



## **Drozdoz - High Court win for Stephen King's contentious trusts team**

14 February 2014

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**Drozdoz v Van Eck** - A resounding High Court success for the contentious trusts team led by Stephen King.

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### **DROZDOV CASE SUMMARY**

#### **Case Summary:**

This case concerned a dispute as to the beneficial ownership of the issued shares in a BVI company ("Monarch BVI"). The Claimant submitted that he beneficially owned one third of the share capital of the company while the First and Second Defendants denied that he had any interest whatsoever. The High Court held that a third of the shares in the company were owned by the Claimant, and consequently his claim succeeded.

#### **Background:**

The Claimant, Max Drozdoz (MD), was the son of the Second Defendant, Anna Ritsema Van Eck (AVE). The first Defendant, Simon Ritsema Van Eck (SVE) was AVE's husband and had been MD's stepfather since 1984.

SVE and AVE had established a partnership called Anglo-Soviet Trading Corporation (ASTC) in the mid-1980s which MD had worked sporadically for whilst at school and university. Between 1991 and 1993 AVE, SVE and MD began a new business venture relating to the export of consumer goods to the ex-Soviet Union, particularly beer and tea, which was increasingly very successful. This business came to be known as the Monarch Foods business. As a result of this various bank accounts were set up with the Heritage Finance Trust in Geneva, in particular one called 'Max' which was used for the purposes of the expanding trade in consumer goods.

Around late 1993 the Parties arranged the purchase of an off the shelf company know Sovereign Trading Corporation Limited (Sovereign Eire) it was intended to be a corporate vehicle for the consumer goods export business.

In 1995 while MD was working in Geneva it became apparent (by disputed means) that the company formation agent for Sovereign Eire had in fact sold the company to a third party. Consequently the Parties hurriedly acquired a new company, Monarch BVI, through Swiss lawyer M. de Bavier to replace Sovereign Eire. The company was duly incorporated on 22 March 1995 and on that date 300 bearer

shares were issued as 3 certificates, which were held by M. de Bavier.

Some years later in January 1998 MD and SVE went to Gibraltar with SVE's lawyer and accountant. The purpose of that trip was to settle shares in a new Gibraltar company, Monarch Foods International Ltd, into two trusts, MF 1 and MF 2. Letters of wishes were signed by SVE for the purposes of MF1, identifying himself and AVE as the principal beneficiaries, and by MD for the purposes of MF2.

In 2009 due to changes in BVI legislation there was a need to convert Monarch BVI's bearer shares to registered shares. Consequently registered shares in the company were issued and held in the name of the Third Defendant, Nominee Services Inc, and the Van Eck's attorneys wrote to them asking for the bearer share certificates. SVE and AVE certified that the shares could not be found and so Nominee Services Inc purported to hold the converted shares on trust for the Van Ecks alone.

As a result of these events in June 2011 MD issued his claim seeking a declaration that he was the beneficial owner of 100 of the 300 issued shares in Monarch BVI. He also sought an order for the transfer of the 100 registered shares to himself, and an account and inquiry as to any distributions made to the Defendants on the erroneous basis that they were the sole beneficial owner of the shares. The Defendants denied that the Claimant ever had any beneficial interest in the shares, or that any agreement had ever existed between them relating to such an interest.

### **The Proceedings:**

The main question before Timothy Fancourt QC (sitting as a High Court Judge) was the factual issue of whether or not it was agreed between the parties in 1995, when Monarch BVI was incorporated, that its issued shares were to be held on behalf of all of them equally. However, as he said in his judgement 'the likelihood of one or other account of the 1995 dispute being true depends to some extent on the factual context' and so he also considered events that both preceded and followed the incorporation of Monarch BVI.

#### Heritage Bank Accounts:

The Court examined the account opening forms, particularly in relation to the 'Max' account, in great detail. These showed that MD appeared to be a beneficial owner and the Court accepted this. In particular it was the case that, in relation to the 'Max' account, MD's signature had been countersigned by AVE and SVE in numerous places. It was concluded that MD had been knowingly added as a beneficial owner of that account by SVE and AVE.

#### Sovereign Eire:

MD argued that it was he who had arranged that OCRA Ltd acquire a company on behalf of all three of them, whereas SVE stated that it was he who dealt with OCRA and that MD had no part to play in the decision. The Court felt that MD's account was more plausible and stated that it was clear MD had had at least a part to play in the formation.

#### MD's involvement in the business of Sovereign Eire and Monarch Foods:

The Court had great regard to the witness evidence provided by Paul Connolly, who had worked with the parties at the relevant time, in relation to this point. Mr Connolly had stated how the business had initially been described to him as an equal partnership between all three of them, and that it was clear to him that MD had a significant involvement in the business of exporting consumer goods, particularly in relation to the financial affairs. The Court accepted this evidence.

#### Loss of Sovereign Eire and setting up of Monarch BVI:

On cross examination SVE stated that he had learnt about the loss while in Denver, USA, when an OCRA employee had telephoned him on his mobile phone (in March 1995). He said that he did not recall discussing the problem with MD but had simply asked his banker, M. de Pfyffer, to resolve the

situation. M. de Pfyffer had subsequently instructed M. de Bavier to obtain a new offshore company and SVE knew nothing of the bearer shares or the shareholding of the new company until 2010.

MD, in contrast, stated that it was he who had discovered the loss while telephoning OCRA in relation to some other business. He had immediately contacted his mother and they had agreed to his approaching M. de Bavier with a view to obtaining an offshore company in respect of which all three of them would be equal shareholders. MD said he had specifically discussed the issue of bearer shares with AVE as a means of preventing their losing the new company, as had happened with Sovereign Eire.

The Court found SVE's account inherently implausible, and found that MD's account, partially supported by that of AVE, had 'the ring of truth to it'. It was logical that bearer shares had been chosen as a means of ensuring that what had happened with Sovereign Eire would not happen again and, consequently, the Court concluded that the shareholding had been discussed as an important part of the strategy to better protect their business.

As a result the Court held that there was an agreement between the parties that Monarch BVI would be set up with the three of them as beneficial owners.

Gibraltar Trusts:

SVE argued that of the two trusts one was intended solely for himself and the other for AVE. He said that the fact MD had signed a letter of wishes in relation to MF2 must have been a mistake on the part of his solicitors. The Court thought that the true explanation was that MD was intended to be the main beneficiary of MF2. It held that SVE was attempting to avoid the conclusion that, in 1998 as in 1995, the parties had intended that MD should have a third share in a Monarch company.

### **Conclusions:**

The Court held that MD's claim succeeded and that he was entitled in principle to a 1/3rd beneficial interest in the shares in Monarch BVI. This conclusion had been reached on the basis of the witness evidence provided by AVE and MD, the Judge's assessment as to the reliability of the witnesses, the support for MD's account found in the documentary evidence, and the inherent implausibility of SVE's witness evidence.

**Payne Hicks Beach acted for the successful Claimant, Max Drozdov, in these proceedings.**

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