Case No: HC12C00507

Neutral Citation Number: [2013] EWHC 1509 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 June 2013

Before :

THE HON. MR JUSTICE HILDYARD

- -

Between :

GROUP SEVEN LIMITED
(a company incorporated under the laws of Malta) **Claimant**

- and -

(1) ALLIED INVESTMENT CORPORATION LIMITED
(a company incorporated under the laws of Malta)
(2) MAREK REJNIAK
(3) PAUL SULTANA
(4) LARN LIMITED
(5) LUIS NOBRE **Defendants**

- -
- -

Jeffrey Chapman QC and **Simon Atrill** (instructed by **Mishcon de Reya**) for the **Claimant**
Romie Tager QC and **Philip Kremen** (instructed by **Hughmans**) for the **Third Defendant**

Hearing dates: 22, 23, 24 & 26 April 2013 and 9 May 2013

- -

Judgment

Mr Justice Hildyard :

Nature of application and the position of relevant parties

1. The Claimant, a body incorporated under the laws of Malta now called Group Seven Limited ("the Claimant"), seeks to commit the Third Defendant, namely Mr Paul Sultana ("Mr Sultana"), for contempt of court for his alleged breach of a freezing order made by Floyd J (as he then was) dated 24 February 2012 ("the Freezing Order").

2. The Claimant contends that Mr Sultana was in breach of the Freezing Order in that he

> "disposed of (or procured the disposal of) one of his most valuable assets for US$200,000 by settling one of his company's (namely, Wealthstorm Limited's) claims in relation to a debt owed to it [in the sum of US$500,000] by Digital Archives Inc and/or Ali Nasir and/or Scheherazade Nasir."

3. In their Skeleton Argument, Counsel for the Claimant (Mr Jeffrey Chapman QC and Mr Simon Atrill) make the point that the settlement of those claims for a sum substantially less than the face value of the debt (being one of Wealthstorm Limited's most substantial assets) diminished the value of the Claimant's shares in Wealthstorm Limited (which are without doubt assets of the Claimant). However, the Claimant's Application Notice focuses not on the Claimant's shares but on the settlement of the debt proceedings; and Counsel for the Claimant made clear that for the purposes of its application the asset in question which is alleged to have been disposed of is thus a debt owed to Wealthstorm Limited.

4. Thus, the premise of the Claimant's application is that the chose in action which the benefit of the debt ("the Debt") comprises is, for the purposes of the Freezing Order, to be treated as an asset of Mr Sultana; and that this is, indeed, how Mr Sultana always regarded it, including in his adumbration of his assets in response to the disclosure provisions of the Freezing Order.

5. Mr Sultana rejects that premise. Counsel on his behalf (Mr Romie Tager QC and Mr Philip Kremen) contend that the application is misconceived and they invite the Court to strike it out, pursuant to CPR 81PD.17, on the grounds that it discloses no reasonable ground for alleging that he is in contempt of court, and on the basis further that the sealed Freezing Order was not formally served on him. It is also contended on Mr Sultana's behalf that the Claimant's Application Notice is insufficiently particularised; and that this too warrants its dismissal.

6. The last two are important but essentially procedural issues. The substantive question upon which Mr Sultana's application to strike out the committal proceedings rests is whether the debt claim of US$500,000, which was settled for US$200,000, was, or for the purposes of the Freezing Order is to be treated as, one of Mr Sultana's assets.

Terms of Freezing Order of which breach is alleged: issues arising

7. Paragraphs 8 and 9 of the Freezing Order are in the following standard terms:

> "8. Until trial or further order of the court, each of the First, Second and Fourth Respondents Marek Rejniak, Paul Sultana and Luis Nobre must not–
>
> (1) remove from England and Wales any of their assets which are in England and Wales up to the value of €12m; or
>
> (2) in any way dispose of, deal with or diminish the value of any of their assets whether they are in or outside England and Wales up to the same value.
>
> 9. Paragraph 8 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. 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 holds or controls the asset in accordance with his direct or indirect instructions."

8. Reflecting those two paragraphs, there are two facets to the substantive issue. One facet is whether Mr Sultana's references in his affidavit evidence (and by implication in his Defence) to the Debt being one of his assets means that it is to be treated as such in any event. The other facet is as to the true construction of the last two sentences in paragraph 9 of the Freezing Order, which undoubtedly extend the meaning of the phrase "his assets".

9. That second facet of the substantive question is, I think, of some general application and importance. Paragraph 9 of the Freezing Order is in the same form as paragraph 6 of the CPR standard form of freezing order, which since 2002 has been and remains in use in the High Court (although there is an alternative form also used in the Commercial Court). Accordingly, the point primarily raised is not only of significance to the parties: it could well affect orders made and to be made in other cases too.

Immediate procedural background

10. The immediate procedural background can be summarised as follows.

11. On 10 March 2013, Mr Sultana's solicitors (Hughmans) informed the Claimant's Solicitors (Mishcon de Reya) that Mr Sultana had *"managed to settle"* Wealthstorm Limited's claim against Digital Archives Inc, Mr Ali Nasir and Ms Scheherazade Nasir for the sum of US$200,000. Hughmans stated that the net proceeds after payment of the US attorney's fees would be paid into its client account, to be held subject to the Freezing Order (although Mr Sultana would be wanting in the future to make payments out of that money in due course).

12. No intimation of the pendency of that claim had previously been given to the Claimant, still less any intention to compromise the Debt to which it related. The funding of the claim was and remains uncertain. Mishcon de Reya sought an

explanation why no mention had been made of the claim; why the Debt had been settled at so heavily discounted an amount; and who had paid the fees of the US attorneys acting for Wealthstorm.

13. Hughmans replied on 19 March 2013, stating that the settlement had been advised on by an US attorney, and a discount accepted as an *"opportunity to come away with at least some money"*. No explanation was offered why Mishcon de Reya had not been told before about the proceedings or the settlement; or as to the precise rationalisation of the settlement; nor as to how the litigation was funded. Further correspondence did not elucidate the issues.

14. The Claimant's committal application was issued on 5 April 2013. The breach of the Freezing Order is described as follows:

> *"In breach of paragraph 8(2) of the Freezing Order Mr Sultana disposed of (or he procured the disposal of) one of his most valuable assets for $200,000 by settling one of his company's (namely, Wealthstorm Limited's) claims in relation to a debt owed to it by Digital Archives Inc and/or Ali Nasir and/or Scheherazade Nasir. This is a clear breach of paragraph 8(2) of the Freezing Order and Mr Sultana and his advisers did disclose this proposed disposal to the Claimant nor seek to vary the Order. Mr Sultana has failed to provide an explanation as to why we were not made aware of these proceedings and their settlement."*

15. The Application Notice was stated to be supported by the affidavit of Jarret Bevan Brown sworn on 5 April 2013 ("Mr Brown's Affidavit") and served at the same time. That affidavit, which is largely devoted to the background of the proceedings, includes the following statements by Mr Brown:

> *"55. …To be clear, although the loan and claim was in the name of Wealthstorm Limited, I do not consider that this matters for two reasons.*
>
> *56, First, in reality this loan and claim was made by Mr Sultana. The fact that the loan was recorded by Mr Sultana as one of his assets suggests that this is how he treated it. He obviously realised that it was to be treated as one of his assets for the purposes of the Freezing Order. Wealthstorm itself is an offshore (Maltese) company with very limited assets and there is little sign of any trading activity. It is 100% owned by Mr Sultana.*
>
> *57. Secondly, even if the loan and claim are to be treated as formally as being the property of Wealthstorm, it is obvious that Mr Sultana has procured the breach of the Freezing Order, to the same effect. He (and therefore Wealthstorm) were obviously aware of the*

fact that the loan was an asset under the Freezing Order.

58. As I have explained above, it does not appear to be in dispute that this amounts to a breach of the freezing Order…"

16. The application was listed for hearing on 22 April 2013, together with two other applications in the same proceedings. At the commencement of the hearing, Counsel for the Claimant indicated that he wanted an adjournment pending further disclosure of documents and to enable a date to be fixed for cross-examination of Mr Sultana on the affidavits he had served in his defence.

17. Counsel for Mr Sultana objected to this course and pressed for summary dismissal. When this objection was raised, Counsel for the Claimant did not object to the procedural issues and the substantive twin-faceted issue as to the interpretation of the Freezing Order being dealt with there and then.

18. Thus, the questions raised as to the sufficiency of the Application Notice, the failure formally to serve a sealed version of the Freezing Order, and whether in principle the admitted dealings with the chose in action which the settlement of the debt at less than its face value comprised would constitute a disposition or dealing with Mr Sultana's assets in breach of the Freezing Order, have each been fully argued at this stage. Before addressing them I need briefly to paint in some of the relevant factual background.

Summary of background facts

19. It is not necessary to delve in any great detail into the facts and matters of which complaint is made in the substantive proceedings. The following will I think suffice as an outline of the dispute.

20. In the main proceedings the Claimant seeks a declaration that a €100 million loan agreement made between the Claimant and the First Defendant is null and void and/or rescinded on the ground that it was procured by fraud; damages or equitable compensation are sought against Mr Sultana and the First and Second Defendants on the ground of their alleged fraud and fraudulent misrepresentations, alternatively breach of duty, in selling or hawking to the Claimant an investment opportunity (for which the loan was a precursor) which proved as illusory as it was inherently unlikely. These claims against Mr Sultana are accepted to be governed by the law of Malta. Under that law, contributory negligence may be a defence (even in the context of fraud), and contributory negligence is pleaded.

21. Mr Sultana denies making any representation intended to be relied on by the Claimant; and in any event denies making any representation he did not believe to be true. He depicts himself as a victim of deceit and breach of trust and confidence on the part of others.

22. One detail from Mr Sultana's defence which is of particular relevance to the present application is this: in paragraph 11 he pleads as follows in justifying his depiction of himself as having been the victim of misplaced trust:

> *"11. As a result of the aforementioned trust and confidence, Mr Sultana (through his wholly-owned company, Wealthstorm Limited) invested the following sums:*
>
> *11.1 $500,000 in Mr Nasir's company, Digital Archives Inc on 8 December 2009; …"*

23. As to other background facts and matters especially relevant to this application, it is common ground that Mr Sultana is the only director and sole shareholder of Wealthstorm Limited. It is also not disputed that (a) Mr Sultana included the Debt in his list of assets in his affidavit dated 14 February 2012 and filed in compliance with the original freezing order made without notice against him by Mann J on 3 February 2012; (b) Mr Sultana did not correct, and appears indeed implicitly to have confirmed, this in a second affidavit dated 14 May 2012; and (c) his solicitors (Hughmans) expressly confirmed the accuracy of Mr Sultana's list of assets as stated in his affidavit of 14 February 2012 in their letter to the Claimant's solicitors (Mishcon de Reya) dated 28 January 2013.

24. The loan agreement which gave rise to the Debt is dated 8 December 2009 and is expressed to be by and between (A) Wealthstorm Limited "represented by Mr Sultana (the "Lender")" and (B) Digital Archives Inc "duly represented by Mr Ali Nazir and Scheherazade Nasir (the "Debtor")". The loan is stated to be in order to finance the day-to-day activities of Digital Archives Inc. and in particular to finance equipment. The Loan Agreement is expressed to be governed by the law of Malta.

25. The accounts of Wealthstorm Limited for the periods ended 31 December 2009 and 31 December 2010, and its unaudited draft statements for the year ended 31 December 2011 do not appear clearly to identify or record the Debt as an asset; a loan to "related party" of €443,974 for 2009 and €532,693 for 2010 is shown; whereas in the 2011 statement a "Loan Digital Archives" is stated as €343,422 in 2011 and 2010, and there is a speared entry for "Loans to related party" showing €84,069 in 2010 and nothing in 2011. No trading activities are recorded.

26. It is not disputed that Mr Sultana signed the Settlement Agreement and Mutual Release dated 27 April 2012 [C/3/373] ("the Settlement Agreement") by which the Debt was compromised (and thereby discounted from $500,000 to $200,000) both as President of Wealthstorm Limited and as "an individual", whilst Mr Ali Nasir signed as an individual, and his wife Scheherazade signed as President of Digital Archives Inc and also as an individual. The corporate Seal of Wealthstorm Limited is also imposed on the Settlement Agreement.

27. Under the Settlement Agreement, the parties agreed to mutual releases of each other, and to settle and release all disputes between them, known or unknown, including any and all claims against each other regarding the proceedings in the Central District of California brought by Wealthstorm Limited to recover the Debt. Payment of the agreed sum of US$200,000 in discharge of the Debt was provided to be made by Digital Archives Inc to Wealthstorm Limited's US attorneys by "cashier's check".

28. In the event, the evidence of Mr Sultana is that such payment was made on 9 March 2013 and cleared on 12 March 2013. Wealthstorm Limited's US attorneys then allocated $10,000 to themselves on account of fees, and on 14 March 2013 remitted

the balance (less transaction costs) of US$189,994 to Mr Sultana's Solicitors' (Hughmans') US $ client account. Previously, and presumably in anticipation of receipt of such monies into their client account, Hughmans had informed the Claimant's solicitors that the monies would upon receipt be held subject to the Freezing Order, and would thereafter be held pending clarification as to whether and how, under the law of Malta, Wealthstorm Limited could pay or advance such monies to Mr Sultana for him to use to cover future legal fees and provide a source for his living expenses.

29. The Claimant relies on Hughmans' acceptance that the monies received into their client account further to the Settlement Agreement were to be held pursuant to the terms of the Freezing Injunction, although belonging at that point to Wealthstorm Limited, as additional confirmation that the Loan was likewise covered by the Freezing Order: the tree and the fruit must be the same. I return to this aspect of the Claimant's case later.

30. As regards service, it is not disputed that although the previous freezing orders (made by Mann J on 3 February 2012 and by Mann J again on the first return date of 10 February 2012) were personally served on Mr Sultana, the actual Freezing Order the alleged breach of which is the basis for the committal application was not. But it is not disputed either (nor realistically could it be) that Mr Sultana is well aware of the terms of the Freezing Order and its application, and has been since it was made; an approved but as yet unsealed copy was served by Mishcon de Reya on Mr Sultana's previous solicitors (Field Fisher Waterhouse) by letter dated 6 March 2012; and he refers to all three freezing orders (including, specifically, the Freezing Order itself) in his second Witness Statement. The terms of the Freezing Order are substantially the same as in the earlier orders, except that the paragraphs requiring identification and confirmation of assets were deleted (since Mr Sultana had already complied with those requirements).

Issues to be decided

31. The issues to be determined are therefore:

    (1) whether the Court should make an order dispensing with service of the Freezing Order or otherwise allow the application to proceed notwithstanding failure personally to serve the Freezing Order on Mr Sultana;

    (2) whether the Application Notice is sufficiently particularised;

    (3) what the effect is of (a) Mr Sultana's apparent confirmation in sworn evidence that the Debt was an asset of his and (b) Mr Sultana's own pleaded case that he made the loan giving rise to the Debt through his company, Wealthstorm Limited;

    (4) whether on its true construction clause 9 of the Freezing Order applies to the Debt or requires it to be treated as an asset of Mr Sultana for its purposes;

(5) whether, having regard to the above issues, the application should be permitted to proceed.

32. I address each issue, but will deal with issues (3) and (4) in reverse sequence for reasons which will become apparent.

Issue as to lack of personal service

33. Counsel for the Claimant applied (albeit informally and without any Application Notice or directly supporting evidence) for an order pursuant to CPR 81.8 dispensing with personal service in circumstances where it could be entirely satisfied that Mr Sultana had had notice of the Freezing Order and there could be no real injustice in permitting retrospectively service in the form in which it actually took place. Counsel referred to the White Book, and its reference at CPR 81.8.2 to an unreported case of Kenneth Parker J (*Serious Organised Crime Agency v Hymans* [2011] EWHC 3599 (QB)) for the proposition that a court may, under the rule, dispense with personal service in the context of committal proceedings.

34. This was opposed by Counsel for Mr Sultana. Mr Tager relied on the further fact that the Claimant's statement of truth verifying its Application Notice was unsigned. He suggested that the Claimant and its solicitors had deliberately sought to hide the issue from the Court, and drew attention to the lack of any proper explanation why service was not properly effected. He emphasised the special importance of strict compliance with such requirements in the context of an application for committal. He drew my attention to a decision of Proudman J in *JSC BTA Bank v Solodchenko and Others* [2010] EWHC 2404 (Comm) emphasising this. He contended that in all the circumstances relief pursuant to CPR 81.8 should be refused.

35. As noted in the White Book (at page 2331 in the 2013 edition), the Court's discretion in this context is a wide one; and it may be exercised with retrospective effect: see *Davy International Ltd and Others v Tazzyman and Others* [1997] 1 WLR 1256 [CA]. Even so, it is to be "exercised relatively sparingly": see *per* Arnold J in *Hydropool Hot Tuns ltd v Roberjot & Anor* [2011] EWHC 121 (Ch), quoting Neuberger J (as he then was) in *Bell v Tuohy* [2002] 1 WLR 2703 at para. [41].

36. It is plainly important that orders endorsed with a penal notice and ordinarily requiring personal service should be so served; and that the Court will usually insist upon that. Nevertheless, I do consider the circumstances in this case such as to warrant dispensation.

37. In my judgment, there is not a shadow of doubt that Mr Sultana and those advising him were fully aware of the terms of the Freezing Order, and the consequences of any breach of it. They had sought to comply with substantially identical terms in the context of an earlier freezing order. They knew what was required of them, and what was prohibited. No injustice would be caused by the order sought. The overriding objective would not be served by requiring proper service purely as a matter of form. Nor would it be proportionate to stand over to enable a formal application for dispensation: the grounds are quite clear. Without in any way doubting the importance in all ordinary circumstances in a context such as this of effecting and proving personal service, I am satisfied that it is proper in this case to grant the dispensation

requested; I invite Counsel to formulate and agree the precise terms of an order accordingly.

Issue as to the sufficiency of the Application Notice

38. It is obvious and clearly established that an application notice for committal must be particularised in clear terms sufficient to provide the respondent with full and reasonable notice of the conduct alleged to constitute contempt: see *Harmsworth v Harmsworth* [1987] 1 WLR 1676. I accept that that is so whether the contempt alleged is civil or criminal in nature, not least since both seek imprisonment as the ultimate sanction.

39. In this case, as it seems to me, the Application Notice gives clear notice of the conduct complained of (breach of paragraph 8(2) of the Freezing Order); it makes clear also that the breach is in consequence of a disposal of or dealing with the Debt; thirdly it identifies the central contention, that the Debt is, for the purposes of the Freezing Order, one of Mr Sultana's most valuable assets and thus plainly caught by that paragraph 8(2).

40. Where the Application Notice is less clear is the basis on which the Debt is to be treated as an asset of Mr Sultana's, given that it is stated in the Application Notice itself to give rise to (and be) a debt owed to Wealthstorm Limited. For example, no mention is made of paragraph 9 of the Freezing Order: no express warning of the alleged application of that paragraph's last two sentences is to be found in it.

41. Whilst an affidavit may, in proving the evidence for the allegations or charges on which the committal application is based, it is the notice itself that should, indeed must, adumbrate the grounds themselves. As it is, in this case, Mr Brown's affidavit does not mention paragraph 9 of the Freezing Order either; and beyond expanding the basis of the application to an alternative ground that Mr Sultana procured a breach by Wealthstorm Limited, it does not take the matter much further in any event.

42. The truth is, I suspect, and this is supported by the (false) supposition on the part of the Claimant that breach was not in dispute (see paragraph 58 of Mr Brown's affidavit as quoted above), that the Claimant did not conceive that it needed to rely on paragraph 9 of the Freezing Order.

43. The question arises, therefore, whether it is unfair to the point of being impermissible for the Claimant now to base one of its two principal contentions on that paragraph 9 and (in particular) the last two sentences of that paragraph.

44. Counsel for Mr Sultana urged that it was; Counsel for the Claimant sought to dismiss the suggestion, drawing attention to the fact that the Skeleton Arguments of both parties clearly engaged with the underlying issue whether the Debt should be treated as an asset held subject to the control and direction of Mr Sultana personally. Certainly the authorities cited by Counsel for Mr Sultana for me to consider before the hearing indicated that this facet of the issues raised was well understood.

45. On balance I have concluded that, though the Application Notice did not adumbrate as clearly and comprehensively as it should have all the grounds relied on by the Claimant in support of its case that any dealing with the Debt was, for the purposes of

the Freezing Order, a dealing with one of Mr Sultana's assets, Mr Sultana and his advisers were aware of the allegations and arguments that they had to meet. I would not in such circumstances consider that the argument should be ruled impermissible. But in reaching that conclusion I emphasise in this context also that I consider the case to be exceptional: my conclusion is not to be taken as any dilution for the future of the rule that a committal application must give clear and fair notice of the breach alleged and the basis of the allegation; and ordinarily any defect cannot be cured by reference to the supporting affidavit, still less a subsequent skeleton argument.

Scope of paragraphs 8 and 9 of the Freezing Order

46. I turn to the first facet of the substantive issue: the scope of paragraphs 8 and 9 of the Freezing Order, and the question whether the Debt owed to Wealthstorm Limited is, for the purposes or by reason of those paragraphs, to be treated as one of Mr Sultana's assets.

47. It is long established that a company limited by shares and incorporated under the Companies Acts from time to time in force in England since 1862 is a separate (albeit artificially created) legal person. As such, it beneficially owns all its assets unless otherwise expressly declared. That is so even if it is wholly owned and controlled by one person; and even though that person, as its sole corporator, may bind the company in any matter which is *intra vires* the company. Nor is such a company by virtue of its sole ownership and control the agent of its owner and controller.

48. All this is made clear by the House of Lords in its decision in *Salomon v Salomon & Co* [1897] AC 22. This indeed is perhaps the feature of company law which primarily distinguished it from its antecedents in partnership law. Some view the doctrine as having provided the engine for entrepreneurial risk-taking and economic growth; others have regarded the decision as a calamity; it matters not: it is the law, in England at least.

49. Wealthstorm Limited is not a company incorporated under any of the English Companies Acts: it is a body incorporated in Malta. However, it was not suggested to me that the effect of such incorporation is any different in this context under the law of Malta. I have no reason to suppose any such difference; and in any event, in the absence of contrary evidence, I consider that I should assume that the same effect is provided for under the law of Malta as under the English Companies Acts.

50. On that basis, there can be no doubt that Wealthstorm Limited owns its assets beneficially. Conversely, Mr Sultana has not, by virtue of his ownership and control of Wealthstorm Limited, any beneficial interest in any of its assets, nor is Wealthstorm Limited his agent.

51. The benefits of incorporation with limited liability are considerable. They are undoubtedly open to abuse; and not infrequently they are indeed abused. As a response, the Courts in England have occasionally been persuaded that to prevent established abuse, they should strip away or lift the "veil of incorporation" and look to the person behind the artificial legal creation.

52. This is, however, rare in England (though it is a little more common in various jurisdictions in the United States of America with similar principles of corporate law).

Further, even if the court is persuaded to lift the "veil", that is not a negation of the principle that a company is a separate legal entity: it is a limited jurisdiction to prevent abuse, very sparingly exercised; and even if the Court in such exceptional circumstances is persuaded to treat the assets of a limited company as answerable for some default or breach of its owner(s) those assets remain in the separate beneficial ownership of the company.

53. Again, no evidence has been advanced as to any different approach under the law of Malta; and I proceed on the basis that the same principles apply notwithstanding that the law of Malta is the law of Wealthstorm Limited's incorporation (and thus governs its characteristics as a legal entity).

54. Thus, it is clear beyond argument for present purposes that the assets of Wealthstorm Limited are not in law the assets of Mr Sultana, even if ultimately the Court may allow enforcement against those assets as if they were, if persuaded that the veil of incorporation should be lifted or pierced.

55. The interesting question raised in this case is whether, even though it is not, as a matter of corporate law, one of Mr Sultana's assets, the chose in action that the Debt comprises is to be treated as one of "his assets" for the purposes of paragraph 8 of the Freezing Order, either because they were so regarded by the parties (which I consider later) or because of the words extending the meaning and effect of that phrase in paragraph 9 of the Freezing Order.

56. As previously mentioned, that latter point is of general importance: the last two sentences of paragraph 9 are in exactly the same form as those included in paragraph 6 of the standard CPR Form.

57. The answer to the question, therefore, depends upon whether, although Mr Sultana has no beneficial interest in the assets of Wealthstorm Limited, and although Wealthstorm is not his agent (even if ultimately it may be shown to be his creature), Mr Sultana has by virtue of sole ownership and control, or is to be treated as having, *"the power, directly or indirectly, to dispose of or deal with* [the Debt] *as if it were his own"* (my insertion).

58. That in turn depends upon whether, for the purposes and within the meaning of the last sentence of paragraph 9 of the Freezing Order, Wealthstorm Limited, by reason of Mr Sultana being its sole shareholder and director, *"holds or controls the assets in accordance with his* [Mr Sultana's] *direct or indirect instructions"*.

59. Counsel for the Claimant submits that even if Wealthstorm Limited were a trading company (and ignoring for the present its financial statements, which suggest it may not have any significant activity except to hold investments on Mr Sultana's behalf), Mr Sultana's legal powers and control over it are such that it is obvious that Wealthstorm Limited does indeed hold its assets in accordance with Mr Sultana's direct or indirect instructions.

60. Mr Chapman prays in aid the demonstration of that control afforded by the facts of the case, and especially (a) the lack of any other influence over Wealthstorm Limited; (b) his entire responsibility for negotiating and concluding the Settlement Agreement; (c) the direction of the monies paid under the Settlement Agreement to his own

solicitors' client account; and (d) his intention to use those monies for his own benefit.

61. Mr Chapman also urges (to quote from his Skeleton Argument) that "if any authority were necessary, *Gee on Commercial Injunctions* confirms that the last two sentences [as found in paragraph 9 of the Freezing Order] cover the common situation where a defendant controls an offshore company and its subsidiaries and uses the assets of those companies as his own." The relevant passage in the 5th edition (2004) at paragraph 3.010 reads as follows:

> *"…it is common for a defendant to control offshore companies and their subsidiaries, and to use the assets of those companies as if they were the defendant's own. Such a situation would come within para.6 of the standard form order."*

No explanation is offered as to why the observation is limited to offshore companies and their subsidiaries, although (as Mr Chapman agreed) the same would logically apply to domestic companies, if the test is exclusive ownership and control of the shares and a company's board (as he urged).

62. Mr Tager rejected that test altogether. His submissions can, I think, be summarised as follows:

(1) As the beneficial owner of its assets only the company may deal with them.

(2) A company, being a legal creation or artifice, can only act through natural persons. The natural persons who may act for it are its primary decision-making bodies (the board of directors or the members collectively) or officers, agents or employees duly authorised by the primary decision-making bodies (or the company's constitution) to act on its behalf.

(3) Their acts are attributed to the company: in the case of the primary decision-making bodies they *are* for these purposes and act *as* the company; in the case of officers, agents or employees they act as agents.

(4) In exercising their powers, primary decision-making bodies do not, therefore, give instructions (whether direct or indirect) to the company; the company is not a "third party" and does not act in accordance with their direct or indirect instructions: they and the company are as one.

(5) The analysis is no different just because a single individual is or comprises the only primary decision-making body: that is the lesson of *Salomon* and the corollary of according the company separate legal status and recognising its beneficial ownership in the assets which it holds (absent contrary instruction or declaration).

(6) It inexorably follows that a person who is the sole director and only member of a company does not, in directing the company, or committing it to a transaction, give instructions to the company; the company is not a third party for these purposes; and it is not, for the purposes of paragraph 9 of the Freezing Order or paragraph 6 of the standard form, to be regarded as

holding or controlling its assets in accordance with that person's direct or indirect instructions.

(7) As Mr Tager put it in his oral submissions to me, with particular reference to the act relied on as constituting a breach of the Freezing Order, that is the execution of the Settlement Agreement:

> *"…when Mr Sultana signed the Settlement Agreement he was not giving direct or indirect instructions to Wealthstorm; he was Wealthstorm at that moment. When he is holding the pen in his capacity as a director – signs the Settlement Agreement as a director – he is not telling Wealthstorm to settle, he is Wealthstorm, he is the director. He has the legal power and duty to manage and husband its assets. So when he settles the litigation, as a director, then, my Lord, he is not giving instructions to anyone."*

(8) Of course it would be different if the company, acting by its directors or shareholders, is bound to act in accordance with instructions from another: for example, if the company is or has declared itself a trustee, or contracted to hold as nominee or bailee, or such like: but that is not the case here. Conceivably, it might apply in the case of a shadow director: but that is not the case here either.

(9) Such an analysis is also consistent with and gives effect to the condition stated in the penultimate sentence of paragraph 9 of the Freezing Order (paragraph 6 of the standard form) that assets are to be treated as a respondent's if he has the power, directly or indirectly, to dispose of or deal with them *"as if they were his own"*. Neither a company's directors nor (it is contended) its shareholders have power to deal with a company's assets otherwise than as if they belong to the company (and not themselves).

(10) This approach accords with the interpretation of the wording consistently with the objective of a freezing order, which is to prevent the dissipation, devaluation or loss of assets against which the claimant could enforce any judgment he obtains in his favour at the end of the day. Only assets which the respondent has the untrammelled right to obtain for himself and use as his own should fall within the scope of restraint; whereas on the claimant's approach assets beneficially owned by the company and not by the claimant, and which would not be available for enforcement, would be subject of restraint: impermissibly, in Mr Tager's submission. As to that last point, Mr Tager also emphasised that the Court could not at this stage assume that the corporate veil would be pierced or lifted: that would subvert basic principles of company law.

(11) Finally, if the assets of a company of which a single person is the sole director and shareholder are to be treated as being the assets of that person for the purposes of the standard form and paragraph 9 in this case, the effect on such a company's trade (if any) would be devastating unless a proviso to enable trading in the ordinary course were implied or expressed.

63. In further support of this approach and analysis Mr Tager referred me to a number of cases, some on the scope of freezing orders in other related contexts, and some on the circumstances in which the Court may permit piercing or lifting of the corporate veil. I need not mention them all; but as it seems to me, the following propositions emerge from the parade:

(1) As indicated above, and as is well known, a freezing order is "designed to prevent injustice to a successful claimant by preserving assets and funds and guarding so far as possible against the risk that they will be disposed of or dissipated before a judgment is satisfied so as to render ineffective the claimant's attempts to recover what is due to him": *per* Mummery LJ in *Federal Bank of the Middle East Ltd v Hadkinson and Others* [2000] 1 WLR 1695 at 1709G-H.

(2) Without more, and in everyday usage, the expression "his assets" refers "to assets belonging to that person, not to assets belonging to another person" (*ibid.* at 1709F): and assets belonging, or at the time of the freezing order assumed to belong, beneficially to someone other than the defendant, will not be assets available to satisfy a claim against that defendant, and without words clearly extending the scope of the phrase "his assets", such assets will not be subject to the freezing order: *ibid.* at 1709H.

(3) That said, a freezing order is a precautionary measure taken urgently to protect the claimant against the *risk* of dissipation, disposal, reduction in value, or loss of assets pending a fuller examination as to what assets would in reality be available to the claimant for the purposes of enforcing a judgment. Accordingly, it may be perfectly consistent with the objectives of such relief to extend the scope of the phrase "his assets" to assets which the defendant may not appear to own but which may in truth be available to him for the purposes of enforcement; however, words extending the ordinary meaning will be strictly construed, and so as not to invest a meaning that the words cannot reasonably bear: thus, the wording must be clear and free of ambiguity: *ibid.* at 1710 A-B.

(4) If the words are ambiguous, or admit of a more restrictive interpretation, so that it is arguable whether or not the assets in question fall within their scope, the court is unlikely to treat a dealing with such assets as a contempt of court: *ibid.* at 1711 D-E; and see also *per* Neuberger J (as he then was) in *Cantor Index Ltd v Lister* [2002] CP Rep 25.

(5) Since the *Hadkinson* case, words to extend the meaning of "his assets" have been introduced into the standard CPR form: these are the words in paragraph 6 of the standard CPR form and paragraph 9 of the Freezing Order. Those words extend the meaning of "his assets" to cover assets which are not in the legal ownership of the defendant but in respect of which the defendant "retains the power to direct how the assets should be dealt with": *per* Patten LJ in *JSC BTA Bank v Solodchenko and others* [2011] 1 WLR 888 at para 26 on page 898.

(6) Thus, where that form is used, the phrase "his assets" is extended to include also "assets held by a foreign trust or a Liechtenstein Anstalt when the

defendant retains beneficial ownership or effective control of the asset": *ibid.*

(7) However, it is clear that those words in the standard form do not extend to assets of which the defendant remains the legal owner but holds for the benefit of someone else: *ibid.*

(8) If it is desired and found appropriate to extend the scope of the injunction to assets held in trust (for example, in cases where a strong *prima facie* case is demonstrated that the trust is a façade or sham), additional wording must be included to make that clear: the Commercial Court now has a standard form including such wording, though the Court of Appeal made clear in the *Solodchenko* case that its use should be exceptional and sparing.

(9) As to piercing or lifting the corporate veil: ownership and control of a company are not themselves sufficient to provide justification for that course, even when no unconnected third party is involved and it might be perceived that the interests of justice would be served by it: see *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808 at paragraph 78. It is always necessary to show impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing: *ibid.*

(10) Even where the circumstances are such as to justify the exceptional step of piercing or lifting the corporate veil the effect is not to alter the beneficial ownership of the company's assets: it is simply to provide for such asset to be available in defined circumstances to the claimant: see *per* Eder J in *Caterpillar Financial Services (UK) Limited v Saenz Corporation and Others* [2012] EWHC 2888 (Comm).

64. Perhaps surprisingly, there appears to be no case directly on the point here: in particular, there appears to be no direct authority on what I consider to be at the nub, which is whether the last two sentences of paragraph 9 of the Freezing Order (paragraph 6 of the standard CPR form) apply to the exercise of power vested in the respondent in right of the company of which he is sole director and shareholder. Put another way: does a company which has a sole director, who also owns all its shares, hold or control its assets in accordance with that sole director and shareholder's "direct or indirect instructions" within the meaning of that paragraph?

65. In my judgment, settled principles of company law, as explained in the judgments of Rimer and Patten LJJ in the decision of the Court of Appeal in *Prest v Prest and others* [2013] 2 WLR 557 (Thorpe LJ dissenting on the true scope of section 24(1)(a) of the Matrimonial Causes Act 1973 and its interplay with those company law principles, which he did not doubt), mandate the answer: which is "No". This response may dilute the efficacy of the standard CPR form of freezing order, and surprise and unsettle not a few; but to my mind, there is no escape from it.

66. Two paragraphs, in particular, in the judgment of Rimer LJ explain this negative answer. Paragraphs 104 and 105 (in material part) read as follows:

> "104. ….It is heretical to suggest that the total control that a single individual is (and will *always* be) entitled to

> exercise over the affairs of his one-man company is a feature resulting in the company's assets becoming assets to which he is 'entitled', and therefore, to which the company is not entitled…The logic…[would]…be that a one-man company can never own its assets beneficially but can only ever hold its assets as the nominee of its sole controller. That is what Lord Wrenbury said is not the law [in *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 633].
>
> 105. The flaw in the 'power equals property' approach is that it ignores the fundamental principle that the only entity with the power to deal with its assets is the *company*. Those who control its affairs – even if the control is in a single individual – act merely as the company's agents. Their agency will include the authority to procure an exercise by the company of its dispositive powers in respect of its property, but those powers are still exclusively the company's own: they are not the agents' powers. When and if the agents act as such, and procure a company disposition, the property which immediately before the disposition belonged to the company will become the property of the disponee. Until then, it remains the property of the company and belongs beneficially to no one else…."

67. Echoing Mr Tager's submissions, as quoted above, I accept that in signing and sealing the Settlement Agreement on behalf of Wealthstorm Limited, and in procuring it thereby to discount the Loan, Mr Sultana was not, as a matter of law, instructing Wealthstorm Limited either directly or indirectly; he was not telling a third party what to do, he was acting in right and on behalf of the company. He was the means whereby the company, as an artificial creation, acted.

68. Finally under this heading, I should mention that I have considered (and, indeed, received supplemental submissions on) the question whether any different analysis is called for in light of the principle (expressed by Lord Davey in *Salomon v Salomon & Co* at page 57) that a "company is bound in a matter *intra vires* by the unanimous consent of its members". It might be argued that this third way of binding a company (in addition to the ordinary process by way of board resolution or the company in general meeting) connotes a power to deal with a company's assets vested in and exercisable by a sole shareholder personally rather than in right and on behalf of the company itself.

69. The nature of such power, and its relationship with the provisions of the company's constitution as comprised in its Memorandum and Articles of Association, is not entirely clear: for example, it has long been a subject of debate whether the power is such that the shareholders acting unanimously (or, in the case of a sole shareholder, acting alone) may direct the company even in respect of matters that are allocated by the articles of association to the board of directors.

70. However, I have concluded that it is unnecessary in the present context to determine this: suffice it to say that, in my view, the nature of the power, whatever its scope, is a power to act on the company's behalf in respect of assets and liabilities of that company: a sole shareholder exercising the power does not thereby instruct a third party: that sole shareholder once again acts in right of the company itself.

Even if the Debt is not otherwise within the scope of paragraphs 8 and 9, what is the consequence of Mr Sultana having ostensibly treated the Loan as his own asset?

71. It follows that, to succeed, the Claimant must show that in the particular factual context, the Loan must be treated as an asset of Mr Sultana, even though it was not, because he listed it and has until now apparently regarded it as such. As previously mentioned, this was the primary way in which the Claimant put its case, initially at least.

72. Mr Chapman emphasised, in addition to the inclusion in his verified list of assets of the Loan as an asset separately from his shares in Wealthstorm Limited, the following:

    (1) the confirmation of the accuracy of that list in his second witness statement;

    (2) the use of some of the proceeds of the monies paid on settlement of the Loan to fund his ordinary living expenses;

    (3) the apparent depiction of the Loan in his own pleadings as a personal loan, and in particular the depiction in paragraph 11 of his Defence (as also in his Amended Defence) of the Loan representing an investment in Digital Archives Inc by Mr Sultana *"(through his wholly-owned company, Wealthstorm Limited)"*, as if Wealthstorm Limited were a mere conduit;

    (4) the lack of any statement or evidence to correct that depiction of the Loan.

73. I took Mr Chapman to suggest that at least three legal consequences flowed from these facts:

    (1) the Freezing Order should be construed in accordance with the parties' apparently shared understanding, of which each was aware, that Mr Sultana's assets included the Loan;

    (2) in any event, Mr Sultana should not be permitted to depart from that shared understanding;

    (3) furthermore, giving effect to that shared understanding was appropriate and necessary to give effect to the objective of the Freezing Order, since in such circumstances the Loan would be an asset available to the Claimant by way of enforcement if successful at Trial, either (a) because Mr Sultana's shares enabled indirect access or (b) because in such a factual context the Court would almost lift or pierce the veil and treat such assets as available to ensure that the benefits of incorporation should not be abused.

74. Mr Tager rejected all these arguments:

(1) As to (1), and the construction of the Freezing Order, the parties' shared understandings could not affect or alter the objective determination of its meaning: an order of the Court was not a contract, and its meaning should be (a) constant and (b) objectively ascertained by reference to facts available to all persons whom it might affect, and not on the basis of private understandings between the parties.

(2) As to (2), no argument based on estoppel, whether by convention or otherwise, should be available, for substantially the same reasons as above;

(3) As to (3), (a) the ultimate power of a controlling shareholder to wind up a company should not be taken as connoting that the company's assets were to be treated, without more, as prospectively available to satisfy a judgment debt; and (b) the possibility of the Court subsequently lifting or piercing the veil is not such as at this stage to warrant treating an asset which is in law the company's as the respondent's, either generally or on the particular facts of the case.

75. In my judgment, Mr Tager is correct on each of these three points. As it seems to me:

(1) an order of the Court, not being a consent order (as to which see *Alexiou & Anor v Campbell* [2007] UKPC 11 at para. 12), is not a contract: the familiar principles of contractual construction cannot be applied without modification. In particular, in my view, the Court will be more reluctant, at the least, to give to words a special meaning which may have been intended by the parties but which would not be their usual meaning. An order of the Court is likely to (and in the case of a freezing order almost certainly will) affect (and in some cases bind) persons other than the parties who may well be (indeed are likely to be) unaware of preceding communications between, or shared assumptions of, the parties. Although an "unswervingly literal" approach is not appropriate, and the context in which the words appear may well affect their construction, it seems to me that the Court must adopt the meaning which, in the context, the words naturally bear, rather than any special but unexplained meaning.

(2) Similarly, in my view, an order of the Court must be given a uniform meaning which can be ascertained by all persons affected by it without reference to evidence that is only available to the original parties. The fact that the parties may have chosen to adopt a meaning other than that intended by the words may well afford each a defence (whether by way of estoppel by convention or otherwise) if the other suddenly departs from their shared understanding; but, in the absence (so far as I am aware) of authority to the contrary, I consider that the Court should not enforce an order otherwise than in accordance with its objective meaning.

(3) As to (3), and as stressed by Mr Tager, the principle of corporate personality precludes treating a sole shareholder's shareholding and the assets of the company as substantially the same: the one may provide the key whereby to unlock the net assets of the other, but they are juridically

different, and a right to enforce against shares is to be distinguished from a right to enforce against the company itself. As to the possibility that, if the claim is made good, and it is subsequently shown that the company was a mere façade (or, although Mr Tager counselled against the term, *alter ego*), the Court may at that stage lift or pierce the veil of incorporation, that is all prospective (as well as uncertain). Although that possibility may warrant an extension of the scope of the Freezing Injunction to cover the company or its assets, it does not, in my judgment, justify giving a more expansive meaning to the words used than that which they can fairly bear.

Conclusion

76. Accordingly, I have concluded that the Claimant's application to commit Mr Sultana for contempt on the basis that the Settlement Agreement compromising claims for recovery of the Debt constituted a dealing with or disposal of his assets must fail.

77. That said, I think it was at the very least unwise of Mr Sultana and his advisers, knowing that he had listed the Debt as one of his assets, to proceed as they did. That may affect the question of costs, on which I will invite further argument.

78. Furthermore, in the particular circumstances, I would be minded to include wording in the Freezing Order to extend to any dealing with the assets or liabilities of Wealthstorm Limited, which appears to have no trading activities. I would hope that this might be agreed; in default of agreement I leave it to Counsel for the Claimant to determine whether or not to make an application for a suitable variation of the Freezing Order.

Observations as to standard form of order

79. More generally, my conclusion that the standard form of freezing order does not, ordinarily and without more, extend to restrain dealings in the assets of a body corporate wholly owned and controlled by the respondent, invites consideration whether, and if so in what circumstances, a variation of the standard form (which is not, of course, a prescribed form, and is often modified to suit the particular case) may be appropriate. I appreciate (as was strongly urged on me by Counsel for the Claimant) that the use of wholly owned and controlled bodies corporate, not as a trading vehicle but in effect as a convenient wallet or pocket, is not uncommon.

80. In my view, it may well be that where there is, or emerges in the context of disclosure, strong evidence that the respondent has or is likely to have assets in a non-trading body corporate which he wholly owns and controls, which do not have any active business, and which are in truth no more than pockets or wallets of that respondent, an extension to the ordinary form of order may be justified. Since it may be that the assets held within those corporate pockets may ultimately be required to be made available for the purposes of enforcement, relief specifically designed to preserve (or more accurately, perhaps, prevent the dissipation of) such assets may be appropriate. Exceptional circumstances would still have to be demonstrated; in many cases, restraint on any transactions diminishing the value of the respondent's sharers may well suffice.

81. In such exceptional circumstances, until at least the return date, and after disclosure of all shareholdings, the order might be crafted to restrain dealings in assets of bodies corporate having no or no substantial trading activities and which are wholly owned and controlled by the respondent. The claimant may then determine whether to seek relief directly against such bodies corporate under or by analogy with the so-called *Chabra* jurisdiction (see *TSB Private Bank International S.A. v Chabra* [1992] 1 WLR 231 (Mummery J, as he then was) and the commentary in *Civil Procedure, vol. 2 (2013) para. 15-63*), or the continuation of the original restriction, with any appropriate exceptions (in either case) to enable any trading in the ordinary course which is demonstrated.

82. However, and as has often been emphasised, a freezing order is, even in its standard form, a substantial invasion of a respondent's usual rights, to be made only to seek to ensure that the effective enforcement of orders of the court is not deliberately thwarted. Obviously, any extension in its application to legally separate third parties, which may be affected in ways that cannot necessarily or comprehensively be envisaged, can only be justified in exceptional circumstances.

83. Beyond the indications of possible parameters I have attempted above, it does not seem to me possible, and in any event it seems to me that it would be unwise, to seek to define what degree of likelihood that the body corporate is no more than convenient and contrived packaging (or, to quote Lord Keith in *Woolfson v Strathclyde Regional Council* (1978) 38 P & CR 521, a "mere façade concealing the true facts") would have to be established to warrant such an extension.

84. My caution, and the emphasis on the need for exceptional circumstances, is further increased in light of the Supreme Court's recent decision in *VTB Capital plc v Nutritek International Corp and others* [2013] UKSC 5. There, Lord Neuberger described the precise nature, basis and meaning of the notion that the Court may in certain circumstances pierce the veil of incorporation as being "somewhat obscure". He made clear that "assuming that there is jurisdiction to pierce the corporate veil on appropriate facts" (see paragraph [148]) the circumstances would have to be such as to demonstrate (see paragraph [142]) "a façade concealing the true facts", such that "in reality, it is the person behind the company, rather than the company, which is the relevant actor or recipient (as the case may be)". He also emphasised (see paragraph [143]) that it is not sufficient to demonstrate "abuse of the corporate structure" (unless that phrase was simply another way of describing use of the company as a façade). All their Lordships concurred in that part of his speech. Judicial reticence in deploying the doctrine of lifting the veil is mandated.

85. Of course, at the interlocutory stage of a freezing order, it may not be necessary (and in most cases is likely to be impossible) to demonstrate that the veil is certain to be pierced or lifted; a real likelihood may suffice. But that likelihood must be demonstrated; for it is (as it seems to me) only the likelihood of the Court at the end of the day piercing the veil so as to make the assets in a company available for the purposes of enforcement which can justify an extension of a freezing order to capture dealings in the assets of bodies corporate wholly owned and controlled by a respondent.

86. In short, only where such proof is or becomes available, is there (as it seems to me) a basis for extending the restrictions in a freezing order to the assets of bodies corporate

that are in the nature of a façade. Even then, the precise wording will require careful thought; and as indicated above, exceptions may be required in case the claimant is wrong that the company is not trading.

87. Whether, given what I apprehend has become the frequent use of non-trading bodies corporate as pockets or wallets, an optional variation of the standard form should be available (by analogy with the optional extension to assets held on trust in one of the recommended forms used in the Commercial Court) is a matter which may require consideration in due course: that is likely to depend on the extent to which it is perceived that the problem is widespread and that otherwise the protections intended to be afforded by freezing orders may be circumvented or undermined.