

EAGERLY ANTICIPATED TRIAL COMPROMISED ON DAY ONE

DALEMONT LIMITED V SENATOROV AND OTHERS

1. Two central questions lay at the heart of the trial in *Dalemont* which was due to commence on 30 September 2013, but which did not go ahead following a concession of the claim by Mr Senatorov less than an hour before the trial was due to start. The first was a question of fact; the second of law. Firstly, was the corporate structure concerned, headed by a Jersey Foundation, established by Mr Senatorov for the purpose of defeating his judgment creditor in Russia? Secondly, was it possible for the Plaintiff to enforce its judgment against assets within the structure, in which it was argued that Mr Senatorov held no interest by virtue of the Foundations (Jersey) Law 2009?
2. In brief the background facts are as follows. Having provided personal sureties on commercial loans made in Russia, Mr Senatorov failed to pay up. The Plaintiff, assignee of the debt, obtained judgment against him for US\$44 million in Russia in 2010. Contemporaneously Mr Senatorov restructured his personal portfolio of commercial property assets, placing them into a structure headed by a Jersey Foundation, which held these assets through layers of holding companies incorporated in Cyprus and the BVI.
3. In November 2011 the Plaintiff commenced proceedings in Jersey, Cyprus and the BVI in an attempt to enforce against the assets which had been placed within the structure. For almost two years Mr Senatorov resisted these claims on the basis that he had established the structure for legitimate reasons (and the timing was merely a coincidence) and that as a matter of law these assets did not belong to him and could not be used to satisfy the judgment debt.
4. The Plaintiff's case was that the evidence that Mr Senatorov had restructured his assets to evade his judgment debts was overwhelming, and that Mr Senatorov had provided no evidence to the contrary, other than his own word. His claim that the restructuring had unrelated commercial purposes behind it was not supported by a single witness or document, and he had no good reasons for this lack of evidence. Although following the concession of the Plaintiff's claim this is a question which no longer fell to be determined, in his judgment on costs the Deputy Bailiff found as follows[at 21]:

"If it were necessary to do so, I would conclude on the balance of probabilities, and on the evidence which was before me in the Court bundles, that the First Defendant intended to put the assets out of the reach of its creditors when the structural changes were introduced between June and August 2010"

5. In assessing the basis of costs he continued;

"In my judgment, Advocate Redgrave is right to submit that the whole defence, from the very outset, was based upon a lie. That is a sufficiently unusual feature which takes this case out of the ordinary. It is not a matter of a legitimate, although wrong, view being taken of the law or of the facts. It is a case where there has been the deliberate advancing by the First Defendant of a position which he knew to be untrue. From the outset, the costs incurred have been wasted. The First Defendant has secured by the transfers and changes in this structure and by his defence of these proceedings, a two year delay in settlement of his debt in full. There is no reason in my judgment why the Plaintiff should have to bear the difference between standard costs and indemnity costs in the circumstances. The whole defence was an abuse of the procedure of this Court."

6. The legal aspect was somewhat more complex. The Plaintiff's primary claim at the time of trial was that the assets in the structure were held on bare trust for Mr Senatorov because he had never disposed of his beneficial interest in them. There was therefore a resulting trust for his benefit. The Foundation was merely Mr Senatorov's nominee, and his beneficial interest in the assets held legally within it could be the subject of enforcement. The judgment of Lord Sumption in *Prest v Petrodel Resources Ltd and Others [2013] UKSC 34* explained that such an analysis rationalised a number of decisions previously thought to involve piercing the corporate veil. The Plaintiff alternatively sought relief under a Pauline claim for setting aside the transactions placing the assets into the Foundation structure, and finally a claim for piercing the corporate veil if no other remedy were available, on the basis that the Foundation structure was established in fraud on creditors and the Court should unravel such fraud to the extent necessary to do justice.

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7. As a result of the last-minute concession, *Dalemont* poses more questions than it answers. Had the Plaintiff succeeded at trial the court would have had to determine which of its pleaded claims was appropriate as a matter of fact and law. The decision would no doubt have represented a leading authority both in relation to these causes of action generally as well as their specific application to Foundations – which are a recent innovation in Jersey law.
8. The concession indicates acceptance by Mr Senatorov that although the assets were legally transferred into a Foundation, because of the gratuitous nature of the transfer and his retention of control over and benefit from the assets, a resulting trust was created. This reflects the unilateral intention of the transferor to retain the beneficial ownership. It follows that the charter and regulations of the Foundation, though purporting to govern both the legal and beneficial ownership of the assets, represented a façade concealing the true nature of the arrangement as far as Mr Senatorov was concerned. An alternative label which could be ascribed to such a device is a sham; however this was a unilateral sham, it not being alleged that the Qualified Member of the Foundation was complicit.
9. This perhaps begs the question whether the *Re Esteem* definition of sham in the case of trusts, requiring a mutual intention by settlor and trustee to deceive the world and hold the property on terms other than those set out in the documents, should survive, or at least whether it should be applied in the case of a foundation.

William Redgrave
Advocate

Charles Sorensen
Associate

PO Box 842, 2 Mulcaster Street, St Helier, Jersey JE4 0US
Tel: +44 (0)1534 766254 Fax: +44 (0)1534 737355
Email: enquiries@bakerandpartners.com

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