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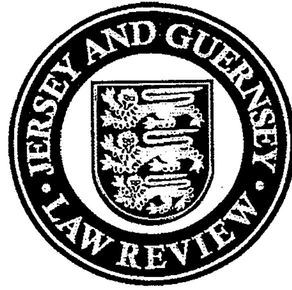

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TRUSTS AND DIVORCE COURTS—AN OFFSHORE PERSPECTIVE

Michael Birt

In this article the writer considers the issues raised where a divorce court in another jurisdiction makes financial orders following divorce where one or both of the spouses has an interest under a Jersey trust. He discusses the question of provision of information about the trust to the divorce court, whether the trustees should submit to the jurisdiction of the divorce court, and the possible responses of trustees and the Royal Court to various orders which the divorce court might make.

1 The interface between offshore trusts and divorce courts in other countries is an area where the law has been developing rapidly in recent years.[1] It is perhaps a convenient moment to take stock. In the period since the early 1980s enormous numbers of trusts have been established in offshore jurisdictions. Inevitably, in some cases, the settlors have subsequently become involved in divorce proceedings in their home jurisdiction, by which I mean their country of residence or domicile. The trust may well hold a substantial portion of the assets which would otherwise have belonged to the settlor. How should the divorce courts of a country such as England deal with assets in such a trust? If the courts of those countries make orders purporting to deal with the assets of the trust, how should the courts of the offshore jurisdiction respond? For the sake of brevity and convenience, I shall use the expression "offshore", because it is an expression which is well understood and because the majority of trusts which will fall to be considered by divorce courts such as the Family Division will probably have been established in a jurisdiction which is traditionally referred to as being "offshore". But similar issues may well arise where the trust is established in a jurisdiction such as the USA or Australia.

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[1] This article is based upon the fifth annual lecture delivered to the Association of Contentious Trusts and Probate Specialists on 25 November 2008 and published in the Association's newsletter in December 2008.

2 One can immediately see that there is an inherent tension between the two jurisdictions. In the case of the jurisdiction where the divorce is taking place, the court will wish to do justice between the husband and the wife and if there are substantial assets in a trust and the evidence shows that, had the marriage continued, the expectation would have been for those assets to be made available to the parties if the need arose, one can well understand the divorce court taking the view that such assets cannot be ignored. Conversely, from the perspective of the offshore court, the settlor will have established a trust governed by the law of the offshore jurisdiction. The assets therefore no longer belong to him; they belong in law to the trustee who holds them upon the trusts laid down in the trust deed. Assuming it to be a discretionary trust, it is therefore a matter entirely for the trustee as to whether the settlor or his wife should receive any distributions from the trust. The duty of the offshore court, in its capacity as a supervisory court of equity, is to ensure that the trust assets are applied only in accordance with the provisions of the trust and in the best interests of the beneficiaries.

3 I would like to consider today how the courts in England and Jersey have dealt with this issue so far and where I think we are at present. I refer to Jersey because I am a judge of the Royal Court of Jersey and can only therefore speak with any confidence of decisions in that jurisdiction. However I have made limited enquiries as to the position in Guernsey and the Isle of Man as well as the Cayman Islands, British Virgin Islands and Bermuda. So far as I have been able to ascertain, none of those jurisdictions has yet been faced with a contested case concerning whether any effect can or should be given to a decision of an overseas divorce court concerning a trust established in that jurisdiction. It seemed at one stage that the courts in Bermuda would have to consider the issue following the decision of the English Court of Appeal in *Charman v Charman (No 2)*,[2] but I understand that that will not now occur. Conversely, we in Jersey have had a number of such cases and, in some of them, we have been faced with a husband who has made it absolutely clear that he does not intend to pay a penny to his wife. The merits therefore have often been somewhat one-sided. So, for one reason or another, it seems only to have been Jersey which has so far had to wrestle with these issues.

4 Apart from Jersey cases, I propose also to refer almost exclusively to decisions of English courts and will refer for convenience to the Family Division, but of course the principles will be equally applicable where an equivalent order is made by a divorce court in

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[2] [2007] EWCA Civ 503; (2006–07) 9 ITELR 913; [2007] I FLR 1246.

some other jurisdiction. I shall also for convenience assume that it is the husband who has set up the trust and is seeking to defend it whereas it is the wife who has the benefit of an order from the divorce court, but of course the position could equally be reversed.

5 Finally by way of introduction, may I add an important caveat. All judges are familiar with the experience of forming a provisional view on the papers and then changing that view as a result of the oral submissions. Any views I express in the course of this lecture are made without the benefit of adversarial argument. They are therefore to be regarded as provisional and subject to change following the forensic process.

6 A trustee of a Jersey trust (by which for today's purposes I mean a trust governed by Jersey law and administered by a Jersey resident trustee) may have to give consideration to the effect of English divorce proceedings involving a beneficiary of his trust at three different stages.

7 Firstly he may be faced with a request for information about the trust for the use of the parties to the divorce proceedings and the Family Division itself.

8 Secondly he may be joined as a party to the divorce proceedings by the Family Division and will need to consider whether he should enter an appearance and therefore submit to the jurisdiction of the English court.

9 Thirdly he may be faced with a judgment of the Family Division which affects the trust in some way and he will need to consider how to respond.

10 In each of these cases, the trustee may choose to act on his own, but he may also elect to seek directions from the Royal Court; so let us look at each of these stages in turn.

1. Provision of information

11 Where there are proceedings for ancillary relief in the Family Division in a case where one or both of the spouses is a beneficiary under a trust, there will be an obligation on those spouses to give full disclosure about the trust; and indeed the Family Division may well make a specific order for disclosure with a view to ascertaining the exact position in relation to the trust. For example, it is likely to wish to know the amount in the trust, the nature of any beneficial interests, what benefits have been received in the past, the likelihood of one or other of the spouses benefiting in the future and who contributed the funds in the first place. If a beneficiary comes to the trustee seeking such information in order that he can comply with a disclosure order

made by the Family Division, how should the trustee react? Indeed how is the Jersey court likely to react if, as will sometimes be the case, the trustee decides to seek its directions?

12 The general position under Jersey law as to a beneficiary's right to obtain information about the trust was established in *Re Rabaiotti 1989 Settlement*.[3] In that case the court considered two categories of document. The first, which I shall for convenience refer to as trust documents, consists of things like the trust deed, the accounts, bank statements, portfolio valuations and generally documents which show how the assets of the trust have been dealt with. The court held that a beneficiary is normally entitled to see such documents but that there is a discretion on the part of the court to refuse him access if satisfied that there is good reason to do so.

13 The second category related to documents which might disclose the reasons for a discretionary decision on the part of the trustees concerning appointments to beneficiaries out of the trust fund. This would include things like minutes of trustee decisions, correspondence between trustees *etc*. In relation to these documents, the court adopted the principle established in the well known case of *Re Londonderry's Settlement*[4] and held that a trustee did not generally have to disclose such documents. The court went on to hold that a letter of wishes written by the settlor to the trustees indicating how he would like them to exercise their discretion was a document which was also covered by the *Londonderry* principle. Such a letter was also generally to be regarded as confidential. The upshot was that the court held that one started with a presumption that a letter of wishes or other document falling within the *Londonderry* principle did not have to be disclosed to a beneficiary but that there was nevertheless power in the court to order disclosure if the court was satisfied that there were good grounds for doing so in a particular case.

14 In connection with letters of wishes, I was interested to read the recent decision of Briggs, J in *Breakspear v Ackland*[5] and would like to express my admiration for his very lucid exposition of the cases and the law in this area. He held that the *Londonderry* principle applied to letters of wishes and that they were also to be regarded as attracting a degree of confidentiality. However he emphasized that it was open to the trustees to maintain or relax that confidentiality as they judged best in the interests of the beneficiaries and the good administration of the trust. His view that trustees need not approach the issue with any

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[3] [2000] JLR 173; (1999–00) 2 ITELR 763.
[4] [1965] Ch 918; [1964] 3 All ER 855.
[5] [2008] 10 ITELR 852.

pre-disposition towards non-disclosure of a letter of wishes is slightly at variance with what the Royal Court held in *Rabaiotti* but, subject only to that, it seems to me that on this topic English law and Jersey law are to broadly similar effect.

15 *Rabaiotti* preceded the Privy Council case of *Schmidt v Rosewood Trust Limited*[6] which is now the leading case on the disclosure of trust documents and has clarified a number of issues. The Privy Council held that a beneficiary's right to seek disclosure of trust documents is best regarded as an aspect of the court's inherent jurisdiction to supervise the administration of trusts. It went on (at para 67) to emphasise that no beneficiary—and least of all a discretionary object—has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. It held that the court has an overriding discretion as to whether to order disclosure of any particular document in any particular case. In particular, where there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. The likelihood of the beneficiary in question actually receiving any benefit from the trust might be an important factor in deciding whether to order disclosure to that beneficiary.

16 Although *Schmidt* was concerned with the law of the Isle of Man, it is clearly of the highest persuasive authority for all courts which apply equitable principles derived substantially from English law. I have no doubt that in due course the Royal Court will have to consider whether the principles established in *Rabaiotti* need any modification in the light of *Schmidt*. On that I would offer only two observations—

(a) *Schmidt* emphasises the court's unfettered discretion as to whether to order disclosure in any particular case. The guidance offered in *Rabaiotti* to the effect that one starts with a presumption that a beneficiary is entitled to see trust documents may therefore have to be read in the light of that very wide discretion.

(b) *Schmidt* did not specifically consider documents falling within the *Londonderry* principle, such as letters of wishes. On the face of it, there is nothing in *Schmidt* which suggests that the line taken in relation to letters of wishes in *Rabaiotti* is wrong and indeed Mr Justice Briggs' decision in *Breakspear* was of course reached after full consideration of the decision in *Schmidt*.

17 With that reminder of the general position as to disclosure, let me return to where a beneficiary is engaged in divorce proceedings in the

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[6] [2003] 2 AC 709; [2003] All ER 76.

Family Division and seeks disclosure of trust documents so that he may in turn disclose these in the course of the divorce proceedings. The Jersey court undoubtedly has a discretion as to whether he should be given any documents and, if so, which documents. Each case will clearly turn on its own facts. However the Royal Court has hitherto taken the view that, if the particular beneficiary would normally be given the documents in question, the fact that he needs them for the purposes of his divorce proceedings is not of itself a reason to refuse. Thus in the case of *Re H Trust*,[7] where the assets in the trust represented the sole assets available for the future maintenance of the husband and wife, the court said this at para 17—

> "It seems to us important, in this case, that the husband and wife should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position."

18 However, even in the case of conventional trust documents, the Jersey court will not always order the relevant documents to be disclosed. An example of where it refused to do so is the case of *Re L & M Trusts*.[8] The settlor in that case was domiciled in the State of Illinois, USA. The former wife of the settlor was a beneficiary of the trust. The wife filed proceedings alleging that the trust was a sham. The Illinois court joined the trustee as a party and ordered it to disclose a very substantial list of trust documents. The trustee sought directions from the Royal Court. The court acknowledged that *Rabaiotti* had indicated that there was a presumption that a beneficiary is entitled to see trust documents but held that, given that the trust was governed by Jersey law and administered in Jersey by a Jersey-based trustee, the Royal Court was the appropriate forum to adjudicate upon the validity of the trust rather than a divorce court in Illinois. The court ruled that it would not be in the interests of the beneficiaries as a whole for the information to be provided to the wife in order for her to use such information for the purpose of attacking the validity of the trust in the Illinois proceedings. If she were to succeed, the beneficiaries would be entitled to nothing under the trust. Accordingly the court ordered the trustee not to comply with the order for disclosure made by the Illinois court and to take no further part in the proceedings before that court.

19 On other occasions the court has agreed that the trustee should provide some of the documents ordered to be disclosed by the Family

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[7] 2006 JLR 280.
[8] [2003] JRC 002A; 2003 JLR *N*–6; (2002–03) 5 ITELR 656.

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Division but not all of them. In *Re Avalon Trust*[9] the English court ha ordered the disclosure of various categories of trust documen including all correspondence between the trustee and any of th beneficiaries. The trustees sought directions as to whether they shoul disclose these documents to the husband so that he would in turn the have to disclose them in the course of the divorce proceedings. Th Royal Court held that the English order went too far and only ordere disclosure of such documents as were necessary to give a picture c the financial position of the trusts. In particular the court refused t order disclosure of correspondence between the trustee and an beneficiaries other than the husband himself.

20 Essentially, the decision as to what documents (if any) to disclos is a discretionary one to be taken having regard to the particul circumstances of the case. In some cases it may even be appropriate t order disclosure of a letter of wishes. For example, in *Rabaiotti* itsel a previous letter of wishes was already in the possession of the wif The subsequent letter of wishes made it clear that the settlor wishe the husband's interest to be limited to the income of part of the tru and the court held that it was in the interests of the beneficiaries as whole that this be disclosed in order to ensure that the divorce cou did not conclude that the husband had a greater interest in the tru than was likely in fact to be the case.

2. Submission to the jurisdiction of the divorce court

21 Where the parties involved in divorce proceedings have interest under a trust, it is often the case that the divorce court will join th trustees to the proceedings. The trustees are then faced with a decisio as to whether to take any part in the divorce proceedings and thereb submit to the jurisdiction of the divorce court.

22 Any decision on whether to submit is closely linked to th question of the enforceability of any subsequent judgment of th divorce court, upon which I propose to say more in a moment, an where there have been interesting recent developments. However, on starts from the position that, when considering whether the judgme of a foreign court is enforceable in Jersey, a critical aspect is wheth that foreign court is deemed to have jurisdiction under the rules c private international law. In the case of orders of divorce court relating to overseas trusts, the most likely reason for the divorce cou having had jurisdiction for these purposes will be where the truste and beneficiaries have submitted to the jurisdiction of the divorc court. It follows that, should the trustee submit to the jurisdiction c

[9] [2006] JRC 105A; 2006 JLR *N* [19].

the divorce court, then, subject to the recent changes introduced by art 9(4) of the Trusts (Jersey) Law 1984—to which I shall refer shortly—the trustee might be in some difficulty in arguing against the proposition that any order of the Family Division should be enforced without reconsideration of the merits of such order.

23 For these reasons the current approach of the Royal Court is perhaps encapsulated in two paragraphs of the judgment in *Re H Trust*[10]—

> "14. In this respect it is important to note that the roles of the two courts are very different. The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the English High Court. This Court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It has therefore a very different focus from the Family Division.
>
> It follows that, in most circumstances it is unlikely to be in the interests of the Jersey trust for the trustees to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases—*eg* where all the trust assets are in England—it may be in the interests of a trustee to appear before the English court in order to put forward its point of view because the English court will be able to enforce its order without regard to the trustee or this court by reason of the location of the assets."

24 An example of the situation mentioned in the last sentence of this quotation can be found in *Re Turino Consolidated Limited Retirement*

[10] 2006 JLR 280.

Trust.[11] In that case the sole asset of the trust was the former matrimonial home in the Netherlands of the husband and wife, who were also the sole beneficiaries under the trust. The trustee had not originally submitted to the jurisdiction of the Dutch courts but, during the course of the divorce proceedings, those courts had made various orders for the sale of the property and the distribution of the proceeds. The property was registered in the name of the trustee. In the particular circumstances of that case, the Royal Court authorised the trustee to appear before the Dutch court in order to advance various arguments concerning the practicalities of the orders made by the Dutch court.

25 In summary, a decision on the part of the trustee or the court, if requested to give directions, as to whether the trustee should submit to the jurisdiction of an overseas divorce court must again be fact specific; a decision must be taken on where the best interests of the beneficiaries lie. Nevertheless, the starting point is likely to be that in most cases it will probably not be in the interests of the beneficiaries as a whole for the trustee to submit to the jurisdiction of the divorce court.

3. Response to orders of the Family Division

26 Let us assume that matters have progressed and that the Family Division has issued a judgment on ancillary matters. Obviously, the nature of that judgment will be an important factor when the trustees or the Royal Court consider how to respond. I shall consider the likely responses to certain different types of order of a divorce court at the end of my talk but, for the moment, I would like to concentrate on a few general principles concerning the enforcement of foreign judgments.

27 In common, I suspect, with most jurisdictions whose legal system has drawn heavily on English law, Jersey's rules of private international law are similar to those of English law. Rule 35 of Dicey, Morris & Collins (14th ed) states that an overseas judgment may only be enforced if it is a final and conclusive judgment for a debt or definite sum of money. Judgments such as declaratory judgments or orders for specific performance cannot be enforced because they are not for a definite sum of money. If this correctly states the position, it would seem therefore that, under English law, an order of an overseas court varying an English trust or ruling upon its validity would not be capable of enforcement in England.

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[11] [2008] JRC 100.

28 As long ago as 1985, Jersey law appears to have gone somewhat further. In *Lane v Lane*,[12] the husband and wife were joint owners of a house in Jersey. Subsequently, they were divorced in England and a consent order was made by the Family Division to the effect that the wife should transfer her interest in the Jersey property to the husband. Subsequently the husband died and the Family Division made a declaration that the order concerning the Jersey property remained in force and was enforceable by the plaintiff, who was the heir to the husband's immovable estate. The plaintiff brought proceedings in Jersey seeking an order that the wife transfer the property to the plaintiff pursuant to the English order. The Royal Court does not appear to have been referred to Rule 35 of Dicey and it held that, where there was a declaration of a competent English court submitted to by the same parties, the doctrine of comity enabled the declaration of an English court to be given effect to, provided that it was clear that the defendant had had every opportunity to raise all relevant defences at the hearing in the English court. The Royal Court made the order requested by the plaintiff. As we shall see in a moment, that case provided the foundation for a number of subsequent decisions where the Jersey Court gave effect to non-monetary judgments involving trusts.

29 I have to say that in my opinion *Lane* was wrongly decided at the time. Rule 35 of Dicey was not cited to it but the Rule could not be clearer and the decision was completely inconsistent with it. However, in the light of recent developments in this area, one can argue that, without knowing it, the court in *Lane* was in fact acting as a trailblazer and its decision has been vindicated some 20 years later. I would like to take a brief moment to touch on this aspect.

30 Rule 35 appears to be based on the case of *Sadler v Robins* [13] which was decided some 200 years ago. The world has changed considerably since then. In *Pro Swing Inc v Elta Golf Inc*,[14] the Supreme Court of Canada held that there was a compelling case for adapting the common law rule which prevented the enforcement of foreign non-money judgments. It held that such judgments could be enforced but that, unlike the case of a money judgment, there was a discretion as to whether or not to do so. At much the same time, in the case of *Pattni v Ali*[15] the Privy Council was concerned with an application to enforce in the Isle of Man a judgment of the Kenyan

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[12] 1985–86 JLR 48.

[13] (1808) 1 Camp 253.

[14] (2006) SCR 612; (2006) SCC 52.

[15] [2007] 2 WLR 102.

High Court ordering the transfer of shares in an Isle of Man company. The case was concerned with the issue of whether the judgment of the Kenyan court was a judgment *in rem*, but in passing the Privy Council expressed the opinion that a court should be prepared to give relief so as to enforce an *in personam* non-money judgment granted against a person who had submitted to the jurisdiction of the foreign court.

31 The principle established in these cases has been adopted by the Grand Court of the Cayman Islands in two cases, namely *Miller v Gianne*[16] and *Brunei Investment Agency v Sol Properties Inc*.[17] It has also been adopted in a recent case in Jersey, namely *Brunei Investment Agency v Fidelis Nominees Limited*.[18] In that case, Commissioner Clyde-Smith concluded that Jersey law was to like effect, namely that a non-monetary foreign judgment, such as an order for specific performance, could be enforced in the island but that, unlike in the case of a money judgment, there was a discretion as to whether to do so. In that case, the court ordered the transfer of the shares in certain Jersey companies which had been the subject of an order for specific performance in the High Court of Brunei. However, the foreign court must still be deemed to have had jurisdiction for the purposes of Rule 35; for example because the defendant was resident in the jurisdiction of the foreign court or had submitted to its jurisdiction.

32 After that slight detour, I return to the topic of how trustees and the Jersey court may respond to a decision of a divorce court which affects a Jersey trust. I well appreciate that for professional advisors such as yourselves, the most important aspect of this is to consider where we are now and what is the likely response to the different types of orders which a divorce court may make. The most recent decision is the case of *Mubarak v Mubarik*[19] and I will come to that shortly. But in order to appreciate where we are now, I think it is helpful to consider very briefly how we have arrived at our present position.

33 In this respect, I have to accept that the journey has not been particularly smooth or well signposted. There has been understandable uncertainty amongst professional advisors as to what the approach of the Jersey Court is and what the underlying principles are which it has been seeking to apply. Perhaps I may say by way of mitigation that the decisions were often very fact specific—the merits tended to be

[16] 2007 CILR 1.
[17] 86/2008, 5 June 2008.
[18] [2008] JRC 152.
[19] [2008] JRC 136.

very much on the wife's side—and there was not always adversarial argument which sought to expose the underlying principles.

34 The difficulty started with the very first case, namely *Compass Trustees Limited v McBarnett*.[20] In that case the sole asset of the Jersey trust was the matrimonial home in England. It was a discretionary trust and the beneficiaries included the husband and the wife. The Family Division made an order varying the trust under the Matrimonial Causes Act 1973 by directing the trustee to pay the wife the sum of £200,000. An important aspect to note is that the trustee had not submitted to the jurisdiction of the Family Division. The trustee then sought directions from the Royal Court. The complication was that, after the decision of the Family Division but before the matter came before the Royal Court, a decree absolute was granted and this had the consequence under the terms of the trust deed that the wife was no longer a beneficiary. She argued that under a combination of the doctrine of comity (founding herself on *Lane*), and the powers under art 51 of the Trusts (Jersey) Law 1984 (which gave statutory effect to the court's general supervisory jurisdiction) the court should direct the trustee to make the payment.

35 That was opposed by the advocate appearing for the minor children. He argued that the court could only stand in the shoes of the trustee. Had the wife remained a beneficiary the court could have made the order sought, but now that she was no longer a beneficiary, neither the trustee nor the court had power to make a payment to her.

36 The court acknowledged the force of this argument, but having done so, sought to circumvent it by the simple—if rather questionable—expedient of saying that it would consider the position as it stood at the date when the Family Division made its order, when of course the wife was still a beneficiary. The court also made no reference to the fact that neither the trustee nor the other beneficiaries had appeared before the Family Division whereas, of course, in *Lane*, both parties had submitted to the jurisdiction of the English court. Nevertheless, whatever the weaknesses in the reasoning, *Compass* came to be taken as authority for the proposition that the Royal Court had a discretion to vary the terms of a Jersey trust in order to give effect to a foreign judgment on the basis of comity even where the trustee had not submitted to the jurisdiction of the foreign court.

37 An example of this was the case of *Re A Trust*.[21] This again involved acrimonious matrimonial litigation in the Family Division

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[20] 2002 JLR 321.
[21] [2006] JRC 020A.

where the judge had found that the husband and his family were determined to do all that they could to ensure that the wife did not receive a penny upon her divorce. There was a Jersey trust which had originally been a discretionary trust, but sometime earlier the trustee had exercised a power of appointment so that the trust fund was held upon trust to pay the income to the wife during her life with power to advance her capital; subject thereto to pay the income to the husband for his life with a like power to advance capital; and subject thereto upon discretionary trusts for the children. The trust owned the matrimonial home in England in which the wife and children still lived. The Family Division made an order under the 1973 Act varying the trust by extinguishing the husband's interest under the trusts constituted by the deed of appointment. This was not something which the trustee had power to do. Furthermore, the trustee had not submitted to the jurisdiction of the English court.

38 The husband did not appear in the Jersey proceedings and there seems to have been no adversarial argument. Be that as it may, the court held that, following the *Compass* case, it had a discretion to vary the trust so as to give effect to the decision of the Family Division on the basis of comity. The court varied the trust by extinguishing the life interest of the husband and the ability of the trustee to advance capital to him. Given that the trustee had not appeared in the English proceedings and that the variation in question was outside the trustee's powers, it seems strongly arguable, following *Mubarak* that the judge in that case, a certain Birt, Deputy Bailiff, erred in the decision!

39 The next case to which I would refer is in *Re Fountain Trust*.[22] This was another case where the husband was found to have concealed his assets, ignored his obligations under various court orders and to be determined that his wife should receive nothing. The husband had established a trust in Jersey known as the Fountain Trust but, in the course of the divorce proceedings, the Family Division held that the trust was a sham and that the assets were accordingly held for the husband. The court then ordered that some £4 million should be paid to the wife. Subsequently the trustee applied for directions from the Jersey court as to how it should respond to the English judgment.

40 The important aspect of the case for our purposes is that the trustee had submitted to the jurisdiction of the English court. The Bailiff, Sir Philip Bailhache held that, despite the fact that the English court had wrongly applied English law in determining whether the trust was a sham, the fact that the trustee had submitted to the jurisdiction of the English court meant that, as a matter of comity, the court would as a

[22] 2005 JLR 359; (2006–07) 9 ITELR 601.

matter of discretion give substantial (although not complete) effect to the English judgment. I know that, at the time, there was some concern about the decision, but it was consistent with *Lane* and indeed would now be consistent with the newly-discovered ability, referred to earlier, to enforce on a discretionary basis a non-monetary judgment of a foreign court where the parties have submitted to that court.

41 All of these cases pre-dated the enactment in October 2006 of a new art 9 of the Trusts (Jersey) Law 1984. That article introduced some important changes. In the first place, art 9(1) provided that a number of matters relating to trusts had to be determined in accordance with the law of Jersey and that no rule of foreign law should affect such question. These included questions of the validity or interpretation of a trust, the validity of any transfer to a trust and questions of variation of a trust. Secondly, and most importantly for our purposes, art 9(4) provided—

> "(4) No foreign judgment in respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law."

42 Coincidentally, the day after the amended art 9 came into force, the case of *Re B Trust*[23] came before the Royal Court. The trust in that case was a discretionary one and the wife was a beneficiary. In the divorce proceedings in England, the Family Division had made an order varying the trust by directing that the sum of £1.5 million be appointed into a sub-trust in which the wife would have a life interest with power to advance her capital. The trustee had submitted to the jurisdiction of the English court and subsequently sought directions from the Royal Court as to whether effect should be given to the English order.

43 It was submitted on behalf of the husband and other adult beneficiaries that the court could not make an order giving effect to the English order because to do so would be contrary to art 9(4). In particular, it was submitted that art 9(4) had removed the jurisdiction of the Jersey court to enforce a foreign judgment on the basis of comity. The court held that, under art 51 of the 1984 Law, it had power to give directions to a trustee and that in doing so it could, in the interests of comity, give substantial effect to the English judgment. It made directions which gave effect to most of the English order, but not all of it.

44 I think it is fair to say that *Re B Trust* caused some concern amongst the legal profession in Jersey. It was interpreted as having

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[23]2006 JLR 562; (2006–07) 9 ITELR 783.

driven a coach and horses through art 9(4) of the 1984 Law and to have held that, despite that article, the court could enforce on the grounds of comity any order of the Family Division varying a Jersey trust notwithstanding the fact that such variation would have been made under English law. I accept that some of the language used in the judgment may have given this impression. However, I do not think that that was a correct reading of the decision. The fact was that, in that case, the variation in question (namely the appointment of a sub-trust in favour of the wife) was something which the trustee had power to do under the trust deed. It was therefore something which the trustee could have done of its own volition and which the court could direct the trustee to do under its supervisory jurisdiction.

45 The final decision to which I would wish to refer before turning to *Mubarak* is the case of *Re H Trust*.[24] In that case all the assets available for the maintenance of the husband and wife were contained in a Jersey trust. Both the husband and wife were beneficiaries. The Family Division made certain orders against the husband directing him to procure the transfer by the trustee of certain trust assets to the wife with the remainder of the trust fund then being made available solely for the husband. The trustee did not agree with the decision of the English court and put forward an alternative proposal to the husband and the wife but this was rejected by the wife. The trustee then decided, in what was described in the judgment as the second decision, to defer making any further decision until it had proceeded with a claim to enfranchise the lease of one of the properties owned by the trust. The wife objected to that course and sought an order from the Royal Court directing the trustee to exercise its powers so as to give effect to the English order.

46 In a judgment delivered by Clyde-Smith, Commissioner, the Royal Court held that *Re B Trust* had correctly decided that art 9(4) had no bearing upon the exercise by the court of its supervisory jurisdiction under art 51 and that the only issue for the court was whether and to what extent the trustee should be directed to exercise its powers under the trust in such a way as to give effect to the English order. The court went on to hold that the second decision of the trustee had been unreasonable and should be quashed. The court then held that it was in the interests of the beneficiaries to direct the trustee to exercise its powers so as to give substantial (but not complete) effect to the English order. An important aspect of this decision, as in *Re B Trust*, was that the action which the trustee was directed to take fell within the powers conferred by the trust deed.

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[24] 2007 JLR 569.

47 It was against that background that the case of *Mubarak*[25] came before the Royal Court earlier this year. The court concluded that, in view of the uncertainty, it ought to go back to first principles and seek to clarify the legal basis upon which the Jersey Court could act. The detailed facts are quite complicated and for ease of presentation I shall simplify them somewhat. The husband had established a jewellery business which, in 1997, he contributed to a Jersey trust. In 1998, he and the wife separated and shortly afterwards he exercised a power conferred upon him under the trust deed revocably to exclude the wife as a beneficiary and to declare her as an Excluded Person for the purposes of the trust. As long ago as November 1999, following a contested hearing, the Family Division ordered the husband to pay the wife a lump sum of £4.8 million with periodical payments until payment of that lump sum. There have since then been innumerable hearings before the Family Division and the Court of Appeal and the case was described by Ward, LJ as having become notorious in the Family Division. The lump sum remains unpaid. Eventually, in a further attempt to secure payment, the wife applied to the Family Division in 2005 for a number of additional orders, including an order under the Matrimonial Causes Act 1973 varying the terms of the trust so as to require the trustee to pay the wife a sum equal to the amount owed by the husband under the lump sum order. Prior to that there was a hearing before Bodey, J during which the wife sought to argue, in accordance with the well-known *Hadkinson* principle, that the husband should not be permitted to participate in the forthcoming proceedings because he was in flagrant contempt of court. Bodey, J said that the husband could participate if he wrote a letter to the trustee indicating that he agreed that he would be bound by the outcome of the forthcoming hearing and that he wished the trustee to give effect to such orders as might be made at that hearing. The husband duly wrote such a letter. The hearing came on before Holman, J in December 2006 and he varied the trust under the 1973 Act in the manner sought by the wife. The matter subsequently came before the Royal Court. The first issue before the Royal Court is the one I wish to concentrate on, namely whether the court had power to enforce the order of Holman, J on the grounds of comity and whether it could therefore vary the trust in accordance with the English order. By enforcement, I mean the situation where, on the application of the judgment creditor, the Jersey court can give effect to a foreign judgment by issuing a judgment in identical form to the foreign judgment without re-considering the merits, so that it can then be enforced in Jersey in the same way as any other Jersey judgment.

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[25][2008] JRC 136.

48 I would summarise the key conclusions of the Royal Court's judgment as follows.

49 It began by explaining that the term "variation" could be used to cover two different situations. In the first sense, the "variation" altered the terms of the trust deed. In other words, it authorised or required the doing of something by the trustees which was outside the powers conferred upon them by the trust deed. An example of this would be an order that part of the trust fund be held upon trust for a person who is not a beneficiary and who is not capable of being added as a beneficiary. The court used the expression "alter" or "alteration" to cover this type of variation and I shall do the same today. The second type of variation was where the existing trusts were varied but in a way that the trustees themselves could have done by exercising a power in the trust deed. A simple example of this would be where the wife is a beneficiary of a discretionary trust and the English court "varies" the trust under the 1973 Act by directing that £1 million is to be held on trust for the wife absolutely rather than continue to be held upon the general discretionary trusts. Although this varies the trusts upon which the £1 million is held, it is nevertheless something which the trustees could have achieved themselves by exercising the relevant power of appointment. The variation does not therefore involve a departure from the trust deed.

50 The court held that it had no power under its inherent supervisory jurisdiction (as reflected in art 51 of the 1984 Law) to alter (in the sense described earlier) the terms of a trust.

51 An order of the Family Division varying or altering the provisions of a Jersey trust under the 1973 Act was made under English law. It was therefore inconsistent with art 9(1) of the 1984 Law and was accordingly not enforceable in Jersey because of art 9(4). This was so even where the trustee had submitted to the jurisdiction of the Family Division.

52 The giving of directions under art 51 did not amount to 'enforcement' of the overseas judgment in question for the purposes of art 9(4) and if one thinks about it that must be so. Let me take a simple example. Suppose that, in the case of a discretionary trust where the beneficiaries include the husband and the wife, the Family Division varies a Jersey trust under the 1973 Act by ordering that the sum of £1 million be paid to the wife out of the trust. This is something which the trustee could do under the trust deed. The trustee would not need to seek directions from the Jersey Court. It would be open to the trustee to take note of the English judgment, to consider the desirability of bringing any financial dispute between the husband and the wife to an end and reach the view that it was in the interests of all the beneficiaries (including the children) for a capital distribution

of £1 million to be paid to the wife so that everyone could get on with their lives. This would not amount to "enforcement" of the English judgment. It would be a conventional case of a trustee taking account of all the relevant circumstances (including in this case the existence of an English judgment) and deciding how to exercise its dispositive powers under the trust deed in the best interests of the beneficiaries.

53 If the trustee wishes to seek the approval of the Jersey court to such a decision, the court would be no more be enforcing the English judgment than would the trustee itself. The court would simply be fulfilling its usual function of supervising the exercise by a trustee of its discretionary powers. However, for the reasons already mentioned, the powers of the court in this respect are limited to where there is a variation. If there has been an alteration of the trust, the trustee has no ability to give effect to that alteration, nor does the Royal Court have jurisdiction under art 51 to direct the trustee to do so. As the order of Holman, J in *Mubarak* amounted to an alteration, the court could not direct the trustee to give effect to it.

54 In summary, the Court held that—

(a) By reason of art 9(4) of the 1984 Law the Royal Court cannot enforce a judgment of the Family Division varying or altering a Jersey trust under the 1973 Act and this is so even where the trustees have submitted to the jurisdiction of the Family Division.

(b) However, where the variation ordered by the Family Division does not amount to an alteration, the Royal Court may give directions under art 51 which have the effect of achieving the objectives of the English judgment. Whether the Court will do so in a particular case is a matter of discretion having regard to the interests of the beneficiaries.

(c) Where the order made by the Family Division amounts to an alteration of the trust, then there is no ability in the Royal Court to give directions to the trustee to act in accordance with that alteration.

55 I should add that, on the particular facts, the Court felt able to assist in a different way and this has now been upheld by the Jersey Court of Appeal. The rule in *Saunders v Vautier*[26] forms part of the law of Jersey. If all the adult beneficiaries of a trust have agreed to an alteration of that trust, the court may supply consent on behalf of the minor, unborn and unascertained beneficiaries pursuant to art 47 of the 1984 Law. In this case the three adult beneficiaries were the husband and the two adult children. The latter two consented to the

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[26](1841) 4 Beav 115

alteration made by the Family Division and the court held that, in the particular circumstances of the case, the letter from the husband to which I have referred earlier should be treated as his consent. He had chosen as a matter of free will to write that letter in order to gain the advantage of participating in the hearing before Holman, J. The court held that, having made his choice, he was bound by it. He could not renege on the letter he had written simply because he did not like the outcome of the proceedings before Holman, J. The court emphasised that this was an exceptional step and was only permissible because the husband was given a choice by the Family Division and chose as a matter of free will to write the letter. By contrast, in the *Turino Consolidated*[27] case, where the husband was ordered by the Dutch divorce court to write to the trustee agreeing to an alteration of the trust, the Royal Court placed no weight upon that letter.

56 The judgment of the Court of Appeal in *Mubarak* has recently become available. Because it dismissed the husband's appeal on the art 47 point, the court did not need to consider the wife's argument that the Royal Court had been wrong to hold that it could not enforce the English order or direct the trustees to give effect to it and accordingly expressed no opinion on the point.

The present position

57 Having considered the recent cases, the question then is what is likely to be the response of trustees and of the Jersey Court to the various types of order which may be made by a divorce court such as the Family Division. There are of course many different types of order which might be made but I would like to concentrate on three. The first is a finding that the Jersey trust is a sham, the second is an order that the Jersey trust be varied under the 1973 Act, and the third is that the husband should pay a lump sum to the wife in circumstances where he will need to have access to the trust fund in order to pay that sum.

(i) *Sham*

58 I think that a few years ago there was a widely held perception that the Family Division was adopting an over-robust attitude towards trusts, particularly offshore ones, and was not making sufficient allowance for the fact that, under the proper law of the trust, there were other beneficiaries who had interests which were entitled to be recognised and protected under that law. It was no doubt concerns

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[27] [2008] JRC 100.

such as these which led the Bailiff, Sir Philip Bailhache, to say in *Re Fountain Trust*[28] at para 27—

> "We agree with counsel that as a general rule ... it would be an exorbitant exercise of jurisdiction for a foreign court to purport either to vary the terms of a Jersey settlement or to declare such a settlement to be a sham."

59 I believe that the position has changed in recent times. In support of this I would refer to passages from two recent English cases. First is the judgment of Munby, J in *A v A & St George Trustees Limited.*[29] The judge there carried out a very thorough review of the law of sham and held in effect that English law and Jersey law on this topic were to like effect. However, at para 21 he made this important observation—

> "In this sense, and to this limited extent, the typical case in the Family Division may differ from the typical case in (say) the Chancery Division. But what is important to appreciate (and too often, I fear, is not appreciated at least in this Division) is that the relevant legal principles which have to be applied are precisely the same in this Division as in the other two Divisions. There is not one law of 'sham' in the Chancery Division and another law of 'sham' in the Family Division. There is only one law of 'sham', to be applied equally in all three Divisions of the High Court ..."

60 The second case to which I would refer is the decision of the Court of Appeal in *Charman v Charman (No 2)*[30] where Sir Mark Potter, P said this at para 58—

> "Mr Boyle submits that, if this court were to dismiss the part of the appeal referable to Dragon, it would send a message to the off-shore world that, in family cases, trusts do not matter. It will by now be clear that we send no such message. He draws our attention to the decision of the Royal Court of Jersey in Re Fountain Trust ... in which it observed at [18], that an assumption of jurisdiction by a judge of the Family Division in England to declare a Jersey trust to be a 'sham', such as there had occurred, would generally be exorbitant. We agree with the Royal Court's observation."

61 But what would be the position if the Family Division or some other divorce court nevertheless dealt with this issue and held a Jersey

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[28] 2005 JLR 359.
[29] [2007] EWHC 99 (Fam).
[30] [2007] EWCA Civ 503; (2006–07) ITELR 913; [2007] 1 FLR 1246.

trust to be a sham? Could such a judgment be enforced in Jersey? It seems to me arguable that the position is as follows.

62 If the Family Division applied English law in deciding that the trust was a sham, its judgment would be inconsistent with art 9(1) of the 1984 Law, which states that any question concerning the validity of a Jersey trust must be decided solely in accordance with the law of Jersey. Article 9(4) would therefore prohibit the enforcement of any such judgment even if the trustee had submitted to the jurisdiction of the divorce court. It would follow that any spouse who wished to rely upon that judgment would have to start all over again and re-litigate the matter on its merits before the Royal Court.

63 If, on the other hand, the Family Division applied Jersey law in concluding that the trust was a sham, this would appear not to be inconsistent with art 9(1) and art 9(4) would therefore have no application. The question then would turn on whether the trustees (and possibly other beneficiaries) had submitted to the jurisdiction of the English court. If they had not, the English court would not have had jurisdiction for the purposes of enforcement of foreign judgments, and under the ordinary rule of private international law, its judgment could not therefore be enforced. Again, any interested party would have to start again and nothing would have been achieved by litigating the matter in the divorce court. If, on the other hand, the necessary parties had submitted to the jurisdiction of the English court, then one would be in the situation envisaged in the recent cases to which I referred earlier such as *Miller v Gianne*[31] in the Cayman Islands and *Brunei Investment Agency*[32] in Jersey. The judgment holding the trust to be a sham would be a declaratory judgment where the relevant parties had submitted to the jurisdiction of the foreign court. The Royal Court would therefore have a discretion as to whether to enforce that judgment in Jersey. As to what factors would be relevant for the exercise of that discretion, I think one must await a suitable case, but one can envisage the possibility of the Royal Court being interested in whether any arguments supporting the validity of the trust had been properly put forward before the foreign court.

(ii) *Variation*

64 I turn next to where the Family Division makes an order varying the trust under the 1973 Act. Following *Mubarak*, the position would appear to be as follows in this sort of case. Such a judgment is not capable of enforcement because the English court will of necessity

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[31] 2007 CILR 1.
[32] [2008] JRC 152.

have applied English law and the judgment cannot therefore be enforced because of art 9(4). The question then is whether the trustee (or the court exercising its supervisory jurisdiction), can nevertheless choose to give effect to the judgment. If the order of the English court amounts to an alteration (in the sense that I have used that term earlier), neither the trustee nor the court can give effect to it because it is outside their respective powers. If, on the other hand, the order amounts only to a variation—in the sense that it is something which the trustee would have power to do under the trust deed—it will be a matter of choice for the trustee, and if necessary the court, as to whether to give effect wholly or partially to the order of the English court.

65 In the first place it will be a matter for the trustees. There is no requirement for them to take the matter to the Royal Court. On the contrary, the primary responsibility for deciding such matters lies with them. It will be a matter for them to decide, in accordance with their normal fiduciary duties, whether it is in the interests of the beneficiaries to exercise any powers they have under the trust deed so as to achieve, wholly or partially, the objectives of the English order. If the matter comes before the Royal Court, this may occur in at least three different ways. In the first place, the trustees might seek to surrender their discretion. There would have to be some reason for the surrender and it would of course be a matter for the court whether to accept that surrender,[33] but if it did, the court would step into the shoes of the trustees and reach its own decision on the appropriate course of action as if it were the trustee. Alternatively the trustees might reach a decision but ask the court to approve that decision on the grounds that it was a 'momentous' decision, in which case the court's task would be to decide whether what the trustees were proposing was a reasonable course of action.[34] Finally, the trustees might reach their own decision—*eg* to give effect wholly or partially to the English order or to refuse to so—and a beneficiary might then seek to challenge the decision of the trustees before the Royal Court. In those circumstances the court would intervene if it considered that the decision of the trustees was one which no reasonable trustees could have reached, but it could not simply substitute its own discretion for that of the trustees.[35]

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[33]*Re H Trust,* 2007 JLR 569 at 586

[34]*Re S Settlement,* 2001 JLR *N*–37; [2001] JRC 154; (2001–02) 4 ITELR 206.

[35]*S v L,* 2005 JLR *N*–34; [2005] JRC 109, followed in Re *H Trust* (*supra*).

(iii) *Lump sum*

66 A third type of order is where the Family Division orders the husband to pay a lump sum to the wife but he is unable to fund the whole of that order unless the trustees advance him some money from the trust. This was the type of order made in *Charman*. It is of course a matter entirely for the relevant divorce court as to the extent to which it takes into account any assets in a trust when deciding how much to order a husband to pay a wife. My understanding of the position in England and Wales is that, as described by the Court of Appeal in *Charman*, the Family Division will ask itself whether, if the husband were to request it to advance the capital of the trust fund, the trustee would be likely to do so. If the answer to that question is yes, the capital of the trust may, to that extent, be treated as a "resource" of the husband for the purposes of determining what order to make. If, on the other hand, the answer is no, it should be excluded.

67 A lump sum order itself will of course have no direct effect on the trust. Unlike an order declaring the trust to be a sham or an order purporting to vary the trust, we are considering here an order which is only directed at the husband. However, if he cannot afford to pay the lump sum without recourse to the trust, the trustees are likely at some stage to have to give consideration to how they should respond.

68 Ultimately, the matter then becomes one of discretion for the trustees. The wife will have become a creditor of the husband by virtue of the order of the divorce court. There is longstanding authority for the proposition that trustees may properly advance capital to a beneficiary in order to enable that beneficiary to pay off creditors if satisfied that this is for the benefit of the beneficiary. See *Lowther v Bentinck*[36] and *Re Esteem Settlement*.[37] Although the trustees will know in such circumstances that the money is eventually to end up in the hands of a non-beneficiary (*ie* the creditor) this will not amount to a fraud on a power if the trustees in good faith believe the payment to be for the benefit of the beneficiary.

69 Whether the trustees will in any particular case respond to the "judicious encouragement" of the divorce court and advance money in these circumstances will no doubt vary according to the circumstances. The trustees will certainly have to take account of their obligations towards the other beneficiaries of the trust. In many cases it will clearly be inappropriate to make such a payment. For example,

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36 (1874) LR 19 Eq 166.
37 2001 JLR 540; (2001–02) 4 ITELR 555.

in *A v A*[38] Munby, J declined to treat the trust assets as being the resource of the husband on the grounds that the trust asset consisted of shares in a private company which could only be realised by a sale of the whole business. There was no reason therefore to conclude that, if the husband asked for capital, he would receive it. But suppose that the divorce court had in fact treated the trust assets as available to the husband and made a lump sum order. One could well understand the trustees in those circumstances taking the view that they were not prepared to realise the sole asset of the trust in circumstances which would prejudice other beneficiaries and therefore declining to make any payment to the husband. In other cases the situation may be different and point in favour of making an appointment to enable the parties, including any children, to get on with their lives. As in the case of a variation the matter is primarily one for the trustees. It is for them to decide what to do. The court would only become involved should the trustees surrender their discretion or seek approval of the course of action which they propose to take or should their decision be challenged by a beneficiary as being a decision which no reasonable trustees could reach.

Conclusion

70 I started this lecture by referring to the different roles of the divorce court and the offshore court and the potential for tension as a result. I think that there has been some concern that the exercise by divorce courts of a jurisdiction to pronounce on the validity of a trust governed by the law of a foreign jurisdiction or to purport to vary the terms of such a trust by reason of an English statute, does not pay sufficient regard to the fact that these are structures which are not governed by English law, are not administered in England and confer rights on parties other than the spouses who are fighting it out before the divorce court. Furthermore, for the reasons which I have sought to explain, such an order is likely to be incapable of enforcement in the offshore jurisdiction in many cases and may therefore not achieve what the divorce court hoped and intended.

71 Conversely, there can be no objection to a divorce court exercising its *in personam* jurisdiction over the parties before it and ordering a husband to pay a wife a lump sum, as was done in *Charman*. Nor can there be any objection to a divorce court taking such steps as are open to it to enforce that order if the husband fails to pay, whether by proceedings for contempt of court or otherwise. Where the husband needs money from a trust in order to make the payment and the

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[38] [2007] EWHC 99 (Fam).

divorce court gives judicious encouragement to the trustees to help out, it must ultimately be a matter of discretion for the trustees exercising their fiduciary duties in accordance with the trust deed to decide whether such assistance can or should be given; and in the event of that decision being referred to the offshore court, that court will similarly have to decide the case having regard to the fiduciary duties of the trustees because, as a matter of legal analysis, the court will be exercising its conventional supervisory jurisdiction over trusts, rather than enforcing or acting in aid of a judgment of a foreign court.

Michael Birt was appointed as Deputy Bailiff of Jersey in 2000. Between 1994 and 2000 he held the office of HM Attorney General for Jersey.

EXHIBIT 108

(1808) 1 Campbell 253

***949 *949 James Sadler v James Robins**

1808

Same day.

(Assumpsit will not lie on a decree of a foreign Court, whereby the defendant is ordered to pay a certain sum of money to the plaintiff on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer; where the defendant's costs have not been taxed, either at his own request, or upon an *ex parte* proceeding at the instance of the plaintiff. Although an objection appear upon the record, and might be taken advantage of by motion in arrest of judgment or writ of error, yet if it be of such a nature, that the action clearly cannot be maintained, the Judge at Nisi Prius will nonsuit the plaintiff.)

[Considered, *Beatty* v. *Beatty* , [1924] 1 K. B. 807.]

Assumpsit on a decree of the high Court of Chancery in the island of Jamaica.—The declaration stated, that on the 16th day of July, 1805, in a certain cause, wherein James **Sadler** and others were complainants, and James **Robins** and others, executors of John **Sadler** deceased, were defendants, it was by the said high Court of Chancery ordered, adjudged, and decreed, that the said James **Robins** and one R. Haywood, since deceased, should on or before the first day of January then next ensuing pay unto the said James **Sadler**, or his lawful attorney or attorneys in the said island, the sum of £3670, 1s. 9¼d. current money **[254]** of the said island, with interest thereon from the 31st day of December then last past, first deducting thereout the full costs of the said defendants expended in the said suit, the same to be taxed by George Howell, Esq. one of the masters of the said Court; and also deducting thereout all and every further payment or payments which the said James **Sadler** and R. Haywood or either of them might, on or before the said 1st day of January, 1806, shew to the satisfaction of the said George Howell that they or either of them had paid on account of their said testator's estate. The declaration having then stated a liability and promise in the words of the decree, and the amount of the sum to be paid in sterling money with interest, went on to aver that the said James **Robins** and R. Haywood did not nor did either of them on or before the 1st day of January, 1806, or at any subsequent time, cause the costs by the said defendants in the said cause in the said Court of Chancery expended in that suit to be taxed by the said George Howell, Esq., or by any other of the masters of the said Court of Chancery, but as well the said James **Robins** and R. Haywood, in the lifetime of the said R. Haywood, as the said James **Robins** since the death of the said R. Haywood, have altogether neglected and refused so to do, nor did the same James **Robins** and R. Haywood, in the lifetime of the said R. Haywood, on or before the said 1st day of January, 1806, shew to the satisfaction of the said George Howell, or any other master of the said Court, that they or either of them had paid on account of the said testator's estate any sum or sums of money whatsoever. Breach, for non-payment of the said sum of £3670, 1s. 9¼d. current money, with interest due thereon, as mentioned in the decree.—Plea, the general issue.

[255] The Attorney-General having opened the plaintiff's case,

Lord Ellenborough expressed himself of opinion that the action was not maintainable; as it did not appear what sum was actually due to the plaintiff according to the terms of the decree.

The Attorney General contended that it lay upon the defendant to reduce the sum below that awarded to be paid on the 1st of January, 1806, and that if he

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took no steps for this purpose, the whole sum of £3670, 1s. 9¼d. currency, became absolutely due on that day. It was impossible for the plaintiff either to tax the costs of the defendants in the suit, or to shew what sums of money any of them had paid for their testator; and it was plain, from the words of the decree, that before any deduction was to be made by the plaintiff, the acts of taxing costs and proving payments were to be done by the opposite party.

Lord Ellenborough.—"Deducting thereout the full costs of the said defendants," is the same as "the full costs of the said defendants first being deducted thereont; and if the defendants did not appear to tax their costs, the plaintiff might have proceeded *ex parte* . At present, the sum due on the decree is quite indefinite. The operations to ascertain it should have taken place in the Court of Chancery in Jamaica, and cannot be gone through here, at Nisi Prius. Had the decree been perfected, 1 would have given effect to it, as well as to a judgment at common law. ***950** The one may **[256]** be the consideration for an assumpsit equally with the other. But the law implies a promise to pay a definite, not an indefinite sum.

The Attorney-General then urged strenuously, that the objection was upon the record, and that if it was well founded, judgment might be arrested.

Lord Ellenborough.—If there is evidently no consideration to raise a promise, so that the action cannot be supported, why should the defendant be put to move in arrest of judgment? The plaintiff ought not to have brought his action here, while the decree was in an incomplete state. The case we had at the sittings after last term (*Buchanan* v. *Rucker, ante* , 63) shews with what facility these decrees and judgments in the West India islands are obtained: and they ought to be examined with some strictness before they are put in force in this country. In many other cases, when it is clear the action will not lie; although the objection appears on the record, and might be taken advantage of by motion in arrest of judgment, or by writ of error, Judges are in the habit of directing a nonsuit.

The plaintiff was then called.

The Attorney-General in the following term obtained a rule to **[257]** shew cause why this nonsuit should not be set aside; but cause being shewn, the Judges were unanimously of opinion that it ought to stand.

Lord Ellenborough.—There appears to be due to the plaintiff upon the decree a sum of money— *x* . Till the sum to be deducted is ascertained, it is impossible to say how much is really due. The plaintiff ought to have taxed the costs *ex parte* . There is no Court where this proceeding is not allowed. At present no one can predicate how much the defendant is decreed to pay. The decree is therefore imperfect, and cannot be the foundation of an assumpsit. As to the payments on account of the testator's estate, none being proved, it might be presumed that there were none; but there had certainly been costs expended in the suit, and until they are deducted according to the terms of the decree, an action cannot be maintained upon it.

Grose, J.—The plaintiff shews what sum is not due to him, not what sum is due.

Le Blanc, J.—It is clear that the plaintiff is not entitled to the whole sum mentioned in the decree; and it was competent to him to have had the costs taxed at something, however small.

Bayley, J.—Of the same opinion.

Rule discharged. 1

[258] The Attorney-General and Le Blanc for the plaintiff.

Garrow and Comyn for the defendant.

[Attornies, Shawe and Richardson.]

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1. *Vide Buchanan* v. *Rucker, ante* , 63, and the cases there referred to.

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