**IN THE HIGH COURT OF THE COOK ISLANDS**
**HELD AT RAROTONGA**
**(CRIMINAL DIVISION)**

**MISC. NO. 9/18**

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| IN THE MATTER | of section 50 of the Proceeds of Crime Act 2003 |
| AND | |
| IN THE MATTER | of the Mutual Assistance in Criminal Matters Act 2003 |
| BETWEEN | **SOLICITOR-GENERAL** of the Cook Islands |
| | Applicant |
| AND | **CAPITAL SECURITY BANK LIMITED**, Rarotonga, Cook Islands |
| | First Respondent |
| AND | **ORA FIDUCIARY (COOK ISLANDS) LIMITED**, Rarotonga, Cook Islands |
| | Second Respondent |

Date of Hearing: 31 May 2018

Counsel: Mr D R James, Solicitor-General, for Applicant (with Mr Hunkin, Head of Financial Intelligence Unit in attendance)
No appearance for First Respondent
Messrs N R Williams and D McNair for Second Respondent (with Mr P Wichman, Managing Director of Second Respondent in attendance)

Judgment: 7 December 2018

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**JUDGMENT OF HUGH WILLIAMS, CJ**

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**A. For the reasons set out in this judgment the Solicitor-General's amended application of 16 May 2018 is wholly dismissed.**

**B. The distribution and confidentiality of this judgment will be dealt with subsequently.**

**C. The interim restraining orders made during the currency of this application relating to the US$72,244.11 held by the First Respondent in the name of the Second Respondent are to be rescinded on and from the date of expiry of the appeal period for this judgment absent further order of the Court.**

**D. Costs are to be dealt with in accordance with para [160] of this judgment.**

**Chronology and Application(s)**

[1] On 1 February 2018 the Attorney-General applied on an ex parte basis for a Production Order pursuant to s 79 of the Proceeds of Crime Act 2003[1] for the production by the First Respondent, Capital Security Bank Limited[2], of a number of property-tracking documents. The application was made because the Prosecutor-General's Office of the Russian Federation, acting under s 7 of the Mutual Assistance in Criminal Matters Act 2003[3], requested the Cook Islands Government to obtain a number of documents which, broadly speaking, related to the affairs of a Mr Sergey Leonidovich Leontiev and companies and trusts said to be associated with him. The ex parte application was on the basis that there were reasonable grounds for suspecting that Mr Leontiev had committed a serious offence or offences and had derived a benefit directly or indirectly from those offences in relation to which CSB had possession or control of the property-tracking documents.

[2] The 1 February 2018 application was supported by an affidavit by a senior police officer sworn on 31 January 2018 which deposed that the Crown Law Office received a request for legal assistance under MACMA in October 2017 from the Investigative Committee of the Russian Federation based on three documents. They were:

a) A five page formal request for legal assistance by the Cook Islands authorities from the Investigative Committee dated 17 July 2017;

b) A six page decree dated 13 July 2017 "on authorised exercise of seizure of items and documents containing a government secret or other secret protected by federal law";

c) A seven page "Warrant of Distress Decree" dated 13 July 2017.

[1] "POCA"in the form with effect from 24 June 2017.
[2] "CSB".
[3] "MACMA".

The first bore the name of D. Kh. Khuramshin designated, in translation, "Mayor of Justice," and the two others bore the name, in translation, of Judge A G Karpov of the Basman District Court of Moscow in the Russian Federation.

[3] Because the Russian Federation had sought confidentiality[4] for the proceedings, it is sufficient to note that the documents produced by the affidavit alleged that Mr Leontiev and others had embezzled sums of, though varyingly stated, up to RUB 27,461,140,857.87[5] using accounts at CSB in the name of Mr Leontiev and six other companies or trusts. The request documents said Russian civil proceedings had been commenced to recover the monies allegedly embezzled and a criminal prosecution had also been commenced against Mr Leontiev. He had left the Russian Federation and the documents[6] said he had been put on an international wanted list.

[4] The Warrant of Distress Decree requested seizure of Mr Leontiev's property in the Cook Islands being bank credits of various amounts held by CSB, and the decree "on authorised exercise of seizure" sought seizure from CSB of its bank files in relation to those accounts together with a large amount of other bank information relating to them.

[5] The Court's minute dated 7 February 2018 recounted the application and evidence just summarised and concluded:

> "[5] Those documents and the material included in them lead to a reasonable conclusion that Sergey Leonidivich Leontiev and others associated with him have been engaged in embezzlement contrary to the Criminal Code of the Russian Federation and have embezzled considerable amounts of roubles and other sums in different currencies through a network of companies and bank accounts in a number of jurisdictions.
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> [6] The information raises at least a prima facie case that Sergey Leonidovich Leontiev and those associated with him have been guilty of a serious offence against the Criminal Code of the Russian Federation which, if the activities had been undertaken in the Cook Islands, would have amounted to serious offences under the Crimes Act 1969. The warrant of distress decree amounts

[4] As do the parties to this proceeding.
[5] US$455,408,637.78 at the then current exchange rate.
[6] Describing him as a "jailbird in absentia".

> to a criminal proceeding under [MACMA], s 5B, as it relates to property obtained by criminal conduct."

and that:

> "(c) Pending further order of the Court there will be an interim order requiring the respondent to produce the property-tracking documents enumerated in the application and in s 79 of the [POCA] namely the complete records for the period September 2014 to the date of such service for all the accounts listed in paragraph [3] of this Minute; and
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> (d) Until the further order of the Court, any funds held in the said accounts on the date of such service are to be frozen; and
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> (e) That pending further order of the Court there shall be no right of search of the file relating to this application and confidentiality is required in relation to the same."

[6] Earlier than the initial application to the Court, namely on 16 January 2018, Mr Hunkin, Head of the Financial Intelligence Unit[7] of the Cook Islands Government acting under the Financial Intelligence Unit Act 2015[8] issued a "freeze" instruction to CSB to hold the sum of US$72,244.11 in sub-call account[9] 570608 in the name of Ora Fiduciary (Cook Islands) Limited[10]. CSB advised on 17 January 2018 that it had complied with the instruction and by letter dated 23 February 2018 the solicitors acting for Ora and Mr Leontiev advised Mr Hunkin that the funds were "earmarked for [Ora] as a retainer for trustee services".

[7] The "freeze" instruction only froze the funds in Ora's account for 60 days, namely until 17 March 2018. That led to the Attorney-General, on 6 March 2018, applying for an interim restraining order in respect of the funds from 17 March 2018 to the substantive hearing and for a permanent restraining order under s 45 of MACMA.

[8] As recorded in the Court's minute of 19 March 2018, CSB advised on 8 March 2018 that it neither opposed nor supported or consented to the 6 March 2018 application and by minute of 30 April 2018, CSB, at its request, was excused from

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[7] "FIU".
[8] "FIU Act".
[9] The sub reference is part of Ora's control procedures for holding client funds where funds are held under the control of Ora as trustee and are separated from and not commingled with other client funds or its own operating funds.

appearing at any of the hearings. Ora's solicitors, by memorandum dated 16 March 2018, advised that it did not oppose the making of an interim restraining order in relation to the funds and, on 30 April 2018, was added as Second Respondent.

[9] More cogently, by a notice of opposition dated 11 April 2018, Ora advised that it opposed the making of a final restraining order on the grounds that:

a) Ora is a party who has an interest in the property the subject of the Application and was accordingly entitled to be heard;

b) There were no reasonable grounds for believing that Mr Leontiev committed the offence alleged;

c) There were no reasonable grounds for believing that the property, the subject of the Application ,was "tainted property"; and

d) There were no reasonable grounds for believing that the property, the subject of the Application, was subject to the "effective control" of Mr Leontiev.

[10] The minute of 30 April 2018 noted[11] that the "principal issue currently arising from the pleadings appears to be whether the applicant is to be permitted to refer the evidence adduced on behalf of the Second Respondent to authorities in the Russian Federation," a substantial amount of material having been voluntarily produced to the Crown Law Office pursuant to an undertaking as to confidentiality dated 8 December 2017. That observation was made following Mr Williams, leading counsel for Ora, filing a memorandum raising doubts as to what was principally in issue in this application.

[11] The confidentiality undertaking by the Solicitor-General and FIU was that the information volunteered should be "held confidential and shall not be disseminated or disclosed to any other person, entity or governmental or quasi-governmental entity or their representatives" subject to a number of conditions including Ora's consent or an order of this Court.

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[10] "Ora".

[12] Because of the doubts expressed by counsel for Ora, a conference call was scheduled for 11 May 2018. The changing course of the application was recorded in the Court's minute of that date:

> [2] Putting the matter broadly, the nub of the conference call was expected to be whether the applicant was to be permitted to disclose information provided by the second respondent to persons or organisations outside the Cook Islands, particularly in the Russian Federation, and, if so, to which persons, on what terms and for what purposes should they be permitted to see and comment on the material.
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> [3] However, as the conference progressed the argument reached the point where Mr James, Solicitor-General and counsel for the applicant, abandoned any wish to disclose the material provided to the Financial Intelligence Unit by the second respondent to any person or organisation outside the Cook Islands. Accordingly, the conference call moved to the timetable orders required to ready for hearing the interim order..."

[13] That led to the Solicitor-General, by then substituted as Applicant, filing an amended application dated 16 May 2018 seeking:

> 1. For the continuation of and final determination of the interim order pursuant to [POCA] s 50, for the funds below described, for the period from the date of hearing until further Order of the Court; and
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> 2. In the alternative, for a Restraining Order pursuant to section 45 of MACMA; and
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> 3. For directions as to holding the funds in an interest bearing account, or directing the funds to be given in custody of the Solicitor-General (see POCA s 50(2)(b)) for management in accordance with directions of the Court.
>
> The funds are an account held by the first respondent in the name of the second respondent in the former's account number 570608 which, as at January 2018 totalled at or about US$72,244.11.

with the grounds being:

> (a) The Solicitor-General suspects that no earlier than 1 January 2017 (ie. within six years of this application) the second respondent committed the offences of,

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[11] para 5.

(i) Failing to file a Suspicious Activity Report pursuant to the Financial Transactions Reporting Act 2017[12] s 47;

(ii) Failing to comply with FTR Act ss 25 and 30: standard customer due diligence requirements;

(iii) Failing to comply with a Head of FIU direction dated 25 October 2017, in particular at page 2, 'In accordance with s 35(d)...';

(iv) The conduct of the second respondent has the effect of rendering assistance to Sergey Leontiev formerly of the Russia Federation and of whereabouts now unknown (possibly the United States) to permit him to engage in a transaction which the second respondent had reason to believe was derived directly or indirectly from a serious offence (see, Crimes Act 1969 s 280A(1) and (2));

(b) The funds are in the effective control of the second respondent because the funds are held in its name; and it is subject to the Court's power to treat the funds as its property regardless of whether or not it has any legal or equitable interest in it [POCA] s 32(1);

(c) The second respondent has claimed an interest in the property as available for fees for services connected to the offences set out above at (a)(i) to (iii);

(d) The second respondent is likely to be charged with one or more of the serious offences described at (a) above;

In reference to alternative item 2 relief,

(e) A request has been made to the Government of the Cook Islands by the Prosecutor-General's Office of the Russian Federation pursuant to Section 7 of the Mutual Assistance in Criminal Matters Act 2003 relating to an investigation into alleged offences by SERGEY LEONIDOVICH LEONTIEV in the Russian Federation.

(f) The request discloses:

(i) A proceeding has been commenced in Russia;

(ii) A restraining order ('Warrant of distress Decree') was issued in Russia and there are funds in the Cook Islands that reasonably appear to be the subject of that order;

(iii) Russian Federation has requested the Warrant of distress Decree dated 13 July 2017 be complied with in the Cook Islands.

[12] The "FTR Act" in the form re-enacted with effect from 24 June 2017.

(g) If a restraining order from the period described is not granted the funds may be lost from the MACMA or Proceeds of Crime Act processes and defeat the course of justice.

[14] It was the Solicitor-General's amended application of 16 May 2018 which was heard on 31 May 2018 and is the subject of this judgment.[13]

[15] The Solicitor-General's application was supported by an affidavit from the Solicitor-General himself[14] affirming that the offences described in the amended application had occurred no more than six years before 1 April 2018 and that he suspected that "to the extent that the funds sought to be restrained are found to be the property of a person other than the Second Respondent, the funds are tainted property" with the grounds for that belief being recounted, based on the affidavits.

[16] Further evidence supporting, and that opposing, the amended application is detailed elsewhere.

**Principal Relevant Statutory Provisions**

[17] Though the Solicitor-General submitted the whole of ss 50-69 of POCA was relevant, he disavowed reliance on ss 59–69 relating to "interim restraining orders for foreign serious offences".

[18] Other relevant statutory provisions appear in the First Schedule to this judgment but those directly pleaded in the amended application are s 50 of POCA which relevantly reads:

> "50. Restraining order – (1) The Court may make a restraining order against property if it is satisfied that –
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> (a) the property is –
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> (i) property of a defendant or suspect (other than property against which a forfeiture order is in force or is proposed to be made under this or any other Act); or

[13] Delivery of which has been, regrettably, delayed by necessary prioritisation of other litigation and logistical difficulties.

[14] Appearing at the hearing either as applicant or as counsel without objection from other parties: *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 at 488-9, paras [147]-[149].

(ii) property, held by someone other than a defendant or suspect, that is tainted property and under the effective control of the defendant or suspect; and

(b) if the order relates to property of, or under the effective control of, a defendant, that the defendant has either been convicted of, or charged with, a serious offence; and

(c) if the order relates to property of, or under the effective control of, a suspect, that the suspect is likely to be charged with a serious offence within the period that the restraining order applies.

(2) The order may –

(a) prohibit the defendant or any other person from disposing of, or otherwise dealing with, the property, or a part of it or interest in it specified in the order, either absolutely or except in a way specified in the order; and

(b) at the request of the Solicitor-General, if the Court is satisfied that the circumstances so require, direct the Administrator:

(i) to take custody of the property or a part of it specified in the order; and

(ii) to manage or otherwise deal with all, or any part of, the property in accordance with the directions of the Court.

(3) In deciding whether there are reasonable grounds for believing that property is subject to the effective control of a person, the Court may take into account the matters mentioned in section 32(2).

(4) the order may be subject to any conditions that the Court thinks fit and, without limiting this subsection, may provide for meeting, out of the property or a specified part of it, all or any of the following –

(a) the person's reasonable living expenses (including the reasonable living expenses of the person's dependants, if any) and reasonable business expenses;

(b) the person's reasonable expenses in defending a criminal charge and any proceedings under this Act;

(c) another specified debt incurred by the person in good faith.

and s 45 of MACMA which reads:

"45. Requests for restraining orders – The Attorney-General may apply to the Court for a restraining order under the Proceeds of Crime Act against property for a serious offence if –

> (a) a proceeding has commenced, or the Attorney-General believes, on reasonable grounds, that a proceeding is about to commence, in a foreign country for the offence; and
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> (b) the Attorney-General believes, on reasonable grounds, that property may be made or is about to be made the subject of a foreign restraining order is located in the Cook Islands; and
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> (c) the foreign country requests the Attorney-General to obtain the issue of a restraining order against the property."

**Evidence**

[19] The FIU's stance in this matter is summarised in an affidavit by Mr Hunkin sworn on 16 May 2018[15] giving details of the FIU's investigation of the Russian request and concluding:

> 2. The [FIU], in addition to the request of the Russian authorities, has an interest in the application for a continuing Restraining Order over the US$72,244.11 held at CSB. The funds may be used to satisfy any future confiscation orders made in the Cook Islands or elsewhere. Analysis undertaken below has identified that circa US$100,000,000 has been transmitted through and dissipated from the Cook Islands.
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> 3. The FIU's conduct in an investigation that commences with the alleged embezzlement in Russia of approximately US$400,000,000. Russian authorities say Sergey Leontiev is a fugitive from Russia and was indicted (with others) in absentia for the embezzlement of those funds. The Cook Islands investigation is focussed on the suspected laundering of those funds through the Cook Islands utilising Cook Island Trusts, Cook Island international companies and other legal entities. The FIU has received intelligence in respect of its investigation from multiple sources. This includes by statutory based investigation of files of the first respondent and Southpac Trust International Inc[16].

[20] Elaborating on that conclusion in the balance of his affidavit, Mr Hunkin gave it as his opinion that, after referring to the results of the FIU's analysis and its conclusions, "all the funds can be reasonably suspected to represent the proceeds of crime" based on the documents, this conclusion being reached "through reference to

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[15] Of 8pp and 45 paragraphs and sworn before the Solicitor-General's amended application was filed and thus mainly with the original focus.

[16] "Southpac".

the Russian Federation request and also from the movement of the monies to and from different accounts and differently named and structured, but, interrelated entities". The US$72,244.11 held by CSB was, Mr Hunkin concluded, part of the funds and was derived from the approximately US$400,000M "embezzled from Russia for which Mr Leontiev has been indicted by the Russian Court".

[21] He said that it was only in October 2017 that the FIU became aware that Ora had become trustee of the Legion and Shasta Trusts[17] on 12 September 2017 and that its analysis of the material produced by Ora was that "the latest point at which Ora took on functions related to the Shasta Trust ... was in the first week of August 2017" so the material volunteered in late October could provide no basis for allaying a reasonable suspicion that at any time from August 2017 onwards steps were taken to disguise the origin of the Russia-sourced funds. These steps, in his view, fell under Ora's duty to report suspicious activity under s 47 of the FTR Act, something with which it had not complied.

[22] His affidavit then undertook an analysis of the assets of the Shasta, Legion and Inlegion[18] Trusts, starting with FIU's directions in its important letter to Ora of 25 October 2017[19] and a further letter two days later specifically directing Ora's attention to the fact its activities might amount to "collusion and a money laundering offence" and any failure to comply with FIU's direction "may expose you to various statutory complaints with criminal penalty consequences"[20].

[23] Ora's response on 27 October 2017 was that they had no bank accounts under their direct control which represented Shasta Trust funds[21]. That, as explained elsewhere, was correct at the time.

[24] Commenting that failure to produce information specified by the Head of the FIU may breach s 45(a) of the FIU Act, Mr Hunkin noted that Ora complied with the directions on 7 November 2017 but, he thought, in a partial way. That led him to

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[17] Leontiev-related entities.
[18] Another Leontiev trust.
[19] The "25 October letter" The whole of the letter is important in relation to various aspects of this matter but is too long to quote here. Selected excerpts appear where appropriate and the whole of the letter appears as the Second Schedule to this judgment.
[20] Hunkin 16.
[21] Hunkin 17.

state that it was "obvious to me that there is and was at that time considerable money of the Leontiev interest outside of the Cook Islands".

[25] Further correspondence ensued, including from the Solicitor-General dated 15 November 2017, giving notice that the laying of a charge under ss 45(a) and 46(d) of the FIU Act "may eventuate". Mr Hunkin concluded on the basis of the confidential information that "there was not conclusive evidence of a fabricated attack on Mr Leontiev; or that if there was that it could justify the movement of all the assets" and that the "allegations of the Russian authorities ... create a strong suspicion"[22].

[26] Mr Hunkin's affidavit then moved to an analysis of the material provided to the FIU and that, in its turn, led him to the conclusion that "the owner or controlling mind of the numerous property-holding structures is Mr Sergey L Leontiev" referring to exhibited wiring diagrams prepared by the FIU[23]. Over the following three plus pages he provided detail of the matters in the material which led him to that conclusion. His final comment was:

> "24. FIU has commenced a criminal investigation in relation to suspected offences under s 280A of the Crimes Act 1969 (as amended) to establish the role of Ora and others. This is in addition to the likely offending indicated in the Solicitor-General's amended application. FIU continues to liaise and collect information, on an intelligence basis, with a number of other jurisdictions. It is anticipated that the FIU through Crown Law will seek formal mutual legal assistance from overseas

[27] Ora's evidence came from its Managing Director, Mr Wichman. He filed affidavits sworn on 11 April and 24 May 2018[24].

[28] Ora, Mr Wichman said, has been a registered trustee company since 2007 and is designated as trustee for over 160 trusts. He, as its founder and managing director, has qualifications and experience in the industry going back much further than that.

[29] In the earlier affidavit, he characterised the initial application as seeking to restrain Ora's sub account with CSB for the Shasta Trust. That trust was established

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[22] Hunkin 19-21.
[23] Hunkin 25.
[24] The earlier of 44pp with 24 exhibits (547pp) and the latter of 22pp (192pp).

on 23 December 2015 with Southpac as trustee, Mr Sergey Leontiev as settlor, Leonard Leontiev as protector and Nella Leontieva as beneficiary with Leonard Leontiev becoming beneficiary on her death and on his death Svetlana Komissarova becoming beneficiary.

[30] ShastaHoldCo Limited[25] was incorporated on 16 March 2016 with an independent director based in Germany. Its shares are owned by the Shasta Trust.

[31] Mr Wichman said that Ora was appointed trustee of the Shasta Trust on 12 September 2017[26] and that, whenever it is appointed trustee, it undertakes what he described as a "comprehensive set of due diligence procedures in accordance with its Operations Manual"[27] which comply with the FIU's guidelines. Specifically, Ora's "on-boarding" processes are constituted by the twelve steps detailed in his affidavit[28] including communications with legal representatives for the beneficiary and protector and receiving the beneficial owner's declaration that assets were not derived from money laundering-criminal activities or fraud. It followed all these procedures with the Leontiev interests.

[32] Ora also inspected Southpac's files "specifically to see if the relevant customer due diligence documentation held on its files would allow compliance" with the FTR Act[29] on the basis that there is "a reasonable assumption that the existing client of a registered trustee company would in any case be compliant with the requirements of the FTR Act[30]".

[33] Ora considered information concerning litigation as discussed in the documents, but with the view that commercial disputes between parties relating to agreements was part of the industry and "an expected part of doing business with Cook Islands trusts".

[34] All these steps were taken against a general reassessment of their obligations by the Cook Islands' trust industry as a result of the re-enacted FTR Act coming into

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[25] A Leontiev-interest company.
[26] Wichman 1, para 4.11, Ex C.
[27] Wichman 1, para 4.2, exhibits D and E.
[28] Wichman 2, para 2.8.
[29] Wichman 1, paras 4.4 and 4.5.
[30] Wichman 2 2.8(d).

force on 24 June 2017. Resultant changes in the industry's actions included conducting internal risk assessments on all existing clients in preparation for an OECD evaluation in November 2017. Ora participated in presentations and seminars and prepared amended assessments to ensure compliance with the new Act.

[35] Consequently, Mr Wishman said this caused "a certain degree of delay in continuing our ongoing collection of due diligence on the Trusts" and it was during that process that it received the 25 October letter. That, in its turn, led to it obtaining reports and querying information with the settlor's representatives. Then "Ora, having completed initial due diligence to its satisfaction, commenced its enhanced due diligence procedures on the Trusts which mainly consists of it obtaining further information and clarification on the source of funds"[31].

[36] In relation to the Shasta Trust, Ora undertook "extensive due diligence checks on the various parties involved and other related entities" The checks included World-Check One on 26 October 2018, Google, IRS, SEC, Interpol and the United Nations. The World-Check One report revealed that Mr Leontiev had been placed on an official wanted list in February 2017 by the Russian Ministry of Internal Affairs on suspicion of involvement in misappropriation or embezzlement.

[37] Ora also made enquiries with representatives of the settlor of the Shasta Trust and Mr Leontiev, Kobre & Kim LLP, a firm of New York[32] lawyers who wrote to Ora as "counsel for Sergey Leontiev" on 31 October 2017[33]. Kobre & Kim were disparaging of the World-Check One report saying:

> "...World-Check's flag on Mr Leontiev is flawed for several reasons. We provide below an overview of these flaws, explaining that (1) World-Check's flag is only as reliable as the sources upon which it relies, (2) the underlying sources World-Check relied upon regarding Mr Leontiev, such as Life.ru, are not credible reporting sources, (3) Mr Leontiev is the target of a politically sanctioned scheme by Russia authorities to expropriate his assets, and (4) Mr Leontiev has successfully vindicated his rights in several court proceedings in the United States. We believe that a proper understanding of these issues, which are not incorporated in the World-Check report or generally reflected in online resources, will make plain that any flag on Mr Leontiev – a well-

[31] Wichman 2 2.18 & 2.21.
[32] And nine other locations.
[33] Wichman 1, paras 4.7-4.9, exhibit G.

> regarded entrepreneur whose Russia-based investments were wrongfully targeted for unlawful expropriation by corrupt government officials and their closest associates – or any entities with which Mr Leontiev may have had ties should be disregarded, especially given the politically motivated attacks on Mr Leontiev and his assets by those corrupt officials."

assertions which they supported in detail over the next several pages. They said one of World-Check's sources is a Russian news website with "very close ties to the Kremlin" and the President of Russia. They noted the limitations on press freedoms in the Russian Federation, and dealt at some length with Mr Leontiev's private bank, Probusinessbank[34], which, they assert, grew to be a large Russian bank but, because it aligned itself with opposition politicians, was expropriated by Russia's bank regulator, a not uncommon consequence, they assert, of those without close ties to the Russian regime. The report details money taken from Probusinessbank which the Russian General Prosecutor's Office concluded was improper and other activities which resulted in Probusinessbank's assets and liabilities being transferred to another bank "well known to be a Kremlin favourite and ally". That led, the report alleged, to charges against Mr Leontiev and other members of the bank's management, despite the Investigative Committee of the Russian Federation concluding, in relation to the prosecution, that there was no adequate evidence of wrongdoing. The Kobre & Kim report is copiously supported by reference to various articles and other reports and led the authors to conclude:

> "Mr Leontiev is a well-respected businessman and entrepreneur who had no record of wrongdoing until his business interests in Russia were targeted by the corrupt Russian officials and their cronies for politically-sanctioned expropriation. Since that expropriation, they have not been content with the spoils of the takeover of Probusinessbank and its assets that they were able to redistribute to their closest friends, but have sought to further attack Mr Mr Leontiev in hopes of enriching the pool of assets they can unlawfully accumulate and divvy up to enrich themselves."

[38] Mr Wichman emphasised that Ora's inquiries were conducted without "any direct communications with the settlor let alone receiving and acting on any instructions made by him or on his behalf"[35].

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[34] A Leontiev entity.
[35] Wichman 1, para 3.6.

[39] Ora was in the process of completing the transfer of administration of the Leontiev interests when it received the 25 October letter which, amongst other matters, outlined – but did not include – the Russian request, sought Ora's files concerning Mr Leontiev and the others mentioned in the documents and required Ora to take steps to ensure no money was paid, transferred or allowed to pass out of its control.

[40] To assist Ora to undertake its due diligence procedures – and as part of the material it volunteered – Kobre & Kim provided Ora with five reports of evidence of Russian corruption against Mr Leontiev: the Russian government's actions in relation to Probusinessbank, reports from a Mr Voronin and a Mr Krys and two other expert reports, one from a Mr Gladyshev, a Russian advocate with extensive experience in representing Western and Russian companies in Russian courts, and the other from a Dr Foxall drawing on his research on economic, political and security trends in the Russian Federation and other countries of the former USSR. The length and content of all those reports makes lengthy citation of their contents inappropriate, but their flavour can be gleaned from the conclusions expressed by Dr Foxall:

> "56. Since Vladimir Putin became the Russian Federation's president in 2000, he has created a grotesquely predatory authoritarian system. This system is ruthlessly committed to protecting Mr Putin's interests and those of his favoured contacts both at home and abroad, using both legal and illegal tactics.
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> 57. In my opinion, based on my extensive research in this area, it is readily apparent that Russia's pursuit of Mr Leontiev, Mr Leontiev's associates, Probusinessbank, and their other entities is a prime example of the Kremlin's use of Russia's corrupt criminal justice system as a vehicle to enrich regime insiders at the expense of outsiders with Western connections. And, in doing so, the Kremlin will likely try to make use of mechanisms provided by legitimate Western legal systems to further its aims."

and those of Mr Gladyshev:

> "223. The key statutory document, the Russian Indictment [against Mr Leontiev], is fundamentally and fatally defective insofar as it omits significant mandatory information and rests on the improper inclusion of an alleged civil code violation, which is not, by definition, criminal.

> And not only is the description of the events in the Russian Indictment insufficient under applicable Russian laws, but it conclusively demonstrates that the conduct complained of is not defined as a crime under Russian law.
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> 224. For these reasons, the Russian Indictment appears not to be a genuine procedural document in a legitimately pursued criminal case. It seems, rather, based on my experience, that the Russian authorities used the indictment to paint ordinary business practices as criminal offences in order to exert pressure on Mr Leontiev and his associates, and to exploit mechanisms of international legal assistance."

[41] Ora's receipt of those, and other, documents led Mr Wichman to conclude[36]:

> "5.3 These documents demonstrate the clean sources of funds settled in the Shasta Trust (and the other trusts of which Mr Leontiev is settlor), the probity of the business affairs of Mr Leontiev (the co-founder of Probusinessbank) … and how factions within the Russian government are perpetrating a corrupt and abusive campaign of asset expropriation against Mr Leontiev.
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> 5.4 These documents outline, with detailed supporting references, that the Russian charges against Mr Leontiev are the product of corrupt actions by the Russian government and the Russian Deposit Insurance Agency. They demonstrate that the prosecution of Mr Leontiev is not a misunderstanding, misidentification, or mistaken analysis of Mr Leontiev's financial transactions. Rather, the Russian government has intentionally raided Mr Leontiev's company's assets and used these allegations as political cover for their corrupt actions.

[42] Since volunteering the material, Ora has obtained a second report from Mr Krys, this time in affidavit form, specifically on the Shasta Trust and a further report from Kobre & Kim dated 28 March 2018 with updating information, all of which Mr Wichman summarised in his first affidavit.

[43] The affidavit sworn on 11 April 2018 by Mr Krys[37] exhibits his report to Ora on the sources of funds underlying two transfers of money, both to one of CSB's accounts identified in the Russian request. Mr Krys described his company as an "international fraud investigation and dispute resolution firm with eight offices worldwide" and his expertise as the areas of fraud investigation and asset recovery in

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[36] Wichman 1.

[37] Sworn in the Cayman Islands, it is of 88pp divided into many paragraphs and supported by some hundreds of pages of detailed workings divided into 12 appendices.

the offshore industry. It is unnecessary to quote Mr Krys' detailed conclusions but, generally, his view is that the many transactions he analysed, though involving substantial amounts of money, were legitimate trades or loans at normal interest rates and were generally on valid, commercially reasonable terms.

[44] Next addressing the sub-account credit totalling US$72,244.11 received by Ora from Southpac on 4 and 8 January 2018, Mr Wichman noted these have been the only transactions to date for the sub-account and were payments by Southpac after locating funds sent to CSB. They were payments from Ora's Shasta Trust Account and from ShastaHoldCo. It was the source of those funds, amongst other matters, on which Mr Krys reported to Ora on 11 April 2018.

[45] Based on all those reports, Mr Wichman concluded that the allegation that the funds in the sub-account are tainted was unfounded, partly because none of the affidavits sworn in support of the application "details any sort of tracing exercise from the monies/accounts subject to the MACMA Request to the sub account"[38].

[46] Mr Wichman similarly gave it as his opinion that the allegation that the sub-account was under Mr Leontiev's effective control was also unfounded because he is no more than the settlor of the Shasta Trust and not a beneficiary[39], trustee or protector and ShastaHoldCo's director is independent of Mr Leontiev. He said:

> "as trustee, Ora has not taken direction from anyone in respect of the Shasta Trust. In particular Ora has not taken direction from anyone on behalf of Mr Leontiev. I have never communicated with, or met, Mr Leontiev. Ora has not received any direction from any party ... either directly or indirectly in relation to the sub account. The protector has never directed the use of any trust funds."[40]

[47] Mr Hunkin's 16 May 2018 affidavit led to Mr Wichman swearing a second, 24 May 2018, reply affidavit. Much of its content is repetitious of issues dealt with in the earlier affidavit, but there was some new matter.

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[38] Wichman 1, 8.2.
[39] The evidence says Mr Leontiev is a US citizen. If so, he is an "Excluded Beneficiary": Shasta Trust Agreement p4.
[40] Wichman 1, paras 9.4–9.5.

[48] Repeating the conclusion from his first affidavit that the allegations concerning Russia were unsubstantiated and the funds in the proceeding were not tainted, he stressed the lack of evidence disputing his views and the change in direction effected by the amended application. He emphasised that the change in tack still rested on the same allegations but focussed on Ora in lieu of CSB or Mr Leontiev.

[49] In considerable detail[41] the affidavit traversed the impact of the 25 October letter with its FIU directions, the alleged assistance to the settlor of the trust, effective control, payment and whether the investigation period and issues arose before Ora became trustee. The material has all been read but as it has been broadly summarised elsewhere in the judgment, no detailed reference to it is required. However, on the topic of Ora's alleged assistance to the Trust's settlor, Mr Wichman principally relied on the unchallenged expert evidence of Mr Krys that the funds are clean, so Ora "has no reason to believe they are derived directly or indirectly from a serious offence". And, on the topic of control, his affidavits detail why Mr Leontiev has no control over the funds: Mr Wichman says "the funds are in Ora's control because the funds are held in its name [and] as trustee it is the legal owner of the funds and the funds are in its bank account[42]".

[50] All of that material led Mr Wichman to say:

> "2.13 This information left Ora completely satisfied that the funds in the Shasta Trust were clean and that the Trust was not conducting suspicious activity. On the contrary the detailed source of funds report gave Ora comfort as to the activity. Section 47(2) of the FTRA provides that a reporting institution must report suspicious activity to the FIU as soon as possible but not later than two working days after it forms, or should have formed, that suspicion. As a result of our enquiries, Ora never reached the conclusion that there was suspicious activity to report.
>
> 2.14 Likewise, we did not see a need to file a suspicious activity report with respect to the funds subject of this application that appeared into our sub account because those funds had always been discussed as between the clients' representative, Southpac Trust and ourselves and which funds were specifically tagged as a retainer on account of trustee fees.

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[41] Wichman 2, pp 7–22, paras 2.18–8.4.

[42] Wichman 2, para 5.1.

2.15 It is confusing that the FIU are now alleging that Ora should have filed a suspicious activity report when it was the first FIU Letter that put Ora on any notice of possible suspicious activity. As soon as that letter was received Ora sought a response from the Settlor's legal counsel. Even if Ora had reached the conclusion that there was suspicious activity to report as it was put on notice in the letter from the FIU, this would have amounted to a notice to the same party that had just written to Ora about the same alleged issues. In other words any new information that Ora could provide to FIU via a suspicious activity report was nil.

2.16 I note that the applicant has not identified in its affidavit evidence in this proceeding, or in any other communication to Ora, any reason why either Mr Hunkin or Mr James have reached the conclusion that the funds in question are tainted. There is not one iota of evidence tracing these funds back to any crime. To the extent Mr Hunkin relies on ([the] Request), that too makes no effort at all to show or establish how the funds in the Cook Islands are tainted. It is impossible to know how to respond to the applicant who just keeps asserting, without any evidence, and contrary to the voluminous expert evidence Ora has filed, that he "believes" the funds are proceeds of crime. Anyone can say they "believe" something but they must have evidence to support a belief or that belief is rendered nugatory. The only expert evidence before this Court regarding the funds, from Kenneth Krys, shows those funds are clean.

2.17 Importantly, Mr Hunkin admits that, having received some 200 pages of important exculpatory voluntary information from Ora through its counsel, all he did was casually "peruse" this material. On the contrary when I received this information I took the time to carefully read all of the information to inform myself as to the key issues relating to the MACMA Request and to get to the truth of the matter. There is a large volume of complex material that I carefully considered. By failing to consider properly the information provided, Mr Hunkin cannot properly conclude that the MACMA Request is legitimate. ..."

**Submissions: Applicant**

[51] The Solicitor-General did not pursue an order under s 50 by dealing with Ora's voluminous evidence that the Russian Federation is a "kleptocracy," but rather questioned the legality of Mr Leontiev's conduct as a principal of Probusinessbank engaged in "off balance sheet trading" for himself through his foreign entity Wonderworks Investments Limited and as seen through the lens of Ora's duties to report under Part 3 of the FTR Act. The Solicitor-General submitted that repayment of what he termed "disguised" borrowing does not clean the funds if the insider remains with the profits.

[52] He submitted that if his knowledge or suspicion that property of a defendant, suspect or some other person holding tainted property or under their control, and the grounds for the same under s 48 of POCA, were reasonable, then the Court might make the orders sought under s 50 upon being satisfied that the money related to "tainted property" held by Ora which was connected to its apparent failure to comply with its reporting duties under the FTR Act as Ora was likely to be charged with a serious offence. The Solicitor-General said charging was likely to occur within the next six months. In undertaking that exercise, the Solicitor-General relied on the Court's powers under s 32 of POCA to lift the corporate veil.

[53] The Solicitor-General submitted that Mr Leontiev's conduct was suspicious because he was a bank insider using bank customer assets for significant personal benefit; the funds were placed overseas from the start of the off balance sheet transactions; the profits were never returned; and no accounting had been made of the profits for tax or any other purpose. He submitted the transaction was secreted and disguised within a maze of interrelated out-of-Russia entities with no sign of their being applied to the common good of those who seek to oppose the current President's regime. Further, the borrowings were switched from roubles to US dollars to buy "blue chip" US company shares in a period where there were sanctions in place against the Russian Federation. He submitted his reading was consistent with the material provided as part of the Russian Federation's request.

[54] As regards Ora, the Solicitor-General submitted that whether or not the off balance sheet trading accorded with Russian practice, the "Leontiev-generated gains raise a number of red flags that would call for enhanced due diligence" by Ora.

[55] Analysing the evidence which he said supported that proposition, the Solicitor-General submitted there were four periods of time relevant to the issue.

[56] The first was the four year period 2011-2015 where, he said, relying on passages from Mr Hunkin's affidavit, that Mr Leontiev allegedly embezzled Russian funds of approximately US$400M and used some US$222M in the transactions analysed by Mr Krys with about a further US$100M passing through CSB and Southpac. It appeared plausible, he submitted, that, reading Mr Krys's analysis with the Moscow District Court material as a base, Mr Hunkin's conclusion may be open.

[57] The second period covered December 2015 – July 2017 during which, the Solicitor-General submitted, Southpac and CSB discussed and ultimately resolved the transfer of the Leontiev-related assets. This period was analysed by Mr Hunkin who said that FIU's conclusions were that over US$100M beneficially owned by Mr Leontiev had been introduced into the Cook Islands into accounts in Mr Leontiev's name or those of companies and trusts associated with him with the source of funds for the other accounts coming from approximately US$290M in intra-group transactions from eight accounts beneficially owned by him. Of the approximately US$100M introduced to the Cook Islands, Mr Hunkin gave details of the amounts used to purchase shares in various blue chip American companies, with another nearly US$11M paid to lawyers coming out of Mr Leontiev's account or others associated with him, and nearly US$32M relating to other payments from the eight accounts, most of which were unidentifiable withdrawals. That led Mr Hunkin to the conclusions earlier recounted.

[58] The Solicitor-General's third period was from August 2017 – 25 October 2017 during which Mr Wichman said Ora relied only on CSB and Southpac material and its own communications with the customer's representatives[43] to make the decision to use its "standard on-boarding requirements". The Solicitor-General appeared to equate that phrase with the "standard customer due diligence" mandated by s 25 of the FTR Act when, the applicant submitted, the circumstances were such that Ora should have undertaken the "enhanced customer due diligence" prescribed by s 29.

[59] The Solicitor-General submitted it was only because of its receipt of the 25 October letter that, the following day, Ora obtained the World-Check One report on Mr Leontiev.

[60] The Solicitor-General's fourth period ran from the 25 October letter to the present time when he submitted that, despite FIU's activity and the World-Check report, Ora did not comply with its statutory obligations. During this period, he submitted, the circumstances obliged it so to do, particularly given its duty to report suspicious activity by persons of interest under s 47ff of the FTR Act. It thus ran the risk of breaching s 53, the "tipoff prohibited" section of the Act, by getting further

information and clarification on the source of funds when also receiving information from other representatives of the settlor[44].

[61] The Solicitor-General supported those submissions by asserting that Ora "persists in ignoring any counter-theory or further questions that arise from the various reports or analysis it has received" taking refuge, he suggested, in lodging its evidence under confidentiality.

[62] Acknowledging Mr Wichman's response and Ora's criticism of the FIU, the Solicitor-General submitted that none of Ora's evidence satisfactorily rebutted his suggestion that the material concerning the Russian Federation should be shared. Without that, he submitted, the assets derived from within the Russian Federation became "accessible to pillage by those who are part of the kleptocracy and of those who have amassed staggering 'profits' by playing the same kleptocratic game". He submitted that Mr Leontiev, and Ora as his surrogate-trustee, wanted the Court to accept that his good reputation in a corrupt regime meant "any appearance of secreting and disguising assets by multi-layered management strategies should be ignored". He asked the Court to "direct what use can be made of the various opinions and descriptions of the Russia criminal offence system" but giving opinions on matters no longer in issue in a case is not part of the Court's function. He further submitted Ora could not have known that Mr Leontiev's conduct was not criminal in Russia – were that proved to be the case – until late October 2017 and so exposed itself to being charged with counts of theft in a fiduciary relationship or a breach of duty by a trustee[45].

[63] The Solicitor-General characterised Ora's evidence as "emotional" with Ora's position being based only on what it was told, not on what would have emerged had what he submitted were the necessary further enquiries been undertaken. He further submitted that, without the right to submit the material obtained subject to the confidentiality undertaking to the Russian authorities, he was effectively unable to respond to Mr Wichman's assertions. Acknowledging that the correctness or otherwise of the allegations made concerning Mr Leontiev, his entities

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43 Wichman 2, 2.8.
44 Wichman 2, 2.10-11.
45 Should current proposed amendments be enacted.

and the Russian Federation was most unlikely to be definitively decided in the Cook Islands, the Solicitor-General nonetheless submitted that the evidence gave no basis for Ora to ignore what he submitted were its obligations for further enquiry. It was insufficient, he submitted, for Mr Wichman to say Ora's suspicions had been met: the test was objective and it did not undertake enhanced due diligence, as, he submitted, it should have done, particularly from late October 2017 following receipt of the 25 October letter and the reports from Kobre & Kim and others which were supplied as part of the confidential information volunteered.

[64] He relied on the FIU's practice guidelines for trustee companies under the FTR Act, specifically listing some of the risks to trustee companies, including the inherent risk where trustee company services do not result in face-to-face meetings with individuals who own or control the entities engaged in the transactions. Other factors on the FIU's list of indicators of high risk of financial misconduct included complex networks of legal arrangements or legal entities with no apparent rationale for the complexity and where the structures embrace a number of different jurisdictions, again with no legitimate or commercial rationale[46]. The evidence concerning Mr Leontiev's activities and those of his companies, he submitted, should have alerted Ora to undertake more than standard customer due diligence in relation to Mr Leontiev and his concerns. In addition, he submitted, the confidentiality restriction should be relaxed to enable FIU to obtain extra expert and other reports on the matters raised in the material held by Ora to decide how FIU should act.

[65] The Solicitor-General particularly relied on the recent[47] New Zealand High Court decision in *Department of Internal Affairs v. Ping An Finance (Group) New Zealand Company Limited*[48] where the defendant, a company which carried on business providing money remittance and foreign currency services, was found liable under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 of a number of civil liability acts, particularly failing to carry out customer identity and verification as part of customer due diligence, failing adequately to monitor accounts and failing to keep transaction, diligence and other records. The Judge

[46] Wichman 1, 4.2 Ex E.
[47] The precedent value of the decision is diminished by the case being undefended.
[48] [2017] NZHC 2363, 28 September 2017.

held[49] that the legislation was consistent with the repealed New Zealand FTR Act in respect of which, in *Police v. Devereux*[50], it was held that the "mandatory reporting of a suspicious transaction applies to a transaction which is objectively suspicious" and that the phrase "reasonable grounds to suspect", judged objectively, means:

> "That if a reporting entity becomes aware of circumstances that a reasonable person would consider to provide grounds to suspect that a transaction or a proposed transaction is or may be relevant ... a suspicious transaction report must be submitted."

with the period for reporting beginning when the entity becomes aware "of reasonable grounds objectively justifying a suspicion of a reportable transaction."

[66] To support his submission that, however the documents are phrased, if they are tainted with unlawfulness, they and their effect should be set aside, the Solicitor-General relied on the decision of the UK Supreme Court in *Prest v. Petrodel Resources Limited*[51] where Lord Sumption, delivering the leading judgment in a matrimonial property case involving the Petrodel group of companies which were wholly owned and controlled through intermediate entities by the former husband, noted the Civil Law permitted the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations. The comparable Common Law principle is that the effect of fraud is to vitiate consent so a transaction becomes voidable ab initio. His Lordship held that there is:

> "A broader principle governing cases in which the benefit of some apparently absolute legal principle has been obtained by dishonesty. The authorities show that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose."

[67] The Solicitor-General also relied on the decision of the Court of Appeal of the Isle of Man in *Barlow Clowes International Limited v. Eurotrust International Limited*[52], explaining *Twinsectra Limited v. Yardley*[53] that "normally accepted standards of honest conduct" means that a person's knowledge of the transaction had to be such as to "render his participation contrary to normally accepted standards of

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[49] At [65].
[50] HC Auckland AO 3/02, 27 June 2006, at [49].
[51] [2013] UKSC 34, 12 June 2013, at [17]-[18].
[52] [2005] UKPC 37, 10 October 2005.

honest conduct"; a decision of the New Zealand Court of Appeal in *Official Assignee v. Wilson*[54] as to control of a sham trust and *Shah v. HSBC Private Bank (UK) Limited*[55] a decision of the English Court of Appeal as to a duty to notify a bank of suspicion.

**Submissions: Second Respondent**

[68] The comprehensive submissions filed by Mr Williams focussed on what he submitted was the key question, namely whether the funds settled into the Shasta Trust and the main subject of the amended application were clean or not. In submitting, unsurprisingly, that the answer to the question was "yes", he contrasted the spare and, he submitted, speculative, evidence adduced by the Solicitor-General in support of the amended application by contrast with Ora's voluminous and highly-detailed evidence. He submitted the Solicitor-General's change in focus with the amended application arose because Ora's evidence, filed on 11 April 2018, was so convincing in relation to Mr Leontiev's activities. In particular he pointed to the initial application alleging that the funds in Ora's sub-account were connected to and under the effective control of Mr Leontiev. That contrasted with the amended application alleging control by Ora.

[69] Mr Williams analysed the factual background at length, stressing Ora's appointment as trustee of the Shasta, Legion and Inlegion Trusts only occurred on 12 September 2017, and its being in the process of undertaking its due diligence procedures when it received the 25 October letter. He noted that, although the letter named Mr Leontiev and other associates and companies – information plainly derived from the material Crown Law received from the Moscow District Court on an unspecified date in October 2017 – the 25 October letter made no mention of the Russian Court material.

[70] That notwithstanding, Ora fully cooperated with the FIU including volunteering over 200 pages of information following execution of the confidentiality undertaking. He drew on Mr Wichman's comments to contrast Mr

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[53] [2002] 2AC 164 174, at [15].
[54] [2008] NZCA 122; [2008] 3 NZLR 45.
[55] Case A3/2009/0461, 4 February 2010.

Hunkin's stated perusal of the material with Mr Wichman's detailed analysis of the same. It showed, Mr Williams submitted, first that the trusts' sources of funds were clean and in particular derived from Wonderworks' legitimate profits on securities' trading over the four years to 2015, and, secondly, spoke to the probity of Mr Leontiev's business affairs and those of his companies, trusts and associates.

[71] Turning to the Solicitor-General's alternative application for a restraining order under s 45 of MACMA, Mr Williams submitted s 45 was no more than a prerequisite section which required to be satisfied before a s 50 order could be made; it was not a provision in itself mandating the making of a restraining order. Accordingly both limbs of the Solicitor-General's amended application needed to satisfy s 50 of POCA.

[72] In relation to the first order sought, Mr Williams submitted that, to succeed, the Solicitor-General had to satisfy[56] the Court that Ora is a suspect[57], and that the funds are either Ora's property or under its effective control[58]. In relation to those criteria, Mr Williams submitted that a belief expressed by the Solicitor-General was insufficient and that, contrary to the applicant's minatory comments, there was little likelihood Ora would be charged with a serious offence as there was no evidence it had committed an offence since assuming office as trustee.

[73] In relation to the alternative order sought concerning Mr Leontiev's affairs, Mr Williams submitted that under s 50(1)(a)(ii) the Solicitor-General had to satisfy the Court that the property held by Ora was tainted property and under Mr Leontiev's effective control and that Mr Leontiev had either been convicted of or charged with a defined serious offence. He submitted that the unchallenged evidence of Mr Krys was that the funds held by Ora were not tainted property; that it was no more than supposition, conflicting with the evidence, that the funds were under Mr Leontiev's effective control; but that Ora accepted that Mr Leontiev had been charged with a serious offence. That said, because the criteria were conjunctive, the alternative application must fail.

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[56] Satisfy means the Court must come to the "required affirmative conclusion" or "make up its mind" on the balance of probabilities. *Z v. Dental Complaints Assessment Committee* [2008] NZSC 55 [2009] 1 NZLR 1; *R. v. White (David)* [1988] 1 NZLR 264.

[57] s 50(1)(a)(i).

[58] s 50(1)(a)(i)(c).

[74] More specifically, Mr Williams submitted firmly that the Solicitor-General could not establish those criteria. Mr Hunkin's belief, largely unsupported by evidence, was, Mr Williams submitted, insufficient. Absent the serious offence acceptance, when all other prerequisites for the making the order sought were disputed, the Solicitor-General was unable to persuade the Court to the required standard on the evidence that his allegations were made out. The amended application should fail on that basis as well.

[75] Mr Williams also submitted that the Solicitor-General's failure to provide evidence should lead the Court to infer that he had no evidence that would be helpful or relevant. He relied in that regard on what is called the *Rule in Jones v. Dunkel*[59] The New Zealand Court of Appeal[60] said that the terms of the inference that may validly be drawn from failure to provide evidence, whether through a witness or by affidavit, is open to dispute but, at least for present purposes, it is apposite to note that such an inference can be taken into account by "increasing the weight of the proofs of the opposite party or reducing the weight of the proofs of the party in default [so] … the direct evidence of the party with the onus of proof can be more readily accepted and inferences in his favour may be more confidently drawn".

[76] Mr Williams submitted that the scheme of POCA was for restraining orders only to be granted on an interim basis pending trial of serious offences since the ultimate outcome is forfeiture which can only follow conviction[61]. Mr Williams submitted that because forfeiture can only follow conviction, Ora would need to be successfully prosecuted and to do that the prosecution would need to prove the funds in the sub-account were tainted in relation to the offence charged. He submitted the funds in the sub-account could not be the proceeds of alleged offending by Ora as there was no causal link between Ora's receipt of the funds in January 2018 and the alleged offending the previous year, namely the failure to file a suspicious activity report, failing to comply with the FIU directions or Ora's rendering assistance to Mr Leontiev to permit him to engage in transactions it had reason to believe were derived directly or indirectly from a serious offence.

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[59] (1959) 101 CLR 298.
[60] In *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731, at [149] p 766, at [155] p 768.
[61] Part 2 of POCA especially s 17.

[77] The alternative grounds for relief in the amended application arose solely from the Moscow District Court MACMA Request exhibited to the affidavit to support the interim restraining order. Mr Williams submitted that the fatal deficiency with the detail in that request, as far as these proceedings are concerned, was that they do not detail how the purportedly embezzled funds could be traced into the sub-account. It is clear, Mr Williams submitted, from Mr Krys' affidavit, that the funds cannot be so traced and, in addition, the documents do not address how Mr Leontiev has any control over the funds held in the CSB account or how he might be said to be the beneficial owner of the same. And finally, beyond the broad statement that offending occurred, the documents provide no evidence that the funds held by the Shasta Trust are tainted; the only evidence of the funds' origin is the unchallenged expert evidence adduced by Ora.

[78] While, in his reply submissions, the Solicitor-General had been critical of the analysis appearing in the reports of Mr Voronin and others with particular reference to the profits ultimately derived and the frequency with which the witnesses said the *modus operandi* described in the request documents was utilised in the Russian Federation, the question was, Mr Williams submitted, what, if any, further activity by Ora should have been undertaken on receipt of that information, seen in terms of the relevant statutory obligations.

[79] Turning to the question of effective control, Mr Williams noted that neither control nor effective control are defined in POCA but ss 50(3) and 63(5) say that in deciding whether there were reasonable grounds for believing property is subject to the effective control of a defendant, the Court may take into account shareholdings debentures directorships trusts and relationships between persons having interests in property[62].

[80] Mr Williams drew on the similar wording of s 58 of the Criminal Proceeds (Recovery) Act 2009 (NZ) and drew on New Zealand commentary that the section "enables the Court to go behind any corporate structure, trust, family relationship, or the like which disguises the true and effective control of property and to consider the real de facto position of the respondent in relation to that property" and that "in order to determine whether the respondent had effective control of the property, the Court

must ask whether in fact the respondent had the capacity to control, use, dispose of, or otherwise treat the property as his or her own"[63].

[81] That authority, Mr Williams submitted, demonstrated that the factual position was crucial, irrespective of the form of the documents, and that, with relevance to this case, the Solicitor-General could not merely point to the settlor to assert he had effective control without evidence of that fact. The date for the assessment of effective control was that of the hearing, he submitted[64].

[82] Mr Williams then analysed the terms of the three main trusts in these proceedings saying the evidence indicated Mr Leontiev does not have effective control of the irrevocable trusts as he is no more than settlor, with the appointment or removal of trustees and disposition of trust assets being exclusively amongst the powers of the protector or trustee. Mr Williams stressed that there was no evidence Mr Leontiev had exercised any control relating to the trusts or that Ora had taken direction from him or anyone on his behalf. Nobody at Ora has ever communicated with Mr Leontiev, so there could not, Mr Williams submitted, be any evidence suggesting Mr Leontiev, as settlor, had effective control of the trusts or the sub-account[65].

[83] Should all that be accepted, Mr Williams submitted, the amended application should be dismissed to the extent it relies on the funds being tainted or Mr Leontiev having effective control.

[84] Ora's submissions relied heavily on Mr Wichman's description of the on-boarding processes it undertook in relation to the trusts to meet the amended application's suggestion that there were reasonable grounds to suspect Ora committed the serious offences of failing to file a suspicious activity report, failing to

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62 s 32(2) of POCA.

63 Adams on Criminal Law – Sentencing, CP 58.01, citing *Solicitor-General v. Bartlett* [2008] 1 NZLR 87, at [27].

64 Citing *Commissioner of Police v. Read* [2015] NZHC 2055, 28 August 2015, at [64]; citing *Bartlett* at [27], though the point may be open to argument on *Webb v. Webb*, HCCI, DP 19 & 24/16, 23 August 2017, Potter J at [57]; "the share must go back to the time of the Trust Deed's execution". See also *Webb v. Webb*, CACI CA7/17, 24 November 2017 at [56], p 17.

65 Other than one Southpac document mistakenly referring to Mr Leontiev as "Beneficial Owner", an error which was acknowledged and corrected by Southpac following correspondence from the settlor's representatives.

comply with the FIU directions, or rendering assistance to Mr Leontiev. In particular, Mr Wichman emphasised that Ora's on-boarding processes in relation to the trusts were incomplete when it received the 25 October letter and that it was nearly three months later – and well after the provision of the volunteered information – that it received any funds for the trusts[66]. Its initial and, after receipt of the 25 October letter, its additional, checks and analysis as detailed in Mr Wichman's affidavits led Ora to conclude there was no suspicious activity to report, either before or after receipt of the funds in the sub-account. Even had it reached the contrary conclusion, any report Ora might have made could only have repeated the information FIU had, that is to say it could have reported no new information.

[85] Assuming – since no section was stated – that Ora might be charged with an offence under s 47 of the FTR Act[67], Mr Williams submitted that FIU would have to prove beyond reasonable doubt that, without reasonable excuse, Ora had failed to report to FIU any activity it had reasonable grounds to suspect was suspicious activity, that, in turn being activity that related to transactions or ongoing business relationships which caused Ora to know or suspect that financial misconduct or a serious offence was intended or had occurred or was such that gave it reasonable grounds to suspect such.

[86] At trial, irrespective of proof of the other elements, whilst Ora would carry an evidential foundation as to the existence of reasonable excuse, it would be for the Crown to disprove reasonable excuse beyond reasonable doubt[68]. Whether an excuse is reasonable depends not on the offender's subjective perception but on whether it was objectively reasonable, that is, an excuse which an ordinary person would consider reasonable in the circumstances[69].

[87] Seen it that light, there was, Mr Williams submitted, no reasonable possibility of Ora's conviction on such a charge because, objectively, it plainly had reasonable excuse not to file a suspicious activity report.

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[66] Which were frozen only 12 and 8 days after receipt.
[67] And, through it of breaches of s 4 of the FTR Act and s 4 of the FIU Act.
[68] *R. v. Gorrie* [2008] 3 NZLR 620, 624-5 at [19]–[23].
[69] *A v. Police* HCNZ Auckland, AP 144/98, 5 October 1998 at p 8.

[88] Sections 25 and 30 of POCA require reporting institutions to establish customer due diligence procedures and undertake the same before entering into business relationships with customers, but breach of those sections, Mr Williams submitted does not constitute an offence. It is only if institutions have reasonable grounds to suspect customers or transactions to be connected with financial misconduct or serious offences, that the obligation is to undertake standard or enhanced due diligence and submit a suspicious activity report. In any event, the unchallenged evidence from Mr Wichman was that Ora undertook both standard and, after the World-Check report, enhanced customer due diligence, so the only possibility of an offence arising out of this allegation in the amended application is failure to submit a suspicious activity report. That was no more than duplication of the previous ground. Mr Hunkin's affidavit did not contend otherwise.

[89] Ground (iii) in the amended application gave, as a ground for the Solicitor-General's suspicion, that Ora failed to comply with the FIU directions in the 25 October letter that it take certain actions "pursuant to s 35(d) of the FIU Act" The passage was highlighted and reads:

> In accordance with Section 35(d) I direct you to contact all financial institutions that hold assets of the abovenamed persons and legal entities, whether in the Cook Islands or elsewhere, and you shall advise those institutions that the funds held have been identified as the reasonably suspected proceeds of serious organised crime, and as such are the proceeds of crime. And you shall advise that any further transactions undertaken are, or may be, in breach of Money Laundering Laws or Rules.

[90] As Ora stressed, there is no "s 35(d)" in the FIU Act. In default of any other likelihood, the letter may have been referring to the power in s 35(3)(d) for the Head of the FIU to give instructions to reporting institutions to "give details of any action to be taken", with those actions, also in terms of the letter, being to take steps not to transact, transfer or deal with money relating to Mr Leontiev and his associated trusts and companies, and provide its files.

[91] Mr Williams, unsurprisingly, submitted, with reference to the chronology of events earlier outlined, that Ora had complied with all its obligations, making particular mention of the fact that at the date of receipt of the 25 October letter Ora had no funds and, almost immediately it received them, they were frozen.

[92] Further, on 15 November 2017, it invoked its statutory right under s 37(2) of the FIU Act to object to Mr Hunkin's instructions. That gave Mr Hunkin 15 days to either affirm or amend or revoke his instruction[70]. No response was ever forthcoming.

[93] Further, ss 31 and 32 of the FIU Act set out the Head's powers, all of which must be prefaced by written notice to the reporting institution from the Head of his or her intention to take the action and the reasons. The highest that could be taken in this instance was the Solicitor-General's letter of 16 November 2017 stating he was "obliged to consider advising the laying of a charge"[71] but this, Mr Williams submitted, came nowhere near the required compliance by Mr Hunkin with s 31(2) of the FIU Act. Nothing further had emerged in that regard since.

[94] Ora was particularly concerned at the wideness of the quoted direction as it potentially involved financial institutions with which it had no connection, within or outside the Cook Islands, and with people who may well have been unknown and unknowable to Ora and immune from its direction or control. Even with those known to Ora, there was potential for significant disruption of ordinary business relationships, particularly when the recipients of the information were required to be told that the funds held by Ora had been "identified as the reasonably suspected proceeds of serious organised crime" coupled with the comments about money laundering and the mention of misappropriation and embezzlement.

[95] Although observations rather than findings are all that is required there is significant force in the contention that the section of the 25 October letter earlier cited was a direction which exceeded the powers of the Head of the FIU under s 35 of its Act. While s 35(3)(d) says the instruction must "give details of any action to be taken by the reporting institution", it is distinctly arguable that the section, focussed as it is on retaining money which the Head considers under subsection (1)(a) to be the proceeds, or the subject of, financial misconduct or an investigation, does not validly extend to a direction to broadcast the Head's suspicions in relation to that money or offences believed to have been committed in relation to the same. That is particularly the case when there may be a number of recipients of that

[70] S 37(3) of the FIU Act.

[71] Letter dated 15 November 2017 from Solicitor-General to Meredith Connell, p1.

information, many of whom – though not in this case in terms of the direction – will not control money of the persons and entities listed in the letter; when the content of the broadcast direction is that the funds held by the publisher of the notice are reasonably suspected to be the proceeds of organised crime; and when that information is no more than an allegation or suspicion, untested by evidence, or buttressed only by supporting documentation, also not evidence, from an overseas agency, however reputable, to the Head of the FIU. Complying with such a direction may expose those publishing it to actions, anywhere in the world, alleging damage to reputations and the fact that the publication is said to be officially required and to be based on no more than suspicion or belief may not amount to a complete defence.

[96] Section 35(4) (and the 25 October letter) requires the Head's instruction and the action taken by the reporting institution to be notified to the persons on whose behalf the institution holds the money. That was done and seems an appropriate course in this case, but the extent of the wider direction highlights the possible invalidity of the wide notification instructions Mr Hunkin gave.

[97] But, in that regard, for present purposes, it is sufficient to note that Ora took no action in connection with, and challenged, that particular aspect of Mr Hunkin's instructions and that, were Ora to be prosecuted for not complying with the instruction, it seems very likely that the legality of the publication direction would be one aspect which would come under close scrutiny.

[98] The final aspect of the amended restraining order application was based on the Solicitor-General's suspicion that Ora's conduct has had the effect of rendering assistance to Mr Leontiev by permitting him to engage in a transaction which Ora believed was derived directly or indirectly from a serious offence, those being the elements of the offence of money laundering under s 280A of the Crimes Act 1969.

[99] Mr Williams was dismissive of the Solicitor-General's expressed suspicions in that regard noting that no one from Ora has ever met or communicated directly with Mr Leontiev and, as a result of its investigation, nobody has any reason to believe he has committed any serious offence. That is coupled with the fact that Ora has undertaken no transactions for any of the trusts and the sub-account is frozen. The funds are clean, as Mr Krys' unchallenged affidavit concludes so, relying on his

evidence, Ora had and has no reason to believe they are derived directly or indirectly from a serious offence and Ora is not a suspect as there is no reasonable basis to suspect it has committed any offence. Were that incorrect, FIU would have charged it.

[100] Mr Williams also supported his submissions on the inappropriateness of the s 50 POCA test against Ora by submitting forcefully that – as appears to be correct – there was not even a scintilla of evidence that the Solicitor-General's affidavit was accurate in saying Ora has "admitted" being engaged in secreting or disguising the funds settled on trust. That, coupled with the change in the focus of attack between the original and the amended application amounted, in Ora's submission, to abuse of process.

[101] While it is well-settled that this Court has an inherent jurisdiction to control and regulate its process and proceedings to prevent any abuse of its procedures which would strike at public confidence and so diminish the Court's ability to function as a Court of law and avoid oppression and injustice[72], because this matter can be dealt with on a basis less contentious than dealing with the proceedings on the foundation of abuse, the Court does not intend to embark on a detailed analysis of the jurisdiction.

**Discussion and decision**

[102] The Solicitor-General's amended restraint application needs to be seen in context.

[103] The Cook Islands, in company with a number of other island nations with few natural resources beyond tourist attractions, has for many years had a thriving international banking and trust industry often involving offshore trusts set up for asset protection purposes. It is a significant contributor to the economy of the country.

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[72] Master Jacob QC "Inherent Jurisdiction of the Court" (1970) 23 CLP 23 at 32; *Moevau v. Department of Labour* [1980] 1 NZLR 464 and authorities there cited.

[104] Common features of such regimes are their rigid requirements, enforced by statute, of the anonymity and confidentiality of people, businesses and trusts which resort to them. Such measures occasionally attract opprobrium because they are said to open themselves to manipulation for nefarious purposes.

[105] Such criticisms are ill-founded as far as the Cook Islands is concerned. It is a jurisdiction firmly founded on Common Law principles. In POCA, the FIU Act, the FTR Act, MACMA, correlative provisions in the Crimes Act and others, it has a suite of statutes providing limitations and regulating the conduct of those in and resorting to the industry with those statutes reflecting international norms for such activities.

[106] There is an argument – which Mr Williams propounded – that resorting to the international banking and trust industry of a country like the Cook Islands was a sensible use of the asset protection trusts available in that jurisdiction for an individual who is harassed by the authorities in his home jurisdiction and who wishes to preserve and enjoy the assets he has built up in that country, including removing what he regards as his assets from their home jurisdiction. Viewed in that light, there was nothing untoward in Mr Leontiev, his family, associates, trusts and companies resorting to, first, Southpac and, then, Ora to protect his assets and wealth as best he could against what he would see as the attempted depredations of the authorities of the Russian Federation.

[107] It must, however, immediately be said that there is another reading – one, no doubt, the Moscow District Court would take – that the resort by Mr Leontiev and his associates to the Cook Islands' asset protection jurisdiction is a device to utilise the confidentiality provisions of various Cook Islands statutes so as to frustrate, as far as possible, the legitimate actions of the Russian authorities to recover assets criminally abstracted from the Russian Federation, and bring those responsible to justice.

[108] Though the sums of money mentioned in both sides' evidence and the activities asserted in relation to them and to Mr Leontiev and his associates are both substantial and unusual, it is the case that the only funds to which the interim restraining order, if continued, can currently attach is the US$72,244.11 paid to Ora

in two tranches in January 2018. Not only do those funds need to be seen against the provisions of POCA, MACMA and the FTR Act invoked by the Solicitor-General, they need to be set against the new regimes effected as from 24 June 2017 by the FIU Amendment Act 2017, the replaced FTR Act and the POCA Amendment Act 2017. Those amendments were so substantial as to make it not difficult to accept Mr Wichman's evidence that all participants, including Ora, in the Cook Islands' offshore banking and international trust industry needed to revamp their procedures and educate themselves so as to comply with the new statutory regimes.

[109] To that context must be added, in this case, that Ora was only asked to assume office by acting for Mr Leontiev and his interests in September 2017, approximately a month before it received the 25 October letter and directions and four months before it received any of the Leontiev-related funds. Throughout the period covered by this matter, it was still in the throes of coming to terms with its altered obligations under the new legislation.

[110] Returning more specifically to what is sought in this case, it must be said that the thrust of the Solicitor-General's amended application[73] is not always easy to discern, not least in that grounds (a)(i)-(iii) only identify three possible offences by Ora when, as has been noted, a considerable number of others, such as s 280A of the Crimes Act 1969 were also mentioned in evidence and argument. Further, it needs to be kept in mind that grounds (a)-(d) only apply to the application for the continuation of the interim order under s 50 of POCA, and grounds (e)-(g) only apply to the application for a restraining order under s 45 of MACMA. On that analysis, as examples, the Russian Federation request is almost wholly irrelevant to the s 50 application and the "rendering assistance" assertion almost wholly irrelevant to the s 45 matter.

[111] That imprecision is compounded because, as the preceding passages of this judgment amply demonstrate, the legal and factual issues debated by the parties traversed matters significantly more wide-ranging and discursive than the amended application seemed to require, and did not precisely observe the differences between the s 50 and s 45 applications. It is considered appropriate to limit the Court's findings to the issues actually raised by each limb of the amended application.

[112] The elements of s 50[74] giving the Court power to make a restraining order against property, as relevant to this proceeding, are:

a) that the property is property of a defendant or a suspect (s 50(1)(a)(i)) or, if held by some other person, is tainted property under the effective control of the defendant or suspect (s 50(1)(a)(ii));

b) that if the property is of, or under the effective control of, a defendant, the defendant has either been convicted of, or charged with, a serious offence (s 50(1)(a)(i)(b));

c) that if the property is of, or under the effective control of, a suspect, the suspect is likely to be charged with a serious offence within the period of the restraining order (s 50(1)(c)); and

d) that in deciding whether there are reasonable grounds for believing property is subject to the effective control of a person[75], the Court may take account of the matters set out in s 32(2) elsewhere cited, namely shareholdings, debentures, directorships of companies with an interest in the property, trusts, trusts with relationship to the property and relationships between persons having an interest in the property or companies or trusts and other persons (s 50(3)).

[113] The match between those elements and the amended application is not wholly clear, largely because the application and submissions did not clearly differentiate between whether the orders were sought against Ora as a defendant or a suspect.

[114] The clearest approach is to exclude what is inapplicable.

[115] It is clear that s 50(1)(a)(ii) is inapplicable because it relates only to property "held by someone other than a defendant or a suspect" and here the funds are held by CSB in Ora's name and both are respondents[76]. It follows that s 50(1)(a)(ii) is

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[73] Cited in paragraph [13] p 6.
[74] Set out in para [18] p8 with associated provisions in the First Schedule.
[75] Amended as from 24 June 2017 from "the defendant".
[76] There being no difference, at least for present purposes, between a defendant and a respondent.

inapplicable even though Ora accepts it has effective control of the funds. That means that, despite the considerable attention paid to the issue in the evidence and submissions, there is no need to consider whether the funds are tainted property.

[116] Section 50(1)(a)(i) is similarly inapplicable because, if the amended application is regarded as seeking orders against Ora as a defendant, the provisions of s 50(i)(b) are cumulative on s 50(1)(a)(i) and Ora has neither been convicted of, nor, at the present time, charged with a serious offence.

[117] On that analysis, the only basis on which the s 50 of POCA application can succeed, and the interim order extended, is if Ora is to be regarded as a suspect – that is, one who there are reasonable grounds to suspect has committed a serious offence[77] and – the US$72,244.11 being admitted to be within its effective control – if the evidence shows Ora is likely to be charged with a serious offence within the period of the restraining order. Again, on that analysis, whether or not the funds are tainted property is irrelevant to the s 50 application.

[118] However, for completeness, and recognising that the FIU may regard as problematic the conclusion that the Court has only that limited jurisdiction to make or continue an order under s 50 of POCA, the Court will later consider whether the US$72,244.11 is tainted property under s 50 of POCA grounds (a)-(d). But grounds (b) and (c) need no further consideration because of Ora's acceptance that it is in effective control of the funds and has an interest in them for fees. Further, ground (d) relates only to the likelihood of Ora being charged with one of the offences described in ground (a) so consideration as to whether Ora is likely to be charged with one of those offences becomes, in a sense, circular and the Court accordingly will focus on whether, on all the evidence, the applicant has demonstrated a likelihood of Ora being charged with one or more of the offences in ground (a).

[119] Before leaving that issue, it warrants noting that the necessity in s 50 for a defendant or suspect to be charged with a serious offence, or for that to be likely, requires that element to be glossed in light of the fact that anybody may lay an information against another for any offence. It is no more than convention that

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[77] POCA s 3. Construction of the definition is not assisted by it using "suspect" as both a noun and a verb.

agents of the Crown usually do so. Of course, informations may be baseless, but nonetheless, when laid, charge the defendant(s) with what may be a serious offence, and that, in terms of s 50, would satisfy s 50(1)(b)(c). Those subsections should therefore be regarded as requiring any informations laid under those provisions charging defendant(s) with a serious offence as being informations which have sufficient legal and factual provability to survive a "no case to answer" application.

[120] Turning then to the grounds, it is convenient to deal with ground (a)(ii) first, namely the allegation that Ora failed to comply with its standard customer due diligence obligations under ss 25 and 30 of the FTR Act.

[121] Section 25 requires reporting institutions to establish, maintain and operate procedures to ensure they conduct due diligence before entering into business relationships with customers and persons acting on their behalf, with the procedures being particularised in s 25(2).

[122] Comparing the requirements of s 25(2) against the evidence, it appears Ora obtained identification information on the customer and persons acting on their behalf, verified that information from what it, not unreasonably, regarded as reliable independent sources and documents and, in relation to the trusts and companies, fulfilled the requirements of s 25(2)(d). It may be asserted that Ora did not obtain information on the nature and purpose of its ongoing business relationship with Mr Leontiev and his interests, but that was only because the FIU's actions, including the freeze application and aspects of the 25 October letter, precluded Ora taking any further action in those respects. In addition, Ora did all it reasonably could to verify the authorisation of Kobre & Kim to act on behalf of the Leontiev interests and, as for the proposed business relationship enquiry, were about to take further reasonable measures to establish the source of the Leontiev funds when the FIU intervened.

[123] On that basis, the appropriate conclusion is that the allegation that Ora failed to comply with the standard customer due diligence requirements of s 25 of the FTR Act is not made out to the required standard. Indeed, it appeared as if the Solicitor-General effectively acknowledged the likelihood of that conclusion and that Mr Hunkin concentrated the major part of his evidence on other issues, particularly the asserted obligation – and failure – to file a suspicious activity report

[124] There is then the further allegation that Ora failed to comply with s 30 of the FTR Act which – the "tipoff" exception in s 26(2) having no application on this aspect – required Ora if it had "reasonable grounds to suspect a prospective customer ... is connected with financial misconduct or a serious offence", to undertake customer due diligence under ss 25 and 29 and submit a suspicious activity report under s 47.

[125] Because the possible obligation to submit a suspicious activity report is subject to a separate ground in the amended application and separate discussion, it is only necessary at this point to focus on ss 25 and 29 and, it having been held that Ora complied with s 25, only s 29 requires consideration and only if Ora had reasonable grounds to suspect the Leontiev interests were in any way connected with financial misconduct or serious offences. The threshold is not high: reasonable grounds to suspect a customer is "in any way connected" with financial misconduct or a serious offence.

[126] Prior to Ora's receipt of the 25 October Letter, Mr Wichman's evidence was that Ora's on-boarding procedures – which met all the statutory and FIU requirements – as conducted to that date disclosed no connection on the part of Mr Leontiev or his associates with financial misconduct or a serious offence so there could have been no breach to that date. Mr Hunkin did not criticise the content of Ora's on-boarding procedures and even though he regarded Ora's compliance overall as partial, did not say how he concluded it was deficient.

[127] "Financial misconduct" is defined[78] as having the same meaning as in the FIU Act which, relevantly amongst other things, means "misconduct by any person relating to money laundering" and, given the 25 October letter included the FIU's belief that Mr Leontiev and the other persons and entities mentioned were believed to be "complicit in dealings with the proceeds of crime in the nature of embezzlement" and that the money held by Ora in its CSB account was believed to be the "proceeds of misappropriation or embezzlement", at that date and for a brief period thereafter – before it obtained the World-Check and Kobre & Kim reports – Ora should be found to have had reasonable grounds to suspect the prospective

[78] FTR Act s 4.

customers to be "in any way connected with" financial misconduct or a serious offence.

[128] Ora was therefore at that date under an obligation to undertake enhanced customer due diligence under s 29. Section 29(1) required Ora to establish and operate procedures to ensure such diligence was conducted when, in these circumstances, its ongoing business relationship was to be with somebody "who has been identified by the reporting institution as a person of interest"[79], that being defined[80]as someone who has been convicted of financial misconduct or a "person whom the reporting institution has reasonable grounds to suspect has committed financial misconduct"[81]. In these circumstances, however, Ora had no obligation under s 29(1) because, although it might possibly have had reasonable grounds to suspect Mr Leontiev or others named in the 25 October letter had committed financial misconduct – were not merely "in any way connected" to such – none of them had been convicted. "Identify" means "to establish what a given person is"[82] and the identification of those persons of interests was by the FIU, not by Ora[83], the reporting institution[84].

[129] Unless, however, the tipoff provisions apply, s 29(2) requires reporting institutions which suspect that ongoing business relationships are "in any way connected with financial misconduct or a serious offence" to examine "as far as reasonably practical" the background and purpose of the relationship and consider whether to make a suspicious activity report.

[130] The reach of s 29(2) is even wider than the threshold in s 30 – "is in any way connected with financial misconduct or a serious offence" against "connected" – but, in Ora's case, after receiving the 25 October letter, being involved in the various meetings with the Solicitor-General and FIU and providing a substantial amount of documentation, it obtained the Kobre & Kim reports - the first as early as 31 October 2017 - the other reports Kobre & Kim provided and the second report from Mr Krys. Against the background of the 25 October letter and the other interactions with FIU

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79 S 29(1)(a)(iii).
80 S 3 of the FTR Act.
81 FTR Act s 4.
82 Oxford English Dictionary 2nd ed. Vol VII p619.
83 Definition of "reporting institution" in s 5 of the FTR Act.
84 FTR Act s 5.

and the Solicitor-General plus the freeze order and the interim restraining order (all of which lead to Mr Wichman's conclusions) that seems as much as Ora could reasonably and practically be expected to do to meet its obligations under s 29(2).

[131] In light of that finding, the appropriate conclusion is again that the Solicitor-General has not shown to the required standard that Ora committed the offences of failing to comply with ss 25 and 30 of the FTR Act or, through s 30, s 29. Ground (a)(ii) accordingly fails.

[132] The allegation that Ora failed to comply with Mr Hunkin's directions in the 25 October letter, has, largely, been dealt with[85]. At this stage of the judgment it is sufficient to record that the evidence establishes that, immediately after receiving the 25 October letter, Ora communicated with Kobre & Kim and Mr Krys and obtained the reports earlier detailed. In doing so, it must have complied with the earlier part of the FIU direction, perhaps also the latter portion – certainly with the penultimate paragraph – but, if not, for the reasons earlier discussed, it had reasonable cause not to act on a direction which may not have been, legally, soundly based.

[133] Further, it is not at all clear what offence recipients of s 35 notices, such as Ora, commit if they fail to act as directed. The 25 October letter avers that failure to comply with such is an offence, but fails to say under which provision. Section 35 itself creates no offences, and none of the offences appearing in Part 7 of the FIU Act appear apt to cover a failure to comply with a s 35(2)(3) direction. Section 45(a) of the FIU Act makes it an offence for a person, given a notice to provide information, to fail, without reasonable excuse, to comply with a requirement in the notice. Even leaving the "reasonable excuse" point aside, an obligation to provide something may not extend to criminalising failure to act in another way. Section 46 (d) of the FIU Act creates the offence of failing, without reasonable excuse, to attend on and assist an investigator when required: again leaving the "reasonable excuse" point aside, it might be argued that it would be straining the obligation to assist to criminalise a failure to fulfil a direction by a recipient of such a notice such as Ora.

[134] Of the other sections pleaded as offences and listed in the amended application, ss 25, 30 and 47 of the FTR Act do not say that failure to comply is an

offence and they do not appear to come clearly within the general offence provisions of s 63 and while s 280A(d) of the Crimes Act 1969 creates the offence of rendering assistance to another to engage in the conduct described in the remainder of s 280A(2), for the reasons appearing elsewhere – especially the freeze order and the conduct of this proceeding – it would be difficult to argue that Ora has done anything, or been able to do anything, in that regard.

[135] All those circumstances lead to the view that it has not been established that making a finding that Ora has been shown to be in breach of ground (a)(iii) would be justified. Ground (a)(iii) accordingly fails.

[136] Ground (a)(i) alleges Ora committed an offence under the FTR Act[86] by failing to file a suspicious activity report under s 47.

[137] Section 47 requires reporting institutions to report to the FIU any activity they have reasonable grounds to suspect is suspicious activity, and to do so within a maximum of two working days, unless s 48 applies.

[138] Section 48 requires reporting institutions to report activity they have reasonable grounds to suspect is suspicious "relevant to a person that has been identified by the reporting institution as a person of interest". Since it was not Ora which made the identification, s 48 is inapplicable.

[139] "Suspicious activity" means any activity or information which relates to, in this case, an ongoing business relationship, being something that causes the monitor[87] to know, suspect or "have reasonable grounds to suspect that financial misconduct or a serious offence is intended, or has occurred".

[140] The 25 October letter and the reports Ora obtained from and through Kobre & Kim and Mr Krys could not have caused it to "know" that financial misconduct or a serious offence had occurred in the sense that Ora's obligation could not be to be a judge evaluating all the material it had to reach a definite conclusion that financial misconduct had been proved. More probably, its view would be as Mr Wichman

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[85] At [90]-[96] pp32-34.
[86] ss 63 and 47(3).
[87] Monitor includes reporting institutions; FTR Act s4.

concluded, namely that no misconduct had occurred, or that misconduct was, at that stage, unproven. That would not amount to knowing.

[141] Alternatively, the information in the 25 October letter might have caused Ora to suspect financial misconduct had happened or give it reasonable grounds to suspect such and the "financial misconduct" might have been the information "relating to money laundering" or the reference to the serious offences the 25 October letter spelled out. In that regard, it is to be noted that the Moscow District Court material was not attached to the 25 October letter. Indeed, there is no evidence Ora has ever been formally given those documents.

[142] The difficulty as far as this approach to the amended application is concerned is, however, is that, at least until Ora's investigation of the background produced the Kobre & Kim and other reports, all its information about any "suspicious activity" by Mr Leontiev and his associates came from the FIU in the 25 October letter, and there is considerable force in Mr Wichman's comment as to the pointlessness of Ora making a s 47 report to the FIU which merely mirrored or repeated the allegations the FIU made to it in that letter.

[143] Then, once the Kobre & Kim, Krys and other reports were to hand, Ora made them available to the FIU either in the meetings it held with Mr Hunkin and the Solicitor-General or by the evidence filed in this proceeding. True, those reports may not have strictly followed the form required by s 50 of the FTR Act, but no complaint was made in that regard in the evidence or by counsel.

[144] In those circumstances, whilst, technically, Ora may have been under an obligation to file a suspicious activity report with FIU in a form that complied with ss 47, 48 and 50, given the facts of the matter as just reviewed, coupled with the onus of proof on the "reasonable grounds" issue, it is extremely difficult to reach a view that Ora's conviction on charges brought under those sections and s 63 would be likely to succeed. Had the FIU been firmly of the view that Ora had offended, it is odd that no charge has been laid.

[145] The Court accordingly reaches the view that ground (a)(i) in the amended application also fails.

[146] That leaves ground (a)(iv) alleging that Ora's conduct had the effect of rendering assistance to Mr Leontiev to permit him to engage in transactions Ora had reason to believe were derived directly or indirectly from a serious offence i.e. s 280A of the Crimes Act 1969.

[147] This allegation was not separately dealt with by counsel. That seemed sensible reluctance on their part if for no other reason than that it is subsumed in the other issues already discussed and, secondly, that holding what, having regard to the allegations in the Moscow District Court material, must be regarded as a modest sum of money in a frozen account when Ora had no communication directly with Mr Leontiev or his interests over the period of the few weeks which elapsed between the 25 October letter and the freezing order of 16 January 2018 could hardly be said to have had the effect of rendering assistance to the Leontiev interests even if – as, throughout this matter, has been strenuously contested – Ora had reason to believe the funds were derived directly or indirectly from a serious offence. It was inactive thereafter.

[148] The Court accordingly concludes that ground (a)(iv) similarly fails.

[149] The remaining issue is the alternative application for a restraining order under s 45 of MACMA on the grounds set out in paragraphs (e)-(g) of the amended application.

[150] The analytical process applied to the amended application is simplified by the fact that it was not in contest that the elements of s 45[88], as listed in grounds (e)-(g) were made out: a proceeding in a foreign country, the Russian Federation, has been commenced against Mr Leontiev alleging a serious offence[89]; there is property[90], namely the US$72,244.11, in the Cook Islands which is the subject of a foreign restraining order; and the foreign country has requested the Attorney-General to obtain a restraining order in this country. There is, therefore, the jurisdictional basis for the making of the order sought under s 45, provided the grounds are made out.

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[88] Cited in paragraph [18] p 8.
[89] As defined in s 3 of POCA.
[90] Also as defined in s 3 of POCA.

[151] In that regard, s 45 empowers the Attorney-General to apply for restraining orders under POCA for serious offences which qualify pursuant to the elements in the last preceding paragraph of this judgment but, for the reasons elaborated on earlier, a s 50 restraining order against the US$72,244.11 could only be made in this case if it is Ora's property or under its effective control and Ora, as a suspect, is likely to be charged with a serious offence within the period of the restraining order. Mr Leontiev and his interests cannot be a "suspect" in this case as they are outside the criminal territorial jurisdiction of the Cook Islands and, again for the reasons elaborated on elsewhere in this judgment, the Court's conclusion is that Ora has not been shown as being likely to be charged with a serious offence as defined in POCA. It does no disservice to say the evidence as to that likelihood was indefinite.

[152] Therefore, although the elements of s 45 of MACMA are satisfied, there is no basis for the continuation of the interim restraining order under s 50 of POCA and the s 45 of MACMA alternative application accordingly also fails.

[153] Returning to the issue of whether the funds are "tainted property"[91] that phrase has since 24 June 2017 been defined as, broadly, meaning property which is the proceeds of an offence, used in or connection with the commission of a serious offence or property intended to be used in connection with commission of a serious offence.

[154] The evidence for and against the US$72,244.11 being proceeds of an offence or used in commission of a serious offence has been extensively summarised earlier in this judgment. There is no need to repeat it. The Solicitor-General and Mr Hunkin believe all the funds they discussed, not just the US$72,244.11, were the proceeds of serious offences committed by Mr Leontiev and his interests in Russia. Ora, relying on the various reports discussed earlier, especially Mr Krys's second report specifically dealing with the US$72,244.11, takes the view that the funds are clean and do not fall within the definition of tainted property.

[155] The Court's view is that the Solicitor-General and the FIU have not discharged the onus of showing the US$72,244.11 is tainted property. Mr Hunkin's evidence is much more general and non specific than the evidence adduced by Ora,

particularly in Mr Krys's affidavit which specifically discusses the US$72,244.11 and concludes that it resulted from legitimate trading and is neither the proceeds of an offence nor property that has been used in connection with a commission of a serious offence.

[156] Though obiter in view of the earlier findings, had it been necessary to decide the issue, the Court would have reached the view that the s 50 of POCA application failed on the basis that the applicant had not shown to the required standard that the funds held by Ora in CSB came within the definition of tainted property.

**Result**

[157] All the grounds for relief in the amended application having been dismissed, the application is itself dismissed.

[158] Issues of confidentiality of the judgment as contrasted with the normal practice of Court judgments being available publicly will be dealt with in accordance with the Minute issued in this proceeding on 30 November 2018, to include Mr James and with the additions of Mr Stuart Baker, Mr James' successor as Solicitor-General, Ms Kathy Bell and Ms Olivia Klaasen to the list of those to whom the judgment can be made available. As the parties seem to be in some doubt about the matter, Messrs Hunkin and Wichman are to be included in the list of those to whom the judgment can, in the first instance, be provided. As they are not parties, Mr Leontiev and Kobre & Kim are to receive, at this initial stage, only the highlighted portion of the judgment on p1. Distribution generally and to the other persons mentioned in Mr Williams' memo of 4 December 2018 will be considered in accordance with the Minute of 30 November 2018. No recipient of the initial distribution of the judgment is to copy the same to any other person.

[159] As a consequence of the delivery of this judgment, it is appropriate to rescind the interim restraining order relating to the US$72,244.11 on and from the date of expiry of the appeal period for this judgment, unless there is a further order of the Court dealing with the matter.

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[91] POCA s 3

[160] Unless counsel argue for a different means of dealing with the issue of costs, they are to be dealt with by memorandum with that from the second respondent being filed and served within 15 working days of delivery of this judgment; and that from the application with a further 10 working days. If CSB seeks costs, its submissions should be filed according to the same timetable as the second respondent.

**Hugh Williams, CJ**

## FIRST SCHEDULE

Proceeds of Crime Act 2003

"property" includes money and all other property, real or personal, whether situated in the Cook Islands or elsewhere, including an enforceable right of action and other intangible or incorporeal property;

"restraining order" means an order made under sections 50 or 63;

"serious offence" means –

a) Acts or omissions that constitute an offence against the law of the Cook Islands punishable by imprisonment for not less than 12 months or the imposition of a fine of more than $5,000; or

b) Acts or omissions that constitute an offence against the law of another country that, had those acts or omissions occurred in the Cook Islands, they would have constituted an offence against the law of the Cook Islands punishable by imprisonment for not less than 12 months or the imposition of a fine of more than $5,000;

"tainted property" means any of the following property, whether located in the Cook Islands or elsewhere –

(a) any proceeds of an offence;

(b) property that is or has been used in or in connection with the commission of a serious offence;

(c) property that is intended to be used, or is allocated to be used, in or in connection with the commission of a serious offence.

32. Court may lift corporate veil – (1) In assessing the value of benefits derived by a person from committing a serious offence, the Court may treat as the person's property any property that, in the opinion of the Court, is under the person's effective control, whether or not the person has –

(a) any legal or equitable interest in the property; or

(b) any right, power or privilege in connection with the property.

(2) Without limiting subsection (1), the Court may take into account –

(a) shareholdings in, debentures over, or directorships of, a company that has an interest (whether direct or indirect) in the property; and

(b) a trust that has a relationship to the property; and

(c) any relationship between persons having an interest in the property, or in companies of the kind mentioned in paragraph (a) or trusts of the kind mentioned in paragraph (b), and other persons.

## Financial Transactions Reporting Act 2017

**financial misconduct** has the same meaning as in the Intelligence Unit Act 2015.

**person of interest** means –

(a) A person who has been convicted of financial misconduct or a person whom a reporting institution has reasonable grounds to suspect has committed financial misconduct.

**serious offence** means –

(b) an offence against the law of the Cook Islands that is punishable by imprisonment for 12 months or more of the imposition of a fine of more than $5,000; and

(c) an offence against the law of another country that, had the acts or omissions constituting that offence occurred in the Cook Islands, they would have constituted an offence against the law of the Cook islands of the sort referred to in paragraph (a)

**suspicious activity report** means a report made under sections 47, 48 or 49.

**suspicious activity** means any activity or information that –

(a) relates to one or more of the following –
  (i) an intended transaction;
  (ii) a transaction, whether or not complete;
  (iii) an ongoing business relationship; and

(b) is something that causes the monitor to –
  (i) know or suspect that financial misconduct or a serious offence is intended or has occurred; or
  (ii) have reasonable grounds to suspect that financial misconduct or a serious offence is intended or has occurred

**25 Standard customer due diligence**

(1) A reporting institution must establish, maintain and operate procedures to ensure it conducts customer due diligence before entering into an ongoing business relationship or an isolated transaction with or on behalf of a customer, on the following –
  (a) a customer; and
  (b) a person acting on behalf of a customer.

(2) The procedures referred to in subsection (1) must ensure that the reporting institution –
  (a) obtains identification information on the persons referred to in subsection (1); and

(b) verifies that identification information using reliable independent source documents; and

(c) obtains information on the nature and intended purpose of the ongoing business relationship or isolated transaction; and

(d) where a customer is not a natural person, the reporting institution must –

(i) identify and verify any ultimate principal of the customer; and

(ii) verify the legal status of the customer, using relevant information obtained from a reliable independent source, and

(iii) obtain sufficient information to understand the nature of the customer's business and its ownership and control structure; and

(iv) obtain information concerning the person(s) by whom, and the method by which, binding obligations may be imposed on the customer; and

(e) where a person is acting on behalf of a customer, the reporting institution must verify the authorisation of that person to act on behalf of the customer; and

(f) takes reasonable measures to establish source of funds; and

(g) takes reasonable measures to determine whether a person referred to in subsection (1) is a specified entity.

(3) The types, kinds or categories of identity information to be obtained or verified under subsection (2) and any additional due diligence requirements may be prescribed.

(4) A reporting institution that breaches this section commits an offence and is liable to the penalties in section 63.

**27 Simplified customer due diligence**

(1) Subject to the requirements of this section a reporting institution may establish and operate procedures to conduct simplified customer due diligence on–

(a) a customer, or

(b) a person acting on behalf of a customer.

(2) The procedures referred to in subsection (1) must ensure that the reporting institution–

(a) cannot undertake simplified customer due diligence if–

(i) one or more of the circumstances referred to in section 29 are present; or

(ii) the customer is a legal arrangement or similar arrangement for holding personal assets; or

(iii) the customer is a company with nominee shareholders or has shares in bearer form; or

(iv) in any other circumstances that may be prescribed; and

(b) is satisfied that the level of risk associated with the person or persons referred to in subsection (1) is low; and

(c) obtains information on the nature and intended purpose of the ongoing business relationship or isolated transaction.

(3) The assessment of the low level of risk referred to in subsection (2) must –

(a) be supported by an adequate analysis of the risks by the reporting institution; and

(b) document the details of its risk assessment.

(4) A reporting institution may undertake simplified customer due diligence on a legal person whose securities are listed on a recognised stock exchange or any other person that may be prescribed.

(5) The types, kinds or categories of identity information to be obtained under subsection (1) may be prescribed.

(6) A reporting institution that breaches this section commits an offence and is liable to the penalties in section 63.

**29 Enhanced customer due diligence**

(1) A reporting institution must establish, maintain and operate procedures to ensure enhanced customer due diligence is conducted in one or more of the following circumstances –

(a) if the ongoing business relationship or isolated transaction is with a customer, or person acting on behalf of a customer –

(i) from or in a jurisdiction on List A; or

(ii) from or in a jurisdiction that is known to have inadequate systems in place to prevent or deter financial misconduct as determined by the reporting institution itself or on List B as notified generally by the Head; or

(iii) who has been identified by the reporting institution as a person of interest.

(b) if a customer seeks to conduct one or more transactions that the reporting institution identifies as unusual activity;

(c) if the ongoing business relationship or isolated transaction involves a foreign PEP, or a domestic PEP, who has been identified as posing a higher risk of financial misconduct;

(d) if the reporting institution considers that the level of risk involved is such that enhanced due diligence should be applied;

(e) in any other circumstances that may be prescribed.

(2) Unless section 26 applies, if a reporting institution suspects that either an ongoing business relationship or a transaction is in any way connected with financial misconducted or a serious offence, it must –

(a) examine, as far as reasonably practical, the background and purpose of the ongoing business relationship or transaction; and

(b) consider whether to make a suspicious activity report under section 47.

(3) The types, kinds or categories of information to be obtained or verified under subsection (1) may be prescribed.

(4) A reporting institution that breaches this section commits an offence and is liable to the penalties in section 63.

**30 Customer due diligence in suspicious circumstances**

Unless section 26(2) applies and despite any exemption or threshold for transactions provided under this Act, if a reporting institution has reasonable grounds to suspect a prospective customer or a proposed isolated transaction is connected with financial misconduct or a serious offence it must –

(a) Undertake customer due diligence in accordance with section 25 and section 29; and

(b) Submit a suspicious activity report under section 47.

**47 Duty to report suspicious activity**

(1) A reporting institution must report to the FIU any activity that it reasonable grounds to suspect is suspicious activity.

(2) Except where section 48 applies the reporting institution must report the suspicious activity to the FIU as soon as possible but not later than 2 working days after it forms, or should have formed, that suspicion.

(3) If a reporting institution fails without reasonable excuse to comply with subsection (1), the reporting institution commits an offence and is liable to the penalties in section 63.

## Financial Intelligence Unit Act 2015

**financial misconduct** means –

(a) a breach of one or more of the oversight acts;
(b) misconduct by any person relating to money laundering;
(c) fraud involving cross-border financial transactions;
(d) the financing of terrorism;
(e) the financing of proliferation of weapons of mass destruction;
(f) the financing or facilitating of bribery and other corrupt practices of any sort;
(g) tax evasion (whether or not relating to taxes payable in the Cook Islands)

**35 Recoverable money**

(1) The Head may exercise its powers under this section if the Head believes money, either in the Cook Islands or elsewhere –

(a) is or may be –

(i) the subject of financial misconduct;

(ii) the proceeds of financial misconduct;

(iii) the subject of an investigation or proceeding that relates in any way to this Act or an oversight act; and

(b) should be detained to allow one or more of the following to happen –

(i) the relevant Cook Islands or overseas law enforcement authority to undertake or complete an investigation or prosecution;

(ii) the FIU to undertake or complete its own investigation;

(iii) the FIU or some other person to seek an order from the Court to restrain or forfeit the money;

(iv) the relevant reporting institution either to comply with section 24 or with an order under section 33.

(2) If a reporting institution has custody of that money or control over it, the Head may instruct that reporting institution –

(a) segregate the money (including interest) in an interest bearing account controlled by the FSC;

(b) take steps to make sure that money (and any interest) is not –

(i) paid out;

(ii) transferred;

(iii) allowed to pass out of the custody and control of that reporting institution.

(3) That instruction must:

(a) be in writing; and

(b) be signed by the Head or a delegate; and

(c) specify the grounds on which the Head acts; and

(d) give details of any action to be taken by the reporting institution; and

(e) incorporate or attach a copy of this section and section 39;

(f) must specify the period (to be not more than 60 days) during which the instruction remains in effect.

(4) As soon as it is practical to do so, the reporting institution must advise at least one of the persons on whose behalf it holds that money-

(a) of the instruction received by it; and

(b) of action taken by the reporting institution.

## SECOND SCHEDULE

## ON FIU LETTERHEAD ADDRESSED TO ORA

**"Re: Instruction to detain funds relating to the Legion Trust, Sergey LEONTIEV, Vadim KOLOTNIKOV and other persons associated to the Legion Trust and any associated legal persons.**

Pursuant to section 35(2)(b) of the Financial Intelligence Unit Act 2015, (the Act) the head of the Financial Intelligence Unit (FIU) instructs Ora Fiduciary Cook Islands Limited to take steps to make sure that money (and any interest) is not:

(iii) paid out;

(iv) transferred;

(v) allowed to pass out of the custody or control of Ora Fiduciary Cook Islands Limited

Pursuant to section 35(3)(d) of the Act as the Head of FIU, I direct:

1. that Ora Fiduciary Cook Islands Limited (you) take steps not to transact, transfer or deal with, in any way whatsoever money relating to the Legion Trust, Sergey LEONTIEV, Vadim KOLOTNIKOV, Andreas MERCURI and other persons associated to the Legion Trust and any associated Legal Persons not limited to but including: Wonderworks Investments Limited; Holdco Limited; Higold Investments Limited; The Shastra Trust; ShastraHoldCo Limited; Quantum Assets Inc; Irbis Investments LLC; Wonderheart Assets Limited; Sergey Limited;

2. Pursuant to the Act sections 24 & 25 at 12 p.m. on Friday 27 October 2017 at your offices in Avarua you provide to me or my delegate Senior Intelligence Officer Walter Henry;

    a) Your files concerning the persons mentioned in this instruction including the Trust and the persons who may be associated with it.

    b) All transactions from commencement of dealings to the present in respect to these persons or any related trust.

I view these instructions and directions as part of an investigation under the Act, so that by way of section 46 any failure to comply may be an offence under section 46 for which the penalties under section 51 (an individual is subject to $50,000 fine or 2 years imprisonment; and for other persons to a fine not exceeding $100,000) may apply.

Pursuant to section 35(1)(a) and (b), I believe –

(a) That money either in the Cook Islands or elsewhere is or may be:

    (i) The subject of financial misconduct;

    (ii) The proceeds of financial misconduct;

    (iii) The subject of an investigation or proceeding that relates in any way in this Act or an oversight Act; and

(b) Should be detained to allow one or more of the following to happen:

    (i) The relevant Cook Islands or oversees [sic] law enforcement authority to undertake or complete an investigation or prosecution;

    (ii) The FIU to undertake or complete its own investigation;

    (iii) The FIU or some other person to seek an order from the Court to restrain or forfeit the money;

(iv) The relevant reporting institution either to comply with section 24 or with an order under section 33.

In compliance with section 35(3)(c) I act on the following grounds:

(a) The receipt of Suspicious Activity Reports that identify that the proceeds within the Legion Trust, Sergey LEONTIEV, Vadim Kolotnikov and other persons associated to the Legion Trust and other associated legal persons are believed to be complicit in dealings with the proceeds of crime in the nature of embezzlement.
(b) Correspondence from two foreign authorities that confirm the proceeds identified above are believed to be the proceeds of misappropriation or embezzlement.
(c) Confirmation from the Cook Islands Solicitor-General that he has received, as the competent authority within the Cook Islands, an official request in respect of the Mutual Assistance in Criminal Matters Act 2003. The request refers to a criminal investigation that relates to the proceeds of misappropriation or embezzlement that has been placed and reasonably apprehended to be laundered through the Cook Islands.
(d) That the Legion Trust was transferred to Ora Fiduciary Cook Islands Limited on the 15th September 2017 when it was made a trustee.

The period that the monies identified above shall remain detained will be 60 (sixty) days from the date of delivery of this letter.

In accordance with Section 35(d) I direct you to contact all financial institutions that hold assets of the abovenamed persons and legal entities, whether in the Cook Islands or elsewhere, and you shall advise those institutions that the funds held have been identified as the reasonably suspected proceeds of serious organised crime, and as such are the proceeds of crime. And you shall advise that any further transactions undertaken are, or may be, in breach of Money Laundering Laws or Rules.

You are advised that by virtue of section 35(4) that as soon as it is practical to do so, Ora Fiduciary Cook Islands Limited must advise at least one of the persons on whose behalf it holds that money:

(a) Of this instruction, and
(b) Of the action taken by you.

I attach copies of sections 35 and 39 of the FIU Act as required by s 35(3)(e). It is an offence under this Act not to comply with these instructions.

Yours faithfully,

**Philip Hunkin**
**Head of Financial Intelligence Unit**