ERSKINE CHAMBERS

Trusts Disclosure

Stephen Smith QC

“Thorny Issue”

Your defendant discloses that he is a member of a class of discretionary beneficiaries of an offshore trust but refuses to say what is in the trust, how it got there, or even who the trustees and other members of the class are. End of story … or just the beginning (and in either case, why)?

Judicial receptiveness

- Per Robert Walker J in **ICIC v. Adham** [1998] BCC 134:

  "The court will on appropriate occasions take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level."

Assets held offshore

- Commonplace for valuable assets to be held by offshore companies whose shares held in offshore trusts
- Administered by trust companies/corporate service providers operating abroad
- With no obvious continuing legal connection to the individual defendant (save that he is a member of a class of discretionary beneficiaries)
- But a very obvious factual connection (defendant was a prior owner/the settlor; defendant or family resides in or has the use of trust assets)
- Even more suspicious: where defendant was the settlor and is a discretionary beneficiary and retains significant powers over the activities of the trustees (eg as protector)

Typical disclosure by a defendant

- No interest in asset held by offshore company
- No interest in company
- If trust involved, it is a discretionary trust and even though defendant a member of the class of beneficiaries, he has no interest in the trust assets
- Neither the trust assets nor his discretionary interest would be available to satisfy the claims of any of his creditors (or his soon to be ex-wife)

Para. 6 standard form WFO (Comm Ct Guide)

"[1] Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name, whether they are solely or jointly owned [and whether the Respondent is interested in them legally, beneficially or otherwise]. [2] For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. [3] The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions."

Para. 9 standard form WFO (Comm Ct Guide)

"... the Respondent must [within [ ] hours of service of this order] and to the best of his ability inform the Applicant's solicitors of all his assets worldwide [exceeding £[ ] in value] whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets"

De facto or de iure control in para. 6?

- Sentence 2 appears to contemplate de iure control of assets – it speaks of “power”
- Sentence 3 appears to expand the concept of “power” to include a situation where the asset is in fact held subject to the indirect control of the defendant: the test appears to be not whether the defendant has an enforceable right to control dealings with the asset, but whether in practice that is how the asset has in the past been administered.
- In that situation the defendant is deemed to have the requisite power (sc which he otherwise does not have).

JSC BTA Bank v. Solodchenko [2011] 1 WLR 888

- The third sentence of para. 6 of the standard form order:

  "Makes it clear that 'the respondents' assets' can include assets held by a foreign trust or a Liechtenstein Anstalt when the defendant retains beneficial ownership or effective control of the asset" (para. 26 and see too para. 31)

- NB: "effective control" is an alternative to beneficial ownership

- (Why does the trust have to be foreign?)

JSC BTA Bank v. Ablyazov (No. 10) [2015] 1 WLR 4754 (SC)

"Rimer LJ said that paragraph [6] 'is about, and only about, dealings with assets of the defendant. I respectfully disagree. It is true that that was the case under the previous form of order but the whole point of paragraph [6] is to extend the meaning previously given to 'assets'. In the Solodchenko case Patten LJ acknowledged that the new wording catches assets which are contained within a Liechtenstein Anstalt... the last two sentences of paragraph [6] are designed to catch assets which are not owned legally or beneficially, but over which the defendant has control." (para. 46)

See too PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov [2013] EWHC 422

- Per Popplewell J at para. 7(5):

  "Substantial control over the assets may be evidence from which the Court will infer that the assets are held as nominee or trustee for the CAD as the ultimate beneficial owner…The ultimate test is always whether there is good reason to suppose that the assets would be amenable to execution of a judgment obtained against the CAD."

“Putin’s banker”

- Not credible that was Putin’s banker
- More credible was closely involved with Putin’s appointment
- Not much of a banker
- Fell out of favour
  - He says (not very credibly) because Putin did not like fact he took an English girlfriend

Proceedings

- Bank's liquidator – DIA – commenced proceedings in Russia seeking over $1bn damages
- Pugachev elected to defend claims in Russia, when threatened with similar claims in England
- In meantime, Chancery Division granted WFO against Pugachev under s.25 CJJA (11.7.14)

Sergei Pugachev disclosure in the Mezhprom case

- “SP is one of a class of discretionary beneficiaries under the following New Zealand based trusts:
  - London Residence Trust, Kea Three Trust, Green Residence Trust, Riviera Residence Trust, Wiltshire Residence Trust”
- BUT no disclosure of trust assets, nor terms of trusts, nor identity of beneficiaries, nor even who trustees

JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2016] 1 WLR 160 ("Mezhprom (1)")

- Henderson J (and David Richards J) ordered Pugachev to disclose:
  - The names of the settlor(s) of the trusts, the trustee(s), and the protector(s)
  - The terms of the trusts
- CA upheld the order: it was a legitimate tactic to ask questions first, before shooting (ie before seeking a Chabra WFO against trustees and disclosure pursuant to that order)

Mezhprom (1) (Continued)

- After referring to Patten LJ's use of the phrase 'effective control' in Solodchenko, Lewison LJ said this (para. 20):

  "I also observe that the final sentence of paragraph [6] says that a respondent will be regarded as having power to deal with or dispose of an asset 'if a third party holds or controls the asset in accordance with his direct or indirect instructions'. This does not, at least on the face of it, distinguish between a legal right to give instructions and the fact that a person in reality follows instructions (in much the same way as a shadow director might give instructions to the de iure directors of a company). It would, I think, be a matter of concern if a person could make himself judgment-proof merely by setting up discretionary trusts or, as Patten LJ said, a Liechtenstein Anstalt."

Mezhprom (1) (Continued)

- Lewison LJ went on to hold (para. 58) that even if the threshold test for including an asset within a freezing order regime is not currently met, that does not mean that the Court is powerless to intervene to test the respondent's assertions that he is not the owner of the assets by an order for disclosure:

  "In my judgment the court's concern that sophisticated and wily operators should not be able to make themselves immune to the courts' orders militates against denying the claimant that opportunity."

Mezhprom (1) (Continued)

- The application for information can be made pursuant to s. 37 SCA/s. 25 CJJA, or pursuant to CPR r.25.1(1)(g), viz for an order:

  "Directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction"

- The tests laid down in **Parker v CS Structured Credit Fund Ltd** [2003] 1 WLR 1680 ("some credible material on which such an application might be based") and **Lichter v Rubin** [2008] EWHC 450 ("a reasonable possibility, based on credible evidence") are the appropriate tests

Mezhprom (1) (con'd)

What was the "credible material" in Mezhprom? See Lewison LJ para. 41:

- Pugachev had "substantial connections" with the trusts
- Pugachev's powers as protector were not explained and could only be understood if disclosure of the trust deeds was ordered
- The professional director had not suggested the substantial involvement of anybody else

Mezhprom (1) (con'd)

- The evidence disclosed that there were good grounds for supposing that Pugachev was in a position to control assets within the trust structures (eg when and if rent was paid in respect of his occupation of a trust property)
- There was no evidence that Pugachev could fund his lavish lifestyle other than through the trusts
- The trustees had not produced evidence to show that they and Pugachev were at arms' length

Pugachev further disclosure

- He was only a beneficiary and knew (almost) nothing
- More lies

Ancillary orders

- A director of four of the trustees was working closely with Pugachev in England: an ancillary order under s. 25/Norwich Pharmacal order (coupled with a passport order) was obtained against her, and she provided the answers
- The basis for the application was that her assistance was necessary to make the disclosure order efficacious, alternatively there was a credible case that she was mixed up in Pugachev's attempts to conceal assets from his creditors

But what if the third party is abroad?

- There is no jurisdiction for the English court to make a Norwich Pharmacal order against a third party resident abroad, see **AB Bank v. Abu Dhabi Commercial Bank** [2016] EWHC 2082 (also ruling that as a matter of discretion an order would not have been made in England even if jurisdiction existed because the NCAD needed the protection of an order from a local court (eg from claims of breach of confidence under the local law) – sed quaere)

- So keep an eye on the arrivals at Heathrow?

But what if the third party is abroad? (Continued)

- It may be possible to seek NP or similar relief abroad: either against the third party company or trustee itself, or against the corporate service provider involved in setting up the structure

- See **JSC BTA Bank v. Fidelity Corporate Services Ltd** (ECCA 21.2.11), a claim for the production of documents and information by 7 BVI csps (including Mossack Fonseca). Per Mitchell JA (para. 27):

  "Registered agents and registered office service providers who are used by others to create and maintain for them corporate vehicles for the purpose of effecting fraud must expect that in due course the victims will come to them seeking discovery of the names and addresses and other information and documents that will enable the perpetrators to be discovered and the misappropriated assets traced."

What next?

- Disclosure by director had revealed names of trustees and nature and location and of trust assets, but not control
- Had also revealed terms of trusts: Pugachev Protector with extensive veto powers, and with power to replace trustees with or without cause
- Then a break: Pugachev fled jurisdiction in breach of court order, seemingly removing electronic information before he left
- Court persuaded to grant search order
- Yielded large amount of information some of which showed control of trust assets (and trustees) by Pugachev
- Further break: Pugachev replaced all original trustees with new companies whose directors loyal to him

Chabra order against trustee

- Injunction sought against trustees (ie trusts a sham)
- Ex parte order refused by Rose J
- But granted by CA, see [2015] EWCA 906 ("Mezhprom (2)") on basis that there was "a good arguable case that the assets held by the trusts are in reality assets of, or under the control of, Mr Pugachev. … The terms of the Trust Deeds and the change of trustees on 24th July 2015 reinforce that conclusion." [per Bean LJ at para. 30].

Jurisdiction

Needed to be trial of issue of ownership of trust assets

- In England or NZ?
- (new) trustees NZ companies and trusts governed by NZ law
- But none of assets in NZ
- And beneficiaries all in England/Europe
- English beneficiaries added as defendants
- And charging orders sought over English assets

Trial

Took place July 2017

- Pugachev made late application for adjournment which refused
- Then played no further part

Judgment 11.10.17 [2017] EWHC 2426 (“Mezhprom 3”):

- On true construction of trust deeds, assets held on bare trust for Pugachev (Protector’s powers personal, not fiduciary)
- Alternatively discretionary trusts were shams because never intended Pugachev would lose control of assets

Answer to question

- Is only the start of the story!
- Need claimant with deep pocket and patience
- And need breaks
- But is possible to bust a discretionary trust which has a professional trustee/professional directors of trustee
- And have trust assets declared available for execution of judgment