

# “The Russia House”

***SOME LESSONS FROM THE LIFE, TIMES AND  
LITIGATION OF  
SERGEI VIKTOROVICH PUGACHEV***

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# 1. Some background

- A clash of oligarchy and kleptocracy
- Sergei, the multi-billionaire, flees Russia
- Significant properties are purchased in the UK and Caribbean
- 5 NZ discretionary trusts are declared to hold those and other assets



## 2. The Pugachev gambit

- Don't disclose trust details in the face of an international freezing order
- Keep back one passport to allow flight
- Disobey the Court by fleeing to France
- Replace NZ trust companies with closer companies
- Strip out millions as “advances”



### 3. The claim

- EW High Court action by MezProm Bank
- Seeking recovery of US\$1bn judgment of Russian Court – alleged theft by Sergei
- Orders sought to have trust assets vested in the claimants or a receiver
- Complex and detailed background necessarily summarised



## 4. The three arguments

- “The True Effect” argument – did they deprive Sergei of beneficial ownership?
- The sham argument
- The argument under section 423 of the UYK Insolvency Act – transfers to prejudice the interests of creditors



## 5. Issues to consider

- Effective control and the resulting absence of a trust “certainty”
- The “transforming” power – fiduciary for some and personal for others
- Sham, emerging sham and illusory trusts – where are we now?
- Validity of trustee appointments



## 6. Effective control / true effect

- Sergei's role as protector crucial to adverse finding – the “disability” clause
- Could replace trustees at will; veto distributions, appointment and removal of beneficiaries, deed variations
- In combination and correctly construed Sergei could ensure no distributions to anyone but him – *Clayton* analysis



## 7. Missing a key element of trust

- Three certainties of a trust
- Certainty of objects/beneficiaries – ok
- Certainty of subject matter – ok
- Certainty of intention to create a trust – uh oh
- Settlor must intend to vest the legal and beneficial interest of an asset in the trustee
- Sergei never intended this – beneficial owner





## 8. “Transforming” powers

- Were the protector powers fiduciary or personal to Sergei?
- If fiduciary, the true effect argument was undermined
- If personal, true effect argument open
- Protector powers legitimate for a “watchdog” role, but only if protector not also a beneficiary – fiduciary for some and not others



## 9. Where to with sham?

- Observations obiter because of true effect
- If Sergei had divested property, then sham
- 4 principles applied:
  - 1. Full analysis of the facts
  - 2. Common intention required
  - 3. Reckless indifference can show this
  - 4. A trust must be a sham from the start



## 10. Some issues to consider with sham

- “Illusory trusts” not helpful
- Shamming intention required by all parties
- Recklessness/going along – what to do to establish trustee independence?
- What has happened to the emerging sham?



# 11. Validity of trustee appointment

- Sergei ditched the NZ trustees for others
- NZ trustees sought declaration of valid removal & no breach of freezing order– Heath J confirmed – loss of confidence
- EWHC did not agree
- Suggests that NZ HC did not have all facts



## 12. The NZ trustee company directors

- Ascertaining settlor intentions?
- Operating at a distance from management of assets (not uncommon but new risks?)
- Limitation to formalities – will pieces of paper be enough?
- Recklessness as to intentions and conduct
- Resistance was too late



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# So, what of Sergei?



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## 15. The fight goes on

- International claim in the Hague against Russia for expropriations
  - Arbitration agreed to but bound up in procedure
  - Extradition from France opposed (a win?)
  - Claims he is worth no more than US\$70m
  - Still living in the French chateau!
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