

# LA DOLCE VITA

## WHEN CAN A CREDITOR GET A PIECE OF THE PIE?



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In the recent case of *La Dolce Vita Fine Dining v Zhang Lan and others* [2022] SGHC 278, the General Division of the High Court of Singapore (the 'Court') held that funds in bank accounts within a family trust structure were the property of the settlor, and therefore capable of being recovered by creditors of the settlor.

Understandably, any decision of a court to lift the curtain on a trust structure and allow creditors to access trust assets will raise concerns for private wealth practitioners and their clients. This article examines the Court's decision in *La Dolce Vita* and considers the potential impact on trust establishment and management and what conclusions practitioners can draw from this case.



### Background

The first defendant, Mdm Zhang Lan ('Mdm Zhang'), was a highly successful businesswoman and founder of the

South Beauty restaurant chain. She had sold a majority stake (83%) of the South Beauty business to CVC Capital in 2013 for the sum of US\$254,419,156. These funds had been paid into Mdm Zhang's personal account at Bank Safra Sarasin Hong Kong.

The fourth defendant, Success Elegant Trading Limited ('SETL'), is a BVI company which had been wholly owned by Mdm Zhang until June 2014. At that point, Mdm Zhang established the Success Elegant Trust (the 'Trust'), an irrevocable Cook Islands family trust that she settled for the benefit of her son, grandchildren and remoter issue. She then immediately transferred the sole share of SETL to the trustee of the Trust. She also transferred US\$142,051,618 from her personal Safra Sarasin account to two bank accounts held in the name of SETL at Credit Suisse and Deutsche Bank (the 'SETL Banks Accounts').

Since then, Mdm Zhang has been embroiled in arbitration proceedings with *La Dolce Vita Fine Dining Co Ltd* ('LDVL'), an investment vehicle of CVC Capital and the plaintiff in this case, over claims of fraudulent and negligent misrepresentation. In March 2015, LDVL was successful in obtaining a freezing order against Mdm Zhang in her personal capacity. Although the freezing order only named Mdm Zhang, Credit

Suisse and Deutsche Bank froze the respective SETL Bank Accounts upon being served with the order.

In May 2020, LDVL succeeded in registering arbitral awards in its favour in the Hong Kong and Singapore courts. LDVL then proceeded to enforce its judgment debts, including through an application to the Court to appoint a receiver over the SETL Bank Accounts.

### The Role of Receivers

The purpose of a receiver is to stand in the shoes of a debtor and do what the debtor should have done, in good conscience, to discharge the debt. In common law jurisdictions, the court has the power to appoint a receiver when it is just and equitable to do so.

Receivers usually appear in cases where alternative enforcement methods are ineffective or not possible. For example, receivers can be appointed to preserve property at risk of dissipation, such as in the high profile English Supreme Court case of *JSC BTA Bank v Ablyazov* [2015] UKSC 64, where a freezing order was thought to be inadequate in circumstances where the defendant's disclosure of assets had been incomplete.

Further, a creditor may seek appointment of a receiver to pursue the equitable interests of a debtor, as seen in a few previous English High Court decisions. These include *JSC VTB Bank v Pavel Skurikhin & Others* [2015] EWHC 2131 (Comm), where the High Court appointed a receiver over trust assets over which the settlor had de facto control.



## The Court's Decision

LDVL sought an order from the Court appointing receivers over the SETL Bank Accounts on the basis that, notwithstanding SETL's legal ownership of the funds within those accounts, either (i) Mdm Zhang was the beneficial owner of the funds in the SETL Bank Accounts by way of resulting trust; or (ii) Mdm Zhang exercised a level of control over the assets tantamount to ownership.

Mdm Zhang opposed the appointment, contending that the funds in the SETL Bank Accounts were held for the benefit of her son and his issue once they had been transferred from her Safra Sarasin account.

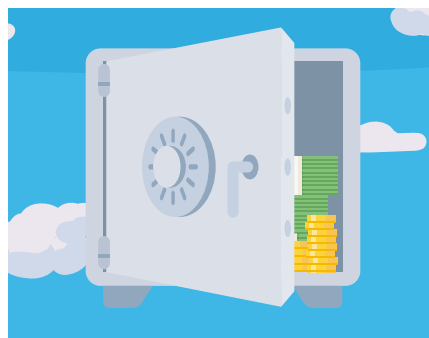
The Court was required to determine two issues:

- (1) Could receivers be appointed over property in which the debtor has effective control but no equitable interest; and
- (2) Were the funds in the SETL Bank Accounts beneficially owned by Mdm Zhang (by way of resulting trust or otherwise)?

On the first issue, the Court drew a distinction between the notion of de facto control and beneficial interest. The key point made by the Court was that even if a debtor had de facto control over an asset, the actions that a receiver may take would be limited by the rights of the debtor. Receivers are not able to compel third parties (such as trustees) to take certain actions if those third parties are not obliged to comply with the debtor's instructions. If, as a matter of fact, that third party would have complied in any event, this

is tantamount to a factual control which may not be reflected in the actual rights of the debtor. As LDVL did not contend that Mdm Zhang had rights over the SETL Bank Accounts other than via her beneficial ownership, the Court turned to the second issue.

On the second issue, the Court noted that a resulting trust arises where one party transfers property to another without the intention to benefit the other, and that it was required to assess Mdm Zhang's intention at the time of transfer to the SETL Bank Accounts. The evidence before the Court included instances of Mdm Zhang interfering with the SETL Bank Accounts (such as the transfer of funds in November 2014 to purchase a property in New York) and a letter from her lawyers stating that she 'maintained' the Deutsche Bank account. The Court inferred that Mdm Zhang was motivated by a desire to protect her funds from potential claims by LDVL without giving up her ability to use those funds for her own benefit and held that she therefore retained a beneficial interest. The court subsequently made the order for appointment of receivers over the SETL Bank Accounts.



## Comment

The judgment in favour of the plaintiff, whilst somewhat alarming to trust lawyers at first sight, is not particularly surprising in light of the facts of the case. Rather than lifting the curtain on a trust, the decision held that the funds were not truly trust assets as they were still beneficially retained by the settlor. Therefore, it is our view that this case should not raise significant concerns about the viability of trusts in Singapore, or elsewhere.

Nevertheless, there are some practical points arising from this case which practitioners should bear in mind:

- (1) **how much control a settlor may have over trust assets** - as we have seen in recent years, courts are willing to find that a settlor's beneficial interest has

not been effectively alienated if they have retained too much control over a trust structure or its assets (see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch)). While certain jurisdictions have reserved powers legislation which permits the reservation of certain powers to the settlor, *La Dolce Vita* is another reminder that it is always prudent to assess and limit the amount of control that a settlor has over the trust assets, particularly where the settlor is concerned about asset protection risks.

- (2) **role of the trustee** – the trustee of the trust should ensure that it exercises its powers and duties properly and independently and that it does not slavishly follow the wishes of the settlor.
- (3) **ensuring that the settlor understands the purpose and function of the trust** – it is important that the settlor should be properly advised when setting up a trust structure, so that they understand that they are relinquishing control and ownership of the assets to the trustee.
- (4) **property comprised in the trust** – as a matter of best practice, the trustee and settlor should keep an appropriate record of the property that is comprised in the trust and, if there is involvement from a third party in dealing with trust assets, there should be clarity over the capacity in which that third party is acting.

Trusts are still important vehicles for asset protection and wealth and succession planning. The judgment in *La Dolce Vita* is a salutary reminder of the importance of respecting the integrity of the trust and operating the trust appropriately to ensure that it offers robust protection to the settlor and beneficiaries.

