ERSKINE CHAMBERS

Disclosure of Assets held by a Third party

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“When will the Court order the disclosure of assets held by a company [third party] which the defendant controls as a matter of fact, but in which he has no obvious legal or equitable interest?”

- Sc. in the freezing order context (Section 37 Senior Courts Act/Section 25 Civil Jurisdiction and Judgments Act)
- Not addressing situation where company is a defendant to a substantive claim (“NCAD” not a “CAD”)
- Nor where a third party disclosure order may be made under CPR 31.17

Tilting at shadows

- 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 in offshore companies or trusts
- Administered by trust companies/corporate service providers operating abroad
- With no obvious legal connection to the individual defendant
- But a very obvious factual connection (prior ownership, residence, a closely connected person giving instructions to trustee/registered agent/csp)

Typical disclosure by a defendant

- No interest in asset held by offshore company
- No interest in company
- If trust involved, is a discretionary trust and not a beneficiary, or if a beneficiary, no interest in trust assets and neither assets nor discretionary interest would be available to satisfy any judgment debt

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 respondent is deemed to have the requisite power (sc which he otherwise does not have).

De facto control

- Makes good sense to have a test of de facto control at the interlocutory – esp. ex parte – stage
- As claimant, prior to disclosure it may be very difficult to establish de iure control of an offshore company or a trust
- Even establishing a sufficient case of de facto control may be a stretch
- Plainly at a later stage – such as execution of a judgment – nothing short of beneficial ownership or de iure control will do ("the enforcement principle"): but by then a much fuller picture will usually have emerged

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

- Issue whether extended wording included assets in which defendant had legal but not beneficial ownership (ie defendant trustee)
- CA said no (but words in square brackets in first sentence did)
- The third sentence "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)

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

- NB: “effective control” is an alternative to beneficial ownership
- Liechtenstein Anstalts are typically controlled through a contractual mechanism, but what if the party to the contract is not the defendant but one of his trusted accomplices: does the defendant retain “effective control”?
- And what about “a foreign trust” (and why does it have to be foreign)?

Lakatamia Shipping v. Su [2015] 1 WLR 291

- Issue: were assets of offshore companies in which D was owner of 100% of shares, assets of D for purposes of WFO and therefore frozen by WFO?

- CA held no, purportedly applying Solodchenko (though it also held that disposal of a company asset outside the ordinary course of business may be a breach because it amounts to a diminution in value of the shares, if on respondent's instructions)

- The extended definition "was not intended to include the assets of another person, here relevantly of a company controlled by the defendant" (para. 30)

Lakatamia Shipping v. Su [2015] 1 WLR 291 (Continued)

- But why not? What about the assets of a Liechtenstein Anstalt controlled by D, which CA in Solodchenko recognised were caught? Or the assets of a (foreign) trust (ditto)?
- How can this decision sit with the Solodchenko decision it purports to apply?

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

- Question whether proceeds of a loan facility fell within the extended definition of “assets”, where the proceeds were never actually received by the respondent

- Held that they did: “an instruction to the lender to pay the lender’s money, which is what it was, to a third party is dealing with the lender’s assets as if they were his own”. (para. 40)

- And: “Paragraph [6] of the order extends its scope to things which are not actually in the defendant’s ownership.” (para. 43)

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

- And: “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)

- De iure or de facto control? (In that case, the control was de iure: Ablyazov had a contractual right to instruct the lender, see para. 48.)

- Several nails in the Lakatamia coffin.

JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2016] 1 WLR 160

- Respondent had disclosed pursuant to WFO that he was a beneficiary of 5 NZ discretionary trusts
- He refused to disclose who were the settlor(s), the trustee(s), the protector(s), the other beneficiaries or the terms of the trusts
- Henderson J (and David Richards J) ordered him – the beneficiary – to give disclosure
- The CA upheld the order: legitimate tactic to ask questions first, before shooting (ie before seeking Chabra WFO against trustees and disclosure pursuant to that order)

Mezhprom (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 (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 (Continued)

- The application for information can be made pursuant to s. 37/s. 25, 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

Discussion

- So where there is a reasonable possibility based on credible evidence that a freezing order may be applied for in respect of the assets held by a third party (esp. an offshore company or foreign trust), an order for disclosure of information may be made in order to assist in the decision whether to apply for an injunction

- But CPR r. 25.1(1)(g) entitles the court to make an order only against "a party", viz to substantive proceedings (a "CAD")

- And in Mezhprom, Pugachev was a CAD: no disclosure order was sought against the NZ trustees, even though they were before the court having applied themselves to set aside the disclosure order (NCADs)

Discussion (Continued)

- What if you want an order for disclosure against a non-party, as will often be the position

  - after all, if your CAD has denied having any interest in/control over a company's assets in his initial discosure, he is hardly likely to volunteer disclosure of those assets

  - and committal of the CAD (for failing to provide infoprmation) is unlikely to be possible at this stage on the hypothesis that all that you have is prima facie evidence of control: not only is the standard of proof criminal, the CAD cannot be compelled to give disclosure (or evidence)

Ancillary orders

- Pugachev said he did not have the information he had been ordered to provide (!)
- But 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)

- There is no reason to think that an application for an ancillary disclosure order would fare any better

- 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."

Chabra to the rescue?

- Is it possible to seek WFO against foreign third party and obtain disclosure pursuant to that?
- Would have to be able to show good arguable case of beneficial ownership/control, see **JSC BTA Bank v. Ablyazov (No. 11)** [2015] 1 WLR 1287
- De facto/de iure debate has also raged in Chabra jurisdiction
- And courts have stressed the need for an even more cautious approach to applications for injunctions against NCADs

Chabra to the rescue? (Continued)

- In **Algosaibi v. Saad Investments Co Ltd** [2011] 1 CILR 178 a Chabra freezing order against a number of corporate NCADs was discharged because there was no reason to suppose that the companies' assets would be available for execution of any judgment obtained against a CAD. Per Sir John Chadwick P (at para. 43):

  "It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (a) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (b) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD."

Chabra to the rescue? (Continued)

- A number of decisions at first instance in England have approved Sir John's ruling and said it represents English law, see the list at Mezhprom (loc cit) para. 17
- But the position is not settled: it is still open to argue that a demonstration of a good arguable case of de facto control is good enough to obtain an injunction

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."

  "Will" or "may" be amenable to execution?

Chabra – jurisdiction?

- The NCAD would have to be joined
- And the Court would have to be satisfied that the NCAD was a necessary or proper party to the proceedings for the purposes of granting permission to serve it out of the jurisdiction
- This is problematic: contrast **C Inc v. L** [2001] 2 All ER 446 and **Ablyazov (11)** (loc cit), with **Linsen International Ltd v. Humpuss Sea Transport Pte Ltd** [2012] Bus LR 1649, **Parbulk II AS v. P T Humpuss Intermoda Transporti TBK** [2012] 2 All ER 513
- But it may work if the claim against the anchor defendant has not yet been determined, see **Cruz City 1 Mauritius Holdings v. Unitech Ltd** [2014] 2 CLC 784

Chabra – abroad?

- Will a foreign court make a Chabra Order in support of proceedings in England?
- Possibly, if the jurisdiction has the equivalent of our s.25 CJJA and has Chabra orders in its armoury (Cyprus?)
- Problematic where it does not (eg BVI)

  -contrast **Black Swan v Harvest View** (BVIHC 2009/399)

  -with **PT Ventures SGPS v Tokeyna Management Limited** (BVIHC 2015/134): per Bannister J at para. 5:

  "The jurisdiction is a narrow one, by which the Court uses its territorial jurisdiction to preserve local assets pending the outcome of the foreign proceedings."