Hidden loot, opaque trusts, and missing legacies

Adam Carvalho and **Oliver Piper** consider how new PSC register requirements apply to foreign companies and discuss two recently reported cases

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Readers will be aware of the new rules requiring UK corporate entities to maintain a register of people who are able to exercise significant control over those entities (PSC register), which came into force on 6 April 2016. What about foreign companies (in particular, those that hold UK property)?

Speaking at the Anti-Corruption Summit in London on 12 May 2016, David Cameron announced that 'all foreign companies which own properties in the UK will have to register publicly who really owns them, who really controls them – and no foreign company will be able to buy UK property or bid for central government contracts without joining this register'.

The prime minister's statement was made some two months after the government launched a discussion paper on enhancing transparency of beneficial ownership information of foreign companies. The discussion paper refers to the need to 'combat illicit financial flows' and 'lift the veil of secrecy over who ultimately owns and controls companies'. This has led to the government's focus on foreign companies which own land or property situated in England or Wales (property transactions are a devolved matter).

Under the proposals, foreign companies would have to provide information on their beneficial ownership before they can buy properties. The government wants to know whether foreign companies which already own property in England and Wales should also be subject to the new rules. The Law Society said it would be difficult to see how this could be enforced, or even communicated to all companies that already own property. If such a provision is imposed, a reasonable transitional period should apply.

The discussion paper also considers how beneficial ownership information should be held. The starting point is that the obligations on foreign companies should be similar to those now placed on UK companies. The information must be easily accessible to law enforcement agencies and 'investigatory organisations', it must be easy for foreign companies to provide the information and update their records, and (crucially) the information must be subject to a level of quality assurance. How much, one wonders, is the government prepared to spend on quality assurance? Whoever administers the register would be responsible for issuing a unique identifier number, which would enable the foreign company to purchase property.

The government is considering exempting foreign companies incorporated in jurisdictions which already have an accessible central register of beneficial ownership information (e.g. EU countries which have implemented the Fourth Money Laundering Directive).

Undoubtedly, people will question the extent to which a register of foreign company beneficial owners can, in reality, prevent the corrupt from 'hiding their loot from the authorities' (to use David Cameron's words). This may depend on how effectively the new regime is enforced. The discussion paper acknowledges that there will difficulties in verifying information provided by foreign companies (whose directors are unlikely to be UK resident), and that thought will need to be given to the type of civil and criminal sanctions that may be imposed in order to encourage foreign companies to provide the correct information and keep their registers up to date. Most effective might be the suggestion that non-compliant foreign companies could be prevented from buying new property or selling existing property.

Despite the fact that there are still some issues to be ironed out, the government's efforts to combat international corruption should be welcomed, and we now await the publication of an impact assessment, which will be informed by the answers received to the discussion paper. >>

>> Disclosure to beneficiaries

The case of *Blades v Isaac and another* [2016] EWHC 601 (Ch) illustrates the issues that can arise where executors and trustees refuse to provide information to beneficiaries, and highlights the rules relating to litigation costs in cases involving trustees.

Valerie Lee died in 2013, leaving her entire estate on discretionary trusts. The beneficial class included one of Lee's daughters (the claimant in the case). Lee had apparently fallen out with her other daughter, who was not named as a beneficiary.

Lee's letter of wishes set out a number of suggested gifts to her beneficiaries, and also asked her trustees to transfer 5 per cent of the assets to the daughter who was not a beneficiary. The trustees (validly) added this daughter to the beneficial class and then made distributions to her and the claimant in line with the letter of wishes.

The trustees were two partners at the firm which drew up Lee's will. The claimant was unhappy with the trustees and their firm almost from the beginning of the administration of the estate. There appears to have been a breakdown of relations.

The firm in question had written to both sisters asking them to limit their communications because 'they only add to the costs of the administration'. The trustees also refused to provide a breakdown of Lee's estate on the basis that the estate accounts were confidential to trustees and executors.

The claimant's concern was that as the trustees were partners at the firm conducting the administration, there would be nobody to monitor professional costs. She said that she would be forced to apply to court for disclosure if the trustees did not provide the requested information.

The trustees instructed counsel, who endorsed their refusal to provide information. A number of months later, once proceedings were underway, the trustees asked a second barrister for an opinion and this resulted in the disclosure of the information sought by the claimant. The case proceeded to trial to determine the question of costs.

The court indicated that it would have ordered the trustees to provide disclosure of the requested information. The claimant argued that as she had succeeded with her claim, the trustees should pay her costs, and they should not be entitled to pay these costs or their own costs from the trust fund.

The court found that both the claimant and the trustees were entitled to take all of their costs out of the trust fund (on the indemnity basis). The stance taken by the trustees was 'unfortunate', but they had acted in good faith and in accordance with counsel's advice.

Master Matthews went on to say that had he ordered the trustees to pay the claimant's costs, they would still have been entitled to their indemnity. The end result is that although the claimant succeeded in obtaining the information she had requested, the cost of the exercise will deplete the trust fund.

Financial advice

A second case, *Herring and another v Shorts Financial Services LLP* [2016] EW Misc B12 (CC), highlights issues that can arise when a will draftsman does not obtain sufficient information regarding the financial products owned by his or her client.

Mrs Shemwell died in 2012 and left legacies to the children of her late husband's niece, the claimants in the case. In order to mitigate inheritance tax, on advice from a financial adviser, Shemwell had previously set up trusts for the claimants.

Shemwell's solicitor visited her in 2011 to draw up her will. Her financial adviser attended the meeting for less than ten minutes, and gave the will draftsman a short 'aide-memoire' setting out the value of the trust assets.

Shemwell wanted to leave the claimants £200,000 each. The will draftsman included legacies for £54,000, but did not check that under the terms of the trusts the trust assets would pass to the claimants on Shemwell's death. In the event, the claimants did not receive any part of the initial capital of the loan trust (which fell into Shemwell's residuary estate). The claimants sought to recover the shortfall from the solicitor and the financial adviser.

By the time that the case went to trial, the claimants had settled their claim against the will draftsman at mediation. Nonetheless, Judge Behrens's comments are interesting. He found that the will draftsman should have made sufficient enquiries to satisfy himself that the loan trust monies would pass to the claimants on the testatrix's death, and should have devised a formula to ensure they received the desired legacies.

Judge Behrens did not feel that the financial adviser owed a duty of care to the claimants – there was not sufficient proximity between him and the will-drafting process and he had not (on the facts) assumed responsibility to the beneficiaries.

Nonetheless, because of the duty of care owed by the solicitor, this was not 'a case where the claimants have no claim against anyone'. **SJ**

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