IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between **JAKOB INTERNATIONAL INC.** **Plaintiff**

-and-

HSBC PRIVATE BANK (C.I.) LIMITED **Defendant**

Defendant's Application for strike out

Date of hearing: 19th April 2016

Judgment handed down: 1st July 2016

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Defendant: **Advocate M C Newman**
Counsel for the Plaintiff: **Advocate S R Geall**

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
The Disclosure (Bailiwick of Guernsey) Law, 2007
The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999
Tranquillity Holdings Limited v Invista Real Estate Management (CI) Limited (unreported, 13 August 2015)
Invescap Holdings Limited v Douglass (unreported, 30 July 2014)
Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd (unreported, 19 and 20 October 1994)
The Chief Officer, Customs & Excise, Immigration and Nationality Service v Garnet Investments Limited [2011-12] GLR 250
Ani v Barclays Private Bank & Trust Limited 2004 JLR 165
Chief Officer of the States of Jersey Police v Minwalla 2007 JLR 409
Gichuru v Walbrook Trustees (Jersey) Ltd. 2008 JLR 131
Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] 1 WLR 2711

Parvizi v Barclays Bank plc (HC13A02291, 21 May 2014)
R v Da Silva [2007] 1 WLR 303
Shah v HSBC Private Bank (UK) Limited [2010] EWCA Civ 31
K Ltd v National Westminster Bank plc [2007] 1 WLR 311
Guernsey Financial Services Commission, *Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing*
Morgan Crucible Co plc v Hill Samuel Bank Ltd [1991] 1 All ER 148

Introduction

1. The Defendant, HSBC Private Bank (C.I.) Limited, has applied to strike out the whole Cause of the Plaintiff, Jakob International Inc., pursuant to rule 52(2)(a) of the Royal Court Civil Rules, 2007 on the basis that is discloses no reasonable grounds for bringing the action. The Defendant's alternative ground in its Application dated 5 February 2016 that the pleading is an abuse of the Court's process has not been pursued.

2. The evidence in support of the Application is contained in the Affidavit of Paul Ridges, sworn on 5 February 2016. It was supplemented by a further Affidavit of Charlotte Henshall, sworn on 18 April 2016, which I agreed to admit as evidence on behalf of the Defendant at the start of the hearing on 19 April 2016. I did so because I took the view that it was appropriate for me to have the benefit of all relevant material in relation to the Application, even though the Defendant had not complied with the timetable I had fixed for the lodging or service of materials in relation to the Application. Ms Henshall's Affidavit does no more than to exhibit three documents, one of which had, in any event, been exhibited to Mr Ridges' Affidavit. This was for the purpose of explaining when the Defendant says the Plaintiff was made aware of changes to the Defendant's terms and conditions. I admitted this evidence because the issue had been aired in the Skeleton Arguments filed on behalf of the Plaintiff and I considered I could deal with any consequences by permitting the Plaintiff to adduce any evidence in response it wished to and, if appropriate, by way of a costs order. The Plaintiff availed itself of the opportunity to file evidence by way of a short Affidavit of Robert Breckon, sworn on 19 April 2016, which stated that he had been informed by a director of the Plaintiff that the Plaintiff had not received the subsequent documents to which Ms Henshall's Affidavit referred.

Background

3. The Plaintiff's Cause was tabled on 27 November 2015. The Plaintiff's case is that it gave instructions to the Defendant on or about 14 September 2015, through one of its directors, Nazma Begum, attending in person, that its account with the Defendant be closed and the funds transferred to Ever Green International FCZO ("Ever Green"). It opened its bank account with the Defendant on or about 11 April 2013, into which it deposited US$10 million in two equal tranches, which it says it borrowed from Ever Green under terms which provided that the loan was repayable on demand, The Defendant has not complied with the Plaintiff's instruction. It referred initially to "*legal and regulatory reasons outside the Bank's control*" and then wrote more expansively to the Plaintiff on 10 November 2015, referring *inter alia* to Mazam Ali Khan's conviction for VAT fraud in Belgium and the international confiscation order made against him that might be executed against the funds in the Plaintiff's bank account. The Plaintiff's case is that the Defendant's failure to carry out its instruction and its retention of its funds is without authority. The prayer seeks damages in the amount standing to the credit of the account and/or an order that the Defendant transfer the monies held in the account to the Plaintiff or to the order of the Plaintiff.

4. The Defendant resists this claim by referring to the terms and conditions applicable to the account (and it mentions both the original terms and conditions and those that replaced them in 2014), which recognise that the Defendant has compliance obligations relating to the prevention of crime. The Defendant filed a report with the Financial Investigation Unit (hereafter referred to as "the FIU") shortly after opening the account of the Plaintiff and receiving the funds deposited into it. The statutory framework under which that was done has enabled the Defendant to maintain the account, but it has not received consent to ending the relationship with the Plaintiff and so cannot comply with the Plaintiff's instructions.

5. The evidence fleshes out the pleaded cases. The account opening form was signed on 6 February 2013. From the information provided, it appears that the Plaintiff was incorporated in the British Virgin Islands on 21 October 2009, but gives an address for correspondence in Dubai. It is a private investment company. The initial deposit was to be US$5 million, to be followed by a further deposit in the same amount. The mandate extended to accepting telephone instructions from the Plaintiff's two directors, Nazma Begum and Amar Khan, as well as from an authorised person, Mazam Ali Khan. The address given for all three was the same. The beneficial owners were declared to be the two directors, each with 50% interests. The introducer was Katharine Lisle, an Associate Director of HSBC Bank Middle East Limited in Dubai, who certified copies of the passports of all three. In a file note, she explained that they met for one hour and that Guernsey had been chosen for the funds because "*they believe Switzerland is too expensive and Luxembourg is too small a jurisdiction*".

6. Having opened the account on 12 April 2013, the Defendant made a suspicious activity report to the FIU on 16 May 2013 under the Disclosure (Bailiwick of Guernsey) Law, 2007. The Defendant referred in it to two articles that had been discovered in the public domain relating to Mazam Ali Khan and his conviction by a Brussels court of VAT fraud in 2007. The Defendant indicated that it understood that Mazam Ali Khan was primarily the source of wealth for the account and it did not know if the funds used were the proceeds of crime. World-Check had been used on 14 February 2013 for the Plaintiff and the three named individuals. In respect of Mazam Ali Khan, the check had included "Haji Kashmir Khan" as the second part of his name, which his passport shows is his father's name. The report shows no match.

7. On 19 July 2013, the FIU gave consent to the Defendant to continue or maintain the Plaintiff's account. However, on 21 November 2013, the FIU stated that the Defendant did not have consent to end the relationship with the Plaintiff. As a consequence, pursuant to section 39(3) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, the Defendant argues that it is prohibited from transferring or otherwise disposing of the funds in the Plaintiff's account.

8. On 14 September 2015, Nazma Begum attended at the Defendant's offices in Guernsey, accompanied by Mazam Ali Khan, and orally gave instructions for the transfer of the funds in the account to Ever Green. On 17 September 2015, Mr Ridges wrote to the Plaintiff, marked for the attention of Mazam Ali Khan and Nazma Begum, explaining that it would not comply with the request to close the account "*due to our statutory obligations which we cannot discuss with you*".

9. On 22 September 2015, the Defendant received an e-mail from Ever Green complaining that the Defendant was creating obstacles to complying with the instruction to remit funds to it. Various documents were attached, including a copy of the funds transfer dated 7 May 2013, by which US$5 million was transferred from Ever Green to the account of the Plaintiff with the Defendant, a letter dated 1 September 2015, signed by Nazma Begum on behalf of Ever Green demanding repayment by the Plaintiff of the loan for the full US$10 million, a letter

dated 22 September 2015 from Appleby Windsor Limited, advisers to Nazma Begum, explaining that the loan needed to be repaid to enable Ever Green to purchase Dubai real estate, which the Plaintiff did not have capacity under Dubai law to do, company documentation relating to Ever Green, showing that the shareholders are Mazam Ali Khan (60%) and Nazma Begum (40%), its trading licence, and its audited financial statements to the end of 2014.

10. On 30 September 2015, Mr Ridges wrote to the Plaintiff, also marked for the attention of Mazam Ali Khan and Nazma Begum, repeating that "*for legal and regulatory reasons outside the Bank's control the Bank is not able to correspond with you further at present*". He suggested the Plaintiff might wish to seek Guernsey legal advice. The FIU was being kept informed by the Defendant.

11. The Plaintiff instructed Stephenson Harwood. That firm wrote to the Defendant on 19 October 2015 indicating that the Plaintiff was "*concerned that the Bank has essentially frozen its account*". The instruction to transfer the funds in the account to Ever Green was repeated and, if it were not to be performed, an explanation as to the reasons for that refusal was sought. Mr Ridges again replied on 30 October 2015 providing no more detail than previously. However, on 10 November 2015, having been permitted to do so by the FIU, the Defendant wrote again to the Plaintiff, similarly marked for the attention of Mazam Ali Khan and Nazma Begum, that it was aware that Mazam Ali Khan was convicted of VAT fraud in Belgium in 2007 and that there is an international confiscation order against him, and that "*The Belgium authorities are aware of the assets held in Guernsey and are seeking the confiscation of those assets via a Rogatory letter to the Guernsey authorities*". (The Defendant has acknowledged that each time it wrote to the Plaintiff marked for the attention of Mazam Ali Khan and Nazma Begum, its letters should have been marked for the attention of the two directors of the Plaintiff, ie, Nazma Begum and Amar Khan.)

12. When the Plaintiff opened its account with the Defendant in 2013, standard terms and conditions were applicable. New terms and conditions with effect from 1 January 2014 were then introduced. Before this occurred, the Defendant sent its customers a mailshot on or around 22 November 2013, and Ms Henshall's Affidavit exhibits a letter of that date to the Plaintiff, although she further deposes to the fact that the Defendant has no record or evidence that this letter and the appendix to it were actually sent to the Plaintiff. The appendix set out the amendments to the terms and conditions intended to be effective from the beginning of 2014. Mr Breckon's evidence on behalf of the Plaintiff is that the letter and the appendix were not received, even though the address used is Amar Khan's private residential address and the post is regularly monitored there. Further, Mr Khan has told him he has retained every document ever received from the Defendant and the letter and appendix are not among those he has.

Test for striking out

13. Rule 52(2)(a) of the 2007 Rules provides that "*The Court may strike out a pleading if it appears to the Court … that the pleading discloses no reasonable grounds for bringing … an action*". Advocate Newman, on behalf of the Defendant, and Advocate Geall, on behalf of the Plaintiff, are broadly agreed as to the principles that this Court should apply on such an application. They were summarised by the Bailiff in *Tranquillity Holdings Limited v Invista Real Estate Management (CI) Limited* (unreported, 13 August 2015), where what I had set out in *Invescap Holdings Ltd v Douglass* (unreported, 30 July 2014) was adopted. Within this jurisdiction, as the Court of Appeal stated in *Silver Falcon Enterprises Ltd v International Hellenic Operations Ltd* (unreported, 19 and 20 October 1994), the Defendant is required to demonstrate that the claims made by the Plaintiff are "*unarguable*".

14. The principles extracted by the Bailiff (at para. 47 of the *Tranquillity* case) are:

> "*a) Claims which are suitable for striking out on ground (a) include those which raise an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides (Harris v Bolt Burdon [2000] L.T.L., February 2, 2000, CA).*
>
> *b) The principal test is whether the party's case is "bound to fail", which creates a high threshold before a pleading, or a part thereof, will be struck out. Simply because a case might be weak is not sufficient to justify striking it out.*
>
> *c) A statement of case is not suitable for striking out if it raises a serious issue of fact which can only be properly determined by hearing oral evidence (Bridgemen v McAlpine-Brown January 19, 2000, unrep, CA).*
>
> *d) Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
>
> *e) The court may strike out, as an abuse of the court's process, particulars of claim which are so badly drafted that they fail to reveal to the defendant, or to the court, the case the defendant can expect to meet at trial. However, proof of bad drafting is not, by itself, sufficient. The court should not strike out the particulars without first giving the claimant an opportunity to amend (see In Soo-Kim v Youg [2011] EWHC 1781 (QB)).*
>
> *f) The purpose of the particulars of claim were explained by Moore-Bick LJ in Credit Suisse AG v Arabian Aircraft & Equipment Leasing Co [2014] CP Rep 4: "Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said the facts give rise to a right to the remedy being claimed."*
>
> *g) It is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (Farah v British Airways, The Times, January 26, 2000, CA referring to Barrett v Enfield BC [1989] 3 W.L.R. 83, HL).*"

15. In short, the question is whether the Plaintiff's claim is unarguable, bound to fail or unwinnable. I regard these terms as interchangeable. The burden of establishing that this is so rests on the Defendant. There is a subsidiary issue about whether or not there is a novel issue involved. This is not, however, a case where there are particulars pleaded as part of the claim that could benefit from being re-written.

The respective cases

16. The Defendant argues that Guernsey's anti-money laundering legislative regime requires it to act the way it has and that this regime intervenes in the contractual relationship between a bank and its customer. Consequently, in reliance on the terms and conditions that govern

that relationship (and it matters not which of those terms and conditions is used), the Defendant's compliance with the regulatory and criminal law regimes afford the Defendant the benefit of the exculpatory provision.

17. The Defendant's position follows from it forming a suspicion that the funds held in the Plaintiff's account with it are the proceeds of crime. Mazam Ali Khan is suspected to have been the source of the funds and the articles reviewed by the Defendant in May 2013 show that Mazam Ali Khan has been convicted of VAT fraud in Belgium. The suspicion held by the Defendant is a reasonably held one. It led to the making of a suspicious activity report to the FIU. Consequently, section 39 of the 1999 Law was engaged. The FIU has not provided its consent to comply with the Plaintiff's instruction to close the account, the effect of which is that the monies in the account are frozen informally unless or until consent is provided.

18. The Plaintiff's claim is for breach of contract. However, the Defendant relies on the terms and conditions of its contract with the Plaintiff to resist that claim. Those terms and conditions state that regulatory or anti-money laundering requirements override the Defendant's contractual obligations to its customers to comply with instructions in such circumstances. Accordingly, the Defendant is permitted to rely on the protection from being sued provided by those terms and conditions. In accordance with the Bailiwick's proceeds of crime regime, the Defendant has done as much as it can and the matter is now out of its hands. A decision as to whether or not consent should be forthcoming rests with the authorities and not the Defendant.

19. Whilst the Defendant acknowledges that it needs to demonstrate that its suspicion that the funds in the Plaintiff's account with it are the proceeds of crime so that, on the balance of probabilities, it was entitled to have a reasonable suspicion, there has been no evidence produced by the Plaintiff to counter that suspicion. Because these are ordinary private law proceedings, the issue relating to suspicion has to be resolved on the evidence available before the Court on the hearing of this Application. On the civil standard, the funds may well constitute the proceeds of crime and so the absence of consent from the FIU leads to the conclusion that the Plaintiff's action has no prospect of success. In those circumstances, the Defendant should not be put to any further expense in resisting proceedings that are bound to fail and where there is no novel point of law involved.

20. The Plaintiff resists the Application on the basis that it has done what the Court of Appeal in *The Chief Officer, Customs & Excise, Immigration and Nationality Service v Garnet Investments Limited* [2011-12] GLR 250 has indicated should be done in a situation like this. If nothing else, this should be regarded as a novel point of law because it is the first occasion when the guidance offered in that case has come before the Court. Throughout, the Plaintiff emphasises the high hurdle over which the Defendant has to pass and that the Plaintiff's function is simply to point out why it has not been surmounted.

21. Further, the approach of the Defendant mis-characterises the effect that its forming of suspicion has. It is not an end in itself of the matter, but is subject to factual testing in proceedings the customer commences for that purpose. There must be some means by which judicial oversight can be given to the question in dispute between the parties and the Court of Appeal has indicated that the type of private law action that has been commenced by the Plaintiff is the most appropriate course to follow. In particular, the Court of Appeal cannot have been taken to recommend a course of action if the effect of the legislative regime would afford a bank a full defence. The comparable legal position in Jersey supports this approach.

22. The Plaintiff also criticises the Defendant for failing to identify whether it relies on the terms and conditions applying when the bank-customer relationship commenced or the terms of

conditions as revised with effect from 2014. It submits that the Defendant cannot hedge its bets in the way it has because doing so obviously shows that there is no knock-out blow to the Plaintiff's Cause. There is an issue between the parties that requires resolution on the evidence to be adduced at trial.

23. In summary, the Plaintiff suggests that it is premature to attempt to strike out the Cause where this would mean that the Plaintiff would be left without a remedy and without there being a means to seek to persuade the Court about the provenance of the funds in the Plaintiff's account with the Defendant. This is not the occasion on which evidence on this issue is required because the evidence to be given at trial, following disclosure, is the proper means of resolving the dispute.

Discussion

24. Both parties have referred to the *Garnet* case (*supra*) as lending support for their respective positions. This was a judicial review action. The decision challenged was of the Financial Intelligence Service (a previous name for the decision-making body that is now the FIU, which I will abbreviate to "FIS") to refuse consent to the bank in that case, BNP Paribas, to make the payments requested by Garnet Investments Limited. The Lieutenant Bailiff concluded that it was irrational and disproportionate for the FIS to refuse consent to the transaction requested by the customer where no criminal proceedings had been commenced and no active investigation was in train, which indicated that there was no realistic prospect of any action being taken by any criminal law enforcement authority that might lead to the funds being restrained or confiscated. The Court of Appeal allowed the appeal on behalf of the FIS.

25. As in the present case, section 39 of the 1999 Law lay at its heart. This provides:

> "*(1) Subject to subsection (3), if a person enters into or is otherwise concerned in an arrangement whereby –*
>
> *(a) the retention or control by or on behalf of another person (called in this Law "A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the Bailiwick, transfer to nominees or otherwise), or*
>
> *(b) A's proceeds of criminal conduct –*
>
> *(i) are used to secure that funds are placed at A's disposal,*
>
> *(ii) are used for A's benefit to acquire property by way of investment,*
>
> *knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.*
>
> *(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represents in his hands his proceeds of criminal conduct.*
>
> *(3) Where a person discloses to a police officer a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a police officer any matter on which such a suspicion or belief is based –*
>
> *(a) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if –*
>
> *(i) the disclosure is made before he does the act concerned and the act is done with the consent of the police officer (and in*

this case the person doing the act shall incur no liability of any kind to any person by reason of such an act), or

(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it, and

(b) the disclosure –

(i) shall not be treated as a breach of any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or contract or otherwise, and

(ii) shall not involve the person making it in any liability of any kind to any person by reason of such disclosure.

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

(a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct,

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1)(b), or

(c) that –

(i) he intended to disclose to a police officer such a suspicion, belief or matter as is mentioned in subsection (3), in relation to the arrangement, but

(ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(a)."

26. Along with sections 38 and 40 of the Law, the Court of Appeal identified the overall purpose as being "*to create extremely wide ranging "all-crime" prohibitions on money laundering*" (para. 23). The judgment continues:

> "24 *In the case of the s.39 offence, the mental element of suspicion may be sufficient on its own part to give rise to criminal activity if any person, with that suspicion, is party to any arrangement involving the proceeds of crime. This means that, in the context of most banking arrangements, when a banker becomes suspicious and is unable to determine the legitimacy of the funds with which he is concerned he is at risk of incurring criminal liability should he continue to deal with the funds.*
>
> *25 The width of the s.39 offence is clearly intended to have a powerfully dissuasive effect on money laundering activity and to restrict the ability of money launderers and criminals to introduce the proceeds of crime into the financial system of Guernsey or to facilitate the transfer of such proceeds out of Guernsey.*
>
> *26 In our judgment, in the context of this very wide ranging offence, the consent regime in s. 39(3) of the Guernsey Proceeds of Crime Law serves two purposes. First, the existence of the consent regime provides a strong incentive to persons who are suspicious of funds to report those suspicions before any transaction is effected. Unlike other parts of the United Kingdom (see, for example, ss. 330-332 of the Proceeds of Crime Act 2002 ("POCA")), Guernsey does not have a general offence of failing to disclose possible money laundering.*

> *27 Secondly, the consent regime gives the police the operational freedom to grant relief from criminal liability in circumstances where it is considered to be in the interests of law enforcement to do so. Thus consent may be granted to avoid a suspected criminal becoming aware of the suspicions that are harboured in relation to him. This objective is also reinforced by the existence of offences in connection with tipping off (see s.41). Consent may also be granted so as to permit a controlled transfer to take place so that funds can be traced for investigative purposes.*"

27. The Court of Appeal proceeded to analyse whether the effect of no consent could be treated as an informal freeze. It concluded that it was inappropriate to use this term. There was an express means of obtaining a restraint on the use of funds in the legislative framework and no apparent intention on the part of the legislature to supplement that with an informal freeze through no consent being given by the law enforcement authorities. Accordingly, the Court's opinion was that "*the principal purpose of the consent regime was to provide an opportunity to the police to give an exemption from criminal liability by consent, but only where it was in the interests of law enforcement to do so; it was not to create an informal mechanism to be used by the police for freezing funds*" (para. 39) and it took that view that "*it is not the FIS that is denying Garnet access to its property and preventing judicial oversight; it is the impact of the width of the criminal law and its chilling effect upon the person holding the fund, namely, BNP*" (para. 41).

28. However, the Court of Appeal further identified that "*the refusal of consent does not preclude judicial oversight by the courts*" (para. 42). Having compared the regimes in the United Kingdom and here and explained why there had been a decision to maintain the consent regime rather than move to a moratorium period after which there would be deemed consent if no steps were taken to freeze the funds before the expiry of 31 days (or consent had been forthcoming anyway), the Court stated (at para. 58):

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

Advocate Geall relies heavily on this statement. The Plaintiff has followed this guidance and commenced its action against the Defendant and that action should be dealt with in the usual way. Advocate Newman does not demur from that contention, but further submits that the particular circumstances of the Defendant's relationship with the Plaintiff must be taken into account and, if the contractual terms governing that relationship afford the Defendant a complete defence, as he suggests they do, then the Cause should be struck out without further delay.

29. Reference is also made to the cases from Jersey and England and Wales on which the Court of Appeal commented in *Garnet* and to more recent examples. The difference is that Jersey's legislative regime is similar to Guernsey's whereas, as noted by the Court of Appeal, the position in England and Wales has developed to introduce a moratorium period followed either by action to restrain or deemed consent. There are, however, underlying principles that can be extracted from the cases from England and Wales to assist with understanding the position in Guernsey.

30. In Jersey, the cases start with *Ani v Barclays Private Bank & Trust Limited* 2004 JLR 165. The application was for leave to discontinue a representation on terms as to costs. It was made by a bank customer in circumstances where a financial institution had made a disclosure to the police and not obtained consent for the transaction requested. However, the need for

the proceedings commenced then disappeared, which is why leave to discontinue them was sought. The Royal Court of Jersey summarised the position as follows:

> "*22. A public law challenge to the refusal to consent by the police would be a conventional application for judicial review but it would clearly face certain difficulties. As Tomlinson J made clear, the issue would not be whether the monies were in fact derived from or used in criminal conduct. The issue would be whether the decision of the police to refuse consent was liable to be quashed on the usual grounds for judicial review e.g. that such refusal was a decision to which no reasonable police officer could have come. Nevertheless that is clearly one option available to customers whose funds have been informally frozen by their bank.*
>
> *23. A better solution, as envisaged both in Amalgamated Metal Trading and in Governor & Company of the Bank of Scotland v. A Limited [2001] 1 W.L.R. 751 might be for the customer to institute proceedings against the financial institution seeking payment of the monies. At the trial of the issue the customer would have the opportunity of producing detailed evidence as to the provenance of the funds with a view to proving that the funds were not derived from or used in criminal conduct.*
>
> *24. Although the representation did not plead the matter very fully, it is nevertheless consistent with the latter approach referred to above. In other words it is a private law action against the Trustee seeking payment of the funds in question. It therefore concerns a dispute between the representor and the Trustee over the Trustee's refusal to consider distributing the funds. There is no allegation against the Attorney General, even in the amended representation. The only mention of the Attorney General is in relation to his carrying out an investigation and in the prayer for costs. There is accordingly no lis or dispute between the representor and the Attorney General as disclosed in the pleading. …*"

31. These principles were developed further in *Chief Officer of the States of Jersey Police v Minwalla* 2007 JLR 409. Having highlighted the structured protections available where criminal proceedings have been commenced or are contemplated, the Royal Court of Jersey again alluded to the two options available to the customer where a suspicious transaction report has been made:

> "*21. Two alternative remedies have been canvassed for a customer whose account has been informally frozen following an STR. The customer may seek to judicially review the decision of the police not to consent to any payment. However, in such proceedings the customer would face the high threshold of showing that the decision of the police was one to which they could not reasonably have come. This may not be easy to establish. Alternatively, the customer may institute an ordinary action against the bank seeking an order that it comply with the mandate and pay the money out as instructed. In the event of the court finding on a balance of probabilities that the funds were not the proceeds of crime, the court would order the money to be paid out.*
>
> *22. The difficulty with the second alternative is that, as a matter of strict analysis, it may not protect the bank. Let us assume that the customer satisfies the court that, on the balance of probabilities, the account does not contain the proceeds of crime. In those circumstances the court will no doubt give judgment for the customer and the bank will pay out accordingly notwithstanding the fact that the police have not consented. Let us further assume that it subsequently transpires – perhaps in later criminal proceedings – that, contrary to what the civil court found,*

the money in the account was the proceeds of crime. Technically, assuming that, despite the decision of the civil court, the bank retained its suspicion that the customer was engaged in criminal conduct, the elements of the money laundering offence would appear to be made out in that, having the necessary suspicion, the bank will have been concerned in the payment out of funds which are in fact the proceeds of crime.

23. The answer must lie in the realms of common sense and reality. As Tomlinson J said when wrestling with this sort of issue in Amalgamated Metal Trading Limited v City of London Police Financial Investigation Unit [2003] 4 All ER 125 at para 32:-

> *"It is to my mind inconceivable that there could be criminal proceedings brought … against a bank or other financial institution which has taken such steps as are reasonable in all the circumstances to resist proceedings but has nonetheless been ordered by the court to pay over money which subsequently has proved to be the proceeds of criminal conduct."*

24. We agree with that observation. Accordingly, it seems to us that, faced with an informal freeze, a customer must, as one possible remedy, be entitled to bring proceedings with a view to establishing to the civil standard of proof that the money in the account is not the proceeds of criminal conduct. On such an application that Court must make a finding on the basis of the evidence produced to it and make such orders for payment as may be appropriate. If, contrary to our view, the Court were held to have no ability to make an order for payment where it has found on the balance of probabilities that the monies are not the proceeds of crime, this would mean that an informal freeze could continue indefinitely without any judicial supervision. Given the careful balance struck in relation to saisies, this would appear to us to be an unacceptable situation and cannot have been intended by the legislature."

32. The final Jersey case to which reference is made is *Gichuru v Walbrook Trustees (Jersey) Ltd*. 2008 JLR 131. The problem was again described in identical language and the two options available to a customer reiterated (see para. 28). In a private law action, there is no requirement to convene any other party because the dispute is between the customer and the financial institution, which has an obligation to resist the claim to the extent that it is reasonable to do so or run the risk that the protection afforded to it will be lost. This was explained fully at para. 32:

> "*… financial institutions are under a duty to contest the customer's claim in such circumstances and must lay before the Court all available evidence which justifies their suspicion that the funds are the proceeds of criminal conduct. I … would summarise the position as follows:-*
>
> *(i) At para 23 of the judgment in Minwalla, the Court approved the observation of Tomlinson J at para 32 of Amalgamated Metal when he said:-*
>
> > *"It is to my mind inconceivable that there could be criminal proceedings brought … against a bank or other financial institution* ***which has taken such steps as are reasonable in all the circumstances to resist proceedings*** *but has nonetheless been ordered by the court to pay over money which has subsequently been proved to be the proceeds of criminal conduct." [Emphasis added]*

(ii) *It follows from the emphasised passage that, if it wishes to obtain protection against a future criminal prosecution, a financial institution must take all reasonable steps to defend the customer's claim and to put forward all available evidence in support of the argument that the funds in question are the proceeds of criminal conduct. If a financial institution allows the customer to obtain a decision in his favour without putting up a proper contest, it will not have fulfilled this requirement. A financial institution should know a fair amount about the funds which it holds. In the first place it has a duty under the various anti-money laundering Orders and Codes of Practice to know its customer and to be aware of the course of funds. If there comes a time when it begins to have concerns about the source of funds, it should pose questions to the customer in order to see if those concerns can be allayed. It is only if those concerns are not allayed that it may end up having the necessary suspicion and make an SAR. All of the information in its possession should be made available to the Court in a private law action. Although the Court will be considering the issue of whether the funds are in fact the proceeds of criminal conduct rather than whether the financial institution has a suspicion, the grounds upon which the financial institution has formed a suspicion will nevertheless be highly relevant to determination of the issue of whether the funds are the proceeds of criminal conduct. Although, for the reasons given earlier, the police will not normally be a party to the action, a financial institution which finds itself the subject of such an action should of course consult and liaise closely with the police.*

(iii) *Mr Young submitted that it would often be appropriate for the customer to seek summary judgment. Each case must of course turn on its own facts but in my judgment it is likely to be rare that summary judgment can properly be given in such a case. In the first place, as mentioned by Lord Woolf CJ in Bank of Scotland v A Limited [2001] 1 WLR 751 at para 41, where the circumstances are suspicious, that could well provide very good reason for the Court not being prepared to grant summary judgment. A similar approach was adopted by Tomlinson J in Amalgamated Metal (see paras 11 and 31 of his judgment). Secondly, the Court must bear in mind that, if it makes an order directing the financial institution to pay, it will be providing a bar to a criminal prosecution of that institution for making the payment and if, in truth, the funds are the proceeds of criminal conduct, it may in fact be directing the institution to commit a criminal offence. It seems to me that, in these circumstances, it would hardly ever be appropriate for the Court to make an order with such serious consequences without investigating the evidence fully at trial rather than proceeding to give summary judgment.*"

33. Each of these cases has referred to the previous decision of Tomlinson J (as he then was) in *Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit* [2003] 1 WLR 2711. Some of the relevant material from that judgment has already been covered in the extracts from the Jersey cases I have quoted and I will not repeat them. However, in para. 27, His Lordship explains more fully why seeking a declaration against the consent decision-maker is inappropriate and why private law proceedings, in his view, are to be preferred:

"*… it was never in my judgment appropriate for AMT to seek as against the police a declaration that the moneys are not the proceeds of criminal conduct. It was never an issue between those parties whether the moneys were such proceeds, and there was and is no occasion for the creation of a lis between them directed to determination of that point. The only question which the police ('the constable' in the language of the statute) were asked was whether they consented to the payment being made. Had they given their consent, AMT would have a defence under s 93A. The 1988 Act is, however, silent as to the basis upon which consent is to be given or refused. The provision would manifestly be unworkable if the constable could only justify the withholding of consent if he could demonstrate his satisfaction, to whatever might be the appropriate standard, that the funds are in fact derived from or used in connection with criminal conduct. It seems clear from the section as a whole that the existence of suspicion is sufficient to ground a proper refusal of consent. It is important to note that there has here been no public law challenge to the propriety of the exercise by the constable of his discretion. It would surely be odd if a legitimate withholding of consent which can be justified on grounds of suspicion were to lead to the situation in which the police must defend (and perhaps pay the costs of) proceedings directed towards determination of a question wholly different from that which they were asked, viz the ultimate question whether the funds are in fact derived from or used in criminal conduct. I cannot think that either Parliament or the Court of Appeal envisaged that this would be the procedure to be followed consequent upon a proper withholding of consent. Such a procedure places an undue and inappropriate burden upon the police, effectively requiring them to litigate at public expense what are in truth private disputes between financial institutions and their customers. The arising of such disputes is one of the ordinary commercial risks which any financial institution faces. I also think it most unlikely that the Court of Appeal can have had in mind that the court would in such circumstances grant interim declaratory relief on the ultimate substantive question whether the funds are derived from criminal conduct. Such a question only permits of a final answer, not a temporary answer, and it is only appropriate to answer it as and when it arises, and then as between the parties between whom it arises. Then it is decided, if it is necessary so to do, upon the basis of such evidence as the parties place before the court, and having regard to the incidence of the burden of proof. Finally the granting of declaratory relief on this ultimate question as against the police whether on an interim or a final basis could prejudice future criminal prosecutions.*"

34. Advocate Newman has also relied on a comparatively recent decision of Master Bragge in *Parvizi v Barclays Bank plc* (HC13A02291, 21 May 2014) as an example of how a similar action was disposed of without a trial. In doing so, Master Bragge applied the description of suspicion drawn from para. 16 of *R v Da Silva* [2007] 1 WLR 303:

"*What then does the word "suspecting" mean in its particular context in the 1988 Act? It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or "firmly grounded and targeted on specific facts", or based upon "reasonable grounds". To require the prosecution to satisfy such criteria as to the strength of the suspicion*

would, in our view, be putting a gloss on the section. We consider therefore that, for the purpose of a conviction under section 93A(1)(a) of the 1988 Act, the prosecution must prove that the defendant's acts of facilitating another person's retention or control of the proceeds of criminal conduct were done by a defendant who thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. We consider that, if a judge feels it appropriate to assist the jury with the word "suspecting", a direction along these lines will be adequate and accurate."

He then referred to *Shah v HSBC Private Bank (UK) Limited* [2010] EWCA Civ 31 (albeit giving a different citation) as establishing the principle that it is for a bank, which asserts suspicion, to establish that suspicion as a primary fact in order to justify not following the customer's instructions. On the basis of the evidence before him, he concluded that the bank had a relevant suspicion and that the suspicion was more than fanciful with the result that there was no real prospect of the claim succeeding at trial and the claim was struck out. Advocate Newman suggests that this shows how a robust approach to the issues results in the most pragmatic outcome and so avoids unnecessary wasted costs.

35. Because it is a decision of the England and Wales Court of Appeal, the decision in the *Shah* case was binding in the *Parvizi* case. It concerned a claim for damages against the bank for failure to comply with instructions and for other breaches of duty. Hamblen J gave summary judgment in favour of the bank. That decision was reversed because the Court of Appeal concluded that the claim was sufficiently arguable to be allowed to go to trial. During the course of his judgment Longmore LJ explained the issues as follows:

> "*24. It must be remembered that it is for the bank to prove that it suspected Mr Shah to be involved in money-laundering. It is, to say the least, unusual to grant summary judgment in favour of a party who has the burden of proving a primary fact which is in issue. Normally one expects evidence to be adduced at a trial. It is true that in Swain v Hillman [2001] 1 WLR Lord Woolf MR stressed the need for judges to use the powers contained by Part 24 of the CPR in appropriate cases. He said that, if a claimant has a case which is bound to fail, then it is in his interest to know that that is the position as soon as possible but he also stressed that the case had to be a plain case. In Equitable Life Assurance v Ernst & Young [2003] EWCA Civ 1114, Brooke LJ said:-*
>
> > *"The overriding concern is the interests of justice. So far as facts are concerned, the simpler the case is the easier it is likely for a court to be able to take a view that the basis of a claim is fanciful or contradicted by all the documentary material on which it is founded. More complex cases are unlikely to be capable of being resolved in that way. There is a danger of injustice in seeking to try such cases summarily on the documents and thus without disclosure and oral evidence tested by cross-examination. It should not be done unless the court can be confident that all the relevant facts had already been satisfactorily investigated."*
>
> *25. To the extent that this is a simple case, I cannot take the view that the claim is "fanciful or contradicted by the documentary material on which it is founded". On the contrary any claim by a customer that his bank has not executed his instructions is, on the face of it, a strong claim if the instructions have not, in fact, been executed. It will seldom, if ever, be contradicted by the documentary evidence on which it is founded. It is only when the bank says that it suspects the customer was money-laundering that any defence to the claim begins to emerge. That may not, of itself,*

make the claim a complex claim but there is, subject to Mr Lissack's second submission, no reason why the bank should not be required to prove the important fact of suspicion in the ordinary way at trial by first making relevant disclosure and then calling either primary or secondary evidence from relevant witnesses. As Brooke LJ said, albeit in the context of complex cases, there is a danger of injustice in deciding cases without appropriate disclosure and cross-examination."

After referring to the proceedings in *K Ltd v National Westminster Bank plc* [2007] 1 WLR 311, His Lordship continued:

"*28. All this was in the context of summary proceedings brought by the claimant. In that context, the decision in K Ltd to refuse the claimant relief is not surprising. It does not at all follow that, if the customer institutes ordinary (non-summary) proceedings against the bank, the bank should be able to obtain (reverse) summary relief against the customer merely by authorising its solicitor to make a witness statement that various unidentified people in the bank entertained a suspicion. By the time of any trial the dust will have settled and it is most unlikely that the tipping-off provision will continue to be relevant. It will also almost certainly be known whether any investigation is or might be taking place which any disclosure by admissible evidence in court proceedings would be likely to prejudice within section 333(1). If any such investigation is occurring (or is likely to occur) the court can be informed of that matter in an admissible manner. But it is, in my judgment, too strong for the court to say now that the bank would be bound to win any trial and should, therefore, now be entitled to summary judgment.*"

36. I have set out the authorities to which I have referred in considerable detail because they helpfully set out opinions on some of the issues with which I have to grapple. The Plaintiff is not suggesting that the Defendant was wrong to make the disclosure it did in 2013. Section 1 of the Disclosure (Bailiwick of Guernsey) Law, 2007 requires a disclosure to be made if specified conditions are met. Those conditions involve knowledge or suspicion about money laundering coming to a person in the course of the business of a financial services business. Although there may be some surprise that the open source material subsequently discovered about Mazam Ali Khan was not known to the Defendant, or at least to Katharine Lisle or someone else of its associate company, before the account was opened, once it was discovered, the Defendant appears to have been obliged to make the suspicious activity report that it did in May 2013. The key question is whether what has happened since means that the Plaintiff has an unwinnable case so that its action should be terminated at this stage of the proceedings or whether it should be permitted to continue towards an eventual trial.

37. Issuing private law proceedings is clearly an option open to the Plaintiff. The alternative was to challenge the decision of the FIU on the usual public law grounds. There is no problem about timing in that respect because it is incumbent on the FIU to keep its decision not to give the Defendant the consent sought so as to be able to comply with the Plaintiff's instructions under review. A fresh decision can probably be achieved by making another specific request to the Defendant for something to happen and seeing if the outcome is different or remains the same. The request to the Defendant would lead to a further request to the FIU and so a decision that would potentially be susceptible to review.

38. Following *Garnet* (*supra*), it appears that it is not an obligation on the part of a bank customer simply to bring a private law action, because the Court of Appeal explicitly recognised that it is open to a customer to proceed by way of judicial review:

"*64 … any decision to grant or withhold consent is amenable to judicial review if the decision was irrational, unlawful or involved some procedural impropriety. The*

fact that there may be an alternative remedy does not deprive an applicant of the right to assert that some reviewable error was made by the FIS or the police in the course of considering consent.

65 The advantage to an applicant in those circumstances is that consent may provide a more expeditious remedy, and the applicant may also be able to rely on wider law enforcement policy issues as justifying consent, even where his private law claim might fail."

However, that is not the choice that has been taken by the Plaintiff and the other cases offer some explanation as to the potential difficulties that such a claim would face. On the present facts, though, recognising that the absence of consent appears to be principally in support of the expected confiscation action to be taken on behalf of the Belgian authorities, I do wonder why it has taken as long as it already has for something of that nature to be forthcoming. This does not appear to be a situation where criminal proceedings are contemplated. The proceedings against Mazam Ali Khan have concluded and what is now driving the FIU seems to be the expectation that there will be a request to enforce the confiscation order made by the Belgian court. The longer it takes for something of that nature to happen, the less satisfactory the position adopted is because it operates to deprive the Plaintiff of access to the funds in its account with the Defendant. A formal restraint would provide the Plaintiff with something more solid against which to contemplate taking review action. Alternatively, an agreement to permit the Plaintiff to repay Ever Green to a designated account would result only in the funds moving from one financial institution to another, albeit in another jurisdiction, where I imagine that a similar regime would be capable of operating in much the same way. Indeed, because of the ownership arrangements of Ever Green, it strikes me that any confiscation proceedings might be as easily taken in Dubai as in Guernsey, and that some co-operation between different law enforcement agencies might have resulted in that outcome. I realise that there was no request to close the Plaintiff's account with the Defendant for a lengthy period after the suspicious activity report was made, but it appears that the Plaintiff's wishes might be capable of being satisfied through further dialogue with the FIU rather than the Plaintiff having chosen in 2015 to bring judicial review proceedings in respect of the refusal to consent.

39. In mentioning those points, I am not criticising the course of action that the Plaintiff has chosen to adopt. The strong inference from the cases is that a private law action, such as the present proceedings, will be the proper vehicle through which to determine what is in issue between the bank and its customer. A trial will enable the provenance of the funds to be explored. On its face, a claim based on non-compliance with a customer's instructions is a strong one. However, it may not be amenable to a summary judgment application by the customer. Conversely, as a general comment, the customer's claim is likely to be arguable and so not amenable to summary judgment and, by extension, striking out on behalf of the bank. The tenor of the judgments is that a trial will be needed to enable the evidence of both sides to be adduced fully and tested through cross-examination. It is likely, on the basis that the approach in the ***Shah*** case is adopted in Guernsey, that the Defendant will have the burden of establishing its suspicion as a primary fact in order to justify not following the customer's instructions. Accordingly, ***Parvizi*** (*supra*) appears to me to be an exception to these general principles where, on the specific facts of that case, Master Bragge was satisfied that there was no possible argument about the basis of the suspicion that had been formed.

40. So far as Advocate Newman suggests that all this Court needs to concern itself with in order to strike out the Plaintiff's Cause is whether there is believable evidence that the Defendant

formed the suspicion that money-laundering might be involved so as to enjoy a complete defence to the action, I reject that submission. The existence of suspicion is what triggers the required disclosure. Customer due diligence plays a part in that. The information that was discovered by the Defendant about Mazam Ali Khan was public source information. As an authorised signatory identified on the bank account opening documentation completed by the Plaintiff, it was incumbent on the Defendant to conduct due diligence on him (see, for example, Chapter 4 of the *Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing* published by the Guernsey Financial Services Commission). That *Handbook* also elaborates on when disclosures need to be made and what to do. Paragraph 300 of the November 2015 updated version explains that an entity such as the Defendant is "*not expected to conduct the kind of investigation carried out by law enforcement agencies*", but "*it must act responsibly and ask questions to satisfy any gaps in the CDD or its understanding of a particular transaction or activity or proposed transaction or activity*". Accordingly, I think that the Defendant's defence to the Plaintiff's action is not confined solely to establishing that it entertained a suspicion. If the Defendant were to be unable to establish that it held any suspicion, its defence would fail. (Similarly, if there were no foundation for the suspicion, the FIU's withholding of consent could not be justified.) However, once the Defendant demonstrates that there was suspicion, the Plaintiff is still able to succeed by establishing to the required standard that the provenance of the funds in the account is such that they are not the proceeds of crime. That is the ultimate question in the present proceedings. I regard that question as being related to the formation of suspicion but going further than just the Defendant's suspicion taken in isolation. Accordingly, I will not strike out the Plaintiff's Cause purely on the basis that the evidence before the Court is sufficient to show that the formation of the Defendant's suspicion in 2013 was a reasonable one for it to hold.

41. Further, I am satisfied that it is not appropriate to attempt to try the provenance question at this stage of the proceedings. This is an application to strike out the Cause where what is pleaded matters and not what evidence there is on that question. It is not a summary judgment application where the Plaintiff might need to show cause by adducing some evidence, but even then the applicable principles caution against the Court descending into a mini-trial on such an application. Instead, I reject any suggestion on behalf of the Defendant that I should draw any adverse inference from the failure of the Plaintiff to adduce any evidence at this stage (see, eg, *Morgan Crucible Co plc v Hill Samuel Bank Ltd* [1991] 1 All ER 148). That means I have to consider the Defendant's application on the basis that its terms and conditions afford it a full defence even if the Plaintiff were able to persuade the Court that the provenance of the funds is not tainted. This is a question of how to construe the terms and conditions advanced on behalf of the Defendant.

42. I can deal first with Advocate Geall's primary submission on this issue that the problem the Defendant has is that it cannot say which of the two sets of terms and conditions actually applies, which in turn means that there must be a trial. I do not regard this as an attractive position to adopt. In my view, on such a point of construction, it is permissible for a party to assert that whichever of the terms and conditions applies, there is a complete defence. In other words, it is a question of law where the factual dispute as to whether the Defendant properly informed the Plaintiff of the change to the terms and conditions becomes irrelevant to the outcome. The question of which terms and conditions govern the relationship of the parties is something that can only be resolved at trial, but the resolution of that issue is not a pre-condition to considering the legal submissions of Advocate Newman that both sets of terms and conditions afford a full defence. Accordingly, the Application does not fail on that technical point. If the Defendant can succeed in demonstrating that both sets of terms and conditions lead to the same outcome, it can have a complete defence. However, if the Plaintiff shows that one of the sets of terms and conditions does not lead to that outcome, the Application will fail because it will take evidence at trial to determine which of the terms and conditions applies.

43. At para. 17 of its Defences, reference is made to various provisions of the terms and conditions that applied when the Plaintiff opened its account with the Defendant. Under the heading "*Your information*", clause E.3 provides:

> "*Crime Prevention and debt recovery*
> *To prevent crime, to verify your identity, to undertake background checks and to recover debt, we may exchange information with other members of the HSBC Group and, where appropriate, with fraud prevention and debt recovery agencies and other organisations involved in crime prevention and intelligence services (both in the UK and where appropriate, overseas).*"

Under the heading "*General information*", more specific provision is made in clause F as follows:

> "*2. … We and other members of the HSBC Group are required to act in accordance with the laws and regulations operating in various jurisdictions which relate to the prevention of money laundering, terrorist financing and the provision of financial and other services to any persons or entities which may be subject to sanctions. We may take, and may instruct other members of the HSBC Group to take, any action which we in our sole and absolute discretion consider appropriate to act in accordance with all such laws and regulations. ...*
> *Neither we nor any member of the HSBC Group will be liable for loss (whether direct or consequential and including, without limitation, loss of profit or interest) or damage suffered by any party arising out of (i) any delay or failure by us or any member of the HSBC Group in performing any of our duties under these Terms and Conditions or other obligations caused in whole or in part by any steps in which we in our sole and absolute discretion consider appropriate to act in accordance with all such laws and regulations; or (ii) in the exercise of our rights under this clause F.2*
> *3. We shall not be liable for any loss, damage or delay caused in whole or in part by the action of any government or government agency, industrial action (whether involving our staff or not), equipment failure, or interruption to power supplies, or anything beyond our reasonable control.*

44. The subsequent terms and conditions, which the Defendant asserts were applied to the Plaintiff's account with effect from 1 January 2014, although that issue remains unresolved, were more explicit. Under the heading "*Your information*", there is now a section headed "*FINANCIAL CRIME RISK MANAGEMENT ACTIVITY*":

> "*4.1 HSBC, and members of the HSBC Group are required, and may take any action they consider appropriate in their sole and absolute discretion, to meet Compliance Obligations in connection with the detection, investigation and prevention of Financial Crime ("**Financial Crime Risk Management Activity**").*
> *Such action may include, but is not limited to: (a) screening, intercepting and investigating any instruction, communication, drawdown request, application for Services, or any payment sent to or by the Account Holder, or on their behalf, (b) investigating the source of or intended recipient of funds (c) combining Customer Information with other related information in the possession of the HSBC Group, and/or (d) making further enquiries as to the*

status of a person or entity, whether they are subject to a sanctions regime, or confirming the Account Holder's identity and status.

4.2 To the extent permissible by law, neither HSBC nor any other member of HSBC Group shall be liable to the Account Holder or any third party in respect of any Loss whether incurred by the Account Holder or a third party in connection with the delaying, blocking or refusing of any payment or the provision of all or part of the Services or otherwise as a result of Financial Crime Risk Management Activity."

The term "Compliance Obligations" is defined in clause E.1 as:

"*obligations of any member of the HSBC Group to comply with: (a) any applicable local or foreign statute, law, regulation, ordinance, rule, judgment, decree, voluntary code, directive, sanctions regime, court order, agreement between any member of the HSBC Group and an Authority, or agreement or treaty between Authorities and applicable to HSBC or a member of the HSBC Group ("**Laws**"), or international guidance and internal policies or procedures, (b) any valid demand from Authorities or reporting, regulatory trade reporting, disclosure or other obligations under Laws, and (c) Laws requiring HSBC to verify the identity of its customers*".

In order to understand that definition, a definition is also given of "Authorities" as being:

"*any judicial, administrative or regulatory body, any government or public or government agency, instrumentality or authority, any Tax Authority, securities or futures exchange, court, central bank or law enforcement body, or any agents thereof, having jurisdiction over any part of HSBC Group*".

The term "Financial Crime" is another of the definitions that assists the construction of clause E.4. It means:

"*money laundering, terrorist financing, bribery, corruption, tax evasion, fraud, evasion of economic or trade sanctions, and/or violations, or attempts to circumvent or violate any Laws or regulations relating to these matters*".

Finally, the term "Loss" is defined as:

"*any claim, charge, cost (including, but not limited to, any legal or other professional cost), damages, debt, expense, tax, liability, obligation, allegation, suit, action, demand, cause of action, proceeding or judgment, however calculated or caused, and whether direct or indirect, consequential, punitive or incidental*".

45. The letter that may or may not have been sent by the Defendant to the Plaintiff dated 22 November 2013, exhibited by Ms Henshall, enclosed an Appendix describing the changes to its terms and conditions the Defendant intended to make. Advocate Geall submits that the document that was then produced does not exactly replicate the changes that the Defendant alleges were notified to the Plaintiff, but which the Plaintiff denies, and that that is a further reason for questioning whether those later terms and conditions form part of the contractual relationship between the parties or even whether the changes notified should be regarded as having been incorporated into the contract between the parties. I do not, however, need to offer a view on that submission because, for the reasons that follow, I am not persuaded that both sets of terms and conditions offer a complete defence to the Defendant.

46. The clauses on which the Defendant relies in the original terms and conditions do not, in my judgment, clearly mean that the relief sought by the Plaintiff is bound to fail. As was noted in the *Garnet* case (*supra*, at para. 41), it is not the FIU, as a government agency, that is denying the Plaintiff access to its property, but the impact of the legislative regime that produces a "*chilling effect*" on the Defendant complying with the Plaintiff's instructions given in accordance with the mandate. The Plaintiff's action basically seeks a Court ruling that the

funds in its account with the Defendant are properly capable of being transferred in accordance with its instructions. It is perhaps a little unfortunate that it is pleaded principally as a claim in damages, which is perhaps why Advocate Newman has argued that it falls with clause F.3 or, as the case may be, clause F.2. I appreciate, though, that the Plaintiff is advancing a claim for breach of contract and the payment of money in respect of such a breach is usually styled in that way. However, I think it is important to remember that what is sought in this case is not the payment of the Defendant's own money but rather the return to it of something that the Plaintiff says is its own property where there is no justification for refusing to do so. There is no claim for loss of opportunity that the Plaintiff might have suffered had it been able to put the monies to use when it expected them to be returned and nothing suggesting that there is loss arising from any delay in complying with the Plaintiff's instructions. Clause F.3 of the terms and conditions might well be apt to provide a complete defence to such a claim, but that clause's wording does not, in my view extend to the type of claim that has been instituted by the Plaintiff.

47. If the Defendant's submission were correct, it would mean that the very route of seeking judicial oversight of what has happened, identified in ***Garnet*** as being the most appropriate way of resolving what is in dispute between the bank and its customer, could be entirely avoided. That does not appear to be something desirable because it would mean that an aggrieved bank customer would then be forced into bringing judicial review proceedings, where a number of the cases to which I have referred have commented that the focus is on the validity of the decision taken to decline to give consent, rather than it being focused on whether the funds themselves are not tainted. Indeed, I suspect that adopting that course of action in the present circumstances would mean that the FIU could only be invited to reach a decision susceptible to challenge if it were provided with all the material that the customer has available for use in its private law proceedings. If that material were not put before the FIU, it could not then be relied on in the review proceedings, because the Court could only be invited to review any decision against the Plaintiff on the basis of what the FIU had itself considered. Further, the tests to be applied in the two sets of proceedings are different. The Court would be reviewing the legality of the decision of the FIU on the usual public law grounds, allowing to the decision-maker whatever degree of deference is appropriate, whereas in the private law action it would simply be a case of weighing the evidence adduced by the parties and deciding which to prefer. Finally, the focus of the two sets of proceedings would not be the same. The dispute between a customer and a bank is primarily about the provenance of the funds. The dispute between the customer and the FIU would necessarily have to be about the lawfulness of refusing consent to the disputed transaction where the provenance of the funds forms a part of that consideration. In my view, unless the customer has particular reason to think that the FIU has erred, these are all factors to be borne in mind as to why the route identified in ***Garnet*** is likely to be the preferable one and why this Court should be extremely cautious about striking out a Cause in such a case.

48. Returning to the wording of clause F.3, I take the view that it is confined to excusing the Defendant from any liability alleged against it in its own right where there is a causal link showing that it arises from action of a government agency (or anything beyond its reasonable control). It is not expressed in terms that mean that the Defendant is immune from suit in a claim such as that brought by the Plaintiff. In my judgment, these terms and conditions do not afford the Defendant a complete defence to the Plaintiff's action and so the Application to strike out fails. Similarly, I consider that clause F.2 addresses liability for loss alleged to have been sustained resulting from the Defendant doing what it is obliged to do as a result of its compliance obligations. It does not address the situation where, if the Plaintiff's action were successful, the Court orders the Defendant to comply with the Plaintiff's account closing and payment instructions.

49. If it is thought that I have been overly generous to the Plaintiff in construing the clauses that way, then I would have reached the same conclusion by reference to the way in which the prayer for relief in the Plaintiff's Cause could be re-worded to make it clearer than it currently may be. What is really being sought is a declaration that the balance in the Plaintiff's account is not the proceeds of crime, coupled with further relief to direct the Defendant to act in a way that respects that finding. The second part is already pleaded as an alternative to the damages claim. Refusing the Application for this reason is consistent with the principle that the Court does not strike out a pleading if a defect may be cured by amendment. Accordingly, if the simple reading of the claim for damages is that it is caught by clause F.2 or F.3, I would not have struck out the Cause because I take the view that the essence of the Plaintiff's case is not a damages claim but rather seeking ultimately an order that the assets in the account be paid to Ever Green in accordance with the instruction given on behalf of the Plaintiff to the Defendant. This is something that could be clarified through amendment to the Cause. Although I am not directing that this is something that must now be done, Advocate Geall may wish to consider whether to propose to Advocate Newman that the Cause be amended or seek leave to make any amendments that are desired.

50. Because I have concluded on the basis of the material adduced in support of the Application that the original terms and conditions do not afford the full defence pleaded by the Defendant in para. 17 of its Defences, I do not strictly speaking need to go on to consider whether the 2014 terms and conditions can be construed differently. This is because I cannot resolve, on this Application, which of the terms and conditions govern the relationship between the parties and, as I have already explained, the Defendant can only succeed in striking out the Cause if it satisfies me that the Plaintiff's case is unwinnable whichever terms and conditions apply. However, I will briefly offer my provisional view on that issue in case it becomes relevant.

51. I take the view that the position if the 2014 terms and conditions apply is less clear. One consideration is the very wide definition given to "Loss". That definition includes terms such as "*suit*" and "*action*". If I substitute either of those words into clause E.4.2, the Defendant will have no liability in respect of any suit or action in connection with the refusing of any payment or otherwise as a result of Financial Crime Risk Management Activity. Accordingly, there is an argument that the Defendant can advance that the 2014 terms and conditions will excuse it from being liable in the manner alleged by the Plaintiff in its Cause. Even then, though, this is not entirely clear, because clause E.4.2 opens with the words "*To the extent permissible by law*" and, although this will be something for the Plaintiff to consider developing at trial, I can imagine that there are arguments to be had as to what that means, especially in a case where the parties would otherwise have contracted to oust the jurisdiction of the Court to oversee precisely the type of issue envisaged in the *Garnet* and other cases. Further, there may be an issue to resolve as to the use of "*Loss*" in conjunction with "*incurred*". I do not, however, think that the way Financial Crime Risk Management Activity is defined in clause E.4.1 necessarily means that the refusal to give effect to a customer's instructions is as a result of that. This appears to me to cover the steps taken by the Defendant before considering whether to make a suspicious activity report and, when combined with the definition of "Compliance Obligations", does not seem to me to extend to the way the Defendant reacts to the FIU declining to give consent to a transaction. This is principally because there is no requirement as such that the Defendant refuse to give effect to an instruction in a no consent situation, although it is understandable that a bank will not wish to ignore the position and run the risk of being prosecuted for a criminal offence. These are the types of argument that may be raised at trial when the Court will have the benefit of setting them against the evidence given.

52. Although I am not in a position to give any ruling on these matters, particularly as they have not been canvassed in the submissions of the Advocates, my provisional view is that the 2014 terms and conditions potentially offer greater scope to the Defendant to argue that it

can defend the Plaintiff's Cause in reliance on them. However, even if there was no dispute about which terms and conditions governed the parties' relationship, I would not have been inclined to strike out the Plaintiff's Cause on this basis. I do not regard the Plaintiff's position as unarguable and, if nothing else, would have been minded to reject the Application on the basis that the case really should proceed to a full trial to enable the question of whether it is possible to contract out of the type of private law remedy advocated as being the preferable course of action for a bank customer to take where there is a "no consent" situation to be determined after all the relevant material has been placed before the Court. In that regard, I can echo what Tomlinson J stated in the *Amalgamated Metal* case: "*The arising of such disputes is one of the ordinary commercial risks which any financial institution faces.*"

Conclusion

53. For the reasons I have given, the Defendant's Application to strike out the Plaintiff's Cause is dismissed. I have not been persuaded by Advocate Newman that the Defendant has established that the Plaintiff's action is bound to fail because the Defendant has a complete defence to it as set out in its Defences. This is a high threshold to surmount and is a course of action only to be taken in the clearest of cases. This is not one of those clear cases and I suggest that the parties now concentrate on what is needed for the provenance of the funds to be resolved at trial.

54. Although I suspect that the costs of the Application will ultimately follow the event, I will reserve the costs for the time being. If the parties agree that the Defendant should pay the Plaintiff's costs on the recoverable basis, that can be dealt with by way of a Consent Order. If there is any dispute about the costs order to be made, perhaps that is best raised when the matter is next before the Court for case management directions.