The German limited and silent partnerships
by Frank Wooldridge

INTRODUCTORY REMARKS

Both the above types of entities exist in France as well as Germany. The limited partnership exists in the United Kingdom in a recent review; however, it has been found valuable in the North Sea continental shelf oil industry. The German limited partnership is defined in paragraph 161 of the Commercial Code as a partnership carrying on a commercial activity under a common name in which at least one partner has unlimited liability towards the creditors, whilst at least one of the other partners is liable only for the amount of his capital investment. A silent partnership is defined in accordance with paragraphs 230(1) and 231(2) of the Commercial Code as a personalistic entity in which the silent partner participates in the commercial enterprise conducted by the active partner in such a way that an investment is made by it in the assets of the active partner, and the silent partner participates in the profits of that undertaking. No such corresponding entity is provided for under United Kingdom law.

In the text below the German limited partnership is considered before the silent partnership, both entities, especially the former, are of considerable economic importance in that country.

THE LIMITED PARTNERSHIP

Nature and some important characteristics

The limited partnership is simply a special form of the ordinary commercial partnership. In principle, the ordinary partners (Komplementaire) are responsible for the running of the partnership, and have unlimited liability, whilst the limited partner(s) are excluded from the management and representation of the partnership. However, the special rules governing the limited partnership, which are principally contained in paragraphs 161-177a of the Commercial Code, are of a flexible nature and some important characteristics

(a) It is decided that there is not to be a prosecution, either because of evidence or legal public interest grounds, and civil recovery requirements are met.
(b) A prosecution fails and civil recovery requirements are met.
(c) Where defendant absconds (before or after conviction) or dies.
(d) Civil recovery may be a maximum of recovery where proper entity has changed beyond all recognition from its predecessor.

The above criteria are not to be treated as conclusive and each case will need to be considered on its special facts and merits. What would not happen, I believe, is to use civil recovery as a substitute for criminal confiscation where the latter is possible, especially where there are victims to compensate from the alleged offending (see also the Attorney General’s Guidelines on civil recovery).

It is worth mentioning here that:
(i) Cases should not be taken on by a prosecuting authority only for civil recovery purposes. In other words, the prosecuting authority should not become a substitute Asset Recovery Agency.
(ii) There are serious risks of costs and damages if civil recovery fails, unlike in most criminal confiscation cases. If so, however, a temptation to go down the civil recovery route, especially given the ruling in the Briggs-Price (currently on appeal to the Supreme Court) and R v Briggs-Price [2009] 3 WLR 1101 (HL).
(iii) In Gale, SOCA alleged that all the property was the proceeds of drug trafficking (largely taking place in Spain and Portugal in the 1980s and 90s) associated luminaries. It is argued that there is no conviction for drug trafficking – in fact the defendant had been tried in Portugal and acquitted. The court found that this was proved on a balance of probabilities and ordered forfeiture. The case is on appeal.

In Rego-Pae there has been both an expansion and contraction of the scope of confiscation orders. It gives the green light for confiscation for offences for which there has been no conviction and the use of evidence for an extremely wide purpose, but at the same time introduces a contraction because such matters have to be proved beyond reasonable grounds – the criminal standard, and that is a threshold which few confiscation proceedings will be able to meet.

It also important to ensure that civil recovery is not pursued because it is the easier option and that there are not double standards where large and rich corporations have self-reporting unprofitable activity “buy their way” out of criminal proceedings. There will be no where, prima facie, civil recovery seems appropriate, but if the offence is serious then justice demands that there is adequate punishment for the offence beyond depriving the offender of ill-gotten gains.

CIVIL RECOVERY AND MUTUAL LEGAL ASSISTANCE TO FOREIGN JURISDICTIONS

If assets within the English jurisdiction are obtained by unlawful conduct in a foreign state then these can be forfeited provided there is sufficient evidence from that foreign jurisdiction that the assets located here were obtained by unlawful conduct in that foreign state even without a conviction in the foreign state. It is strictly therefore not mutual legal assistance to a foreign state in criminal cases of mutual legal assistance. Civil recovery will only be pursued if evidence is provided by the foreign state that the assets were obtained by unlawful conduct.

COMPENSATION TO VICTIMS

This area is not without its difficulties. Compensation is envisaged in the criminal regime. Under the civil recovery route there is no mechanism to compensate victims of crime. The only available option would be under section 281 Proceeds of Crime Act 2002 (POCA) where the “victim” would need to make a declaration acceptable to the court that he/she has an interest in recoverable property or property subject to civil recovery. It is the “victim” who has to make the declaration and since pursuit of civil recovery is not necessary it may be difficult to persuade the court to rule in his or her favour. It is possible that the “victim” would then suffer financially if the recovery were unsuccessful.

IMPLICATIONS IN TERMS OF HUMAN RIGHTS

Civil recovery proceedings are both civil in domestic and European Convention law. In R v He & Chen [2005] EWHC 3021 (Admin) the point was taken that civil recovery proceedings represent an unjustified breach of property rights contrary to Article 1 of Protocol 1 of the ECHR. The submission was rejected. However, this should not be taken to imply that there are no ECHR implications Article 1 (protection of property) and Article 8 (right to respect for private and family life) may well be engaged. Furthermore, the investigator in each case on whom the powers are conferred must fall within a description specified in an order made for these purposes by the Secretary of State under section 84. The powers in question fall within Article 8.2 by virtue of being necessary for the prevention of crime, and accredited financial investigators have functions in the prevention of crime.
Civil recovery and international issues in relation to restraint and confiscation

This article and the one that follows – “Civil interventions for tackling MTIC fraud: a UK perspective”, by Steven Pope and Roderick Stone – were taken from presentations given at a half day seminar held at the Institute of Advanced Legal Studies on November 12, 2009. The seminar, “Civil recoveries and criminal confiscation: UK and EU interventions against fraud,” was chaired by Dr Simone White of the European Anti-Fraud Office (OLAF), Visiting Fellow at the IALS.

by Philip F J Mobsdji

INTRODUCTION

The Serious Crime Act 2007 states: “A relevant authority must exercise its functions under this Act in the way which it considers best calculated to contribute to the reduction of crime.” It further states: “… the reduction of crime is best secured by means of criminal investigations and criminal proceedings.” (See Sch 8, Pt 6) leading “Contribution to Reduction of Crime”.

In my opinion civil recovery work is not, nor should it be, a substitute for criminal investigations, prosecutions and criminal confiscation. Civil recovery ought to be undertaken in circumstances where criminal confiscation is impossible.

It may be helpful to summarise briefly the way in which civil recovery claims are brought. The claimant agency (Serious Fraud Office (SFO), Crown Prosecution Service (CPS) and Serious Organised Crime Agency (SOCA)) has to establish to the civil standard of proof that property has been obtained by unlawful conduct (ie the commission of crime here or abroad) and that the property, or other property which can be shown through the tracing provisions in the Act to “represent” it, is held by the respondent in “recoverable.” The respondent may apply for the release of frozen funds to take appropriate steps to secure his interests and may object to the Part 8 proceedings and ask for the case to proceed under Part 24 or settlement.

In practice the procedure may be more complicated. For example, it may be necessary for the agency to ask for the appointment of a receiver to manage the property in issue and conduct an investigation leading to a report to the court as to whether the property identified and any other property held by the respondent is “recoverable.” The respondent may apply for the release of frozen funds to take appropriate steps to secure his interests and may object to the Part 8 proceedings and ask for the case to proceed under Part 24 or settlement.

To avoid delay it is suggested that the claimant agency should take a more pro-active part in the case management process and that, in almost every case, at an early stage insist that the respondent submits a witness statement setting out in some detail the nature of his answer to the claim that the property in question is or represents property obtained by unlawful conduct.

WHEN SHOULD A PROSECUTING AUTHORITY CONDUCT CIVIL RECOVERY?

In my view civil recovery would be appropriate in cases in the following circumstances:
over, or the right to give assent to changes in the objects of, the undertaking. The relevant contract has to be considered as a whole in order to determine its nature.

A distinction is often made between typical and atypical silent partnerships. A typical silent partnership is thought of as having only two members, the undertaking or active partner and the silent partner. Such an arrangement only gives the silent partner the right contained in paragraphs 230-37 of the Commercial Code. The contribution made by the silent partner to the relevant undertaking is not treated as equity capital (Eigenkapital) but as loan capital (Pendekapital). A silent partnership may deviate in certain ways from the above model: thus the silent partner’s holding may be treated as part of the assets of the active partner. Furthermore, the silent partner may have management functions in that undertaking. The silent partner may also have the status of a limited partner in the undertaking (see K. Schmidt, Gesellschaftsrecht, 14th ed, pub Heymanns Verlag, Munich 1997, in this sense).

The investment in a silent partnership may take the form of patents or copyright or of cash. Only the active partner takes part in legal transactions. The silent partnership is used for the purpose of giving medium term loans to undertakings and as a useful facility for other purposes, for example that of making provision for family members, and for persons withdrawing from ordinary commercial and limited partnerships. In recent years, a considerable amount of use has been made of the GmbH & Co. In such an entity, the silent partner and the GmbH (private limited liability company) combine together to form a single organisation. The silent partner may be a member of the GmbH. This type of silent partnership is used for the purpose of accumulating capital. It has tax advantages in addition to the limited liability enjoyed by the private company.

Rules governing the silent partnership

Since the silent partnership has no external relations in its business, no contracts are required to make the promised contributions to the assets of the active partner. That partner is required to conduct the business in the general interest and to pay the silent partner an annual dividend (Commercial Code, para 232(1)), and when the partnership has terminated to pay the silent partner the appropriate credit balance (Commercial Code, para 232(3)). The silent partner must participate in the profits of the partnership, and in its losses, unless there is an agreement to the contrary.

The management of the partnership is entrusted to the active partner: according to paragraph 235 of the Code, will provide an important context in which to analyse the responses to our consultation exercise.

Our consultation paper is available to download free of charge from our website (www.lawcommission.gov.uk) and contains details of how to respond. The consultation period runs until February 28, 2010. We would urge all readers, whether or not you were able to attend the seminar, to respond to the consultation. If you have any questions please email propertyandtrusts@lawcommission.gov.uk.

Professor Elizabeth Cooke
Law Commission for England and Wales

Articles for Amicus Curiae

Amicus Curiae welcomes contributions, which should be accompanied by the name and contact details of the author. The journal publishes articles on a wide variety of issues, ranging from short pieces of 700-1,200 words and longer articles of 4,000 words of so (the upper limit can be extended where appropriate). Articles should be written in an informal style and without footnotes.

Anyone interested in submitting a piece should email Julian Harris (julian.harris@sas.ac.uk).
the silent partner has only a limited right to receive information. However, in certain untypical silent partnerships the silent partner is given the right to object to or approve proposed actions of the management, and give instructions to the managers. Sometimes the silent partner is entrusted with management functions itself. An active partner in a silent partnership is only required to exercise the same degree of care as that which that partner would exercise in the conduct of its own affairs (see Civil Code, para 708). It is doubtful however whether this rule would apply where the silent partnership had the character of a large entity inviting subscriptions from the public, or Publikengesellschaft (see Köbler and Assman, op cit, p 114 in this sense).

A silent partnership has no assets of its own, and thus when it terminates there is no liquidation procedure. Once a ground for dissolution occurs according to the law, the silent partner is entitled to claim the credit balance due to him (or it), in accordance with the relevant balance sheet. The position of such a partner is different from that of a limited partner in this respect, because the silent partner is treated as a qualified creditor of the partnership. If insolvency proceedings are begun against the assets of a partner, the silent partnership is treated as dissolved. If the active partner becomes insolvent, paragraph 236(1) of the Commercial Code provides that the silent partner may prove for his credit balance (which is likely to have been diminished through losses) in its insolvent, and that partner will have the same rank as the other creditors who do not have preferential claims and will be entitled to the same insolvent quota as such creditors.

De Frank Wooldridge

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INTESTACY AND FAMILY PROVISION
CLAIMS ON DEATH

Readers who attended the lecture at the IALS on November 17 – Inheritance Law in the 21st Century: the Law Commission’s Consultation on Intestacy and Family Provision Claims on Death – may have been struck by the unusually high number of non-lawyers among the large audience who squeezed into the lecture theatre.

It was gratifying that so many members of the public had taken the time and trouble to attend. One of those in the audience had travelled down to London from Harrogate to listen to the presentation and comment on the importance of making a will, prompted by his own experiences following the death of his brother.

But perhaps this level of interest should not be surprising. People say “if I die...” but we are all going to die. And inheritance disputes have the potential to generate very intense emotions. The last thing anyone needs amidst the pain of bereavement is difficult law, or law that produces unexpected or unwanted results.

That is why our current work is so important and so relevant for lawyers and non-lawyers alike. The questions raised in our recent consultation paper, Inheritance and family provision claims on death (CP 191, published on October 29, 2009) are for the most part questions that could be just as well addressed to a crowded pub as a group of legal specialists.

When a spouse dies, should the surviving inheret the whole estate or should the deceased’s children get a share? And what if the children are not also the children of the surviving spouse? We ask questions about the way that the spouse and the children should be treated both under the intestacy rules and by the law of family provision. And what of cohabitants – by which we mean unmarried, non-civil partnered couples living together in a joint household, and not those who share a house on a commercial basis, nor those who “live apart together”. They have long been part of the family provision legislation. In the light of social change over the past decades, should they now have a place within the intestacy rules so that they automatically inherit? And what if the children are not also the children of the surviving spouse? We ask questions about the way that the surviving spouse should be treated both under the intestacy rules and by the law of family provision.

We have also been greatly assisted by our advisory group, comprised of academics and practitioners, who give up their time to meet with us at key points during the life of the project and act as a sounding board for our policy ideas. And we regularly undertake what might be called targeted consultation with key “stakeholders” such as the Probate Service, Law Society committees and the Treasury Solicitor’s Roma Vacantia Division.

The present project has also made extensive use of social research techniques to obtain a clear and up-to-date picture of public attitudes to inheritance in general and the particular issues we have addressed. Our consultation paper was informed by qualitative research – a series of focus groups undertaken on our behalf by the National Centre for Social Research (NatCen) – giving us a fascinating insight into the complex and often conflicting views individuals hold about the proper distribution of their property on death.

In the time we have to draft our final recommendations, we will have available the findings of a large-scale, quantitative public attitudes survey (again conducted by NatCen, in collaboration with Professor Gillian Douglas and her team at Cardiff University). This

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Any more complicated than at present, ideally, the process should be made simpler (without introducing unfairness).

We ask more than 30 consultation questions. Some are provisional proposals on which we seek views. Others are open questions. We hope to hear the views of as many consultees as possible, lawyers and non-lawyers alike. Consultation is the key to the success of all Law Commission projects and the strength of our final recommendations is in the quality and breadth of responses that we receive.

The IALS lecture is very much part of our consultation process and we will take on board all of the views expressed by audience members (though we would still encourage the submission of formal responses from those attended). We have also been greatly assisted by our advisory group, comprised of academics and practitioners, who give up their time to meet with us at key points during the life of the project and act as a sounding board for our policy ideas. And we regularly undertake what might be called targeted consultation with key “stakeholders” such as the Probate Service, Law Society committees and the Treasury Solicitor’s Roma Vacantia Division.

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