Nohow or contrariwise?

Ekaterina Pakerova peers down the rabbit hole to consider ownership and control in freezing injunctions

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In *Alice in Wonderland*, the Cheshire Cat famously disappears leaving only its smile. Alice remarks that she has 'often seen a cat without a grin but never a grin without a cat'. Like cats and grins, ownership and control often go hand in hand. But, not always: the modern world of trust and company devices requires that sometimes the ownership cat can be separated from the control grin, just as it could in the magical world that Lewis Carroll invented for Alice.

In many situations the fact that the two are severed can be regarded as ephemeral. For example, a sole shareholder of a solvent company will usually be able to effect the transfer of its unencumbered assets to them, if they so wish. Indeed, if the respondent is a director of the company, their control will be all the more immediate. But they can use their powers as a director of the company only as the company's agent, and not on their own behalf. Is the fact that the assets are held by a fully owned corporate vehicle enough to separate the ownership cat from the control grin? Or are the assets *automatically* subject to the provisions of a freezing order against the shareholder? If not, the claimant will need to consider, for example, the appointment of a receiver over the respondent's shareholding in the company or whether for example the requirements for invoking the *Chabra* jurisdiction (see *TSB Private Bank International v Chabra* [1992]) are met.

'Even if the respondent was the sole shareholder this cannot be taken to mean that they own or are in any way entitled to the company's assets.'

Clarity

The position used to be clear: the freezing order attaches to the assets of the respondent. If these are not the respondent's assets (ie as a matter of legal analysis they genuinely do not have the ownership 'cat') then the injunction will not apply to their dealings with the assets as a director or officer of the company. The assets are not 'theirs'. But the world (and the wording of freezing orders) has moved on from those days. The now common Commercial Court wording is accepted as having a broader scope. In *JSC BTA Bank v Ablyazov* [2015], the Supreme Court considered the Commercial Court injunction in the following terms:

> Paragraph 4 applies to all the respondents' assets whether or not they are in their own name and whether they are solely or jointly owned and whether or not the respondent asserts a beneficial interest in them. For the purpose of this Order the respondents' assets include any asset which they have power, directly or indirectly, to dispose of, or deal with as if it were their own. The respondents are to be regarded as having such power if a third party holds or controls the assets in accordance with their direct or indirect instructions.

Considering the above paragraph (the so-called 'extended definition', see *Ablyazov* at para 2), Lord Clarke held that:

> ... the focus... is not on assets which the respondent owns (whether legally or beneficially) but on assets which he does not own but which he has power to dispose of or deal with as if he did...

(see *Ablyazov* at para 49). So, it looked like the 'control grin' might be enough.

The *Ablyazov* decision related to an unusual arrangement in which the respondent could procure that loans were made to them by instructing the lender to make payments directly to third parties. But what about a more commonplace arrangement where the respondent is the sole shareholder of a company? Is their control over the company (and by extension its assets) sufficient to trigger

the Commercial Court wording? The argument that it does is sometimes referred to as a manifestation of the 'power equals property' approach, and it is more often described as such to be disagreed with than it is to be endorsed.

FM Capital Partners Ltd v Marino [2018] is a recent example. The court considered a freezing order in which the claimant had amended the provision as follows (emphasis added):

> Paragraph 4 applies to all the Respondent's assets whether or not they are in his own name and whether or not they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Respondent is to be regarded as having such power if a third party *(which shall include a body corporate)* holds or controls the asset in accordance with his direct or indirect instructions.

The injunction then went on in the usual way to specify that it applied to '[t]he following assets in particular'. The assets so described however, explicitly included assets in the name of companies in which the respondent was interested. The respondent applied, *inter alia*, for the removal of the words 'which shall include a body corporate' and of the references to assets in the names of companies in which they were interested. In doing so, they resuscitated an argument that has been ventilated in the course of three cases, each well known to practitioners.

First, in *JSC BTA Bank v Solodchenko* [2010] the court decided that the extended definition does not apply to assets in which the defendant did not have any beneficial interest:

> ... the power to deal with or dispose of the asset as if it were his own is a reference to a case where the legal owner is not the defendant but a third party yet it is the defendant who retains the power to direct how the asset should be dealt with.

Then came *Group Seven Ltd v Allied Investment Corp Ltd* [2013] where Hildyard J decided that the company's debt was not an asset to be treated as an asset of the respondent for the purposes of a freezing order, notwithstanding that they were the sole shareholder and director in the meaning of the freezing order. The focal point of the judge's analysis was that the company and the respondent were separate legal persons. The judge was unpersuaded that the extended definition, ie (para 7):

> ... any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own... the respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions...

affected the position. Indeed, Hildyard J was critical of 'power equals property' reasoning, noting that it fails to recognise that only the company can deal with its assets (see *Group Seven* at para 66).

Then in *Lakatamia Shipping Co Ltd v Su* [2014] the Court of Appeal concluded that:

> ... the extended definition of a respondent's assets was not intended to include the assets of another person, here relevantly of a company controlled by the defendant.

That does not mean, of course, that the respondent has carte blanche to deal with the company's assets as they wish. A transaction outside the ordinary course of business runs the risk of being held to diminish the value of their shareholding in the company, as was emphasised in *Lakatamia*. But, understandably, this is not enough for many claimants, particularly those who fear contrived corporate asset stripping exercises by respondents.

Did *Group Seven* and *Lakatamia* survive the *Ablyazov* decision?

Peter MacDonald Eggers QC held that they did. In *FM Capital Partners*, the claimant and the third defendant had sought a variation of the freezing order made by the court in respect of the defendant's asset in which they had no beneficial interest.

He considered that even if the respondent was the sole shareholder this cannot be taken to mean that they own or are in any way entitled to the company's assets. In his view this would otherwise mean the company never owns its assets beneficially.

The judge considered an exception to this principle where in limited circumstances the application of a freezing order may extend to assets apparently belonging to a company but, in reality, belonging to the respondent. That would be so if the respondent is the sole director and shareholder and is using a non-trading body corporate for the purpose of holding their assets 'which are in truth no more than pockets or wallets of that respondent'. In doing so, of course, he seems to have been saying nothing new. This is precisely the situation that led to the *Chabra* jurisdiction. Absent a situation of this kind, when the respondent exercises control over assets, they are doing so as an agent of the company.

According to Peter MacDonald Eggers QC:

> The extended definition does apply to assets over which the respondent has control but which the respondent does not legally or beneficially own...

(see *FM Capital Partners* para 52). He did not accept that the defendant had *control over* the company's assets for the purposes of the extended definition, save in the limited circumstances where their actions are with a view to diminish the assets, and thereby diminish the value of their shareholding, and are done outside the ordinary course of business. He found that the decisions by the Supreme Court and the Court of Appeal were inconsistent insofar as the extended definition was not intended to include assets of another person even where the respondent was the sole director and shareholder.

There are currently no appeals pending this decision. Clearly, however, it will not be the last we hear of the issue. ■

FM Capital Partners Ltd v Marino & ors [2018] EWHC 2889 (Comm)
Group Seven Ltd v Allied Investment Corp Ltd & ors [2013] EWHC 1509 (Ch)
JSC BTA Bank v Ablyazov [2015] UKSC 64
JSC BTA Bank v Solodchenko [2010] EWCA 1436
Lakatamia Shipping Co Ltd v Su & ors [2014] EWCA Civ 636
TSB Private Bank International SA v Chabra [1992] 1 WLR 231