Chancery Bar Association Conference 2016

Offshore Trusts and 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. According to Munby J in *Ben Hashem v Shayif* [2008] EWHC 2380 (Fam), para 229, the exercise of the statutory jurisdiction involves three questions
    a. Is there a settlement within the meaning of section 24(1)(c)?
    b. If so, what is the property comprised in that settlement?
    c. If there is a settlement, how should the court exercise its jurisdiction?

3. As to the first question, s.24 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 "settlement" for the purposes of this provision has a very wide meaning and is not limited to formal trusts constituted by trust deed – any arrangement or disposition is capable of being a "settlement" without any trust being involved at all; see e.g. *Ben Hashem* (supra) and *NR v AB* [2016] EWHC 277. To qualify as an ante-nuptial settlement in relation to a marriage, it is clear that the marriage must have been in

contemplation at the time the settlement was created; *Burnett v Burnett* [1936] P 1. 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 regarded as creating a nuptial settlement. 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.

6. As to the second *Ben Hashem* question, plainly if the Triangle Trust is a nuptial settlement, then its trust fund is the property which is the subject of a nuptial settlement. However, because "settlement" has such a wide meaning, it is possible that even if the Triangle Trust itself is not a nuptial settlement, some but not all of the trust fund may still be regarded as subject to a nuptial settlement if some part of the trust fund has been used to make continuing provision for one or both of the parties to the marriage. In *N v N and F Trust* [2006] 1 FLR 856 the provision for the parties of a matrimonial home by the trustees created a nuptial settlement of that property only.

Enforcement and Effectiveness of any Order

7. 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.

8. 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 Guernsey; see s14(4) of the Trusts (Guernsey) Law 2007. In the Cayman Islands it has been held that an order of the English High Court is unenforceable in the Cayman Islands whether or not the Trustee submits to the jurisdiction because of the terms of its firewall legislation. Were the Trustee to submit to the jurisdiction of the High Court this would create a conflict between its duty to observe the terms of the trust and its obligation to comply with the order of the High Court. It has been held in the Cayman Islands that it would be unwise for trustees to place themselves in this position; see *In the matter of the B Trust* [2010] 2 CILR 348. In the Jersey decision of *Re H Trust* [2006] JLR 280, the Royal Court took the view that submission to jurisdiction increased the likelihood of an English order becoming enforceable in Jersey, and made the following point:

> "It follows that, in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee 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, *e.g.* where all the trust assets are in England, it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because, by reason of the location of the assets, that court will be able to enforce its order without regard to the trustee or this court."

9. 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.

10. 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

11. 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.

12. 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.

13. 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

14. 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. That decision has now been disapproved of, see *TM v AH* [2016] EWHC 572.

15. 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.

16. 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

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

Disclosure

18. 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.

19. 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

20. 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

21. 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.

22. The common response is to seek directions from the local court.

Addendum - Problem

Chancery Bar Association's Channel Islands Conference 2016 - Guernsey

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Nicholas and Helena married in 2003, having lived together since 1998. They are now divorcing. They have sons of school age. Nicholas' father, Alexander, is a former Russian National who appears to have great wealth, the source of which is obscure. Nicholas has an older brother, Stephan who is unmarried with no issue.

Nicholas and Helena are both in their mid-40s. Nicholas has a history of drug abuse and has never managed to hold down a job. Helena has never worked. Nicholas and Helena have no assets of any real value other than a holiday house in Devon worth around £300,000. Prior to their separation Nicholas and Helena lived in Manor Mansion, a substantial house in Chelsea and Helena remains there with the children.

Nicholas is a beneficiary of a trust, the Triangle Trust. This is a Guernsey law trust created by Alexander in 1990. The trustees have always been a Guernsey based trust company, Triangle Trust Co ("TTC"). The trust is discretionary for a wide class of beneficiaries which includes Alexander, his children and remoter issue and their spouses.

The trust assets consist of:

- The Manor Mansion, which is held via a UK Company, Manor Mansions Ltd. The property is believed to be worth around £7m.
- A BVI holding company ("BVI Co") which in turn owns a UK holding company ("UK Holding Ltd") which owns various properties in London worth around £15m and investments worth around £5m.
- Cash, and other investments of circa £15m located around the world and held directly by the trustees.

In 2006 TTC appointed the shares in BVI Co on trusts that were similar to the original discretionary trusts but which limited the class of beneficiaries to Nicholas, any spouse of his and his issue and Stephan, any spouse of his and Stephan's issue.

TTC have never paid income or capital to any beneficiary outright. From time to time, TTC have made loans to beneficiaries, including a series of interest free loans made between 2006 and 2007 to enable Nicholas and Helena to carry out some improvement works to Manor Mansions. The total amount loaned for this purpose by TTC was £250,000. The loans were made to the couple jointly, were repayable on demand and are secured by a charge over the Devon property.

There is no letter of wishes. The trustees do have on file a number of letters between Alexander and TTC from which it is apparent that TTC has broadly followed his direction. TTC are considering, at Alexander's request, executing a deed to exclude spouses from benefit from the trust altogether. Alexander has also asked them to call in the loans to Nicholas and Helena.

Helena, via her solicitors, asserts ignorance regarding the trusts other than a vague knowledge of their existence. She says she was never informed that she and Nicholas did not own Manor Mansions and she is determined to remain there. Her solicitors, W & Co, have written to TTC asking for disclosure of the trust documents, accounts from 1998 onwards, trustee minutes, letters of wishes or other correspondence between the trustees and the settlor that refer to the settlor's wishes. Nicholas is opposed to any disclosure.

<u>The Advice Sought</u>

TTC are faced with numerous issues:

- Can they or should they provide any of the disclosure Helena has asked for.
- Should they do as Alexander asks concerning exclusion of the spouses and the calling in of the loans.
- Whether Helena is able to make an application in respect of the Triangle Trust and whether (and where) any order could be enforced.
- How they can know what is being said in the Family Division, and whether they should ask to be made parties.
- What steps they should take in those proceedings.
- What they should do in Guernsey, whether they should seek directions and, if so, what directions.