

# Divorcing spouses - trustees between a rock and a hard place

Even though the festive season approaches, high profile divorces continue to dominate the media and the English courts. This briefing explains the difficult balancing act which trustees find themselves having to make when caught up in English divorce proceedings. When the trustees are not certain how to navigate safely between the rock and hard place ahead, they have traditionally sought guidance from their own courts, seeing this as a safe harbour. *Tchenguiz-Imerman v Imerman* [2013] EWHC 3627 (Fam) shows that even this can lead to difficult waters. A divorce court will not necessarily follow the wishes of the trustees' home court.

In *Imerman*, the divorcing couple have settled their differences. But difficult points of law arose during the proceedings in particular in relation to disclosure of papers relating to the trusts. In the final act of this long running matter, the parties asked the Judge to give a judgment explaining his order for disclosure. This judgment was handed down in November 2013 and provides invaluable guidance to trustees as to the approach which the English court will take in the context of divorce.

During the divorce proceedings, the wife argued that she should be given a share of the assets held in trusts settled by her husband's father during the course of her marriage. She said that many of the assets had been generated during her marriage and, although her husband had been a beneficiary when they got married, he was later excluded, revocably. It was her case that at any time this wealth could be made available to the

husband. So, the key issues at trial would have been whether the trusts were "nuptial settlements" under the Matrimonial Causes Act 1973, and so within the English Court's power to vary the trusts, or whether the trust assets were financial resources available to the husband within the meaning of the 1973 Act.

The wife was anxious to build up as complete a picture of the trusts as possible. She joined the trustees to the divorce proceedings seeking disclosure of information about the trusts and, in due course, sought orders against the trustees for payment to her from the trusts.

## The trustees' dilemma

As is always the case in this scenario, the trustees were faced with a dilemma. If they stayed away from the English proceedings, adverse inferences might be drawn against the trusts and the husband, but any order made against them would not be

readily enforceable as they were not based in England and most of the

## Key issues

- **The long running battle with the English divorce courts continues as the divorce courts seek to understand what they perceive to be the realities behind trusts and offshore jurisdictions**
- **Measures taken in offshore jurisdictions, including firewalls and specific legislation to negate the enforceability of foreign divorce judgments, do not protect assets in England**
- **Even where trustees seek guidance from their home court, a divorce court will not necessarily follow the wishes of the home court**

trust assets were not in England. However, some of the assets comprised real estate in England and so would plainly remain exposed to any order made by the divorce court.

Typically, trustees faced with such a dilemma ask their own courts what they should do. In *Imerman*, the trustees were based in Jersey and the BVI and so made parallel applications in both jurisdictions in summer 2011. The applications were held in private and the trustees disclosed to the offshore courts a range of factual information, some of it sensitive, some of it privileged. The trustees joined their beneficiaries to the directions applications, as well as other members of the husband's family but not the husband and wife. Following these hearings, the trustees chose not to submit to the jurisdiction of the English divorce court but they did provide voluntary disclosure of some information so as to provide the divorce court with a full picture of the trust structures and the wealth held in them.

However, the husband's adult children from his first marriage decided that they would like to intervene in the divorce proceedings and to make submissions as to why the wife should not be given a share of the assets in the trusts. The English Court allowed them to intervene but in return required them to preserve copies of the evidence filed by the trustees in the BVI and Jersey.

The children themselves sought guidance from the BVI and Jersey courts because they were concerned to understand the status of the court papers which they had received in 2011.

### The court's guidance to the trustees

The Jersey court issued a judgment in 2012 explaining that it is of vital importance that trustees should be able to make applications for guidance as to what to do in difficult situations involving competing issues and that this was only possible if the beneficiaries joined to such applications hold the court papers in confidence. The trustees are under a duty in such applications to give full and frank disclosure to the parties and the court so that any guidance from the court is based on a genuine understanding of the facts. This disclosure will often include copies of leading counsel's written opinion on the issues at stake. Disclosure of such an opinion to the court is done in confidence and without intending to waive privilege. The Jersey court said that it would be difficult if trustees were to feel inhibited in future applications because of the risk that the papers shown to the Jersey court would end up in the hands of those with hostile eyes upon the trust fund.

Having laid down the general principle of discouraging disclosure, the Jersey court nevertheless gave permission for certain information to be disclosed by the children if the English court made an order to that effect. The children had already given an undertaking to the English court to preserve the 2011 court papers and the non-privileged and non-sensitive papers were less of a concern.

The Jersey Court went on to indicate that it felt that the disclosure about the trusts which it had already allowed the trustees to make in 2011 ought to be enough for the English court and questioned whether the English divorce court would benefit at all from

seeing the 2011 court papers. The Jersey Court invited the English court not to require disclosure. The Jersey Court even added a judicial threat if the English court did not agree: "If this Court were to find that the Family Division began routinely to make orders requiring disclosure of applications by trustees brought in private, the Court would have to consider amending its procedures either so as to heavily redact any material served on English resident beneficiaries or to preclude material from being sent out of the jurisdiction and allowing only inspection within the jurisdiction."

### The divorce courts' demands

The English Court was not asked to order disclosure of the privileged 2011 court papers; privilege was sacrosanct. However, the wife did ask to see the sensitive material (which showed the reasoning and decision making process of the trustee other than privileged material), and the Judge ruled in her favour.

The Judge recorded that he gave considerable weight to the Jersey Court's concerns, but he then set out at length why he disagreed with the Jersey Court and why he ordered disclosure of the sensitive material.

The Judge explained that if the case had gone to trial he would have had to ask himself whether the assets in the trusts were likely to be made available to the husband either now or within the foreseeable future. If so, the trust assets could and should be taken into account when deciding the fair amount to award to the wife. But deciding this issue is a question of fact and will plainly depend on the court's assessment of the evidence

adduced by the parties and the trustees. The less direct evidence that is available to the court, the more the court will be driven to draw inferences or make assumptions.

Typically, if a spouse enjoys access to wealth but has no absolute entitlement to it because it lies within a discretionary trust, the court will not usurp the rights of the trustees to nor put undue pressure on the trustees to exercise their discretion in a way which enhances the means of the maintaining spouse. However, the court does not totally disregard the potential availability of such wealth, and the judge may frame his orders in a form which affords "judicious encouragement" to the trustees to provide the maintaining spouse with the means to comply with the court's view of the justice of the case.

So in summary, the English court considers what is the fair way to do justice between the divorcing spouses and then how best to encourage trustees to release funds to the maintaining spouse so that he or she can pay the receiving spouse what the English court considers to be an appropriate sum. An outcome-based approach.

With this in mind and because there was little evidence before the court touching on whether the trustees were likely immediately or in the foreseeable future to exercise their powers in favour of the husband, the English court ordered disclosure of the 2011 sensitive material in the hope that it may shed light on that question. It can only have been a hope as the court did not itself have prior sight of the sensitive material.

While expressly recognising the concerns of the Jersey Court about

infringing the confidentiality attaching to applications for court directions, the English court said that any light cast upon the internal thinking of the trustee would be preferable to none. This extended to why the trustees did not consider it to be in the interests of the beneficiaries for the trustees actively to challenge the wife's claims within the divorce proceedings either as a party or as a witness when the trusts held significant wealth within England.

## Conclusions

There has been a long running battle between the English divorce courts keen to understand what they perceive to be the realities behind trusts and offshore jurisdictions keen to establish and protect their trust structures. The English Courts have made orders against trust assets, trustees and companies held in trusts without regard to the strict legal entitlements under the terms of the trusts. They have done this because they do not trust trusts.

The offshore jurisdictions have put up firewalls around their trusts, specific legislation which negates the enforceability of foreign divorce judgments. But that legislation does not protect assets in England.

So, if trustees have a trust containing both English and non-English assets and then get caught up in divorce proceedings, they face a dilemma. Should they stay away from the English court and protect the non-English assets or participate? And if they tend to the view that they should stay away, should they get approval from their own home court?

Until the Imerman case, the orthodox answer would have been to stay away if the English assets are a relatively

small proportion of the trust assets and to get local court approval. That will probably remain the right course but going forward trustees may want to consider limiting access to the court papers so that the papers cannot fall into hostile hands.

But the orthodox approach may not always be the right one. The Judge's comments about drawing adverse inferences against the trustees may mean that the better strategy is to participate in the divorce proceedings. Before doing so, trustees will again want to get home court approval and again they will want to think carefully about limiting access to the court papers.

In terms of structuring trusts, thought should be given to keeping English and non-English assets in different trusts and the degree to which it is appropriate to hold some wealth in dynastic trusts where the husband and wife are excluded, irrevocably, from benefit so they are manifestly not available to either spouse.

Trustees are well used to taking tough decisions - but divorce continues to be a source of real dilemma and litigation risk.

**Clifford Chance LLP acted for the trustees in *Imerman*.**

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