EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL **DIVISION**

CLAIM NO.: BVIHCM 2017/0211

IN THE MATTER OF THE TRUSTEES' RELIEF ACT CAP 304
AND SECTION 246 OF THE BVI BUSINESS COMPANIES ACT 2004
AND PART 67 OF THE CIVIL PROCEDURE RULES

BETWEEN:

(1) .DEYANA DIMITROVA MARCHEVA
(2) VASIL GEORGIEV STANCHOVSKI

Applicants

and

(1) BLENSDALE LIMITED
(2) BIRCHSTEAD LIMITED
(3) WISSINGTON LIMITED

Respondents .

Appearances: .
Ms. Tana'ania Small,Davis for the Applicants
Mr. Andrew Willins for the Respondents

2018: February 22;
March 20

JUDGMENT

[1] **CHIVERS, J. [AG]:** It is unusual for an application for judgment in default of acknowledgment of service (let alone defence) to result in a reserved Judgment. It is no less unusual for a person absolutely entitled as against a trustee not to obtain the transfer of the trust property when demanded.

[2] Blensdale Limited ("the Company") was incorporated as a BVI Business Company on 29th April 2009. Initially it had one shareholder, Birchstead Limited, which held the single issued share of $1 nominal value. On 31st March the Company issued one further share of $1 nominal value to Wissington Limited.

[3] Birchstead Limited and Wissington Limited ("the Shareholders") are both. BVI registered companies. Each of them has executed a deed of trust in respect of \ their share in the. Company. Birchstead Limited executed a deed on 4th November 2009 in, inter alia, the following terms:

> "We, Birchstead Limited....hereby acknowledge and declare that we hold the share [in the Company] registered in our name as Nominee and Trustee of DEYANADIMITROVA MARCHEVA ... (...l'the Owner") and WE UNDERTAKE and agree....to exercise our voting power as holder of the said [share] in such a manner and for such purposes as the Owner may from time to time direct or determine".

[4] On 31st March 2010 Wissington Limited executed a materially)dentical deed in favour of Vasil Georgiev Stanchovski who is, with Ms. Marcheva (of the first deed) one of "the Claimants".

[5] The Shareholders are companies in the control of SMP Partners Limited ("SMP") who provide various nominee services. SMP also provided ,the services of a further company, Montrond Inc, to act as a director of the Company. Montrond Inc remains the sole director.

[6] By a letter dated 29th May 2017 solicitor for Ms. Marcheva and Mr. Stanchovski wrote to SMP instructing them to cause:

a. The transfer of Wissington's share in the Company to Mr. Stanchovski;

b. The transfer of Birchstead's share in the Company to Ms. Marcheva;

c. The removal of Montrond Inc and the appointment of Mr. Stanchovski in its place as director of the Company.

Relevant letters of authority and a consent to act as a director from Mr. Stanchovski were provided.

[7] Mr. Stanchovski was entitled to collapse the trust under which Wissington held its share for him, and Ms. Marcheva likewise in respect of Birchstead under the **Saunders v Vautier**[1] principle (both being of full age and absolutely entitled to the trust property). Additionally both Wissington and Birchstead were bound to act, as shareholders, under the directions of their respective cestui qui trust. In the ordinary case there could have been no question of SMP doing anything other than acting upon those instructions.

[8] But SMP did not act on those instructions. The Claimants brought these proceedings seeking orders to give effect to the above instructions as well as a declaration that they are the beneficial owners of the respective shares in the Company. The Shareholders and the Company were made defendants to the proceedings which were served on 13th December 2017. Neither the Shareholders nor the Company acknowledged service of those proceedings, nor intimated that they intended to oppose any order which the Court might make.

[9] This application, for judgment in default made without notice (pursuant to rule 12.10(5), **Civil Procedure Rule, 2000** "CPR") was filed on 25th January 2018 and came before me for hearing on 22nd February 2018 with a time estimate of 1 hour.

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[1] [1841] EWHC Ch J27

[10] Ms. Marcheva's affirmation filed in support of the claimant's application and dated 24th January 2018 states at paragraph 11:

> "In or about June 2017 we were informed by Janie Kean SMP Partners that they prefer to have a court order directing their compliance with our instructions ..... because Wissington... is aware of a dispute between me and Mr Krassimir Guergov, a Bulgarian citizen, regarding the beneficial ownership of another BVI company, Equip Limited. That dispute has been resolved as set out below". [2]

[11] Ms. Marcheva then went on to refer to the brief details of the claim by Mr. Guergov against her in respect of Equip. The proceedings she said were as follows:

a. Mr. Guergov obtained a freezing order in respect of Equip Limited ("Equip") in the Isle of Man on 1st April 2010. This was discharged on 6th May 2010.
b. Mr. Guergov obtained a freezing order in the BVI on 4th May 2010, which was discharged on 4th June 2010.
c. Mr. Guergov obtained a freezing order in Bulgaria on 29th November 2010 which was discharged on 19th March 2011.
d. Mr. Guergov sought in Bulgaria an order directing Ms. Marcheva to instruct Wissington as sole shareholder in Equip to transfer its shares in that company to a Mr. Dixon in the Isle of Man, and, a decision establishing that Mr. Guergov was the beneficial owner of Equip.

[12] Ms. Marcheva went on to say that the Bulgarian proceedings had been dismissed, ultimately, by the Supreme Court of Cassation on 11th April 2017. She exhibited a translation of that court's decision as well as an opinion from a lawyer in Bulgaria regarding the finality of that decision.

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[2] In fact by letter dated 22nd June, SMP wrote to the claimant's solicitors setting out 5 suggested ways forward. As well as the possibility of a claim in the current form further options were an application as trustee for directions, an opinion of independent Isle of Man advocate confirming that there was no risk of a claim against SMP by Mr. Guergov, confirmation from Mr. Guergov himself that he would not claim against SMP, and specific insurance for SMP.

[13] Finally Ms. Marcheva drew this court's attention to·the fact that the claim (i.e. Mr. ·Guergov's claim) was in relation. to "an entirely different company, i.e. Equip Limited".

[14] As matters stood on my pre-reading of the papers the application was straightforward. The Claimants each had a cast iron claim to the relief sought as regards the transfers of the Company shares, one to each of them. This was supported by the clearest documentation and was not opposed (indeed the claim had not even been acknowledged) by the defendant trustees. I was less certain as to whether it was appropriate to give declaratory relief as to the beneficial ownership of the shares, a matter to which I shall return. But that uncertainty was nothing to do with the claim which Mr. Guergov had made against Ms. Marcheva in respect of Equip, because that was a different company which appeared to have no connection with this Company save that Wissington was a common shareholder (and presumably nominee shareholder) in both.

[15] On 21st February I received a certificate of urgency and hearing bundle filed on behalf of the Shareholders. They applied to the Court in its jurisdiction over trustees pursuant to section 246 of the **BVI Business Companies Act, 2004** and section 6 of the **Trustees' Relief Act 1877 (Cap 304),** rule 67.4 of the CPR and pursuant to the inherent jurisdiction of the Court, for directions as to what steps they should take in respect of the application for judgment in . default due to be heard on 22nd February.

[16] On the afternoon of 21st February I gave directions to the Shareholders, as trustees, 'that they should attend the hearing on the 22nd February tq give assistance to the Court, but that they should not seek to defend the application, because I could not see that the matters which they had drawn to my attention raised any defence in law to the claim that had been brought. The Shareholders duly attended the hearing of this application on 22nd February and Mr. Willins of Messrs Appleby appeared for them. Ms. Tana'ania Small Davis appeared for the Claimants.

History

[17] The story which emerged from the evidence filed by the Claimants and the Shareholders is as follows - with the very substantial caveats that:

a. the court has not heard from Mr. Guergov,
b. SMP's file is apparently incomplete with relevant personnel having left their employ,. and
c. the Claimants have not had any opportunity to answer the evidence which was filed by the Shareholders.

[18] Equip was incorporated by SMP as a "stock" company on 5th July 2007. Its director was another SMP BVI company, Mollyland Limited. Ms. Marcheva, who is a Bulgarian national and a lawyer practicing in Bulgaria, appears to have acquired Equip in about November 2007. According to particulars of claim filed by Mr. Guergov in the Isle of Man in April 2010 there exists a declaration of trust - presumably by Wissington Limited in favour of Ms. Marcheva in respect of the Equip share -dated 14th November 2007.3 If this was in a standard SMP form I imagine it was in the same form as the declarations of trust referred to above in relation to the shares in the Company. However, nothing turns on that.

[19] Mr. Guergov claimed, in the Isle of Man proceedings, that there existed a further two documents in.relation to Equip. A "Nominee Agreement" dated 20th May 2008 by which Ms. Marcheva expressed that she held the shares in Equip for Mr. Guergov, and a "Contra Letter" of the same date, which states that the shares in Equip are owned by Ms. Marcheva. I have not seen either document. Mr. Guergov claimed that, notwithstanding the Contra Letter, the shares in Equip were always intended to be held by Ms. Marcheva beneficially for him.

[20] On about 8th March 2008 a company called Top Tone Media Holdings Limited ("TTMH") of which Mr. Guergov claims (or claimed) to be the beneficial owner,

3 Subsequently referred to by the Bulgarian Supreme Court of Cassation as 4th November, see below.

transferred to Equip a 10% shareholding in a company called Top Tone Media SA. On 10th September 2008 the rights in 75% of these shares were transferred back to TTMH on payment to Equip of €2.5 million. The monies were paid into a bank account of Equip at Barclays Wealth in London.

[21] In about October 2009 Ms. Marcheva approached SMP for the incorporation of a second BVI company. A services agreement was entered into between SMP and Ms. Marcheva on 23rd October 2009 and the declaration of trust by Birchstead, then the sole shareholder in the Company was made on 4th November 2009.

[22] Also on 4th November 2009 the sum of €525,000 was transferred, on the instructions of Ms. Marcheva (but through the agency of SMP entities) from the Barclays Wealth account of Equip to an account at the same branch in the name of the Company. Two further payments were made from the Equip account to the Company as follows:

a. 14th December 2009 the sum of €735,000;
b. 24th February 2010 the sum of €1,245,000

leaving the Equip account with a balance of nil.

[23] On 2nd March 2010 (according to an email from Ms. Marcheva to SMP dated 10th March) Ms. Marcheva instructed SMP "for closure of Equip".

[24] On 5th March a letter was received by the chairman of SMP by lawyers for Mr. Guergov which appeared to include a copy of the nominee agreement of 20th May in favour of Mr. Guergov and referred to "an impending shareholder dispute". Ms. Marcheva replied on 10th March with a suggested response which suggests that the nominee agreement was "simulative and executed only for the purpose of negotiations with CME" which appears to be an entity in

respect of which Top l]one Media SA Shareholders were in some commercial relationship[4].

[25] On 11th March Ms. Marcheva signed a "dissolution declaration" for Equip Limited in which she declared inter alia that the company had no assets and all the bank accounts had been closed. In the event SMP did not take steps to bring about the dissolution of Equip Limited (not least because there is no provision for voluntary dissolution in the BVI).

[26] In the Isle of Man proceedings Mr. Guergov claims that, on 30th March 2010, he instructed Ms. Marcheva to transfer the Equip shares to him or his agent. At any rate, on 1st April 2010 he obtained ex parte from Deemster Corlett a freezing order against Ms. Marcheva, Equip and SMP and permission to serve the proceedings out of the jurisdiction on Ms. Marcheva and Equip. Broadly speaking the order prevented any dealings in the shares in Equip or Wissington as well as any dealings with the Barclays Wealth bank account. Ms. Marcheva was obliged to provide information stating whether she had procured the making of any payment from the Barclays Wealth account since 23rd February 2010. I do not know why the 23rd February was chosen and in the event it appears she did not provide any information.

[27] By his particulai-s of claim filed on 21st April 2010, Mr. Guergov claimed beneficial ownership of both the shares in Equip and "the assets of Equip Limited in particular €2,500,000 comprising' the bank account of Equip and certain share options of which Equip Limited have the benefit of.[5] This claim (and indeed the freezing order in respect of the bank account) is consistent with no one having told Mr. Guergov that the bank account of Equip was empty..

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[4] It is of some concern that a lawyer should participate in a "simulative" agreement which was, presumably on Ms. Marcheva's own case, entered into for the purpose of deceiving CME. But - as mentioned below -this Court has received no explanation from Ms. Marcheva (and necessarily not from Mr. Guergov) of any of this.

[5] The.matter of share.options (presumably relating to the TTMH transaction) or indeed any other possible asset of !:quip appears to have fallen by the wayside; At least, there is no evidence of any asset in Equip. It is possible that such other assets as Equip may have were transferred out of Equip prior to the "dissolution declaration" but, if so, history does not relate where.

[28] On 5th May 2010 (following an initial application on 4th May) a freezing order was obtained in the BVI against Ms. Marcheva, Equip, Wissington Limited and SMP Partners Limited preventing any dealings in the shares in Equip, any changes in its officers, any changes to the bank mandate and an order freezing the account at Barclay's Wealth. The renewed application seemed to turn on Mr.. Guergov establishing an anchor defendant in the jurisdiction, namely Equip, against whom he claimed a cause of action as constructive trustee of the monies in the bank account.

[29] Also on 5th May Mr. Guergov's lawyer in the Isle of Man wrote to the defendants' (in that action) lawyers informing them that the BVI court had accepted jurisdiction and that t e action would proceed in that jurisdiction, although the Isle of Man injunction would be sought to be continued in support of the BVI action.

[30] That letter was premature, as will appear be.low. But it was one factor·in the judgment of Deemster Corlett who on 6th May acceded to an application by Ms. Marcheva and Equip that the Isle of Man court had no jurisdiction over them so that service should be set aside. At paragraph [10] of his judgm nt Deemster Corlett agreed that there was "clearly a serious issue to be tried" as regards the beneficial ownership· of the shares in Equip. The question was, where?

[31] Deemster Corlett set aside the service on Ms. Marcheva and Equip on the grounds that the Isle of Man was not clearly the most appropriate forum for the determination of the dispute - he considered at [9] that "the real connection here, is, or the closest connection is with the British Virgin Islands".

[32] SMP, who were represented by the same advocate as Ms. Marcheva and Equip, applied for a stay of the proceedings. on the grounds of *forum non conveniens.* The D.eemster said [17]:

> "I consider that it is somewhat early to conclude definitively that [SMP] has discharged the required burden on it. It is possible that the British Virgin Islands Court may not continue to accept jurisdiction in this case. For my own part, though of course it is entirely a matter for the BVI Court, I would have thought that it is unlikely in light of the close connections which this dispute has with the British Virgin Islands"

and he adjourned the application for a stay with liberty to apply. But the Deemster did discharge the injunction against SMP. He said [22]:

> "Also, there may be a question as to whether there are in fact assets within this jurisdiction because the assets seem to me to be in a bank account in London. Also, the risk of, dissipation seems to me to be fanciful because we are dealing with a reputable corporate service provider which has been placed on notice about the likely dispute in this case and I do not believe it is credible to believe that they would actually dissipate these funds without at least seeking some guidance from the Court."

[33] Clearly the Deemster was not told by counsel for Ms. Marcheva (who had given the instruction) Equip and SMP (which had put it into effect) that the bank account in London was already bare. A fair inference would be that the Court was allowed to believe that the money was still in the bank account to avoid tipping off Mr. Guergov as to the fact of the transfer and indeed the existence of the Company.

[34] The inter partes hearing of the BVI injunction application came on for effective hearing on 1st June 2010. Bannister J dealt with the matter in a short judgment where he held that, in light of the documentation concerning the transfer of the Top Tone Media SA shares, it was impossible for Mr. Guergov to argue that the Equip monies were held on trust for him.[6] He had no claim against Equip

[6] Krassimir Petrov Guergov v Deyana Demitriova Marcheva et al, BVIHC{COM)2010/0047 (delivered 8th June 2010).

(or Wissington) and hence there was no anchor defendant. Accordingly service would be set aside on Ms. Marcheva and SMP and the claims be struck out.

[35] Bannister J refused permission for evidence of Bulgarian law to be introduced for the purpose of showing the BVI was the appropriate forum for the dispute. He said [11]:

> "Mr Arthurs further submitted....that Bulgarian law does not recognize trusts. This submission seemed to break down at the first hurdle in light of the fact that the Nominee Agreement and Contra letter were drafted by Bulgarian lawyers in Bulgaria for two Bulgarian nationals."[7]

and at [12]

> "...It seems to me that the real dispute is between Mr Guergov and Ms Marcheva, for which the proper forum is Bulgaria. It is entirely Mr Guergov's own fault that, for whatever reason, he has not brought Ms Marcheva before the Bulgarian _courts and has instead chosen to attempt to litigate here, as he had earlier attempted (with similar lack of success) to litigate the same dispute in the Isle of Man".

The issue of the continuation of the freezing order did not arise and in theory it might be said hat the question of whether Equip was constructive trustee could be determined whether or not Equip actually held any money. But at any rate it seems that once again no mention was made by counsel for Ms. Marcheva and SMP of the fact that Equip had divested itself of the money the subject of the claim.

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[7] Mr. Guergov's case in the Isle of Man proceedings was that Ms. Marcheva was a partner in the law firm which prepared the documents (if indeed she had not prepared the documents herself).

[36] Having been "sent" by Deemster Corlett to the BVI,[8] Mr. Guergov was now forwarded by Bannister J to Bulgaria where he did, indeed, try his hand: I will not attempt to set out in detail the various Bulgarian proceedings. Although I have been provided with translations of two of the decisions made in those proceedings it is not entirely easy for a common lawyer to understand their real nature, at least without expert assistance.

[37] In particular it is difficult to understand the extent to which the Supreme Court of Cassation found against Mr. Guergov. In part the decision appears to be based on forum grounds: the translation provides that:[9]

> "The grounds for the claim[10] [by Ms Iylarcheva] do not derive from the refutation of the claimant's statement about the presence of a contract for pecuniary interest and a failure to perform the contract on the part of the fiduciary but from the inappropriately selected defence method through an inadmissible declaratory action. The action is inadmissible because it aims at establishing rights over the capital of the company without participation of the company itself or the company entered in the register as the owner of its capital. Additionally, the action is inadmissible due to the fact that the \company in question is registered abroad which rules out the competence of the Bulgarian court on such an issue".

On its face that passage does suggest that the question of beneficial , ownership of the shares in Equip cannot be determined in Bulgaria as Bannister J clearly thought it should. The passage also suggests that the . appeal was not allowed on any merits based argument as to whether or not Ms. Marcheva has failed in any contractual obligation to Mr. Guergov.

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[8] I am of course aware that the BVI proceedings were commenced prior to the judgment of the Deemster. Nonetheless, the connection with the BVI and even the fact of the proceedings was highly relevant to his determination.

[9] Decision No. 257 of 11th April 2017 Supreme Court of Cassation Commercial College in Bulgaria

[10] In this context the appeal, I think

[38] A further passage from the translation suggests that a claim for Ms. Marcheva to procure the transfer of the Equip shares to Mr. Guergov turned upon whether the claim was a claim for a "non-substitutable action" within the meaning of Article 527 of the Civil Procedure Code. The Court held that it was not; in other words Mr. Guergov appeared to have brought "the wrong type of claim".

[39] In its decision the Supreme Court of Cassation nullified that part of the decision of the Sofia Court of Appeal *"in the part* which recognised as established with regard to [Ms. Marcheva] that under the terms of Article 292 paragraph 2 of [Obligations and Contracts Act], [Mr. Guergov] as the actual owner of the rights and share of "Equip Lirnited" according to the written statement of Wessington Limited of November 4 2007." So it appears that, in so far as the question of the beneficial ownership of the Equip share was ever the subject of a merits based determination by a court in any jurisdiction, that issue was decided in favour of Mr. Guergov, even if set aside for lack of the correct parties and/or forum grounds.

[40] Exhibited to the affirmation of Ms. Markova in support of this application is an opinion from -a Bulgarian lawyer, Mr. Valentin Braykov. Ms. Marcheva says that he is an "independent" lawyer and that may well be the case, although Mr. Braykov does not say so in his opinion. Mr. Braykov confirms the evidence which Bannister J refused to admit (and dismissed out of hand) on the 1st June, namely that the law of Bulgaria does not recognise trusts. Mr. Braykov does however refer to the concept in Bulgarian law of an "actual owner" of property which is held by a "mandatory-indirect agent".

[41] Mr. Braykov says that the Supreme Court of Cassation was faced with two claims by Mr. Guergov. The first was a claim to order Ms. Marcheva to instruct Wissington Limited to transfer the share in Equip to a Mr Dixon. Mr. Braykov says that the court "finally dismissed that action as unfounded". I take it that this is a reference to the claim not falling within Article 527 of the Civil Procedure Code but it is unclear to me, at least, wheth r the Supreme Court of Cassation was also saying that no such claim was possible as a matter of

Bulgarian Law, or simply Whether such a claim was possible but had been brought under the wrong head.[1.1]

[42] The second claim was the claim as regards ownership of the Equip share brought under Article 292 of the Obligation and Contracts Act. Mr. Braykov says that the court found that this claim was "inadmissible and terminated proceedings on it". I take this as a reference to the "forum" issue considered in the first extract from the translated judgment and the basis upon which the Supreme Court of Cassation overturned the decision of the Court of Appeal.

[43] Mr. Braykov sets out the limited basis upon which a decision of the Supreme Court of Cassation can be set aside and refers to the decision as creating a res judicata. He then deals with the question of limitation as regards a claim against Equip for ownership of its "assets". He concludes that such a claim would fail (for the same reason given by Bannister J) but in any event would be statute barred.

[44] By an email dated 10th January 2018, Mr. Yavor Kambaurov introduced himself to SMP as a Bulgarian lawyer representing Mr. Guergov in his dispute with Ms. Marcheva. The email referred to an pplication made to the Supre(Tle Court of Cassation for a review of its decision. That review was rejected on 17th December 2017 apparently with the words

> "within the grounds of the decis.ion it is expressly stated that the inadmissibility of the claim results from the defective method of defence of the claimed material right, chosen by the claimant which means that the right may be defended upon the right choice of claim for its defence".
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This is a reference to the first of the claims mentioned by Mr. Braykov. The email of the 10th January evinced an intention to issue further proceedings in

[11] Which raises shades of the old English "forms of action" which Maitland referred to when he said "the forms of action we have buried, but they still rule us from their graves". Equivalent forms may, for all I know, and might, reading as best I can the translation of the Supreme Court of Cassation's judgment, rule in Bulgaria.

Bulgaria based upon the fact that "there is no court resolution that resolves this case on its merrts" and promised notification of such proceedings, though none have yet been notified to SMP.

The Application

[45] Ms. Tana'ania Davis case was simple. Her clients were the clea.r beneficial owners of the shares in' the Company and were entitled to have them transferred to them. The decision of the Supreme Court of Cassation in Bulgaria put to rest any suggestion of a live claim by Mr. Guerdov against the shares in Equip, let alone the shares in the Company. Nor can Mr. Guerdov have a claim to the money in the Company bank account because the documentation makes clear that this must be money which belonged to Equip and not to Mr. Guerdov personally.

[46] I was urged to make the declaration sought by the Claimants to the effect that they are the beneficial owners of the shares in the Company. I was shown two authorities which suggested that the court should be. willing to make such an order notwithstanding that this was an application for a summary remedy in respect of which the court has heard no argument on the merits. In **Patten v Burke Publishing Ltd,**[12] Millet J granted such a declaration on a motion for judgment in default where the justice of the case required it. He said at 543H

> "Even after trial it is not the normal practice of the court to make a declaration that the defendant had been guilty of fraud or negligence. Justice can be done to the Plaintiff by awarding him damages....but in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts b en investigated. Quite apart from this however, it is clear from *Wallersteiner v Moir* that this is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be

[12] [1991] 1 WLR 541

followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without a declaration"

[47] In **Lever Faberge Ltd v Colgate-Palmolive Co**[13] Lewison J referred to Millet J's judgment and noted that following the introduction of the CPR it was no longer sufficient simply to allege facts - the claim form must be supported by a statement of truth. At paragraph 4 he said:

> "In my judgment, the reluctance of the court to grant declarations without full investigation of the facts is less strong now that allegations have to be supported by a statement of truth."

[48] The difficulty in this case is two-fold. In the first place there is no evidence before the Court as to how the Claimants came to be "the" beneficial owners of the shares in the Company, The declarations of trust evidence that, as between the Claimants and the Shareholders, the Shareholders hold the shares on trust for the Claimants. But there is no evidence that the Claimants themselves are the ultimate beneficial owners of the shares. At one level that may not matter, because the proceedings are as between Claimants and Shareholders and it may be said that the declaration would be binding on them only - a point which weighed with Millet J when making the declaration sought in **Patten v Burke Publishing.** But on this basis there is no need for a declaration because the Shareholders do not deny that they hold the shares on trust for the Claimants. There is no need, as between the parties to this litigation, for any such declaration so as to do "the fullest justice" between them.

[49] That leads to the second difficulty which is that the purpose of the declaration can only be to assist the Claimants in seeing off any future challenge to the ownership of the shares in the Company by Mr. Guergov. Whether such a declaration would be regarded as determinative of the issue of beneficial ownership in Bulgaria, I cannot say, but there must be a real risk that it would

[13] [2005] EWHC 2655 (Pat)

be so regarded. But Mr. Guergov is not before the Court and the bare assertion of beneficial ownership has not been tested.

[50] Ms. Tana'ania Davis said that there was no challenge to the beneficial ownership - the defendants had not put in a defence (indeed I have directed them as trustees not to defend). But any challenge to beneficial ownership will not come through the Shareholders or SMP. It will come, if at all, from Mr. Guergov if and when he discovers the existence of the Company.

[51] As to that the Claimants say that Mr. Guergov could never make a realistic claim to be the beneficial owner of the shares in the Company, even if he could establish beneficial ownership of the shares in Equip. I am not so sure. If Ms. Marcheva was at the time of incorporation of the Company a lawyer owing professional duties to Mr. Guergov, or perhaps in any case as trustee of the shares in Equip, then if the purpose of the acquisition of the Company was to fill its bank account with the proceeds of Equip's bank account (so as to remove the money from the intended target of anticipated litigation and make it easier to div·ert to Ms. Marcheva) it may well be that the law would impose on Ms. Marcheva a constructive trust over the share capital of the Company. The Court has not heard Mr. Guergov on this point and it would be wrong to shut· him out of any such argument not least because he may be aware of further facts relevant to the determinatio.n

[52] In the circumstances not only is it not necessary to make a declaration, and not only has the Court not seen any substantive evidence (beyond mere assertion) to support the claim and heard no argument or evidence designed to defeat the claim, such a declaration could be positively misleading to another court (or even to Mr. Guergov and his advisors). Finally, on this point, a declaration is a discretionary remedy. It seems to me that the court should not exercise its discretion in favour,of the Claimants for at least the following reasons:

a. The evidence shows a strong prima facie case that the Company was· acquired by Ms. Marcheva solely for the purpose of receiving money the subject of a claim by Mr. Guergov.

b. Whether by original design, or by circumstance, the Isle of Man Court (and to perhaps a lesser extent this court) were allowed to be misled as to the continued existence of the funds in the bank account of Equip.

c. The effect, if notthe intention, of this was to ensure that Mr. Guergov would not learn of the existence of the Company and to ensure that he could not pursue his remedies in respect of, or against, the Company.

d. Even when coming before this Court on an application for judgment in default Ms. Marcheva failed to inform the Court that the Company had received the entire contents of Equip's bank account. Her evidence was positively misleading in this respect as she referred in one part of her affirmation to the wish to take control of the Company's bank account, but in another part asserted that the Equip claim was "in respect of an entfrely different company". In light of the history set out above t e Company was not "entirely different". There was a very close and highly material connection between them. The Court should at the least have been told that the Equip money had been transferred to the Company for no consideration.

e. So far as the bank account is concerned, the Company has no other assets. The sole purpose of the relief sought in this application (including the declaration) is to allow the Claimants to obtain and protect from Mr. Guergov the money in the bank account. If (as Mr. Guergov would say) the money does not belong to the Company or the Claimants - but to Equip and (ultimately through Equip) to him, then the Court should not assist the Claimants in their scheme.

[53] 'Of course, if Ms. Marcheva is properly entitled to theshares in Equip and Mr. Guergov has no claim to them, then she would say that there is no impropriety in her conduct and the Court should not shrink from giving her the declaration she seeks. I am not convinced that the conduct set out above is proper, regardless of Ms. Marcheva's ultimate beneficial ownership of Equip or the Company. But in any case a person who conducts her affairs in secrecy from a counterparty (and indeed from the courts) cannot complain if considerable suspicious falls upon her when those matters come to light, not least when they come to light despite, not because, of her own efforts.

[54] Accordingly, I refuse the declaration sought. That leaves the further claims for relief as to which I have already concluded that the defendants have no defence. But I am not prepared to grant the Claimants the relief they seek, at this stage at least. If Mr. Guergov was the t,rue beneficial owner of the shares in Equip then the relief sought is merely a further step in a process designed to deprive him of the €2.5m to which he is ultimately entitled. Not only that, it is a step conducted (as were the previous steps) behind Mr. Guergov's back. It would be urprising if the Court were to lend its aid to such a scheme.

[55) · Further, in light of the previous conduct of Ms. Marcheva this Court can be confident that if the relief is granted, the money in the Company's Barclay's Wealth account will disappear to some destination known neither to Mr. Guergov nor to the Court.

[56] This Court cannot know whether Mr. Guergov has exhausted his remedies either in Bulgaria or in some other jurisdiction not least because it has not heard from Mr. Guergov on the question. What is clear is that Ms. Marcheva has never established in any court ultimate entitlement to the monies in the Barclays Wealth account. Nor has she given this court any account of how they came to be owned by her, or rather for her benefit.

[57] Ms. Marcheva may have a perfectly good eicplanation, but in light of the matters set out above I am not prepared to make any order which will put into her hands monies acquired by her in circumstances unknown to this court and

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which have since 2010 been the subject of a clear and persistent challenge. The challenge appears to have failed on procedural or jurisdictional grounds, the latter raising particular concern in circumstances where no court (of the only three possible) has accepted jurisdiction to decide the question of beneficial ownership.

[58] I should make it clear that I do not refuse the relief sought pn the grounds that Mr. Guergov may have beneficial ownership of the shares in the Company, though that would be a sufficient ground. I refuse it because the Court will not allow itself to be used as an instrument of wrongdoing. There is a serious risk that any relief granted in this qase would enable Ms. Marcheva to perpetrate wrongdoing.

[59] In the circumstances I shall of my own motion stay this application. I shall give the Claimants liberty to renew it on 35 days written notice to Mr. Guergov. If Mr. Guergov seeks to intervene whether by joinder or otherwise the matter should come back to the court in the first instance for directions.

David Chivers, Q.C. -
High Court Judge

By the Court