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Insights - 24/02/2020

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If a trustee finds that one of its beneficiaries has been the subject of a court judgment for the payment of a sum of money, should the trustee have to tell the holder of the judgment about the assets of the beneficiary so that the creditor can go after those assets to satisfy the judgment? You are right to think that the answer is one of the following:

1. never: because the affairs of the trust and the beneficiary known to the trustee are confidential and the reputation of the industry depends upon that expectation
2. Yes but only where the beneficiary has been wilfully evading their creditor and has been using the trust as part of that effort (the restrictive test)
3. Yes whenever it can be shown that there is reasonable prospect that the trustee has information that will help track down the beneficiary's assets, whether or not there has been any attempt by the beneficiary to use the trust to avoid paying their creditor (the simple test)

What is clear from the judgments of the Royal Court discussed below is:

1. There is no overriding right to privacy as suggested at A above (which has got to be right)
2. The Court has granted these disclosure orders using the restrictive test at B) above but in other cases has used the simple test in C) above. It must be the case that there should be only one legal test that a creditor has to pass in order to get such an order but, at present, it is unclear from the cases which of B and C is the correct one.[1] Three important questions arise:

- How has this happened?
- Which is the better or right test?
- Does it matter which is the right test?

How have we ended up with two tests?

The reason why we may have the present lack of clarity is that the matter has not, as it were, been "fought out" in court and given the lack of clarity, different lawyers have succeeded using different tests. To have the issue fought out requires two parties, so who is it that has an interest in resisting these orders? More often than not, the beneficiary debtor has disappeared leaving the poor trustee holding the baby.

From the trustee's point of view the perfectly understandable position is often taken that it will not consent to or oppose the granting of the order sought, so the order is then made without too much stress testing as to the legal basis. The trustee generally has little incentive to risk its own funds or trust funds arguing over such matters.

The facts of the two Jersey cases that had different results are as follows:

The case using the simple test was a judgment of 7 February 2018 in the case called *In the matter of the Brazilian Trust*[2]. In this case the applicants sought disclosure orders against a Jersey mortgage lending company Jersey Home Loans Limited, seeking disclosure of information about Jersey-based assets of the judgment debtor. The substance of the application was unopposed and was granted by reference to the Jersey authority of the case of *Jomair Leasing-v-Hourigan*[3] where the court's jurisdiction to order disclosure to aid enforcement of a judgment was said to be by reference to the simple test set out in the judgment of Coleman J in the English case of *Gridrxsime Shipping Co-Limited-v Tantomar –Transportes Maritimos LDA*[4] (which did not involve any third party) where he said that *"...it is just and convenient that the judgment or award creditor should normally have all the information he needs to execute the judgment or award anywhere in the world"*.[5]

In that court the simple test of granting an order where the interests of justice required it was applied. For some this might be regarded as too wide a test and which allows a judgment creditor to require disclosure from anyone who knows of a debtor's assets regardless of their relationship to him. Or for our purposes to, metaphorically speaking, bash down a trustee's door for the same reason.

However in the other Jersey case of the same year, *Riba Consultaria Empresarial Ltd v Pinnacle Trustees Limited,* [6][the Plaintiffs did not rely it seems upon the *Jomair Leasing* simple test but rather the more difficult restrictive test (broadly that at C above) which has come to be known as the *Norwich Pharmacal* test or jurisdiction (after the famous English House of Lords case of that name which gave rise to a range of information gathering rights against third parties in

order to promote justice).

The claimants in the *Riba* case were after information from the Jersey trustee about the affairs of certain companies owned as trust assets where the judgment debtor was one of the beneficiaries. The court there set a threshold legal test for the Plaintiffs of showing that there was a reasonable suspicion that the trustee had become mixed up in wrongdoing by the judgment debtor who was a beneficiary of the trust. The wrongdoing by the judgment debtor was held to have included the disposal of assets through the companies owned by the trust, with a view by the debtor to avoiding payment of the judgment debt. Thus the rationale was that the companies had been used by the judgment debtor as a means of evading the payment of the judgment debt.

But which of these two tests is right and does it matter?

Perhaps we have a clue as to what may be the correct approach from the judgment in the English case of *NML Capital Limited v Chapman Freeborn Holdings and others*[7]. NML Capital was a judgment creditor of the Republic of Argentina. The information holder was an English company called Chapman Freeborn, specialising in aircraft charter broking. In order to avoid its own aircraft being seized by its creditors while out of Argentina the Republic chartered an aircraft from Chapman Freeborn. NML found out about this charter soon after it had begun and that US$ 440,000 was due to be paid 10 days after completion of the charter. The court had to decide whether it was appropriate to compel disclosure by Chapman Freeborn of the bank account or accounts from which those sums had been or would be paid.

The lead judgment of Lord Justice Tomlinson in the case opens with the following pithy introduction that goes to the nub of the public policy issue at the heart of these cases; namely the need for a threshold test to balance the strong public interest in the preservation of confidential business relations on the one, hand and the need for courts to assist judgment creditors to recover sums due; He began:

"This appeal is concerned with the scope of the Norwich Pharmacal jurisdiction. It arises in the context of an attempt by a judgment creditor to enforce a judgment against a judgment debtor determined to resist enforcement. If successful, it would [...] be the first case in which a bona fide company doing business with a judgment debtor would find itself on the receiving end of a Norwich Pharmacal order merely to assist a judgment creditor in enforcing his or her judgment."

As to the appropriate threshold test Lord Justice Tomlinson held (in an non-binding way because the issue was not central to the result in the case) at paragraph 25 of the judgment that *"...if the Norwich Pharmacal jurisdiction is not to become wholly unprincipled, the third party must be involved in the furtherance of the transaction identified as the relevant wrongdoing".* And that *"The third party has to have some connection with the circumstances of the wrong which enables the purpose of the wrongdoing to be furthered. It follows that it is important to analyse*

with some care in what precisely lies the alleged wrongdoing. There is nothing inherently wrong in chartering an aircraft, unless it be said that any trading by a judgment debtor which involves using his assets for that purpose rather than satisfying a judgment debt is in itself wrongdoing. However I reject that proposition. It would lead to a jurisdiction of absurd width."

Because the judge decided that such an order was not justified on the facts he did not have to decide the question of whether the Norwich Pharmacal jurisdiction should be available post judgment in aid of execution at all. What he did say was that it will be unlikely that the jurisdiction could be engaged short of involvement by the information holder in something which amounts to wilful evasion by the judgement debtor and that the mere non-satisfaction of a judgment debt is not wilful evasion of it.

Where does this leave trustees? The simple test means that simply having information about a judgment debtor's assets may give rise to an obligation to give disclosure and an order to do so. If the restrictive test is applied the applicant for the disclosure order will have to show that there is at least a reasonable suspicion that the trustee has done something (albeit unwittingly) to facilitate the wilful evasion of the judgment debt by the beneficiary.

Does the simple test present an *"absurdly wide"* right to information as the English court of appeal suggests? It is time for the argument to be resolved in Jersey; so we wait for the right case to resolve the point. The BVI and Cayman courts have gone down the route of using the restrictive test.

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[1] It seems that the courts in England have not finally resolved this dilemma as there are cases where the simple approach has been relied upon to grant other types of disclosure orders against third parties; see *JSC BTA Bank v Solodchenko* [2011] EWHC 843 which goes back to the foundational English case of *A J Bekhor v Bilton* [1989] Ch 289 which is also the origin of the principles underlying the Jersey cases that take the simple approach as explained in the article by the author found in the Jersey and Guernsey Law Review in 2012 entitled "*Third party Disclosure of a Debtor's assets: What are the Limits*?" found at https://www.jerseylaw.je/publications/jglr/Pages/JLR1202_Journeaux.aspx

[2] [2018]JRC 032

[3] [2011] JRC 042

[4] [1994] 1 WLR 299

[5] The same simple test was applied by the same judge in the same year in the case of Crociani v Crociani [2018] JRC230C

[6] [2018]JRC033A

[7] [2013] EWCA Civ 589

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