

The Jersey Foundation: The Royal Court speaks

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Dalemont Limited v Senatorov and others; Unreported Judgments, 21 March 2012, Royal Court

Introduction

The caption for this briefing is perhaps overstating the position. Nonetheless the Deputy Bailiff has made certain remarks regarding the situation of the Qualified Member of the foundation in this case which could amount to a criticism of the foundation regime. In the writer's view, whilst the Deputy Bailiff's comments are perhaps understandable here, it was unfair to malign the Foundations Law. A service provider could have found itself in the same position if it had been in a minority on a PTC board or on the board of a private investment company owned outside a trust.

The Facts

In May 2010, the Plaintiff obtained two judgments against the First Defendant in this case. \$43 million remained outstanding under those judgments. The Plaintiff brought proceedings in Jersey seeking to enforce the foreign judgments against the First Defendant in the sums outstanding and seeking orders enabling the Plaintiff to pierce the corporate veil of the Second Defendant (the "Foundation") so as to be able to get to the Foundation's assets. These assets included the shares in the Fourth Defendant, itself a holding company of a structure holding valuable real estate assets. The Order of Justice contained wide disclosure orders against the Defendants, including the Foundation, requiring the Defendants to provide details of their assets. The hearing which is the subject of this judgment, saw the Defendants justify to the Court why they had failed to comply with the disclosure orders within the stated time period. It was in the context of delivering judgment against the Foundation that the Royal Court made its remarks on the Foundations (Jersey) Law 2009 (the "Law").

The Court noted that there were three Council Members in this case and a guardian. One of the Council Members was the Qualified Member. In the affidavit filed on behalf of the Foundation by an officer of the Qualified Member, it was confirmed that the Foundation held shares in the Fourth Defendant, the ultimate holding company of the valuable real estate. The officer of the Qualified Member stated that she fully expected an affidavit would be lodged on behalf of the Fourth Defendant in respect of its assets. In giving evidence, the officer of the Qualified Member stated that she had never met the other Council Members and that Council meetings took place by written resolution. It was not known whether the other Council Members were directors of the underlying companies. The Foundation, it seemed, had very little information about the companies in the structure. As far as the Qualified Member was concerned, it was always intended that it would play no part in the administration of the underlying corporate structure. The court noted that under the specific regulations of the Foundation, key decisions such as the acceptance by the Foundation of endowments, the application of any of the Foundation's assets and also any payments or other distributions to the beneficiaries, could not be taken without Qualified Member consent. The court questioned how those decisions could practicably be taken or any control exerted when the Qualified Member had such limited information.

Decision

The court found all the defendants, including the Foundation, to be in contempt. The Defendants were given a fresh date by which they had to file comprehensive affidavits. In finding against the Foundation, the court noted that under the Law and the regulations of the Foundation, it was possible for a foundation to be formed where the Qualified Member was in a minority and where in practice the Qualified Member did not have any information regarding the foundation's assets, liabilities or business. In such a case the Qualified Member is reliant on the co-operation of its fellow Council Members who were resident elsewhere than Jersey. The court concluded that this situation was unsatisfactory and it invited the authorities to give consideration to the structure of the Law and to the requirements put upon Qualified Members. Without sufficient information, the Court said it was very difficult to prevent underlying structures from being used for money laundering or other criminal purposes.

Comment

The court was concerned that the service provider in this case did not have sufficient information on the assets underlying the Foundation. It was troubled also that under the Law, the Qualified Member did not appear to have any obligation to obtain such information. We would make two comments. Firstly, under article 36 of the Law, a foundation itself must keep at its business address (which will be the Qualified Member's address in Jersey) both records "sufficient to show and explain its transactions" and records "that disclose with reasonable accuracy, its financial position". Coupled with a service provider's obligations under the AML regime, it is our view that there are provisions under the law sufficient to enable service providers to require the provision of information on entities underlying a

foundation. My second point is that the service provider would have been in the same position had it been in a minority on a PTC board of potentially being unable to obtain information on underlying entities. Thus the criticism of the Law in this case might be said to be unfair. The lesson for service providers from this case is that they should require as part of their client take on sufficient disclosure on assets underlying the foundation and to have an up front agreement with the client on a mechanism for the provision of updated documentation in the future.

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