

Arrangements to deceive as to beneficial ownership will not be upheld - Al Tamimi v Al Charmaa [2017]

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Summary

In this case, the Court made it very clear that any arrangement which detracts from the ability of regulators or law enforcement authorities to identify beneficial owners of companies, or beneficiaries of trusts, would not be recognised on grounds of public policy.

Facts

The parties to the case were a divorced couple who had been married in the United Arab Emirates under Sharia law in 2002 and subsequently divorced according to the laws of the United Arab Emirates in early 2015.

The dispute between them was as to the beneficial ownership of two Jersey companies: First Grade Properties Limited (**First Grade**) and Jorum Limited (**Jorum**) (together the **Companies**). The Companies were incorporated in 2007 (during the marriage) and owned UK property.

The evidence showed that the information given to the company incorporation agents in Jersey and to the JFSC showed that the owner of the Companies on incorporation would be the former wife (**Rouzin**). The banking documentation also showed this to be the case, and board minutes of the Companies recorded Rouzin as being the beneficial owner.

However, the former husband (**Essam**) asserted that he was the ultimate beneficial owner of

the shares in the Companies and that Rouzin held the shares as his nominee on the basis of an oral agreement or understanding between the two of them. In support of his case, Essam argued that he provided finance to the Companies both directly and by his negotiation of loans to the Companies from banks, which he personally guaranteed. He was also granted a power of attorney to act on Rouzin's behalf in relation to (among other things) the Companies.

Essam also sought to argue that the shares were either held on trust for him, or that Rouzin had been unjustly enriched and should account to him for that (**Trust Claims**).

The Judgment

The Court confirmed that the burden of proof lay upon Essam to show that he was the beneficial owner of the Companies, and concluded that he had not done so.

On the evidence, the Court was not satisfied that there was any agreement by Rouzin to hold the shares as nominee. In any event, in this regard the Court also noted that in Jersey there is a rebuttable presumption that family arrangements do not create legally binding contracts and no such legally binding contract was suggested here.

The Court also rejected the Trust Claims.

- No trust could have arisen on incorporation, as the Court did not believe that Essam would have misled the JFSC as to who the beneficial owner was intended to be. The suggestion that the Power of Attorney gave Essam a power of disposition of the shares was also rejected: he could not use the Power of Attorney to dispose of Rouzin's beneficial interest without her consent..
- No "resulting trust" arose (a type of implied trust that may arise where property is transferred for no consideration in circumstances where there is no presumption of advancement). Here, no property had been transferred – Essam had not "transferred" the shares to Rouzin – and in any event a presumption of advancement arises between a husband and wife.
- No "constructive trust" arose (a type of implied trust that may arise where (a) someone makes or receives a gain from a breach of trust; or (b) equity operates on the conscience of the legal owner by reason of their unconscionable conduct). As Essam had not established his case for an express trust or nominee agreement, the constructive trust claim necessarily failed as there was no inequitable conduct to found such a claim.
- While Rouzin had undoubtedly been enriched, given that she made no financial contribution to the acquisition of the UK properties or the incorporation of the Companies, the enrichment was not unjust. The Court accepted Rouzin's explanation that the incorporation of the Companies and the acquisition of the properties was carried out so as to secure Rouzin's future. Rouzin and Essam had briefly separated in 2005 after Essam had an affair,

and Rouzin only agreed to take Essam back if her future was secured. Thus it was that the shares in the companies were issued to her and finance provided.

The Royal Court also noted that it would not, in any event, have upheld such an arrangement on the basis that it would be contrary to public policy. The Court considered the test set out in the UK Supreme Court decision of Patel v Mirza [2016] 3 WLR 399 in relation to whether or not to uphold an illegal agreement. The Supreme Court had stated that the Court should assess whether the public interest would be harmed by the enforcement of the illegal agreement, which in turn requires consideration of the underlying purpose of the prohibition which has been broken, and whether those purposes would be enhanced by the denial of the claim.

On Essam's case the JFSC was apparently deliberately given incorrect information. The Court noted that a dishonest failure to make complete and accurate answers to incorporation questionnaires would amount to a criminal offence.

The Court stated that:

"There is a public interest – 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. In our judgment the Court should not recognise any arrangement which detracts from the ability of regulators or law enforcement authorities to do so ...".

Comment

As the Court noted, it is vital to the Island's international reputation that the Island's regulators and law enforcement authorities are able to identify the persons beneficially entitled under trusts, foundations, companies or limited partnerships. The Island's regulatory and enforcement systems have been examined at least twice by the International Monetary Fund and once by Moneyval in the last eleven years, and on each occasion the investigating body has been completely satisfied in this regard.

This judgment sends a very clear message that the Jersey Court will not allow those regulatory and enforcement systems to be undermined by arrangements designed to mislead the relevant authorities. Moreover, the judgment reiterates that anyone attempting to do so faces criminal sanction.

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