in March 2020) each transferred sums of approximately \$30Mn from their Accounts with the Bank in Guernsey. The reason for this transfer had been a wish to place funds with a particular investment manager in Zurich.

72. Within these CS Zurich investment accounts, though, had also been funds of approximately €35Mn (each) which had been transferred from accounts which they had held with Credit Suisse in Singapore.

73. Some of the monies in the CS Singapore accounts had been derived from payments made by Mr Y in respect of his purchase of Company F shares from Mr B (see item (1) above), but the primary source of the funds in the CS Singapore accounts, was M’s interest in Company R, which carries on a waste recycling business. It was this business, I understand, which M had been concerned with managing directly during Mr B’s life, it having been founded by his great-grandfather and thereafter passed down the family. Mr B had also owned shares in Company R, but indirectly, through owning Company F A shares (which have nothing to do with the X Group companies). These A shares were inherited by the Plaintiffs in equal shares on Mr B’s death in 2015, but on 1 February 2017 M had purchased his sisters’ and his mother’s interests in the Company R shares under an arrangement (exhibited) whereby these holdings were to be consolidated with his and sold on to a third party or parties, with him then making agreed payments back to his sisters and his mother for their shares. These transactions, made through the CS Singapore accounts, took place between 2017 and 2021, with those accounts subsequently being closed in January 2023.

74. The point of this explanation was to illustrate that the “repayments” of US\$ several millions back into Guernsey from CS Zurich, which had been made in September 2020, had, in practice, been payments out of a mixed fund, with sources other than simply the original roughly \$30Mn transfers made to CS Zurich from the Accounts with the Bank in Guernsey. In 2020, the Zurich accounts had contained monies from Mr Y, and from Singapore.

75. M confirmed that the four sets of transactions listed above constituted the only sources of the funds held in the Plaintiffs’ Accounts with the Bank in Guernsey from their inception. There had been other transactions on the accounts, such as investments, inter-

family member transfers (M had made investments on behalf of himself and his sisters, and their respective shares of purchase prices and sales receipts had then been given effect), foreign exchange transactions, the making and repaying of fixed term deposits, interest adjustments, payment of charges and fees, etc. M had prepared spreadsheets, therefore, scheduling all the credits and debits on his own account, attributing them to such matters, and the other Plaintiffs had done the same.

76. This evidence had been comprehensively and meticulously prepared, and I am satisfied that it shows that all the funds now present in the relevant accounts, constituting the approximately \$90Mn in question can be considered to have originated from the four original sources described above.
77. It has not been sought to argue that the funds now standing in the accounts should be regarded as having the character of the last recorded credit items up to the total of the balance now “frozen” in the accounts, on the “last in” principle in tracing, of attributing funds in an account, and in my view properly so. It is not the case that the “last in” payments can be seen to have any clear connection with the alleged criminal conduct which is in issue. The information provided has been a recognition of the question of “how far do you go back?”, alluded to by the then Deputy Bailiff in *Liang* at [26], cited above. It does, however, illustrate the enormity of the practical consequences of having to do the kind of exercise which the Plaintiffs have carried out in this case, in order to attempt to answer such question.

### **Expert evidence**

78. M’s evidence shows, in effect, that the origin of the funds paid into the Accounts from sources external to the Plaintiffs’ own subsequent dealings with them came from the X Group and from Mr Y, and that it is a reasonable assumption that the latter’s funds paid into the Accounts as the purchase price of the Company F shares from Mr B must also have come from Company X, as his earnings. To deal further with the question of the provenance of such funds, the Plaintiffs sought and were granted leave to file expert evidence, for reasons which will appear. This expert evidence was taken as read, since there was no cross-examination proposed.
79. The first such evidence was a report dated 15 March 2023 from Pr. R, a Professor of Law and Advocate of Country Z, whose evidence was taken as read. Interesting and forceful though it was, it was directed at the merits, or otherwise, of the Country Z Prosecutor’s case against Mr B, and by extension against the Plaintiffs as his heirs, as a claim for damages, or for civil fines, and it concerned the issue of what might be the “proceeds” of the postulated criminal conduct only incidentally. Pr. R raised three procedural difficulties in the Country Z Prosecutor’s way, being principally (i) that, as he very much emphasised, such a claim was compensatory in nature and the charge did not identify loss to Company P, but, rather, invited the (false) assumption that the profits supposedly earned by Company X could simply be equated with loss to Company P, (ii) that it would be necessary to prove that Mr B actively participated in the alleged bribery scheme and the evidence disclosed was merely circumstantial, and (iii) that under Country Z law, the relevant civil fines could not be pursued against Mr B’s heirs at all.
80. Discussing the approximately \$40Mn claim from the perspective of quantum, but reiterating that it could not be the correct basis for assessment of damages (see (i) above), Pr. R said that, in any event, the basis of the calculation of supposed profit was patently flawed in several respects, of which the principal ones were (a) treating such profit as Company X’s assumed gross (rather than net) profit, (b) conveniently

presuming Company X's gross profit margin to be the same as other companies', or upon other transactions, known in the natural resources sector, even though those businesses or transactions related to materially different commodities, and (c) having applied a current exchange rate from BRL to US\$ rather than apply the relevant historic exchange rate and then adjust for inflation using the Country Z Central Bank's interest rate, which was the correct method of assessing historic damage in a different currency under Country Z law. Even, therefore, using the Country Z Prosecutor's incorrect thesis for calculating loss, the proper calculation was reduced to less than \$15Mn. He also gave his opinion that Administrative Misconduct claims were taking an average disposal time of 5.5 years up to Court of Appeals stage, but that this particular claim was likely to take longer - at least 8 years.

81. The second tranche of expert evidence was contained in a joint report dated 17 March 2023 of Mr Ian Clemmence and Mr Ed Gray, both qualified Chartered Accountants and respectively a partner and a director of PwC in London. They each gave evidence remotely at the hearing. Mr Gray and Mr Clemmence had not had access to all of Company X's records, but worked, in part, on the basis of a report obtained on behalf of Company X by Alvarez & Marsal ("A&M"), international forensic accountants, as to the same matters. They did this based on their understanding that A&M had had access to all such records in preparing their report.
82. Mr Gray, whose expertise is petroleum product trading, questioned whether it could really be said that the 31 trades in question had resulted from the alleged bribery at all, which would of course produce the conclusion that no profits had been earned as a result of it. However, as this is more a conclusion about legal causation than accountancy/valuation evidence, I think it right to ignore it. Otherwise, Mr Gray confirmed that the basis for the Country Z Prosecutor's assumption of a 5% profit margin as the basis of his calculation of Company X's supposed profit (and therefore Company P's loss) on the 31 trades was flawed for being based on business and transactions which were simply not comparable in terms of product type, location, size and nature, and had been over-stated for (apparently) disregarding freight and other shipping costs, hedging results and performance related trader bonuses. Taking assessments of true profit margin from the A&M report, these being consistent with his own experience, he gave his opinion that the true estimate of supposed unlawful profits on this basis was, actually, between \$4Mn and \$5Mn.
83. Mr Clemmence, whose expertise is in share and company valuation, considered the question of the impact of such supposed unlawful profits on the value of X Group. With Company X being a private company, it was not possible to determine such value using stock market data, and, considering the various possible tools of analysis, he chose ultimately the method based on Net Asset Value (NAV) as the most appropriate method, since that is the conventional approach to valuing the shares of such a company at any particular time (and it was indeed that adopted by Company X in valuing its own shares.) With Company X's NAV in 2013, just after the alleged tainted transactions, being over US\$ 5Bn, the Country Z Prosecutor's figure of almost \$40Mn represented just 0.7% of that figure, and if Mr Gray's alternative calculations were applied, it represented just 0.09% (maximum) of that figure. This would therefore also have been the impact of such supposedly unlawful profits on Company X's share price.
84. He opined that there could have been no greater impact subsequently and, indeed, by 2017 (the date of opening of the relevant Accounts) such profits would have had no discernible or meaningful impact on Company X's value or share value at all, because Company X was not dependent on these profits to continue trading as it would have

wished (having obvious access to other credit lines) and because the quantum of such profits was so insignificant compared to the overall profit and NAV of Company X that its effect was negligible. If the exercise were done, however, the same relative proportions would be applicable. Applying this to the totals of about \$500Mn received into the Accounts from Company X / Company F and from Mr Y, a maximum total of less than \$4Mn (on the Country Z Prosecutor's calculations) or of approximately \$500,000 (on Mr Gray's calculations) could be attributed to the supposed unlawful profits. Applying those calculations to the approximately \$90Mn still remaining in the Accounts resulted in sums of less than \$1Mn (on the Country Z Prosecutor's calculations) and approximately \$80,000 (on Mr Gray's calculations) being attributable to supposed unlawful profits. In his opinion, this was the maximum potential impact of any such unlawful profits on the sums retained by the Plaintiffs into the Guernsey Accounts.

85. Advocate Florance, very fairly and properly, made two points about this expert evidence concerning the regard which could be had to it. First, as to Pr. R, he pointed out that his evidence was aimed fairly and squarely at the merits of the Country Z proceedings taken against the Plaintiffs, and touched only consequentially, in that context, on the issue of supposed unlawful profits made by Company X (or Mr Y or Mr B), and not at all on the issue actually before this Court. It was, in any event, no more than an expert opinion, obtained on one side of the dispute in those proceedings. The Court might fairly, therefore, regard it, as being of little assistance or weight.
86. Second, as regards the accountancy expert evidence, he pointed out (as he had done to the witnesses themselves) that as they had worked from the A&M report rather than having access to the source records for that report, the reliability of their work and conclusions necessarily depended on the accuracy and reliability of the A&M report, itself, which was not available for testing. He cautioned again, therefore, that the Court might not feel that this accountancy evidence could be accorded great weight or significance as to the real issue before it, this being whether, or the extent to which, the sums in the Guernsey Accounts were, or were not, the proceeds of crime.
87. As regards these points, I think Advocate Florance's analysis is correct as regards Pr. R's evidence, and whilst it may provoke sympathy with the Plaintiffs' case and position with regard to the Country Z proceedings, and thus in this matter as well, it is not of any weight for the purpose of determining the issue which is before me. As regards the accountancy evidence, whilst I note the possible limitations arising from the witnesses' not having had direct access to the source records, my task is to make a judgment here, on balance of probabilities, as to whether the monies in the accounts are properly seen, in whole or in part, as "*representing ... any person's proceeds of criminal conduct*" and on that basis I do consider that the evidence which has been produced, going as it does to analysis of the character of the source funds paid into the Accounts, has a bearing on the issue which is before me. I consider that I should therefore accord it, such weight as I think appropriate, acknowledging the limitation pointed out – and accepted by the witnesses themselves – by Advocate Florance.

## General

88. Before turning to the submissions and discussion of these, I make some general observations.
89. I am concerned here only with the "provenance" issue, regarding the approximately \$90Mn presently in these various Accounts. The burden of proof as to this falls on the

Plaintiffs, and requires them to prove to my satisfaction (although only on the usual civil standard of balance of probability) that the sums which they wish to have transferred out of their Guernsey Accounts

*“[are not, nor] in whole or in part directly or indirectly represent another person’s proceeds of criminal conduct”*

this being the negative expression of the phrases found in ss 38 (2) and 40(1), and by implication in s 39 (2), of the PoC Law. I remind myself that a person’s “*proceeds*” of criminal conduct, by s 4 (1) of the Law, at least includes (it is not quite an actual definition) property obtained “*as a result of or in connection with... criminal conduct*”.

## **Relationship to the Forfeiture Law**

90. I commented in *HMC v Carter & Associates* [2023] GRC015 at [140] – [145] on the conceptual difficulty of interpreting the slightly different phrase

*“the money or the part...is any person’s proceeds of unlawful conduct”*

in s 13 (2) of the Forfeiture Law. At first blush one would have thought that, with the link between “do not pay” directions and the eventual possible freezing and forfeiture of the relevant sums, those phrases should mean the same thing, and I have already noted that “*unlawful conduct*” in the Forfeiture Law is defined to mean criminal conduct. However, the wording of the two provisions still remains different. In the Forfeiture Law there is no extension of the very forthright word “*is*” to include direct or indirect “*representation*”, as there is in the PoC Law, and any such extension has to be a matter of implication or interpretation. This possible limit is perhaps attenuated by the use of the very emphatic phrase “*any person’s proceeds of unlawful conduct*” (emphasis added) in the Forfeiture Law, as contrasted with the phrase “*another person’s proceeds of criminal conduct*” in the PoC Law offences, which seems more focused.

91. The word “*is*” in the PoC Law in combination with the phrase “*another person’s criminal conduct*” (emphasis added) may at first seem infelicitous as it thus expressly does not apply to the actual wrongdoer - until it is recalled that the PoC Law offences are all aimed at conduct which assists the wrongdoer to hide, transfer or otherwise retain or gain the benefit of the proceeds of his wrongdoing. With sums in a bank account, therefore, one is looking at the bank, and its legal title to the funds and the “*other*” person can therefore include the actual account holder or his/its associate(s).

92. In other words, the PoC Law offences are aimed at deterring others from helping launder criminal money, property or benefits, whereas the Forfeiture Law is aimed at appropriating them. This provides a perfectly plausible reason as to why the scope of the former might be broader than the latter. Given the difference in wording, and the difference in the actual objectives of the Forfeiture Law powers and the PoC Law offences, therefore, I cannot derive any direct assistance from the Forfeiture Law as to the meaning of the relevant phrase in the PoC Law, although I bear in mind that its provisions provide context.

## **The meaning of the PoC Law**

93. Looking simply at the words of the PoC Law itself, therefore, I leave aside the philosophical problems inherent in holding that “*another person*” is there apt to refer to literally any other person at all, because this would require a plaintiff to prove an

impossible universal negative. In my judgment, and in the context of the purpose of the Law referred to above, it must be implicit that the relevant “[other] person” should mean a person who is identifiable, either explicitly or at least by general description as the possible or apparent (but not known) perpetrator of criminal activity which has occurred. In the case where suspicion arises from unexplained wealth, then the very suspicion that is thereby created is that there has been criminal activity, which must therefore have been committed by someone.

94. The next question is, therefore, what connection with that criminal activity is implied, by the breadth of the phrase “*is or in whole or in part directly or indirectly represents another person’s proceeds of criminal conduct*” (emphasis added) - ie property obtained by such perpetrator “*as a result of or in connection with his criminal conduct*”?
95. I have already considered the word “*is*”.
96. The words “*in whole or in part*” to my mind emphasise that one is looking at a relationship of practical identity, between the subject property or funds and the “*proceeds*” in question. It is a clear direction to have regard to the identifiable quantum of the subject property or funds which fits the requirement of identifiability with the relevant proceeds of criminal conduct.
97. This, in my judgment, completely negatives any possibility of finding that the whole fund “*is or ...represents*” [some other] *person’s proceeds of criminal conduct*” on the basis that, whilst only a part of it can be seen to be, or could be regarded as, such proceeds, the mingling of such tainted funds with other funds “contaminates” the whole. Therefore, any arguments regarding mixed funds, when dealing with provenance, must be dealt with by looking at the actual attribution or character of relevant parts within the funds, and cannot be met simply by according a general pejorative description to the whole.
98. The effect of the words “*directly or indirectly represent*” is more problematic. It is obviously intended to broaden the qualifying description beyond merely “*is*” but the question is: how far? The words “*directly or indirectly*” modify the word “*represent*”, but the concept of “representation” already excludes actual correspondence (this is dealt with by “*is*”) and therefore inevitably imports some indirectness into the relationship. However, “indirect” representation is plainly thought to extend the concept more widely than whatever the draftsman considered to be merely “direct” representation.
99. In my judgment, the emphasis implied by the addition of the word “indirectly” must be aimed at preventing any argument that “representation” requires 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 like the rule in *Clayton’s case (Devaynes v Noble)* 1816 2 Mer 572 or the principle of *Re Hallett’s Estate* (1880) 13 Ch D 696, or the rule that funds cannot be traced though an overdrawn bank account.
100. The question for determination must simply be whether, on the facts of the particular case, it can be fairly and reasonably said that the relevant property (or sum in a bank account) does “represent” the wrongdoer’s proceeds of criminal conduct, and it may

also be appropriate to add the qualification of “in the hands of the [relevant owner]”. By the same token, though, this notion seems to me to import recognition that, in appropriate cases - and no doubt in particular where the relevant property or sums in the bank account are not the property of the actual wrongdoer - “[X’s] *proceeds of criminal conduct*” may simply lose their character as such, even having regard to the fact that the Law has apparently seen fit to extend the retention of such character by importing the notion of “representation”, and even though the nature of such representation is further extended by accepting that it can be “indirect”. The word “represent” does, though, carry the notion of “standing in the place of”, and once again it seems to me, therefore, to point to a relationship of substitute *identity* in some way, which must have some justification in practical reality rather than metaphysics, rhetoric or mere theory.

101. I have tried to compose examples to illustrate such a position, to see whether, where or how a line might be drawn. However, this has not proved helpful to the task of seeking to formulate some form of test, because any illustration has to be so detail-specific. Some simple points though, show the difficulty of such an exercise. If X embezzles money from his employer and uses part of it to buy securities, which increase in value, I suspect no-one would argue that the securities do not represent his proceeds of criminal conduct, at their increased value; such “proceeds” include indirect benefits, as they clearly “result” from the original criminal conduct. Suppose X uses his ill-gotten gains to buy a car for his (innocent) daughter, who then sells the car and uses those proceeds for a deposit on a flat. How far along this trail (car, money, part of flat) could it still be said that X’s proceeds of criminal conduct were “represented”, even “indirectly” by the relevant property? Would the money which bought the car in the first place still “represent” X’s proceeds of criminal conduct in the hands of the garage from which he bought it? Surely not; the car must be the natural candidate to delimit such proceeds, otherwise they could reproduce and multiply rather strangely. Would it be different as regards the travel company, if X had spent the money on a world cruise? Again, surely not, even though that manifestation of X’s proceeds of criminal conduct had disappeared by being consumed. But what if X had won a significant sum gambling in the casino on board the ship? Could that money be said to “represent” his proceeds of criminal conduct? It could be described as “resulting” from it if the cruise would not have happened but for the embezzlement. On the one hand, this looks like a resort to arguments of metaphysics, but on the other, this might be thought to be countered by the fact that the candidate “proceeds” are again in X’s own hands.
102. One can continue constructing such thought experiments, but as they do not seem to lead to the formulation of a helpful test, and are not the subject of this case anyway, I do not do so any further.
103. The upshot, in my judgment, though, is that there must come a point, in considering any particular potential trail of “representation” of the identified “*proceeds of criminal conduct*”, where the combination of factual circumstances of time lapse (not sufficient on its own) and the number and nature of the transactions to which the wrong-doer’s proceeds of criminal conduct have been subject, possibly (according to the facts of the case) in combination also with any relationship between the wrongdoer and the person with the apparent legal title to the supposedly “representative” assets, gives rise to the common-sense impression that the relevant asset or funds in the hands of their present beneficial owner cannot fairly be said to “represent”, even as to some part (which must itself be sufficiently identifiable; see above) the “proceeds” of the relevant wrongdoing. The necessary nexus has to be one of identity, and not simply of

consequence, or subsequence, or mere context.

104. Turning to the present case, therefore, it is for Plaintiffs to prove, on balance of probability, that the approximately \$90Mn in the subject accounts are not proceeds of crime. In *Liang* (above) it was said that this could be done, and it is implied that it normally would be done, by the plaintiff proving affirmatively what the source of the funds actually was and that it was innocent, although this still raises the question “how far back is it necessary to go?” to prove this, and the plaintiff’s subjective innocence at any particular juncture is certainly not necessarily sufficient.
105. However, it also seems to me that a plaintiff is not necessarily limited to this route; he is entitled to prove his case by reference to any available evidence and argument. If, therefore, it is not possible to prove the innocence of the ultimate provenance of the relevant funds positively at some point, it is still open to a plaintiff to start from the other end of the connectivity trail, by identifying what would or could be regarded as the “proceeds” of the relevant criminal conduct and demonstrating, by evidence and/or argument, that such proceeds could not reasonably be taken to be now “represented” by funds in the relevant bank account, in the events which have happened. This may be regarded as simply another way of answering the question “how far back?” posed by the Deputy Bailiff in *Liang*. Bearing in mind that the standard of proof is balance of probability, it may be that a combination of such approaches can be adopted.

#### **Plaintiffs’ submissions**

106. Advocate Robison makes four submissions to the Court on behalf of the Plaintiffs. The first, and primary, submission is that regardless of whether the allegations of criminal conduct apparently being made in Country Z are proved, Company X is an enormous worldwide company. The criminal conduct alleged against Company X (and also, although much more tenuously, against Mr Y and Mr B) if it is ever proven, arguably enriched Company X between May 2012 and October 2013, but it cannot be assumed, on the basis of this, that any salaries, bonuses, dividends or other payments subsequently made by Company X are, or in any part participate in the character of, being the “proceeds” of such criminal conduct, carried through, indefinitely.
107. He points out that there have as yet been no findings of criminality even against Company X (let alone Mr Y or Mr B) and submits that that really is, or ought to be, the end of the matter. He submits that the Plaintiffs cannot be required to disprove mere allegations of criminal conduct, occurring many years before the actual funds came to be paid to them (being no earlier than January 2017) and at a time when the proceeds of such conduct could not be said to be having any impact on the value of Company X (or Company F) shares or to be in any way “represented” by the funds which came to them. The evidence shows that the funds in the Accounts (now in fact comprising only the balance of approximately \$90Mn out of an original US\$ several hundred million) came from Mr B, Mr Y and ultimately Company X (sometimes via Company F) and insofar as they came from Company X or Company F, they are derived from the enormous profits of this enormously successful organisation and cannot just be presumed, based on nothing but assertion, to be “tainted”.
108. His second submission is that as a matter of fact there is no causal link between the unlawful profits allegedly made by the bribery scheme and the sum informally frozen in the Accounts. The claim of unlawful profits by the Country Z Prosecutor amounts only to almost \$40Mn at its highest, whereas approximately \$90Mn has been the subject of the “no consent” instruction. Therefore, at least half of the funds in the

accounts can be immediately seen to be quite incapable of representing the proceeds of any alleged criminal conduct.

109. Moving on from this, his third proposition is that, again taking the Country Z Prosecutor's case at its own highest calculation of almost \$40Mn, as a matter of arithmetic recorded factually in the evidence of Mr Clemmence, this was only 0.7% of Company X's Net Asset Value in 2013. If this percentage is applied to all the sums ever received into the Accounts (US\$ several hundred million), it represents less than \$4Mn of those sums. If it is applied to the current total balance of approximately \$90Mn it represents only approximately US\$ half a million out of that balance.
110. His fourth submission, moving one stage further, is that having regard to the evidence of Mr Gray, endorsed by Pr. R, as to the (he would submit obvious and undoubted) factual flaws in the Country Z Prosecutor's methodology of assessing the alleged profit to Company X, the sum which, on balance of probability, could be regarded as the quantum of the unlawful profit to Company X in 2013 is reduced to \$4-\$5Mn or a maximum of about 0.09% of Company X's 2013 NAV. The corresponding percentage then applied to the balance of the sums in the Accounts reduces the quantity of any "suspect" funds to less than \$80,000.
111. He finally submits, therefore, that even applying a notional attribution of a percentage "representing" the proceeds of the alleged criminal conduct to any payments emanating from Company X subsequent to such conduct – an approach which is divorced from the reality of what has happened in any event, but is the best which could be applied in the Country Z Prosecutor's favour – the Accounts can be argued to contain no more than approximately \$80,000, or perhaps just over half a million, of such "tainted" monies. He submits therefore that on any basis the Plaintiffs have proved to the Court that no part of the approximately \$90Mn balances in their accounts with the Bank in excess of such amount could possibly be held to represent that proceeds of criminal conduct on any basis. If the Court is not minded to accede to his primary submission, that it cannot be said that any of the payments made into these Accounts in the circumstances of the case and now remaining there in any way represent, directly or indirectly, in whole or in part, another person's "proceeds" of criminal conduct (whether Company X, or Mr Y, or Mr B), then the Court should make a declaration that the appropriate, major, part of such sums are not and do not represent the proceeds of such conduct, by accepting one of the arguments above.

### **Defendant's observations**

112. As previously mentioned, Advocate Florance took a neutral stand with regard to the merits of the "provenance" arguments themselves but made one submission on behalf of the Bank. This was to the effect that if the Court should conclude that any portion of the sums in the Accounts had not been proved, on balance of probability, not to be or represent the proceeds of the alleged criminal conduct, then the Court should not be tempted to make an order that the Bank should nonetheless pay over the whole of the balances as sought by the Plaintiffs on the grounds that any such amount was small enough to be ignored, as this would put the Bank in a difficult position; he urged that if the Court made any such "split" finding, any order for payment should correspond only to the amount thereby effectively cleared of possibly representing the proceeds of crime.

### **Conclusion and reasons**

113. I am perfectly satisfied, on the evidence presented (in particular by the Plaintiffs themselves) and the arguments put to me, that the sums of approximately \$90Mn standing to the credit of the five Accounts held by the Plaintiffs with the Bank are not, nor do they in whole or in part directly or indirectly represent any person's proceeds of criminal conduct within the meaning of the PoC Law.
114. My principal reason is that I accept Advocate Robison's primary case, that even if it is assumed that the criminal conduct alleged by the Country Z Prosecutor occurred, then any "proceeds" enriched Company X at that time (2012-13) and having regard to the size of Company X's enterprise relative to the possible proceeds, the length of time elapsed and the way in which, in the interim, any such proceeds were inevitably dealt with by being mixed into the funds of an enormous, active, worldwide commodity trading company, there is no sufficient (or even any) connection of identity which can be established between the moneys which were paid into the five Accounts some of which now remain there, and the original proceeds of the alleged assumed criminal conduct in Company X's hands, which fulfils that description.
115. Whatever the proper quantum of any such assumed "proceeds", they are utterly insignificant in the context of Company X's total NAV. What actually became of any such proceeds in point of fact is not only not known, but incapable of being ascertained, probably even at the time, but certainly not by January 2017, let alone now. They were no doubt used in some way in the business of Company X itself or one of its subsidiaries or associates, but one cannot go further than that, and this just emphasises that, absent any specific piece of material evidence, the realistic fact is that any such proceeds simply lost their identity as such more or less quickly over time, to the point where that identity, direct or indirect, disappeared.
116. I am quite satisfied of this, regardless of whether any criminal conduct is actually proved, in the end, in proceedings in Country Z against officers of Company X or Mr Y or, indeed, Mr B. The mere fact that there is assumed to have been criminal activity which produced some proceeds does not also require it to be assumed that such proceeds must later always be capable of being identified and characterised as such. Attempting to support such identification, once the real character of any proceeds as such has been obscured, diluted or otherwise affected by intervening acts or transactions becomes simply a resort to rhetoric or abstract theory. I regard the thesis based on the calculation of percentages in this case as an illustrative example of just such a resort to rhetoric or abstract theory. It does not, in my judgment, bring the subject funds within the description laid down in the PoC Law, even having regard to the words of s 4. That description requires some justification in real and practical terms, not simply in terms of possible conceptualisation, or mathematical calculation.
117. I think there is something of a helpful comparison with the principles of remoteness of damage in tort law. There comes a point, in looking for loss "caused" by civil wrongdoing, where the link between the wrongdoing and the matter of loss in question becomes so distant that the wrongdoing cannot be regarded as "causing" it, even if it was a "*causa sine qua non*" of that loss being suffered. It simply becomes too remote. The wrongdoing ceases to be capable of being seen as a *causa causans* of that loss, and becomes merely context for it. It seems to me that a similar appraisal has to apply here. The concept of proceeds being the "result" of criminal conduct, or indirectly "representing" its proceeds, cannot be extended beyond reasonable common-sense impression of whether the wrongdoing had some operative effect on the funds or assets now in question.

118. That is in itself probably enough to dispose of the matter, but for completeness I make the following points.
119. First Advocate Robison argued that there had been, as yet, no finding of criminal conduct, or its equivalent in the Country Z proceedings, and the Plaintiffs should not have to disprove mere allegations of criminality. He did not actually argue that there could be no “proceeds of criminal conduct” without such criminal conduct having been established, and, indeed, this point does not seem to have been taken in any of the authorities. I pointed out the apparent assumption in s 4 of the PoC Law, but as I have heard no argument about this, and have not considered the wider implications of any such argument, I say no more about it.
120. Second, whilst I accept Advocate Robison’s contention that the burden of proof placed on the Plaintiffs does not require them to disprove mere allegations of as yet unproven criminal conduct, the existence of such allegations necessarily remains part of the evidence in the provenance issue, in the context of which the Plaintiffs do have to assume the burden of proving that “their” funds do not represent the proceeds of anyone’s criminal conduct. The weight of this factor (the absence of any conviction) is, in my judgment, fact-specific to the particular case. There had been no criminal convictions in *Liang*, although there had been in *BD*. In each case the whole of the evidence was examined for its impact on whether the plaintiff had discharged the burden of proof, on balance of probability with, obviously, the possibility of the subject funds representing the proceeds of some person’s crime being part of the total evidence
121. Third, whilst my above conclusion is based on my completely general finding as to the character of the funds paid into the Accounts upon the particular facts of the case, I review, for completeness, the several classes of payments which have been established and explained to my satisfaction. The comprehensive evidence of M establishes, in each case, what the Deputy Bailiff described in *Liang* at [26] as the source of the funds at the “last step”, being their arrival into the institution ie the Bank, with some further tracing back, especially in relation to the transfers from the CS Zurich accounts.
122. Source (1): As regard the payments from Mr Y for the purchase from Mr B of Company F shares, these payments were fixed as the purchase price for such shares in January 2012, the payments into the Accounts being instalments of deferred consideration. The contract though actually pre-dated the alleged criminal conduct. It is therefore impossible that any part of the purchase price could have been attributable to the value in Company F of unlawful proceeds received into Company F/ Company X, as none had yet been obtained. None of the deferred consideration payments which were subsequently paid into the Accounts could therefore possibly represent the proceeds of the alleged assumed criminal conduct in themselves, on any basis.
123. This leaves only the proposition that the later sums paid by Mr Y to the Estate of Mr B were paid out of funds obtained by him from Company X as his remuneration, and that a part of such remuneration then “represented” the proceeds of the relevant criminal conduct, either because the payments were from monies so tainted in Company X’s hands or because in Mr Y’s hands they represented his own “proceeds” of the criminal conduct alleged against him, presumably as increased remuneration. I reject this proposition as simply untenable, on the facts of the case. It is either pure speculation or amounts to no more than an application of the abstract theoretical

argument which I have already said simply does not, of itself, bring subject funds into the necessary, common-sense and practical, connection by identification with the actual proceeds of the alleged (assumed) criminal conduct.

124. Source (2): As regards the buy-back by Company F of its own shares, whether from Mr B's estate or separately from Mrs B, only the same tortuous arguments that I have already rejected could be invoked to support any submission that the payments made to the Plaintiffs for these shares "represented" the proceeds of the alleged assumed criminal conduct. The arguments have to be either that the value of the Company F shares on which the purchase price was based included an element which can be identified as being attributable to such proceeds (received four or five years earlier) or that the funds which Company F used to make the payment were themselves thus tainted with a proportion having the character of representing such proceeds. These propositions are, once again, those of theory in the abstract which I have dismissed.
125. Source (3): As regards the purchase prices of the Company C shares, the Company C1/Company C business had not been part of the X Group at the time of the alleged criminal conduct. The value of the relevant Company C shares could therefore owe nothing to that conduct. The argument then becomes, once more, the argument in which I find no merit, that the funds actually used by Company X to pay for the acquisition of the shares must be viewed as tainted to some degree, even in 2021, with the proceeds of the alleged assumed criminal conduct in 2012-13, and that they retained that character in the hands of the Plaintiffs. My reasons for rejecting this argument have been given.
126. (I should note that there was some inconsistency, highlighted by Advocate Florance, between M's account of the transaction giving rise to the payments for these shares made to the Plaintiffs, and the apparent identity of the payer of the funds, according to the supporting documentary evidence. M immediately and frankly admitted that he could not explain this. Any mystery here does not, however, in any way affect my judgment as to whether or not any part of the sums paid into the Accounts deriving from these share sales could be said to "represent" the proceeds of the alleged assumed criminal conduct. If they were paid by Company C1 itself, then, on the facts, they were "clean" in any event. If they were paid by Company X then I have rejected the argument that they could or should be viewed as in any way being the proceeds of criminal conduct.)
127. Source (4): As to the various US\$ multi-million payments coming into the Accounts from CS Zurich in 2021, the carefully explained provenance of these, from 2017 to 2021, simply illustrates the point which I have been making (and no doubt labouring) about the way that a succession of ordinary, even prosaic every day, transactions can cause funds simply to lose their original connection, or character, with criminal conduct as a matter of common-sense impression. The Zurich funds had contained monies from Guernsey, themselves with the mixed origins already discussed, but also moneys from Singapore, which themselves comprised mainly the value of shares in Company R, a business which had not been part the X Group, and could not have benefited even notionally from the proceeds of the alleged assumed criminal conduct, but also some payments from Mr Y, which were subject to the critical considerations mentioned under (1) above. By the time these funds came to be paid into the Guernsey Accounts, of which they therefore now form part, I find it difficult to say how they could be taken to be, or to represent, anything but themselves.

128. For all the above reasons, therefore, the Plaintiffs satisfy me that the whole of the

balances presently standing to the credit of their accounts in Guernsey are not, and do not, in whole or in part, directly or indirectly, represent anyone's proceeds of criminal conduct, as recognised by Guernsey law.

129. For completeness, and in case I were wrong on the above, I will briefly deal with the "percentage attribution" argument.
130. I have found that no part of the payments into, and thus no part of the payments remaining in, the Accounts is to be regarded as the proceeds of criminal conduct. Had I considered there to be sufficient merit in the "notional percentage attribution" argument that I should apply it – and I would have had grave misgivings about whether I could or should do so, because of the huge abyss of unknown facts and assumptions which it requires simply to be ignored, between the original established (assumed for these purposes) fact that Company X must have obtained a sum of money by way of unlawful profits into its enterprise in 2013, resulting in the NAV there recorded and used to establish the relevant percentage, and the established fact that Company X made certain payments into the Plaintiffs' Accounts in performance of certain transactions from 2017 onwards – I would, in my judgment, have had to apply the relevant percentage to the whole of the funds still remaining in the Accounts. This is because all the payments in, even those from Mr Y, seem to have emanated from Company X, and therefore to be subject to this same principle, if it is being applied, except possibly for some minuscule fraction of the US\$ multi-million repayments from CS Zurich attributable to the € amounts coming from Singapore. These do not appear to have had anything to do with Company X's enterprise at all, but are negligible.
131. The first question I would have had to decide was whether any such attribution should be based on the Country Z Prosecutor's claimed figure or should be reduced to take account of the factual and valuation criticisms of Mr Gray and Mr Clemmence. Whilst taking due note of Advocate Florance's cautionary warning that the evidence before the Court is only one opinion, untested by the evidence and the probing that it would be subject to in the normal course of court proceedings because of the singular nature of this private law action, I found those criticisms very forceful, to the point of being compelling. I would have concluded that the claimed "profit" to Company X of approximately \$40Mn was grossly exaggerated on the basis of flaws in the methodology which would be almost certainly upheld, certainly surmounting the balance of probability. Bearing in mind that my function here is only to decide the probabilities of the position, I would have concluded that the Plaintiffs did satisfy me that only a maximum amount of approximately \$5Mn could be regarded as the total potential "proceeds" of the relevant criminal conduct.
132. I would also have held that the relevant percentage which that sum represented as a fraction of Company X's NAV in 2013 should be applied to the sums in the Accounts and on that basis, for simplicity, that it should be applied to the remaining balance of approximately \$90Mn, to ascertain (by subtraction) the amount as to which I would then have been prepared to declare my satisfaction that it did not represent the proceeds of anyone's criminal conduct. From the arithmetic performed by others, this would have enabled me to declare my satisfaction on balance of probability, that all but approximately \$80,000 within the Accounts did not represent the proceeds of crime, and I would have so declared (with respect, of course, to the actual calculated sum).
133. In recognition of Advocate Florance's submission, and even though it would be tempting to hold that such an amount was *de minimis* in context and should be ignored,

I would have ordered payment of all but this approximately \$80,000, distributed, for simplicity, rateably across the Accounts.

### **Final Decision**

134. The result is that I will make the declaration requested by the Plaintiffs. I will declare that the funds and other assets held in the Accounts identified in Paragraph 8 of the Cause are not, nor do they represent, in whole or in part, directly or indirectly, any person's proceeds of criminal conduct for the purposes of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law 1999.
135. I will also make an order that the Defendant do transfer the funds and investments held in such Accounts to, or to the order of, the respective Plaintiffs.
136. If there is to be any order in costs, I will deal with this by way of written submissions.

### **Postscript**

137. Finally, I refer to the "postscript" of the then DB McMahon in the first *Liang* case (Royal Court Judgment 20/2018), and record my support of the views, even urgings, there expressed.
138. The then Deputy Bailiff (now the Bailiff) there drew attention to the plight of persons in the position of Mrs Liang there, and of the Plaintiffs here, when their funds or assets are informally "frozen" by the effect of an SAR made by their bank or trust service provider of which they may not even be aware – and made, almost inevitably, on a "play it safe" basis by such institution, in its own regulatory and commercial interests – which then becomes coupled with a subsequent "no consent" (or, in practical effect, "do not pay") instruction issued by the FIU, again probably on a "play it safe" basis. All this can be brought about by the institution's getting wind of actual or alleged criminal activity by some other person, of which, or even possibly of whom, the customer may be totally unaware, and of which activity they regard themselves as perfectly innocent.
139. The effect of being caught up in this situation is now that the customer is required to take proceedings such as the present in order to gain any access to his or her funds or assets, with the burden of proof being on him or her, to satisfy the Court of the "untainted" provenance of the funds in their account. This is in a situation where they have very possibly not kept or preserved relevant records (not being aware that they might be required) possibly from many years previously, and they do not have the powers of law enforcement to compel production of relevant materials. They may therefore even be unable to produce sufficient evidence actually to satisfy the Court, on balance of probability that their funds are not the proceeds of crime, as required
140. Of course, in such a private law action, the Court will, in applying the burden and standard of proof and deciding whether the plaintiff has discharged it, 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. The Court may well be sympathetic, therefore, to the burden placed on the plaintiff to surmount it. However, and as this case illustrates, any such sympathy does not relieve such a plaintiff of what can potentially be a hugely expensive evidence gathering exercise,

for which he or she will not be able to recover the cost. This has been a high value case, but the costs incurred by the Plaintiffs would appear to have been considerable.

141. The prospect of a customer's possibly being caught up in such a predicament surely cannot have any advantage for Guernsey's finance industry; it can only be a potential deterrent to doing business here, even if only a mild one, and one wonders just how necessary it is for the appropriate balance between the free flow of trade and appropriate law enforcement mechanisms to combat financial crime and money-laundering. The system which has been adopted elsewhere, which puts a time limit on the efficacy of such a "do not pay" instruction, if this is challenged by the customer, requiring the relevant authority to take steps within a certain time to justify its prohibition or allow it to lapse, would seem to provide a fair and acceptable balance which apparently works well in other jurisdictions. Whilst it is of course the case that the merits of adopting such a system are a political decision, if, as the Court of Appeal was apparently inclined to allow in *Garnet*, (above) 12 years ago, the problem were lack of investigative or communications resources, then it may well be that the situation has changed in the interim. In any event, consideration could perhaps be given to providing a longer time limit – say three months – for the authority to elect (or not) to take action.
142. On any basis, though, I would respectfully endorse the view expressed by DB McMahon in *Liang* that this point is worthy of re-consideration by politicians, with a view to possible amendment of the Law in the interests of the Guernsey finance industry and its responsible customers.

**Hazel Marshall KC**  
**Lt Bailiff**

**Dated: 11<sup>th</sup> July, 2023**

