

Chancery Bar Association Conference 2016

Cayman Trusts in English Divorces

Notes

**Nuptial Settlement**

1. The English Court's power to vary a settlement is found in section 24(1)(c) Matrimonial Causes Act 1973:

*“On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter ... the court may make any one or more of the following orders, that is to say—*

*(c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage ...”*

2. It applies to an *“ante-nuptial or post-nuptial settlement ... made on the parties to a marriage”*. A settlement is nuptial if it is made upon the husband in the character of husband or upon the wife in the character of wife, or upon both in the character of husband and wife (*Prinsep v Prinsep* [1929] P 225), and will usually be one which makes some form of continuing provision for both or either of the parties to a marriage *Brooks v Brooks* [1996] AC 375. A vague intention to benefit one or more of the parties in the future, including by amending the trust deed, is insufficient (*Quan v Bray* [2014] EWHC 3340). The provision for the parties of a matrimonial home is considerably more likely to be a nuptial settlement, *N v N and F Trust* [2006] 1 FLR 856.
3. It can be open to question whether all or only some part of a settlement is nuptial. So, in *Ben-Hashem* it was found that the only nuptial aspect of the settlement was the licence that had been extended to the couple to permit them to occupy the home. Varying that licence was of little practical value to the wife. A similar conclusion was reached in *Joy v*

*Joy-Morancho*. On the other hand, in *AB v CB* [2014] EWHC 2998 (on appeal, *P v P* [2015] EWCA Civ 447) the trust of a family home (of which the husband was the life tenant) was held to be fully nuptial by reason of its holding the matrimonial home and because of a power in favour of the husband to advance all of the capital to him.

4. A settlement will not cease to be nuptial merely because the parties to the marriage (or one of them) have ceased to be able to benefit from it. Nevertheless, a settlement which was nuptial when made may lose that character “*depending on the facts and circumstances of the particular case*”, *C v C* [2004] EWCA Civ 1030.
5. It is open to question whether a non-nuptial settlement can become nuptial. In *Quan v Bray* [2014] EWHC 3340 [2014] EWHC 3340 said:

*“In my judgment on the authorities, a settlement which is non-nuptial at its creation could itself later become ‘nuptialised’ if there was, in fact, a flow of benefit to the parties during the marriage from the trust. Alternatively a later disposition from the trust can itself constitute a post nuptial settlement without the main or superior trust necessarily becoming nuptial.”*

However, the more recent case of *Joy v Joy-Morancho* [2015] EWHC 2507 suggests that a non-nuptial trust cannot become nuptial although leaves open the question of whether an alteration in the settlement (such as by an appointment) can have that effect and, if so, the extent of the effect (e.g. is the whole trust nuptial or just that part in respect of which the appointment was made), see paras 109 and 110. In *N v N and F Trust* the trust itself was not held to be nuptial but the property, which had been made available to the parties, was treated as property the ownership of which could be varied.

## Enforcement and Effectiveness of any Order

6. There is no doubt that the Court has the power to vary offshore trusts and that it will frequently purport to do so, see *Charalambous*. The key issue is one of enforcement.
7. Under the law applicable to the Triangle Trust and to TTC as its trustee, any variation of its terms should only be made in accordance with the law of Cayman; see Part VII of the Trusts Law and *In the Matter re B Trust (Grand Court) 2010 (2) CILR 34*. If TTC were to submit to the jurisdiction and be joined to the divorce proceedings, it might subsequently undermine the efficacy of the firewall legislation. Unless TTC were authorised by the Grand Court to take that step, it would be exposed to criticism by present and future beneficiaries for having exposed the trust assets to enforcement of an order which should not have been capable of enforcement and may be liable for breach of trust. It is also possible that TTC will be held to be personally liable to one or more of the parties to the divorce under the terms of the an order made by the Courts of England and Wales but not be able to use the trust assets to satisfy the order.
8. The underlying assets, though, include assets located in the UK (including the home). Prior to the decision in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 it was common to ignore the existence of intervening companies and to make orders directly against the assets. Following that decision (which concerned the court's powers under section 24(1)(a)), it was widely believed that this would no longer be possible. However, in *DR v GR* [2013] EWHC 1196 Mostyn J. stated that the power to vary settlements was different to, and wider than, the power in section 24(1)(a) so that where provision had been made "*from assets held by a group of family companies then the entire set-up when viewed as a whole, is capable of amounting to a variable nuptial settlement. If the top company is owned by a trust of which the spouses are formal beneficiaries then the position is a fortiori.*" This would mean that orders could continue to be made directly against the particular assets, indeed it would mean that the use of section 24(1)(c) would greatly increase. It remains to be seen whether Mostyn J.'s view is also that of the wider Family Division (and the Court of Appeal).

### **Judicious Encouragement**

9. An alternative approach to varying the trust pursuant to section 24(1)(c) is the use of judicious encouragement. This amounts to making an order against one party which he or she may be unable to meet without assistance from the trustees, in the expectation that the beneficiary will make a request of the trustees, and on the basis that the trust assets are likely to be made available to that party (and so are an asset of the marriage), see e.g. *Whaley v Whaley* [2011] 2 FCR 323.
10. When making these orders the court has, to date, distinguished between private individuals (e.g. wealthy parents) and trustees, the assumption being that whereas a private individual can act entirely capriciously, thereby leaving an unenforceable order, a trustee is under a fiduciary duty to at least consider a request to make provision so as to make good the order, see *TL v ML* [2005] EWHC 465.
11. Historically, these orders have been made against individuals so as to use up all or most of their assets, expecting the trustees to make provision for them. What is more difficult is an order made against a person that simply cannot be met unless the trustees make provision. In *BJ v MJ* Mostyn J said:

*“The only truly problematic situation is where the trust is not nuptial and where there are no or scant assets outside the trust. In such a circumstance the court might find that its findings as to the likelihood of advancement are frustrated by a refusal by the trustees to do what the court expects them to do. In such a case a deal of worldly realism is called for”.*

### **Procedural (English)**

#### **Parties**

12. It has been said that neither the trustees nor the underlying companies are required to be parties although pursuant to FPR 9.13 they will be served with copies of the application and they can apply for their own joinder, see *DR v GR* at para 22.
13. Essential parties are children who will be affected by the decision (Rule 9.11(1)). In *P v P* the trustees represented their interests so that a wider representation order was avoided.
14. Other persons with an interest in the outcome of the dispute, including beneficiaries of the settlement, are also entitled to be heard and may be invited to make submissions, particularly where the trustees refuse to participate (*BJ v MJ, DR v GR*)

#### Service Out

15. Permission is not required to serve out of the jurisdiction (FPR 6.41).

#### Disclosure

16. The Court has wide powers to order disclosure, including to order non-parties to disclose documents. It is required to exercise these powers only where “*disclosure is necessary in order to dispose fairly of the proceedings or to save costs*” (FDR 21.2). The court’s jurisdiction is investigatory and so disclosure is not limited by reference to relevance. However, the process usually begins with the exchange of Form E’s, followed by lists of issues and so disclosure is generally limited to the determination of issues in dispute between the parties.
17. There are strict limitations imposed by common law and statute in the Cayman Islands preventing the disclosure of confidential information relating to Cayman Islands trusts, other than in prescribed circumstances (see Confidential Relationships (Preservation) Law

(2015 Revision) in the Cayman Islands). TTC are therefore not in a position to disclose any documentation or information relating to the Triangle Trust without having first made the appropriate applications to court in the Cayman Islands, sought consents where necessary and ensured compliance with the applicable legislation.

18. Where documents are unlikely to be provided by trustees, it is not uncommon for one of the parties to be ordered to provide such documents, leaving them to request the trustees for them.

### Evidence and Inferences

19. Trustees are in a difficult position when participating in matrimonial litigation. Should they participate in providing disclosure or in giving evidence then they may disclose information which may be used as the basis for adverse orders made against the trust. On the other hand, should they refuse to participate then they cannot be surprised if the court makes adverse inferences against them (see e.g. *BJ v MJ*).

### Conclusions

20. Trustees based offshore are faced with difficult decisions including as to whether to participate in the proceedings, whether to submit to the jurisdiction, whether to comply with orders or requests for disclosure and ultimately whether to comply with the English Court's decision. They will be faced with complaints from their beneficiaries (very often including the husband himself) and will be concerned that any action they might take will lead to criticism.
21. The common response is to seek directions from the local court.