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THE JURISDICTION TO FREEZE A THIRD PARTY'S ASSETS AND DOUBTS ABOUT PIERCING THE VEIL

Nicolas Journeaux

This article considers the Royal Court of Jersey's power to make orders to freeze assets in the hands of a third party against whom there is no substantive claim. The paradigm example for these purposes is taken of a claimant against a settlor or beneficiary of a discretionary trust wishing to apply for an injunction to freeze the trust assets because he believes that they should be made available to meet the claim. The particular focus is on the question of the extent to which the claimant needs to show when he applies for the freezing order that he might or will ultimately be able to enforce such a judgment against trust assets. It also reviews in brief form the not unrelated current state of English law as to piercing the veil of companies and refers to the academic and judicial tide of thinking against the doctrine.

Freezing third party assets

1 *Obiter* statements in the judgment in the Jersey case of *Africa Edge SARL v Incat Equipment Rental Ltd*[1] raise the issue of and, on one view, may appear to endorse a "freeze first and ask legal questions later" approach. In that case a Jersey resident beneficiary of Guernsey discretionary trusts was subjected to a freezing order from either procuring disposal of the trust assets or disposing of any interest he had. Birt, DB (as he then was) responded to the argument that the assets in the Guernsey trusts would not be available to meet the judgment against the beneficiary and therefore it would be wrong to freeze the trust assets. At para 11 he said—

> ". . . this Court is not being asked to freeze the assets of the trusts, I am only being asked to restrain the defendant [beneficiary] from either procuring disposal of the trust assets or disposing of any interest he may have. Nevertheless I do think it important to remind oneself of what was said in *In re Esteem Settlement* 2003 JLR 188, in particular at paragraph 96. It is clear from that

[1] [2008]JRC175.

paragraph and the authorities referred to earlier in that case that the courts do, on occasion, grant a freezing injunction in respect of trust assets where there is a claim against a settlor or a beneficiary, *because at that stage it is not known whether there will be some ground for attributing the assets in the trust to the alleged debtor*. For example he may have put the assets in there at a time when he was insolvent, or the trust may be a sham, or other matters.

. . . it will eventually be a matter for the Guernsey Court as to whether any judgment can be enforced against the trust assets. For these interlocutory purposes I consider that what I am being asked to order is proper and reasonable." [Emphasis added.]

2 It is important to reiterate that the order being made in that case did not have the effect of freezing the trust assets. It might be that different considerations might be applied in the case of injunctions against a beneficiary. However the underlined part of the judgment above does invite the question as to how far the court in both scenarios should be required to be satisfied as to the prospects for the recovery from trust assets.

3 Before analysing that issue it is useful to remind oneself of the context and content of the passage from *In re Esteem* referred to in *Africa Edge*. In *In re Esteem* (where the author appeared as counsel for the plaintiff), the plaintiff Grupo Torras S.A. ("GT") claimed that the assets of two Jersey discretionary trusts known as the Esteem Settlement and the Number 52 Trust should be made available to meet the judgment debt owed to it by the settlor and beneficiary Sheikh Fahad Al-Sabah. Although GT was successful in claims that certain settlements of funds into those trusts should be set aside on the basis that they were carried out as a fraudulent disposition designed to defeat the settlor's creditors and also in seeking to trace funds stolen from it by the settlor into the trusts, GT was not successful in other claims. These included claims that the veil of the trusts should be pierced or lifted because, it was claimed, Sheikh Fahad had effective control over the trusts which he had abused to avoid his creditors and that the trusts were sham trusts. The headnote to the case report[2] summarises the court's finding on the claim to pierce the veil as follows—

"Although the court could pierce the veil of a company where the controlling shareholder used the company to conceal the true facts of his own impropriety, the principle did not apply to allow

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[2] 2003 JLR 188, at 193.

> the piercing of the veil of a trust where the settlor had managed to assume substantial and effective control of the trust and had dominated the trustees improperly. The beneficiaries' interests could not be affected by such a breach of the trustees' fiduciary duties which permitted the settlor to control and misuse the trust."

4 The key finding of that judgment was, most importantly, that settlor control for an improper purpose is not a basis for setting aside trusts and that piercing the veil was for company law and not trusts law.

5 The passage from para 96 of the judgment in *Esteem* referred to in *Africa Edge* followed a discussion in the judgment of four interlocutory judgments in English cases that dealt with freezing applications, namely (1) *Re a Company*,[3] (2) *Intl. Credit & Inc. Co. (Overseas) Ltd. v Adham*,[4] (3) *Grupo Torras S.A. v Sheikh Fahad Mohammed Al-Sabah*,[5] and (4) *Private Trust Corp. v Grupo Torras S.A.*[6]

6 The Royal Court held at para 96 that in each of those cases—

> "the court was concerned at an interlocutory stage with assets which seemed to have disappeared into offshore structures of one sort or another amid allegations of fraud. On the facts as described, there were obviously all sorts of possibilities as to potential causes of action. Thus there might be a suggestion that in truth the assets were held as nominee or agent for the wrongdoer and that the trust was a sham; that there was a proprietary claim; that the transfers to these entities were made for creditor defeasance purposes and might therefore be attacked at common law or under applicable bankruptcy legislation. The courts did not have to consider these aspects. In each case there was an allegation of fraud and of the transfer of assets to such structures. It is hardly surprising that, in such circumstances, the court would wish to restrain disposal of any assets which might eventually be found to belong to or to be due to the defrauded parties. Clearly at such a stage, given the allegations of fraud, the court is likely to err on the side of caution and preserve the assets. There was no detailed consideration in any of the cases as to whether the veil of a trust could be pierced at the end of the day; the courts were simply concerned with the preservation of assets in the meantime. In our judgment the cases do not really advance

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[3] [1985] BCLC 333.
[4] [1998] B.C.C. 134.
[5] English QB, 29 July 1994, unreported.
[6] Bahamian Court of Appeal, October 27th, 1997, unreported.

Mr. Journeaux's case. *The courts in question simply did not have in mind the issue which we now have to consider. In each case all that was done was a lifting (as opposed to piercing) of the veil for the purposes of preserving assets (as indeed was done in Atlas Maritime*[7] *itself).*" [Emphasis added.]

7 Thus, whilst the Royal Court contemplated that it might be possible to "lift" the veil of the trust for the purposes of a freezing order application, it did not follow that one could apply the "piercing" principles to the application for substantive relief. What this seems to mean is that the *effect* of granting a freezing order over the trust assets is that the veil of the trusts is lifted but that one can no longer on an application for such an order invoke the idea that, at trial, the veil of the trust should be pierced as the only basis (and logically "a" basis) for showing that the assets in the trust may become available to meet the settlor's debt and should for that reason be frozen.

8 Recent English and Cayman Islands' case-law discusses the correct test on this point when an application is made to freeze third party assets. A creditor-friendly approach was the result of *Dadourian Group International Inc v Azuri Ltd*,[8] where Mr Edward Bartley Jones, QC (sitting as Deputy High Court Judge) granted a freezing order against an English Company called Azuri which, through a French subsidiary, had received ownership from one of the judgment debtors named Helga Dadourian of a flat in Paris. Helga's evidence was that in 1994 she had established a Liechtenstein Anstalt called Brinton who had acquired the shares in Azuri in 2005. The judge began by setting out the general law as follows, but it is what he said at para 30 that may cause the offshore lawyer (in light of the decision in *Esteem*) to raise an eyebrow—

"**The Law**

26 The jurisdiction to make a freezing injunction against a third party is undoubted. The jurisdiction is exercised as, in effect, ancillary relief granted by the court in aid of, and as part of, the freezing relief granted against the defendant to the substantive claim. Exercise of the jurisdiction can occur where there is good reason to suppose that the assets of the third party are, in truth, the assets of the injuncted defendant (see, *e.g.*, *SCF Finance Co Limited v Masri* [1985] 1 WLR 876 per Lloyd LJ at 884 B–F). A classic case where there would be good reason for supposing that the assets are, in truth, the assets of the defendant is where there

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[7] [1991] 4 All ER 769.
[8] [2005] EWHC 1768 (Ch).

is good reason for supposing that the assets are held by the third party on bare trust (or as nominee) for the defendant. But I would reject any suggestion that the 'Chabra' jurisdiction is limited to such a case. In *International Credit and Investment Co (Overseas) Limited v Adham* [1998] BCC 34 at 136 Robert Walker J pointed out that it had become increasingly clear, as the English High Court regrettably had to deal more and more often with major international fraud, that the court would, on appropriate occasions, take drastic action and would not allow its orders to he evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy was highly prized and official regulation was at a low level. The present is undoubtedly a case of shadowy trusts and companies (although I hasten to add that I make no adverse comment, whatsoever, about the level of official regulation or level of secrecy in a country such as Liechtenstein). Robert Walker J went on to indicate that a freezing injunction may indeed, in appropriate circumstances, be justified and necessary where parties have the ability to switch real assets from one shadowy hand to another in such a way that it is difficult to keep track of where they are. That, he said, was the justification for orders which looked through offshore companies in order to find the real assets—or which did, if you looked, pierce the corporate veil (to use that vivid, but imprecise, metaphor which is sometimes used). Robert Walker J then went on to consider the decision in *Re a Company* [1985] BCLC 333 where Cumming-Bruce LJ (at 337–38) indicated that the court would use its powers to pierce the corporate veil if it were necessary to achieve justice, irrespective of the legal efficacy of the corporate structure under consideration . . .

. . .

29 In *C v L* [2001] 1 All ER (Comm) 446 Aikens J said (at paragraph 75) that, generally, it must be arguable that the assets, even if in the third party's name, are in fact beneficially owned by the relevant defendant before a Chabra-type injunction can be granted.

30 For my part, I do not believe it is necessary to establish beneficial ownership in a strict trust law sense. Clearly, if assets are held on a bare trust then the Chabra jurisdiction can be exercised. But, in my judgment, even if the relevant defendant to the substantive claim has no legal or equitable right to the assets in question (in the strict trust law sense) the Chabra jurisdiction can still be exercised if the defendant has some right in respect of, or control over, or other rights of access to, the assets. The

> important issue, to my mind, is substantive control. The view expressed in Gee on Commercial Injunctions 5th Edition 2004 at 13.007 is that if a network of trusts and companies has been set up by a defendant to hold assets over which that defendant has control and that this has, apparently, been done to make himself judgment-proof, then such would be an appropriate case for the granting of freezing relief against a relevant non-party. I agree. What needs to be considered is the substantive reality of control, not a strict trust law analysis as to whether the third party is a bare trustee. Thus, in my judgment, placing assets in a discretionary trust would not prevent the Chabra jurisdiction being exercised against that discretionary trust if the substantive reality were that the relevant defendant controlled the exercise of the discretionary trust. Any other analysis would entirely defeat the ability of the English courts to take drastic action and would allow the court's orders to be evaded by manipulations, entirely contrary to the court's powers and duties as identified by Robert Walker J in *International Credit and Investment Co (Overseas) Limited v Adham* (above). Whether this be described as identifying the discretionary trust as a 'sham', as piercing the corporate veil, or as seeking to identify a controlled discretionary trust as a bare trust does not, to my mind, particularly matter. Certainly, at the interim stage, all that matters is to ascertain whether there is good reason to suppose that the relevant defendant controlled the assets in the discretionary trust."

9 This judicial view that evidence of control over the assets of a third party by a debtor can be a sufficient basis to freeze trust assets (as opposed to a good arguable case as to how those assets might ultimately be subject to an order to meet the claimant's just demands) appears to have been endorsed in the English case of *Yukos Capital Sarl v Rosneft Intl*[9] at para 22 by Steel J. where he said of para 30 of the judgment of Deputy High Court Judge Bartley-Jones, QC that he found it "persuasive. [and went on to say] I doubt the need to establish a structure under English trust law in determining the jurisdictional scope of a freezing order which would commonly involve both domestic and foreign parties". The *Dadourian* decision also appears to have been followed in Hong Kong in *Hu Chi Ming v Koon Wing Yee*.[10]

10 If one would have hoped and expected a counterblast against the heresy of control as a sufficient basis to freeze a trust to come from offshore, one was not to be disappointed. In the Cayman Court of

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[9] [2010] EWHC 784.
[10] HCA 1479-2009.

Appeal case of *Algosaibi v Saad Invs Co Ltd*,[11] Sir John Chadwick held as follows—

> "35 . . . I am not persuaded that the courts in this jurisdiction should treat the decision in the Akai Holdings case as a sufficient reason to depart from the need—emphasized in Cardile, and in the cases in England and Wales and in Australia in which Cardile has been followed—that 'substantive control' is not, of itself, sufficient to found jurisdiction to grant Mareva relief: *it is necessary to identify some process of enforcement which would (or might) lead to the assets of the [non-cause-of-action defendant] becoming available to satisfy the judgment which the claimant may obtain against the [cause-of-action defendant]*.
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> 36. In addressing the question whether there is good reason to suppose that the assets of the [non-cause-of-action defendant] can, by some process ultimately enforceable by the courts, be made available to the claimant to satisfy the judgment which the claimant may obtain against the [cause-of-action defendant] it is pertinent to have in mind the observation of Mr Justice Warren in *Basra v Poole* (*supra*), at paragraph [10]:
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> > 'As I have said, it is important that the case against the defendant is clearly formulated, but more so must the possible claim against a third party be clearly formulated . . .'
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> With respect to Justice Henderson, it is not enough to say, as he did at paragraph 59 of his judgment, that—
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> > 'It seems probable that when the dust has settled and the true picture has emerged, the assets of many of the non-cause-of-action defendants may become available to satisfy a judgment against Mr Al Sanea personally.'
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> *It is necessary to identify, with a degree of specificity appropriate to the evidence before the court, why it is that the court is satisfied that, following a judgment against the [cause-of-action defendant], there is good reason to suppose that the claimant will be able to invoke some process of enforcement which will lead to the assets of the NCAD becoming available to satisfy that judgment*." [Emphasis added.]

11 Importantly for the wider world, this part of the *Algosaibi* judgment received judicial approval as a correct statement of the scope

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[11] CICA 1 of 2010 (handed down on 15 February 2011).

and limitation of the *Chabra*[12] jurisdiction under English law by Flaux, J in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd*[13] at para 146 and Gloster, J (Judge in charge of the Commercial Court and a former Judge of the Jersey and Guernsey Courts of Appeal) in the case of *Parbulk II SA v PT Humpuss Intermoda Transportasi TBK*.[14]

Conclusion on third party freezing

12 As the Cayman judgment says, there will, of course, be a wide spectrum in the degree of specificity required to establish the juridical route to trust assets, depending upon the facts of the case. For example there will be cases like *Dadourian* where the judge was rightly very concerned and influenced by the defendant's coyness to reveal to the court information about the trust structure as well as any evidence of attempts to avoid the payment of the judgment debt. At the other extreme will be cases where the claimant will rightly meet judicial reluctance where he can only point to a long-established discretionary trust where the trustee has met all of the requests of a beneficiary who happens to be a judgment debtor. In between the two will be the harder cases where the need to seek urgent *ex parte* relief will create pressure to give the benefit of any doubt to the applicant and to play safe to freeze assets.

Doubts about veil piercing

13 The current state of English law on piercing the veil of companies, and the departure from the *Salomon* principle, has probably been best summarised by the Court of Appeal in the family law case of *Petrodel v Prest*,[15] where Rimer, LJ at para 125 approved what the Court of Appeal had recently held in *VTB Capital PLC* v *Nutritek Intl Corp*[16]—

> "125 . . . I shall now set out the material parts of what the court in VTB said about the next key authority, a decision in family proceedings:
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> > '78 Faiza Ben Hashem v. Shayif and Another [2008] EWHC 2380 (Fam) is a judgment of Munby J that includes between paragraphs 144 and 221 a comprehensive discussion of the principles by reference to which the court may pierce the veil of incorporation. Between paragraphs

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[12] *TSB Bank International v Chabra* [1992] 2 All ER 245.
[13] [2011] EWHC 2339.
[14] [2011] EWHC 3143 (Comm).
[15] [2012] EWCA Civ 1395.
[16] [2012] EWCA 808.

> 159 and 164 Munby J restated the principles, which he summarised as follows. First, ownership and control of a company are not themselves sufficient to justify piercing the veil. Second, the court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justice. Third, the corporate veil can only be pierced when there is some impropriety. Fourth, the company's involvement in an impropriety will not by itself justify a piercing of its veil: the impropriety "must be linked to use of the company structure to avoid or conceal liability" (a principle derived from Trustor). Fifth, it follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing. Sixth, a company can be a façade for such purposes even though not incorporated with deceptive intent:
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> > "164 . . . The question is whether it is being used as a façade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."""

14 The Court of Appeal in *VTB* agreed with Munby, J's summary of the principles, subject to two clarifications. The first, expanding the fourth principle, that—

> "it is not sufficient for veil piercing purposes merely to show that the company is involved in wrongdoing . . . The relevant wrongdoing must be in the nature of an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts."

The second is a qualification to Munby, J's final principle that the court will do only what is necessary to provide a remedy, stating that veil piercing may in fact be suitable even where other possible remedies are available.

15 To take just one English judge who is unconvinced about the general principle,[17] Arnold, J expressed views disparaging of it in his judgment at first instance in *VTB*.[18] At para 71 he describes the doctrine thus—

> ". . . the expression 'piercing the corporate veil' is a convenient label which is used to identify cases in which the courts have granted relief which involves, or perhaps more accurately appears at first blush to involve, disregarding the separate legal personality of a company from the person or persons who control it. It is not a substitute for analysing the legal basis for such relief."

16 Arnold, J rejected the attempt by VTB to pierce the corporate veil by treating the controller of a company as a contracting party to a contract entered into by the company. This went against the judgment of Burton, J in *Antonio Gramsci Shipping Corp v Stepanovs*[19] a few months earlier, of which Arnold, J was harshly critical. The Court of Appeal confirmed Arnold, J's approach on that aspect in the *VTB* appeal. The *VTB* case was then appealed to the Supreme Court.

17 In his lecture to the Chancery Bar Association in January 2013 (after the Court of Appeal but before the Supreme Court hearing in *VTB*), Arnold, J. set out his reasons for thinking that the doctrine as a whole ought to be scrapped. He argued that many of the decided cases which are said to be examples of piercing the corporate veil could be interpreted in ways which do not, in fact, disregard the separate legal personality of the company. These decisions, he said, were actually based on more established legal principles, such as agency or equitable fraud. On this basis, he concludes that the doctrine of piercing the veil is not in fact "soundly based in authority", and is actually unnecessary,

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[17] The academic dispute is well documented on both sides of the Atlantic, see, for example, Cheng (2011) "The corporate veil doctrine revisited: a comparative study of the English and the U.S. corporate veil doctrines", at http://lawdigitalcommons.bc; Richardson (2011) "The helter skelter application of the reverse piercing doctrine", *University of Cincinnati Law Review*, vol 7, no 4, art 9, at hppt://scholarship.law.uc/uclr/vol79/iss4/9 and David Cabrielli (Lecturer in Commercial Law at the School of law University of Edinburgh) "The case against 'outsider reverse' veil piercing in company law" at http://www.law.ed.ac.uk/file_download/publications/2_97_thecaseagainstoutsiderreverseveilpiercin.pdf

[18] [2011] EWHC 3107 (Ch).

[19] [2011] EWHC 333 (Comm).

saying—"In most cases there is no need for it at all. There are generally other remedies available".[20]

18 Arnold, J went on in his lecture to say that he hoped that the Supreme Court in *VTB* would confirm his views and dismiss the appeal. Ideally, he said, it would "take the opportunity to put an end to the doctrine of the piercing of the corporate veil". The Supreme Court did dismiss the appeal but only by refusing to extend the doctrine to include adding third parties to a contract. It agreed with the lower courts that the circumstances in which veil piercing could occur ought not to be widened any further, and certainly not purely "in the interests of justice", without an element of impropriety. However, at para 127 of the judgment, Lord Neuberger stated he was "not convinced that all the cases where the court has pierced the veil can be explained on [the] basis" of the submission put to the court that "piercing the corporate veil is contrary to high authority, inconsistent with principle, and unnecessary to achieve justice". Neuberger declined to express a view on whether the courts can pierce the corporate veil at all, saying at para 130—

> "In my view, it is unnecessary and inappropriate to resolve the issue of whether we should decide that, unless any statute relied on in the particular case expressly or impliedly provides otherwise, the court cannot pierce the veil of incorporation. It is unnecessary, because the second argument [that allowing the court to pierce the veil in this case would represent an illegitimate and unprincipled extension of the circumstances in which the veil can be pierced] raised on behalf of [the second respondent] . . . persuades me that VTB cannot succeed on this issue. It is inappropriate because this is an interlocutory appeal, and it would therefore be wrong (absent special circumstances) to decide an issue of such general importance if it is unnecessary to do so."[21]

19 Lord Clarke, dissenting, agreed with Lord Neuberger that "this is not a case in which it would be appropriate to pierce the corporate veil on the facts. I would however wish to reserve for future decision the question what is the true scope of the circumstances in which it is permissible to pierce the corporate veil".[22] The judgment due from the Supreme Court in the case of *Petrodel v Prest*,[23] heard in March 2013, is awaited with much interest because that court might (but, it seems,

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[20] 'Piercing the corporate veil: time to give the doctrine its quietus?', Arnold, J, Chancery Bar Association Lecture, 18 January 2013.

[21] [2013] UKSC 5 at 130.

[22] *Ibid* at 238.

[23] [2012] EWCA Civ 1395 appealed.

like *VTB*, is not bound in order to resolve that appeal) to grasp the nettle and perhaps to re-cast the jurisprudential pedigree of veil piercing. Certainly, it is in the interests of justice as well as commerce in the Channel Islands where assets find a home in various structures (including the new legal entity created by statute of Foundations) that the circumstances in which the veil might be pierced are clarified. It is to be hoped that *Petrodel v Prest* will clarify the situation and not create further uncertainty.

Nicolas Journeaux is an advocate and a partner in Carey Olsen, 47 Esplanade, St Helier, Jersey JE1 0BD and was assisted in this article by Alice Bailhache who is a Legal Assistant at Carey Olsen