FREEZING ORDERS AND 'SHADOWY OFFSHORE STRUCTURES'

1. Robert Walker J coined the term "*shadowy*" to describe entities "*formed in jurisdictions where secrecy is highly prized and official regulation is at a low level*".[1] Notoriously, such structures can be abused to disguise ownership, as well as to shift assets rapidly and imperceptibly between entities and jurisdictions. Their use to facilitate tax evasion, corruption and other serious wrongs has gained increasing public and political attention.

2. Those same features also render them adept at facilitating the evasion of judgments and other orders of the civil courts. As the prominence of international disputes litigated through the High Court has increased, so too has offshore structures' role in frustrating its process and creditors' claims. This paper surveys how the law of freezing and related disclosure orders has sought to respond.

3. A recurring theme is the uncertainty, still not fully resolved, as to whether evidence of the defendant's control of a structure should be regarded as sufficient to justify the freezing of its underlying assets, either by restraining the defendant or by directly restraining the entities holding the assets. It is argued here that such an approach is unprincipled and wrong: instead, the appropriate threshold for relief is a good arguable case, by reference to the elements of the cause of action relied on, that a route exists to ultimate enforcement against the assets ostensibly belonging to the structure. The law's confusion on this point has stemmed from two causes. The first is the unsatisfactory role played by the standard form orders in shaping the development of the law. The second is the disjuncture between, on the one hand, the legal obstacles placed in the way of 'busting' such structures (by the law of sham in particular) and, on the other

[1] International Credit & Investment Co (Overseas) Ltd v Adham [1998] BCC 134 (at 136)

hand, many judges' sense of justice. That sense is well-founded, but the better answer lies in reforming the relevant areas of property law, rather than an unprincipled application of freezing orders.

4. What may prove the crucial recent shift in the law's response to shadowy structures by way of interim remedies, however, is the recognition of CPR 25.1(1)(g) as a basis for ordering wide-ranging disclosure of information about the structures and their assets at an early stage. All this requires, at least as a jurisdictional threshold, is credible evidence of the basis on which an application for a freezing injunction may follow.

General principles

5. It is at least the "*first and primary*" purpose of a freezing order to prevent the injuncted defendant from unjustifiably disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought (per Beatson LJ, in JSC BTA Bank v Mukhtar Ablyazov [2014] 1 WLR 1414 at [34]). According to Patten LJ's formulation in JSC BTA Bank v Solodchenko [2011] 1 WLR 888 (at [49(1)]), it is the only purpose of such an injunction "*to prevent the dissipation of assets which would otherwise be available to meet a judgment*".

6. That primary or sole purpose, which Beatson LJ referred to as the "*enforcement principle*", suggests that the scope of the assets frozen should be confined to those potentially amenable to future enforcement. Thus assets held by the respondent on trust for a third party will not usually be subject to the injunction: Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695; Solodchenko. Conversely, the applicant may assert that an asset ostensibly owned by a third party is in truth the respondent's, so that it could ultimately be enforced against. If a good arguable case can be made out to that effect, the injunction against the respondent may be extended explicitly to cover dealings with that asset.

7. An injunction may be available, alternatively or as well, directly against the third party, even though there is no substantive cause of action against that party: TSB Private Bank International v Chabra [1992] 1 WLR 231; PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov [2013] EWHC 422 (Comm), at [7(2)]). Such orders are not confined to instances where the respondent arguably already has legal or beneficial ownership of assets in the hands of the third party. They also encompass the situation where the respondent has a substantive right against the third party and some process, ultimately enforceable by the courts, is or may be available to the claimant (such as by appointment of a liquidator, trustee in bankruptcy or receiver) whereby the third party may thereby be obliged to contribute to the funds of the respondent to help satisfy its judgment debt to the claimant: C Inc v L [2001] 2 Lloyd's Rep 459, relying on the decision of the Australian High Court in Cardile v LED Builders Pty Ltd (1999) 162 ALR 294. In C v L, Aiken J held that this principle was limited by the need to show some causal connection between the claimant's claim against the respondent and the respondent's claim against the third party. That limitation was subsequently thrown off by Briggs J in Revenue and Customs Commissioners v Egleton [2006] EWHC 2313 (Ch) (see also the judgment of David Steel J in Yukos Capital SARL v OJSC Rosneft Oil Co [2010] EWHC 784 (Comm)). Furthermore, it is not necessary to identify a specific asset in the third party's hands which may be beneficially owned by the respondent if the existence of such assets generally can be sufficiently shown: Yukong Line Ltd of Korea v Rendsburg Investments Corp [2001] 2 Lloyd's Rep 113.

8. On the other hand, the mere fact that the respondent appears to *control* an asset in the hands of a third party, whilst evidentially relevant to the risk of that asset being dissipated, has been said to be insufficient to justify an order against the third party under the Chabra jurisdiction in the absence of a good arguable case that some future process will be available in respect of the asset. This much was held by Sir John Chadwick P in the Cayman Islands Court of Appeal in Algosaibi v Saad Investments Co Ltd [2011] 1 CILR 178, where he said as follows:

"32. It is necessary to keep in mind the basis on which a court exercises the Mareva jurisdiction. It is to ensure that the effective enforcement of its judgment (when obtained) is not frustrated by the dissipation of assets which would be available to the claimant in satisfaction of that judgment. It is trite law that the jurisdiction is not exercised in order to provide the claimant with a security for his claim which he may otherwise have. But, as it seems to me, it is equally plain, as a matter of principle, that the jurisdiction is not exercised in order to give the claimant recourse to assets which would not otherwise be available to satisfy the judgment which he may obtain. The court needs to be satisfied of two matters before granting Mareva relief. First, that there is good reason to suppose that the assets in relation to which a freezing order is imposed would become available to satisfy the judgment which the claimant seeks; and, second, that there is good reason to suppose that, absent such relief, there is a real risk that those assets will be dissipated or otherwise put beyond the reach of the claimant.

"33. The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD)—say, because the NCAD can be expected to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so)—is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. 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 (i) 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 (ii) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD."

9. As observed by Lewison in LJ in JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] 1 WLR 160, there is now a considerable body of authority holding that this summary also represents the present state of English law. It

was approved and adopted by Flaux J in Linsen International Ltd v Humpuss Sea Transport Pte Ltd [2011] EWHC 2339 (Comm); [2011] 2 CLC 773 at [146] and also approved in Parbulk II AS v PT Humpuss Intermoda Transportasi TBK & Ors [2011] 2 C.L.C. 988; [2011] EWHC 3143 (Comm) at [43]; JSC BTA Bank v Ablyazov (No 10) [2012] 2 All ER (Comm) 1243; and Pugachev [2014] 1 WLR 1414 at [35].

10. The enforcement principle also underpins the usual order for disclosure ancillary to the freezing injunction. By enabling the injunction to be policed, such an order "*gives the teeth which are critical to the freezing order*": Motorola Credit Corporation v Uzan & ors [2002] EWCA Civ 989, per Lord Woolf at [37]. This suggests that the scope of the disclosure ordered should be circumscribed in the same way as the injunction itself (at least in the case of a pre-judgment freezing order: the position is different post-judgment where the enforcement of the judgment may justify wider-ranging orders under the principle in Bekhor v Bilton [1981] QB 923). Thus a company ordered to give information as to its assets for the purposes of a freezing injunction is not required to give details of the assets of its subsidiaries, because they are not its assets: see Linsen International Ltd v Humpuss Sea Transport Ltd [2010] EWHC 303 (Comm) per Christopher Clarke J at paragraph 125.

Application to offshore structures

11. In many discretionary trusts and analogous arrangements, the settlor is effectively a 'client' of the trust company that sets up the trust and administers it for him. Where a request is made by him as a discretionary beneficiary to advance funds or purchase property for his use, the trustee will reliably comply. Even if such arrangements might appear more akin to a banking relationship than a genuine forswearing of ownership, they will not be regarded as a sham on the present state of the law: Re Esteem Settlement [2004] W.T.L.R. 1. The trust assets belong to the trust and not to the respondent discretionary beneficiary, whose "interest" as such is as a matter of legal analysis limited to a right to be considered by the trustees for a distribution: Gartside v Inland Revenue Commissioners [1968] AC 533, at 615-617).

12. This analysis is, of course, subject to the terms of the trust. For example, in the case of Cayman discretionary trusts settled by a judgment debtor in favour of himself and his wife, but containing a power of revocation in his favour, the Privy Council held that the power of revocation was tantamount to ownership over the underlying assets and a receiver could be appointed at the behest of the judgment creditor to aid execution of the judgment: Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd [2011] UKPC 17; [2012] 1 WLR 1721. It follows that there could be no objection in principle to freezing the assets of such a trust pre-judgment where the other requirements were met.

13. Similarly, as a matter of company law, the assets of a holding company within the structure are not the respondent's assets or even, generally, the trust's assets. It follows that they could not be enforced against by the claimant, save in the narrow circumstances identified in Petrodel Resources v Prest Ltd [2013] 3 WLR 1. Once again, of course, particular circumstances of the case may give rise to enforcement routes against the corporate third party's assets contrary to the general rule. For example, in Yukos Capital, irrevocable instructions had been given to pay sums received into the third party company's bank account to the defendant. This had the consequence that any sums in the account were potentially recoverable by the claimant, if necessary by the appointment of a receiver.

14. Absent vulnerabilities arising from the arrangements utilised or an egregious lack of caution by the defendant or officers of the structure, none of the typical means of attacking it so as to enforce against the underlying assets is made particularly easy by the law. For example:

    a. The assets within the structure could be enforced against if it could be shown that the whole structure, or at least particular transfers of assets into it, were a sham. This, however, is notoriously difficult, in particular because it will need to be established that a shamming intent was shared by both the transferor and transferee at the time of the original transfer:

Snook v London and West Ridings Investments Ltd [1967] 2 QB 786 at 802. Where notionally reputable professional administrators are involved, it is generally difficult to establish even a good arguable case of sham. The treatment of the allegation as one of fraud discourages it from being made on the basis of inference and speculation, which is what the claimant will generally be limited to.

b. It may be possible to attack the transfer of assets into the structure under provisions of the Insolvency Act 1986, most notably under s 423 (on the basis that the transaction was one defrauding creditors). In the case of respondents who routinely used offshore structures to hold their wealth, however, it may not be easy to demonstrate the requisite intention.

c. Lord Sumption observed in Prest (at [52]) that whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue and it is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. However: "*I venture to suggest, however tentatively, that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company*." Yet such an inference would seem considerably less likely to be justified where the property holding companies form part of a wider offshore settlement. Unless the whole structure can be attacked as a sham, the holding of the property through the company is readily explicable on the basis of it (see, for example, Hamilton v Hamilton [2016] EWHC 1132 (Ch)).

15. Applying the principles as to the law of freezing orders identified above to the relevant principles of property law, it should follow that:

a. A freezing order in standard form will not directly 'freeze' the assets of a company of which the respondent is a shareholder, even if he is the sole shareholder and sole director and even though in his capacity as director he exercises control over those assets. So much was held by the Court of

Appeal in Lakatamia Shipping Co Ltd v Su [2015] 1 WLR 291, disagreeing in the relevant regard with the first instance decision of Burton J (and thereby agreeing with the decision of Hildyard J in Group Seven v Allied Investment Corp [2014] 1 WLR 735). Note, however, that if the respondent procures dealings by the company outside the ordinary course of business, this will involve a breach by him of the freezing order, on the basis that he is thereby diminishing the value of the asset (truly his asset) represented by his shares.

b. Similarly, as Gloster J observed in Parbulk v Humpuss (at [42]), it is not legitimate, in the context of third party freezing orders, to disregard the separate corporate personality of individual companies in a group merely because the ultimate, or intermediate, holding company may have the practical ability to require a subsidiary to act in a particular way, or because it is necessary to achieve justice, even in circumstances where one or more of the companies in question may have been involved in some sort of impropriety.

c. On the other hand, a freezing order can be obtained against the respondent and the third party where a good arguable case can be shown that the assets could be attacked under s 423 or on the basis that the respondent is in truth the beneficial owner: Pugachev [2015] EWCA Civ 906.

The strand of unorthodoxy

16. However, alongside the above principles there is a persistent strand of unorthodoxy running through the authorities which has sought to temper the strictness they imply.

17. The observations of Robert Walker J as to shadowy offshore structures in International Credit and Investment Co (Overseas) Limited v Adham [1988] BCC 134, at 136 have already been noted. Adham was heavily relied on in Dadourian v Azuri [2005] EWHC 1768 (Ch), where Edward Bartley Jones QC reasoned as follows in granted an order under the Chabra jurisdiction:

"*The present is undoubtedly a case of shadowy trusts and companies (although I hasten to add that I make no adverse comment, whatsoever, about the level of official regulation or level of secrecy in a country such as Liechtenstein)…For my part, I do not believe it is necessary to establish beneficial ownership in a strict trust law sense. Clearly, if assets are held on a bare trust then the Chabra jurisdiction can be exercised. But, in my judgment, even if the relevant defendant to the substantive claim has no legal or equitable right to the assets in question (in the strict trust law sense) the Chabra jurisdiction can still be exercised if the defendant has some right in respect of, or control over, or other rights of access to, the assets. The important issue, to my mind, is substantive control…What needs to be considered is the substantive reality of control, not a strict trust law analysis as to whether the third party is a bare trustee. Thus, in my judgment, placing assets in a discretionary trust would not prevent the Chabra jurisdiction being exercised against that discretionary trust if the substantive reality were that the relevant defendant controlled the exercise of the discretionary trust. Any other analysis 'would entirely defeat the ability of the English courts to take drastic action and would allow the court's orders to be evaded by manipulations, entirely contrary to the court's powers and duties as identified by Robert Walker J in International Credit and Investment Co (Overseas) Limited v Adham (above). Whether this be described as identifying the discretionary trust as a "sham", as piercing the corporate veil, or as seeking to identify a controlled discretionary trust as a bare trust does not, to my mind, particularly matter. Certainly, at the interim stage, all that matters is to ascertain whether there is good reason to suppose that the relevant defendant controlled the assets in the discretionary trust*."

18. In *Marlwood Commercial Inc v Viktor Kozeny* [2007] EWHC 950 (Comm), HHJ Mackie QC similarly proceeded on the basis that the "test" for granting freezing relief under the Chabra jurisdiction was whether a sufficient case could be established that the respondent had "*substantive control*" over an asset (see [18]-[19]), without reference to the question of whether there was a basis in prospect on which the assets could be executed against in the event of judgment ultimately being obtained.

Role of standard form

19. Similar outcomes as regards the cause of action defendant have been reached on the basis of construing the 'standard forms' of freezing order.

20. The history of the standard forms is significant in this regard. Prior to the advent of the Civil Procedure Rules 1998, two practice directions were issued annexing standard form orders (see [1994] 1 W.L.R. 1233 and [1996] 1 W.L.R. 1552). These forms of order were required to be used save where the judge hearing the application considered that there was a good reason for adopting a different form. Practice Direction 25A to the CPR appears to signal a different approach. It annexes what is described as an "*example*", rather than a standard form, of freezing injunction and expressly provides that the example may be modified as appropriate in any particular case (para 6.2).

21. However, the "*example*" Freezing Injunction continues to be treated and generally referred to as a standard form, any departure from which will require a good reason to be given: see, for example, JSC BTA Bank v Ablyazov [2009] EWHC 3267 (Comm) at [41] (dealing specifically with maximum sum orders) and L v K [2013] EWHC 1753 (Fam) (departure from standard form must be "*clearly justified*" (per Mostyn J at [49])). It is regarded as part of an applicant's (and advocate's) duty of full and frank disclosure on a without notice application to draw attention to any respect in which the draft order departs from the 'standard form': see per Lord Neuberger MR in Finurba Corporate Finance Ltd v Sipp SA [2011] EWCA Civ 465 (at [30]).

22. Until 2002, the CPR example order restrained the respondent from disposing of or dealing with "*his assets*"…"*whether in his own name or not and whether solely or jointly owned*." At that point, the CPR example order was modified (the "**CPR revision**") to provide that:

"*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. 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."

23. The Commercial Court Guide contains an amended example order which, in addition to the above gloss on the meaning of "*assets*", contains bracketed words to the effect that the order applies to all the Respondent's assets "*whether or not he is interested in them legally, beneficially or otherwise*" (the "**Commercial Court Additional Words**"). The Commercial Court standard order contains a further important addition to the CPR standard form, in that the restrained assets are stated to include:

"any interest under any trust or similar entity including any interest which can arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever."

24. Patten LJ addressed the background to the CPR revision in Solodchenko and explained as follows (based on his personal knowledge of how the revision had come about):

"*…a number of judges of the Chancery Division heard applications for freezing orders designed to catch assets held by the defendant in what were described as sham trusts. These were cases in which assets owned or controlled by the defendant were held by third parties in a trust or other similar entity ostensibly for the benefit of a third party. Concern was expressed that the forms of order prepared for the applications contained additional words which, on one view, would extend the order to cover assets held by the defendant merely as a trustee for a genuine third party or by some third party for the benefit of persons other than the defendant…there was concern that orders designed for this purpose should not be framed so as to catch assets which did not belong to the defendant beneficially at all*."

25. Patten LJ explained that the wording introduced by the CPR revision which refers to an asset which the respondent has power to dispose of or deal with as if it were his own:

"…*is a reference to a case where the legal owner is not the defendant but a third party yet it is the defendant who retains the power to direct how the asset should be dealt with…it makes clear that "the respondent's 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."*

26. Those words, Patten LJ also held, did not encompass assets held by the Respondent on trust for others (which was the issue in that case), since the words introduced as a result of the CPR revision must all be read in the light of the fact that they supplied the definition of "*his [i.e., the Respondent's] assets*" and not assets belonging to any other party. On the other hand, the Commercial Court Additional Words must be taken to encompass such assets. However, the inclusion of those words could only be justified where there were proper grounds for believing that assets ostensibly held by the defendant on trust or as nominee for a third party in fact belonged to him: nothing in the judgment was intended to "*cast any doubt upon the established principles which underlie the grant of all freezing orders*" and "*in particular to the fact that the only purpose of such an injunction is to prevent the dissipation of assets which would otherwise be available to meet a judgment*." (It was on this basis that brackets were inserted around the words in the version now appearing in the Commercial Court Guide).

27. Solodchenko is one of a number of important recent appellate decisions where orders have apparently been made in the standard form without detailed consideration being given to the reach of the order at that stage. The appellate court has then focused on the meaning to be given to the order as a matter of construction, rather than addressing what as a matter of principle was the appropriate order. Whereas the exercises conducted have been comparable to exercises in statutory construction, the example orders have no such status and the intentions underlying them (to the extent material to their application or

meaning in any event) seem obscure, save for snippets of information such as those given by Patten LJ.

28. In Lakatamia, Rimer LJ said of the revised wording resulting from the CPR revision:

"*The question which those sentences might be said to raise is whether they operate to extend the definition of the defendant's 'assets' to include not just assets beneficially owned by him, but also assets not so owned. The answer is that they do not. The sole purpose of the two sentences is to spell out that a defendant's assets will include assets held by others that the defendant is entitled to dispose of as his own*."

29. Rimer LJ made the same point again in JSC BTA Bank v Ablyazov (No 10) [2014] 1 WLR 1414 at [103].

30. The application of the (Commercial Court) standard wording to interests under discretionary trusts was directly considered in Pugachev. At first instance ([2014] EWHC 3547 (Ch)), David Richards J observed that, whilst the purpose of freezing orders was to preserve assets so as to be available for enforcement, the standard form had "*come to be drafted in a way which may cast a wider net*". Similarly on appeal, in considering the effect of the words added by the CPR revision, Lewison LJ noted Patten LJ's suggestion in Solodchenko that the language would catch assets held by a foreign trust where the respondent retained control and observed (whilst declining to decide any point as to the general reach of the order):

"*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 Pattern LJ said, a Liechtenstein Anstalt*."

31. Lewison LJ went on to hold that, as a matter of construction and in particular having regard to the additional words in the Commercial Court standard form relating to trust assets, the "interest" of a discretionary beneficiary was caught

by the freezing order made in that case. It should be underscored that this was not a determination that the freezing order would ordinarily catch the underlying assets of the trust, as opposed to the narrow "interest" of the discretionary beneficiary in relation to the trust (whatever that may be).

32. The relevant effect of the words added by the CPR revision was again considered by the Supreme Court in JSC BTA Bank v Ablyazov (No 10) [2015] UKSC 64, albeit in the different factual context of the permissibility of drawing down a debt facility. Lord Clarke, with whom the other members of the court agreed, approached the matter purely as one of construction. He expressly disagreed with Rimer LJ's observation that the definition was confined to the Respondent's own assets. The whole point of the extended definition of assets, he held, is to catch rights which would not otherwise have been caught. In particular, the second sentence focuses not on assets which the respondent owns (whether legally or beneficially) but on assets which he does not own but which he has power to dispose of or deal with as if he did. This conclusion therefore appears to involve a rejection not only of Rimer LJ's analysis, but of the Court of Appeal's approach in both Lakatamia and Solodchenko. Whereas its basis is said to lie in what must have been intended by the revision of the CPR example order, moreover, this appears to be based on the slender account given by Patten LJ of the background to the change, rather than closer examination of what principles informed the revision.

33. The position therefore appears to have been reached where the respondent's mere control over a structure has been rejected as a basis for making orders against its constituent entities under the Chabra jurisdiction, and yet the freezing order directed at the respondent will usually catch those assets to the extent he controls them merely because of the way that the standard form has been drafted.

34. At first instance in Pugachev, David Richards J sought to justify dealings being restrained on the basis of evidence of mere control because, at this early stage, the true ownership position could not be known. The suggestion appears to be

that control can be treated as a proxy for ownership, at a stage of the litigation when the available evidence is likely to be limited.

35. However, that justification is (with respect) unconvincing, because control is a poor proxy for the issues relevant to whether a claim could ultimately be asserted to enforce against the assets, which is the relevant question. To take the example of a claim to the assets based on sham, the respondent's control of the structure at best addresses only one side of the equation and may be focused on entirely the wrong point in time. Nor is the appearance of control necessarily inconsistent with the existence of a structure that the law will (on its present state) regard as unimpeachable. Moreover, the freezing order jurisdiction already has developed means of catering for the limited evidence typically available at the stage of the application, in the form of the good arguable case threshold which is the subject of substantial jurisprudence. If that threshold cannot be met with respect to a particular asset, it is unclear why an order should be made at all with respect to it.

Consequences for disclosure

36. Nonetheless, the court's conclusion in Pugachev that a standard form freezing order catches dealings with the 'interest' of a discretionary beneficiary had limited practical consequence. The real focus of the decision was on what disclosure could be ordered concerning the trust's assets.

37. Indeed, it is frequently the case in international asset recovery cases that the disclosure usually described as 'ancillary' to the freezing order is in fact the most important aspect of the relief. This was a point noted by Lawrence Collins (as he then was) in 'The Territorial Reach of Mareva Injunctions' 105 LQR [1989] 262 (in an observation with which Steyn LJ expressed his agreement in Grupo Toras v Al-Sabah [2014] 2 CLC 636):

"*In those cases where an effective order can be made, it is likely to be the disclosure order which will be the most useful in practical terms. If proper disclosure is made of assets abroad, the plaintiff will be in a position to make*

an application in the relevant foreign court for an attachment. If the foreign court is in a 1968 Convention Contracting State, it is likely that the courts of that State will exercise an Article 24 jurisdiction to make provisional orders in aid of proceedings in England. If the State is not a Contracting State, then the same result will follow in those countries which would allow an attachment to be made in aid of proceedings pending in other jurisdictions; it may be that the number of such countries will be very small, and that in most countries it will be necessary to start fresh, parallel proceedings on the substance and obtain security in those proceedings.

The practical consequence is that it is really the Mareva injunction which is ancillary to the disclosure order, rather than the traditional relationship in which it was the disclosure order which was ancillary to the Mareva injunction. For the disclosure order will be the main remedy in England, and the Mareva injunction will, in the words of Nicholls L.J. in Babanaft, be a "holding" injunction, to give the plaintiff time to apply to the relevant foreign court for appropriate orders of attachment or the like."

38. On the basis that the discretionary beneficiary's "interest" is of a very limited kind, the disclosure ancillary to a freezing order restraining dealings with that interest ought, on principle, to be of similarly limited scope. Certainly, the requirements of policing such an order would not on the face of it justify an order for disclosure of information concerning the underlying assets of the structure or other aspects of its affairs, such as the identity of other beneficiaries and the nature of their interests or the details of transfers into the trust.

39. In justifying a far wider form of disclosure order, the Court of Appeal in Pugachev relied principally on CPR 25.1(1)(g), which provides a specific jurisdiction to the court to make 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*."

40. The provision was considered in Parker v CS Structured Credit Fund Ltd [2003] 1 WLR 1680, where Gabriel Moss QC, whilst not considering the applicable threshold in detail, stated that for the jurisdiction to make an order under these words of the subsection to arise it must be "*at least likely*" that there will be an application for a freezing order and continued (at [23]): "*In other words, the provision assumes that there is some credible material on which such an application might be based*."

41. More detailed consideration to the applicable threshold was given by Henderson J in Lichter v Rubin The Times, 18 April 2008. Having considered Parker, he observed (at [15]):

"The likelihood ... is not one that has to be demonstrated to any very high degree and certainly does not amount to a likelihood on the balance of probabilities. It seems to me that a reasonable possibility, based on credible evidence, should be sufficient to found the jurisdictional requirement of rule 25.1(1)(g) ."

42. The judge further observed (at [21]):

"But I do accept ... that rule 25.1(1)(g) is intended to provide machinery, in a suitable case, for the provision of information in advance of an application for a freezing injunction. Plainly a provision of that nature would lose its utility if it were necessary to demonstrate at that stage that a freezing order would, in due course, be granted. It is only necessary to show that a freezing order may be applied for, and whether or not the application would be successful is not a matter on which the court can form a view at this stage; it need only be satisfied that there are credible grounds for making an application if so advised."

43. In JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2016] 1 W.L.R. 160, the Court of Appeal approved both decisions and cited approvingly the passages referred to above. Lewison L.J. held that the threshold test for asking questions was not the same as the threshold test for freezing assets: if it were, the provision would lose its utility (at [52]).

44. In Pugachev, the jurisdiction was relied on to order disclosure of information about trust assets after the making of a freezing order against the cause of action respondent and on the basis of possible applications against the trust entities. In Gerald Metals v Timis [2016] EWHC 2136 (Ch), such an order for disclosure of information about trust assets was made prior to the grant of any freezing order. Rose J held that it is no basis for resisting the application that, since the respondent will have been tipped off regarding the putative freezing order by the prior disclosure order, no application for a freezing order could ever be made.

45. The remedy is a discretionary one. In exercising it (and, in particular, fashioning the width of the disclosure order) in the context of shadowy offshore structures, the court will doubtless have regard to the scope of the freezing order which might subsequently be made. Yet the discretion appears a wider one, and the remedy less draconian, than applies to the freezing order itself. It is to be anticipated that greater use will be made in future of this hitherto somewhat neglected, but potentially highly useful, jurisdiction.

JAMES MATHER

Serle Court

23 May 2017