VOISIN LAW

Beneficial Ownership in Jersey: The Importance of Transparency | 1

"There is...a very strong public interest in the Island being able to demonstrate that it has the ability to identify the beneficial owners of companies or the beneficiaries under trusts...This Court should not recognise any arrangement which detracts from the ability of regulators or law enforcement authorities to do so".

So spoke the Royal Court in the recent case of Al Tamimi v Al Charmaa [2017] JRC033. The case demonstrates the importance of public policy concerns in relation to the Island's financial regulatory systems.

The dispute arose out of the acrimonious divorce proceedings of the Plaintiff, Essam Abdulamir Al Fadhi Al Tamimi and the Defendant, Rouzin Marwan Al Charmaa. It concerned the ultimate beneficial ownership of two Jersey companies which were incorporated during the marriage and which owned valuable London properties.

The Defendant was the sole registered shareholder of the Jersey companies. The Plaintiff claimed that he was the ultimate beneficial owner and that the Defendant was merely holding the companies' shares on his behalf as a nominee or as a bare trustee: in other words, she was obliged to deal with the shares as he directed. In the alternative, the Plaintiff sought a declaration that the Defendant held the shares for him on resulting trust (that the shares in the companies were created on behalf of the Plaintiff and transferred to the Defendant) or on constructive trust (that it was unconscionable for the Defendant to retain the shares) or that the Defendant had been unjustly enriched at the Plaintiff's expense given that the Plaintiff, unlike the Defendant, had provided finance to the companies.

Papers lodged with the Jersey Financial Services Commission stated that the Defendant would be the legal owner of the companies on their incorporation. The Court stressed that there was an "obligation" on those applying to the JFSC for the incorporation of a company to make "complete and accurate answers". A dishonest failure to do so would, in the Court's view, amount to a criminal offence.

The burden of proof lay on the Plaintiff to show that the Defendant was not also the beneficial owner of the shares. In support of his case, the Plaintiff relied upon, amongst other things, a power of attorney granted by the Defendant in his favour authorising him to deal with the affairs of the companies on her behalf. However, the Court was not satisfied that a nominee arrangement existed. It noted the rebuttable presumption under Jersey law that arrangements amongst family members do not give rise to legally binding obligations.

The Court acknowledged that there may be occasions where it is obliged to find that shares are held on nominee arrangements, despite their registered ownership. However, it noted that "deliberately misleading or procuring, attempting or conspiring to mislead the JFSC on the incorporation of companies in the Island is capable of being a criminal offence and the Court is bound to be slow in reaching a conclusion that one or more parties before it in a civil case have in fact a potential criminal liability."

The Court considered the test set out in Patel v Mirza [2016] 3 WLR 399, namely, whether the public interest would be harmed by the enforcement of an illegal agreement. It referred to the investigations carried out in Jersey by international organisations in the past eleven years and noted that those bodies had been "completely satisfied at the ability of the regulators and law enforcement authorities to identify

the persons beneficially entitled under trusts, foundations, companies or limited partnerships." On this basis, the Court concluded that the public interest "has very clearly rested in the Island authorities being able to demonstrate that ability" to international organisations making enquiry of them. Accordingly, even if the Court had found the nominee arrangement which the Plaintiff sought to establish to be valid, it would have been contrary to public interest to enforce it.

The judgment conveys a clear message that the Court will not uphold arrangements made with the intention of deceiving the JFSC as to beneficial ownership – and those who make such arrangements risk facing criminal sanctions.