

legalupdate

YOUR UPDATE OF
REGENT CHANCERY &
COMMERCIAL LAW

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Jane Evans-Gordon

Munby J has produced a comprehensive and masterful analysis of the law on shams and nuptial settlements in *Hashem v Shayif* [2008] EWHC 2380 (Fam). The case started as a claim for ancillary relief in which the wife alleged that two properties in England, registered in the name of a Jersey company ('Radfan'), were really owned by the husband. Those properties were the only assets connected with the husband (who was a Saudi citizen and resided there) that were within the jurisdiction.

The husband:

- > had provided all capital injected into Radfan;
- > had paid for all the issued shares, including those allotted to his four children from other marriages;
- > had received the proceeds of sale of three properties formerly owned by Radfan;
- > had been a director for most of Radfan's existence; and
- > had been heavily involved in all decisions about the acquisition and disposal of property and in matters requiring significant expenditure.

The children were never formally involved in the management of Radfan but held 70% of the shares. Radfan was acquired and all the English properties purchased before the husband met the wife.

Wife's claim

The husband effectively withdrew from the proceedings, which were fought largely between the wife and Radfan, although the children were also parties. At trial the wife put her claim to Radfan's properties on four different bases:

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- > Radfan held the properties on a constructive trust for the husband;
- > Because the shares held by the children were purchased by the husband and given to the children, their shareholdings were subject to resulting trusts in favour of the husband;
- > Radfan was the husband's alter ego, the other shareholders being simply his nominees, so the court could pierce or lift the corporate veil and make orders directly against the two properties; and
- > Finally, and in the alternative to all the above, the properties should be regarded as having been settled on the husband (or on the husband and the wife) so that there was a 'nuptial settlement' within section 24(1)(c) of the Matrimonial Causes 1973 Act ('the MCA') and the court should accordingly exercise its power to vary the settlements in the wife's favour.

Munby J emphasised that the law applicable in these cases is the same in the Family Division as in the Chancery (or any other) Division: the outcome of a case, he said, must be the same, regardless of the Division in which it is started. The case is useful for its discussion of constructive and resulting trusts but the first two issues were decided in favour of Radfan on established principle and fact and will not be discussed further here. The decisions on the other two issues are of much more interest.

Shams

The wife did not assert a sham within *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (make-believe transactions) and the judge observed that he doubted whether a registered company could ever be a sham in that sense. The wife's case was that Radfan was a façade or alter ego of the husband, as in *Mubarak v Mubarak* [2001] 1 FLR 673. Munby J set out six principles drawn from the cases:

- > Ownership and control of a company are not sufficient to justify piercing the corporate veil.
- > Even where there is no unconnected third party, the corporate veil cannot be pierced merely in the interests of justice.
- > To pierce the corporate veil there must be some impropriety involved.
- > The impropriety must be linked to use of the corporate structure to conceal or avoid liability.
- > Accordingly, the corporate veil can only be pierced when the wrongdoer has control of the company and is (mis)using it to conceal his wrongdoing.
- > It is not necessary that the company be established for the purpose of the wrongdoing; it could subsequently be used as a façade in relation to a particular transaction. The veil will only be pierced so far as is necessary to provide a remedy for the relevant wrong and not for all purposes.

The wife failed to establish ownership or control by the husband. More importantly, perhaps, she also failed to establish any relevant impropriety in the use of the company to own properties in England. Radfan was established for a proper purpose and traded for many years, letting out its properties. The breakdown of the marriage could not, of itself, turn Radfan into a façade or sham. In particular, Munby J rejected an argument that impropriety was not required where the assets of a company (or trust) were owned and controlled by one party because the law would regard 'that as done as ought to be done'. That principle has no relevance to piercing the corporate veil.

Varying a nuptial settlement

There are copious authorities on the nature of a nuptial settlement within section 24(1)(c) of the MCA. The questions to be answered are:

Article continued >



The Family Division ... will not ride rough-shod over genuine third-party interests.



- > Is there a nuptial settlement at all?
- > If yes, what property is comprised in the settlement?
- > How should the court exercise its discretion to vary it?

What is a nuptial settlement

Absent a formal document, the answer to the first question is essentially one of fact. A nuptial settlement has two essential ingredients: (i) an intention to make continuing and not fleeting or temporary provision for one or both of the spouses and (ii) in their capacity as spouse.

The provision of a matrimonial home is a classic example. Here one of the properties had no connection with the marriage between the parties at all and made no provision for them as spouses; as to that property, therefore, there was no nuptial settlement. But after the wife had broken into the other property and occupied it as her home, Radfan agreed that she could continue living there, on terms that the husband paid all outgoings until he resolved matters. Although it was originally envisaged that this would be a temporary arrangement, in fact it carried on for some years. As the provision of a home was continuing and was for the wife as a spouse, Munby J (with some hesitation) held that there was a nuptial settlement.

Property in settlement

It was argued that the *entirety* of Radfan's interest in the property fell into the settlement. Lord Nicholls said in *Brooks v Brooks* [1996] 1 AC 375 that '... the court's jurisdiction extends to all the property comprised in the settlement. Thus it includes any interest the settlor thenceforth may have in the settlement.' Section 1(4) of the Settled Land Act 1925 ('the SLA') also provides that any interest not disposed of by a settlement and remaining in or reverting to the settlor falls within the settlement.

Munby J rejected the argument. As a matter of principle, it was 'an extraordinary proposition' to say that where A grants a married couple a revocable licence or tenancy to occupy Blackacre this meant that the court had power to deal with the fee simple. There was authority that where a rentcharge formed part of a marriage settlement this did not bring within the settlement the land on which it was charged.

The provision in the SLA was expressly confined to the SLA itself, was designed for wholly different purposes and dealt with successive, not concurrent, interests in land. The particular facts of this case did not even point to a life interest but to a licence determinable on reasonable notice.

Discretion

On the question how the court's discretion should be exercised, there is little judicial guidance. Munby J set out five principles governing the court's jurisdiction to vary nuptial settlements:

- > The court's discretion is unfettered and, in theory, unlimited.
- > The starting point is section 25 of the MCA, in particular the matters listed in section 25(2)(a)-(h).
- > The objective is to be as fair to both sides as far as is possible, looking to the effect of the order as a whole.
- > The settlement should not be interfered with any further than is necessary to do justice between the parties.
- > The court ought to be very slow to deprive innocent third parties of their rights under the settlement.

Munby J varied the settlement to require Radfan to give the wife six months' notice to quit from the date of the order. There is clearly no power to increase the property in the settlement by, for example, requiring the trustees or the settlor to bring further moneys into the settlement in order to pay or discharge a mortgage. Munby J stated that while he readily accepted that the position of the wife was very unfortunate, that was no reason for making an unprincipled award at the expense of Radfan or the children.

Summary

This case sets out in clear terms the principles applicable to façade-type shams and those governing the court's powers under section 24(1)(c) of the MCA. It demonstrates that, contrary to the belief of some, the Family Division does operate on principle and authority and will not ride rough-shod over genuine third-party interests. While anecdotal evidence suggests that this is not

always true, the move towards public hearings and judgments can only assist.

Jane Evans-Gordon appeared for both Radfan and the children in *Hashem v Shayif*. She has a general chancery practice covering contentious wills and probate, real property and company and insolvency. According to *Chambers UK 2009* she is a 'pleasure to deal with and is good on her feet'.

jane.evans-gordon@newsquatchambers.co.uk



Nicholas Le Poidevin

Serving abroad in trust disputes

Trust disputes often involve foreign defendants and before any litigation in England can get off the ground the claimant will have to think about how the proceedings are going to be served. There are two sets of rules, though both may apply to different defendants in the same proceedings. They were recently considered by the Court of Appeal in *González Gómez v Gómez-Monche Vives* [2008] EWCA Civ 1065, on appeal from Morgan J at [2008] 3 WLR 309.

Non-EU defendants

If a defendant is based outside the EU, then the rules for service out of the jurisdiction are those in CPR rule 6.20, which requires obtaining the permission of the court. The only provision specifically designed for express trusts is rule 6.20(11), which allows for service on a trustee



The Civil Jurisdiction and Judgments Order 2001 ... says that a trust is domiciled in England if English law is the system of law with which the trust has 'its closest and most real connection'. What that meant was disputed in Gómez.



of a trust (not a beneficiary or anyone else), where the proper law of the trust is English law and the claim is for a remedy 'which might be obtained in proceedings to execute the trusts of a written instrument'. (The wording is odd but *Gómez* confirms that it must cover a claim for breach of trust.)

If there is an English-based defendant, however, it may also be possible to bring in the overseas defendant as 'a necessary or proper party' under rule 6.20(3). Claims about trusts created by contract, about constructive trusts and about restitution may come within other provisions (rule 6.20(5), (14), (15)).

EU defendants

If a defendant is based within the EU, then CPR rule 6.20 does not apply and the rules for service out of the jurisdiction are those in Council Regulation 44/2001. The general rule is that in art 2: defendants are ordinarily entitled to be sued where they are 'domiciled', a term which in this context roughly means habitually resident (art 59 and Civil Jurisdiction and Judgments Order 2001, Sched 1, para 9). As with the CPR, an EU defendant can also be sued where another defendant is domiciled (art 6(1)).

But the Regulation makes a number of exceptions for special cases. One is for trusts. Art 5(6) allows service on a defendant domiciled elsewhere in the EU who is sued:

'as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled'.

The decision in Gómez

The decision in *Gómez* was mainly concerned with art 5(6). The trust was governed by English law. Three sons, who were residuary beneficiaries, alleged that their mother had been overpaid income and capital by the trustee. They sued both her and the present and former trustees for breach of trust. All the beneficiaries were domiciled in Spain and the trustee defendants were spread between the BVI, Liechtenstein and Jersey. There was no doubt that mother was entitled to

some income, if only under a resulting trust in favour of the settlor's estate, as the trusts were non-exhaustive. The sons said that she had wrongly had it all. The claim against her was to ascertain her entitlement and to recoup any overpayment.

Questions for court

The claim form was served on her in Spain, in reliance on art 5(6), and she challenged the jurisdiction of the English court. The main questions for the court were:

- > Was the trust 'domiciled' in England; and
- > Was she being sued 'as ... beneficiary'?

Where trust was domiciled

Art 5(6) requires the trust to be domiciled in the member state where the proceedings are taking place. The Regulation leaves it to the local law to determine where a trust is domiciled (art 60(3)). The idea that a trust has a domicile at all is novel to English law, so a new rule had to be invented here to make the Regulation work. The Civil Jurisdiction and Judgments Order 2001, Sched 1, para 9 says that a trust is domiciled in England if English law is the system of law with which the trust has 'its closest and most real connection'.

What that meant was disputed in *Gómez*.

The Court of Appeal held that while a choice of English law might not be conclusive, it was very difficult to see what other circumstances would be sufficient to outweigh it. The fact that, in *Gómez*, the trust was in practice administered in Liechtenstein was not enough. Trustees have to be intimately aware of their responsibilities under the general law applicable to the trust; resort to the law governing the trust is central to their responsibilities. So the trust, having English law as its proper law, was domiciled in England.

Whether defendant sued 'as beneficiary'

Then it had to be decided whether mother was being sued as beneficiary within art 5(6) of the Regulation. The argument that she was not was essentially that her sons' very complaint was that she had been overpaid, *ie* that the money paid to her had *not* been paid to her as beneficiary: she was not entitled to the money claimed.

The Court of Appeal drew attention to an authoritative report by a Professor Schlosser, commenting on the scope of the predecessor of the Regulation. The court held that she was being sued as a beneficiary because it was accepted that she was a beneficiary and the claimants were suing her for sums which she had received by way of overpayment of her entitlement. The relief claimed was an account of all moneys which she had received, including those to which it was conceded she was entitled, and that was a necessary preliminary to identifying the moneys to which she was entitled. She was sued because she had been treated as a beneficiary by the trustees and by herself, and she actually was a beneficiary. That was the only basis on which she could claim to retain any of the moneys she had been paid. The claim involved, and arose out of, problems arising in connection with the internal relationships of the trust rather than its external relations, a distinction drawn by Professor Schlosser.

General

If a claimant falls outside art 5(6) of the Regulation he cannot sue in England at all should the EU defendant object. Conversely, if he falls within that article he can serve English proceedings on the EU defendant as a matter of right: there is no need to ask for the court's permission.

The decision is significant because interest in trusts in Continental Europe is on the increase: trusts have attained some popularity in Italy, and France introduced legislation providing for trusts last year. Cases on facts similar to those in *Gómez* will become more frequent and the jurisdiction of the English court under the Regulation is likely to be invoked more often.

Nicholas Le Poidevin appeared for the successful appellants in Gómez. His practice is largely contentious and the focus is on trusts, wills and estates, and real property, together with the associated professional negligence and conflicts of laws. Chambers UK 2009 describes him as 'phenomenal on the law'.

nicholas.lepoidevin@newsquarechambers.co.uk



John Eidinow

In *Breakspear v Ackland* [2008] 3 WLR 698, decided recently by Briggs J, the effective settlor of a lifetime discretionary trust gave a letter of wishes to his trustees and supplemented it orally. Some years after his death, three of his children, who hoped to establish what they might expect to receive from the trust, asked to see the letter of wishes, the existence of which had been revealed to them by the trustees. The trustees refused.

Disclosure of letters of wishes

Most trust practitioners will at some point have had to address questions about such 'letters of wishes', that is, documents addressed to the trustees of discretionary trusts containing expressions of the settlor's wishes about the ways in which the trustees might exercise their distributive discretions. Are they documents beneficiaries have a right to see? Are they documents that trustees have a right to withhold? On what basis can trustees be made to disclose them to their beneficiaries? (The last question is put in that form, because it does not seem to be doubted that trustees may reveal such documents or their contents to their beneficiaries, if they choose to do so.) Although these questions have been examined judicially in New South Wales, Jersey, New Zealand, and Guernsey, they had not, before *Breakspear*, been the subject of analysis by an English court.

There is, as Briggs J observed, an 'inevitable tension' between the advantages of keeping letters of wishes confidential and the advantages of requiring them to be disclosed. If they are confidential, settlors will be encouraged to use them to communicate to their trustees matters which it is desirable the trustees should know, but which would cause family controversy and upset if published; on the other hand, beneficiaries who properly wish to monitor the trustees' performance of their fiduciary duties and hold them to account, may be hamstrung by not knowing what the settlor has told the trustees and asked them to consider. One solution would be to treat the question of disclosure each time it arose not as one involving issues of principle, but as one

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invoking the case-by-case discretion of the court. Rightly, Briggs J regarded this as approach as undesirable: settlors, trustees, and beneficiaries would have no idea where they stood, and an increase in litigation would be the inevitable consequence – not to speak of the point that equity without principle is not equity at all.

Commentators have been divided over the hierarchy of principles involved: some have weighted the argument towards disclosure, stressing the importance of enhancing the basic accountability of trustees to beneficiaries; others (the editors of *Lewin*, for example) have been more cautious. The question is complicated by the need to determine the effect of the Privy Council's decision in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, in which the Board rejected an analysis of beneficiaries' rights to disclosure as based on a proprietary right in favour of an analysis emphasising the court's supervisory jurisdiction over trustees, and the interrelation of that case with the well-known (if imperfectly understood) authority of *Re Londonderry's Settlement* [1965] Ch 918 (CA).

Governing principles

Briggs J came to five conclusions of principle:

- > The proprietary theory of access to trust documents (ie, that beneficiaries are entitled to trust documents because they own them in equity), often thought to have been enunciated by the Court of Appeal in *Londonderry*, was in fact regarded by that court as unsatisfactory. Relying on the 'virtual unanimity' of common law jurisdictions, he felt able to hold that it was not good law.
- > The principle that clearly emerges from *Londonderry* is that 'the process of the exercise of discretionary dispositive powers by trustees is inherently confidential, and that this confidentiality exists for the benefit of beneficiaries rather than merely for the protection of the trustees'. This '*Londonderry* principle' is still good law in England, and in any event law by which a judge at first instance remains bound.
- > A letter of wishes is brought into existence for the sole purpose of serving and facilitating an inherently confidential process; it, therefore, is properly to be regarded as confidential 'to substantially the same extent and effect as the process which it is intended to serve'. (This was the case for 'family discretionary trusts' such as

the one he was considering; he left open the possibility that the same degree of confidentiality might not apply in employee trusts, pension trusts, or other business trusts.)

- > Generally, the confidence attaching to a letter of wishes is such that, for the better discharge of their confidential functions, trustees need not disclose it to the beneficiaries merely because they request it unless, in the trustees' view, disclosure is in the interest of the sound administration of the trust.
- > In the absence of special terms, the confidentiality in which a letter of wishes is enfolded is something given to the trustees to use on a fiduciary basis, in accordance with their best judgment as to the interests of the beneficiaries and the sound administration of the trust. The settlor's attitude to disclosure is not, therefore, usually relevant, nor (probably) would it be appropriate or legitimate for a settlor to attempt to fetter the trustees' use of it.

What does this mean practically? If a beneficiary demands to see a letter of wishes, the trustees have a discretion whether or not to let him see it. They may apply to the court for directions, if the problem really justifies the costs of doing so, and (*per* Briggs J) on such an application the letter of wishes must be disclosed to the court, but not, obviously, to the beneficiaries.

Briggs J's order

Briggs J ordered disclosure to the beneficiaries; but only because the trustees had stated that they would be applying for the court's sanction when they came to distribute the trust fund, and had accepted that the letter of wishes would have to be disclosed at that point. If the trustees have made their decision without the court's assistance, it is important to remember that they are under no obligation to explain it to the beneficiaries. Indeed, any explanation might itself provide a beneficiary who has been denied disclosure with a further ground of attack. For trustees the moral seems to be the second half of an old adage: never explain.

John Eidinow appeared for the claimant beneficiaries in *Breakspear v Ackland*. He has a chancery litigation practice specialising in trusts (domestic and offshore), wills, probate and the administration of estates, and Inheritance Act claims.

john.eidinow@newsquarechambers.co.uk

Silks

John Macdonald Q.C.
Eben Hamilton Q.C.
George Laurence Q.C.
Robin Mathew Q.C.
Robin Hollington Q.C.
Stephen Smith Q.C.
James Thom Q.C.

Juniors

Rodney Stewart Smith
Michael Kennedy
John Ross Martyn
Lynton Tucker
Colin Braham
Kenneth Munro
Gordon Bennett
Nicholas Le Poidevin
Malcolm Chapple
Christopher Semken

Alexander Hill-Smith
Clive H. Jones
Leigh Sagar
David Eaton Turner
Claire Staddon
Thomas Graham
David Fisher
Ross Crail
Stephen Schaw Miller
Robert Levy

Ian Peacock
Gerard van Tonder
Edwin Simpson
Simon Adamyk
Mark Hubbard
John Eidinow
Jane Evans-Gordon
Nigel Hood
Sebastian Prentis
Gary Pryce

Adrian Pay
James Bailey
James Brightwell
Alexander Learmonth
Nicola Allsop
Shelley White
Tim Akkouch
Emily Gillett
Watson Pringle
Charlotte Ford

New Square Chambers
12 New Square
Lincoln's Inn
London
WC2A 3SW

T 020 7419 8000
F 020 7419 8050
E clerks@newsquarechambers.co.uk
www.newsquarechambers.co.uk

Senior Clerk: Clive Petchey