

Recovering Assets from Corporate Structures

Nick Ractliff is a Commercial Litigator at PCB Litigation.

A major part of our work whilst acting for creditors and victims of fraud is the recovery of assets that are hidden within a holding structure. There are valid reasons why individuals and entities use these structures, such as for tax and financial planning purposes.

However, they are invariably used by fraudsters or judgment debtors with the primary motive to shield their assets and make it intentionally difficult for potential claimants to link them to the ownership of the underlying assets and make a financial recovery.

These structures are often complex with multiple layers of ownership using companies, nominees, discretionary trusts and other entities such as foundations spread over a number of different offshore jurisdictions.

The legal concept of separate corporate identity, the inability of being able to go behind a trust without establishing that it is sham, and the lack of available public information and the laws of secrecy of some of jurisdictions make it difficult, but not impossible, to breakdown these structures to establish the identity of the ultimate beneficial owner of the underlying assets.

The English Supreme Court in its recent decision in the divorce case of *Prest v Petrodel Resources Limited* concluded that the court had a very limited power to ignore the concept of separate corporate personality and it should only look to do so if there was no conventional remedy to provide assistance. However, it identified and provided illustrations of the availability of alternative remedies that are likely to give assistance where fraud is involved and someone is seeking to hide by a corporate identity.

Examples of such claims include conspiracy to injure, knowing receipt, unjust enrichment, fraudulent misrepresentation and, particularly in England pursuant to the Insolvency Legislation, setting aside transactions at an undervalue for the purposes of putting assets beyond the reach of claimants.

Likewise, the burden on demonstrating that a trust is a sham is heavy. This is because there has to be a common intention between the settlor of the trust and the trustee that the intention of the trust, i.e the assets are to be treated as if owned by the settlor, is different from that set out in the trust document, i.e they are to be dealt with in accordance with the terms of trust and at the discretion of the Trustee. The Trustee is invariably a professional person. Therefore the chances of finding that the Trustee has operated in a deceitful manner on setting up the trust are low.

However, recent case law has provided some assistance to allow claimants access to trust assets without having to demonstrate that it is a sham. The Privy Council in the case of *Tasarruf v Merrill Lynch Bank and Trust Company (Cayman) Ltd* found that a settlor's power of revocation in respect of a trust was sufficient to give him such control to withdraw assets from the trust so as to vest in the settlor an equitable interest which is equivalent to an asset and capable of enforcement.

The principle was adopted by the High Court in another case last year to prevent a debtor from hiding his assets in a



pension fund where he has the right to withdraw monies to pay his creditors.

Although the judgment debtor or the fraudster is likely to refuse to exercise those rights in such a manner, the court has the ability to appoint a receiver to take control of their assets either on an interim basis or for the purposes of enforcement. The right of revocation or such other right of control or withdrawal from a trust that could be said to be tantamount to having rights of ownership and an asset can be placed in to the hands of a court appointed Receiver. The Receiver is then able either to protect or to make a recovery of assets for the claimant.

Our recent experience suggests that the appointment of a Court Receiver either on interim basis either in place of or in addition to a freezing injunction pending the determination of a claim, or as enforcement measure post judgment to be a useful tool in breaking down asset holding structures.

Whilst a claimant establishes its claim the courts, both in England and other common law jurisdictions, are prepared to appoint a receiver to take control and manage the entity at the head of the structure, particularly if it is considered that a freezing injunction may not be sufficient to protect the assets within a network that has numerous layers spread over different jurisdictions.

Likewise, once a claimant has obtained judgment against the fraudster or creditor, their interests, whether they are beneficial interests in shares of company or a power of revocation in a trust placed at the head of the structure can be placed into the hands of a court appointed Receiver. The

court will then grant appropriate powers to the Receiver to allow him to exercise control over the entity at the head of structure and to use it to start breaking down the layers to release the underlying assets.

The downside is that it adds an extra layer of initial cost for the claimant. Although the receiver's costs will hopefully be paid out of the recovered assets, there is no guarantee that this will happen and until it does the receiver will require its costs to be underwritten by the claimants

However given that it can be an effective protective and enforcement remedy where assets are hidden by a complex structure, it is an additional cost that may be worthwhile incurring in the long term.



Company: PCB Litigation
Name: Nick Ractliff
Email: nr@pcb litigation.com
Web: www.pcb litigation.com
Address: PCB Litigation LLP, 4th Floor, 90
Chancery Lane, London, WC2A 1EU, UK
Telephone: +44 (0) 20 7831 2691