

Family Property

Attacking Offshore Trusts

An Offshore Perspective on How To Deal with Divorcing Beneficiaries



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When beneficiaries divorce, offshore trustees can often find themselves in a difficult position. Trying to balance the interests of all those with an interest in a trust is never easy at the best of times and is even less so in the face of increasingly hostile attacks from the English (or foreign) Family Courts. This article considers the most common forms of attack on offshore trusts and their structures in such situations and how best offshore trustees and their advisers can deal with them.

In recent editions of P.C.B., Alison Bull¹ and James Finch² have provided an English perspective on how to protect trusts and deal with disclosure requests where one or more beneficiaries are involved in a matrimonial dispute. It has often been the case that offshore trusts, by their very nature designed to be outside the English sphere of influence, can be overlooked at the start of such disputes. Often the offshore trustee is the last to know that the trust he is responsible for is potentially under serious threat. However, since the credit crunch and the recession, offshore trust structures have, unsurprisingly, come under ever more scrutiny. There is now even greater incentive for divorcing beneficiaries to seek to attack these in order to increase the size of the deemed matrimonial estate which may be available for distribution by the Family Division of the English High Court.

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¹ [2014] P.C.B. 25.

² [2014] P.C.B. 104.

This article seeks to provide an offshore view of such problems and cover the issues generally faced by offshore trustees when one or more beneficiaries divorce. It assumes: (1) that the trust is a wholly discretionary trust managed by an offshore institutional trustee; (2) that the husband is a beneficiary; and (3) that the wife is considering, or is making, a claim against the trust in the matrimonial proceedings (although the position would, of course, be the same if the roles were reversed).

Preliminary considerations

Who are the beneficiaries?

It seems obvious, but the first thing for an offshore trustee to consider, once made aware of the existence of matrimonial proceedings threatening a trust, is who precisely the beneficiaries are and what is the matrimonial couple's entitlement to, and indeed expectation of, receiving benefit (if any) under the trust.

In well established dynastic structures it is highly likely that the husband (in the above scenario) will be one of several beneficiaries under a trust and may, dependant upon the size of the trust fund, the number of beneficiaries and the trustee's discretion, only have a limited expectation of benefit along with his other siblings or the wider family class.

Equally, although less common in trusts these days, it is also a possibility that spouses may be included in the beneficial class under the trust deed, and that the wife may also have a direct interest in, and legitimate expectation of benefit from, the trust.

Conversely, with more modern structures one may find that the trust is a nuptial one, set up by the matrimonial couple themselves and that, as such, they are the principal beneficiaries, albeit with minor or young adult children who have a more limited expectation of benefit.

Whatever the situation, it is therefore vitally important for the trustee to look at the beneficial class as a whole and carefully examine the history of distributions made to the husband or the matrimonial couple. This will need to look at not only how much and how regularly such distributions were, or are being, made but also who requested them and how—for example, if the husband regularly requested distributions for the purposes of household upkeep then this could give rise to a legitimate expectation on the wife's part. Either way, a trustee will need to investigate the position fully in order to consider what steps it should next take in the face of an onshore attack.

What could be attacked?

In tandem with considering the beneficial class, an offshore trustee must also turn its mind to what assets within the trust structure may potentially be liable to attack from the matrimonial proceedings. Assets within England and Wales will already be deemed to be within the jurisdiction of the English Courts and there will be very little that a trustee can do to resist an order dealing with these onshore. In respect of assets held elsewhere, the position is more nebulous.

In recent years, more and more complicated trust structures appear to be in vogue and it is becoming increasingly rare to find the traditional model of a single holding company owned by a trustee being used to hold the entirety of the asset base. Increasingly one sees multiple companies within a trust being used either to hold specific individual assets (usually, but not always, real property) or potentially to ring fence assets for the use of a specific individual or a specific class of beneficiaries.

It may be, for example that a trustee has already set aside (whether explicitly or otherwise as a notional "fund") a certain proportion of the assets for the benefit of the husband's side of the family and that this "fund" is now considered to have been depleted. In such a situation an offshore trustee may have to seriously consider whether, in order to protect the interests of the other beneficiaries, it may have to take

a more active role in the matrimonial proceedings than would be usual, lest the English Family Court get the wrong impression about the husband's entitlement to benefit.

Equally, one may also find that the matrimonial home is owned by the trust. In such circumstances a trustee will have to consider whether this ownership may be open to attack on the grounds of sham, as was the case in the decision of the Supreme Court in *Prest v Prest*.³

Whatever the circumstances, the trustee will need to be ready and able to deploy such information as needs require depending upon the manner and form of any such attack.

Where are the attacks likely to come from?

Depending upon how much notice an offshore trustee has of impending matrimonial proceedings, it is prudent for it to consider how and from whom any potential attack may come. As can be seen from Guernsey and Jersey jurisprudence, the most obvious route is via the English High Court, either seeking to join an offshore trustee to the onshore proceedings or purporting to vary the terms of a Guernsey or Jersey law trust.

However, just as common can be information requests coming directly from the divorcing beneficiary or more hostile approaches for information from his spouse, thereby putting the offshore trustee in the difficult position of balancing their interests with those of the other beneficiaries under the trust. Potentially just as harmful though, are circumstances where the divorcing couple manage to settle their differences amicably and reach an agreement, without reference to the trustee, which may include trust assets and potentially seek to vary a trust's terms. As detailed below, whatever avenue of attack is faced, if the offshore trustee is not consulted at an early stage, his options for responding may be limited.

Forms of attack

Disclosure / Information Requests

Often, and unsurprisingly, the most common instance of such requests will be approaches from the beneficiary seeking information as to trust accounts and assets so that he may provide financial disclosure on the Form E in the matrimonial proceedings. Similarly, if the proceedings are already well underway and the husband has been less than forthcoming on his Form E, he may be seeking the information in order to comply with a court order for disclosure.

The types of information usually sought will be copies of the trust deed; valuations of assets and recent and historic trust accounts; details of distributions made to the requesting (and sometimes all other) beneficiaries; and copies of any letters of wishes relevant to the trustee's considerations.

Obviously a trustee, mindful of its fiduciary obligations, would want to assist the beneficiary in so far as it is able within the terms of the trust. However, more often than not such requests will be excessively broad in scope and seek information to which the husband would not normally be entitled. For example, unless the husband is also the settlor of the trust, he would not be entitled to see the letter(s) of wishes. Equally a review of the terms of the trust deed will often reveal that it specifically excludes (as it is entitled to do) the statutory provisions of the relevant Guernsey or Jersey Trusts Law⁴ which allow for an automatic entitlement for beneficiaries to such information.

As noted above, it may be that the wife (in this scenario) is also a beneficiary under the trust, in which case the trustee would have to give similar consideration to any disclosure request made by her. But sometimes a trustee will find itself faced with a hostile request directly from a spouse who is not within the beneficial class but is claiming, by virtue of the marriage, an entitlement to some of its assets.

³ *Prest v Prest and others* [2013] 4 All E.R. 673.

⁴ c.f. s.26 of the Trusts (Guernsey) Law, 2008 and art.29(d) of the Trusts (Jersey) Law, 1984, as amended.

The problem that an offshore trustee will face, particularly when there is no entitlement to such information, is that a blanket refusal to disclose is likely to find little sympathy with the English Family Court. More often than not, the Family Court will make whatever order it considers just between the parties, whether or not this potentially infringes upon the entitlement of other beneficiaries under the trust. This can include “judicious encouragement” of the husband (often with the threat of court sanction) in order to make him comply with his disclosure obligations. In both circumstances an offshore trustee may feel that it is necessary to disclose information regarding the asset position and likely expectation of benefit in order to protect the interests of the husband or the other beneficiaries.

Whatever a trustee decides, it will invariably have to seek the protection of the Royal Courts of Guernsey or Jersey by making an application for directions. Where a trustee wishes to disclose information which the matrimonial couple would not normally be entitled to see (whether by exclusion of statute or otherwise), it will need to seek the court’s permission to do so and demonstrate why such disclosure is necessary and proportionate for the protection of the interests of the beneficiaries or for the proper administration of the trust⁵. On the other hand, given the potentially serious consequences to the trust of doing so, a trustee wishing to resist all such information requests would also wish to seek directions from the offshore courts in order to protect itself.

Orders of the Family Division of the English High Court

The most concerning forms of attack for an offshore trustee will be those that come directly from the Family Division of the English High Court. Whether it is an order seeking to join the trustee to the matrimonial proceedings or one purporting to vary an offshore trust and/or deal with its assets as if they were part of the matrimonial estate, in either situation the only sensible option for a trustee will be to seek the assistance of the Royal Courts.

Although not the default position, as noted above, there may be certain rare circumstances where a trustee, faced with a joinder application, may wish to submit to the jurisdiction of the onshore court, for example where the majority, if not all of the assets are onshore and already within the Family Court’s jurisdiction. Either way, whether it has decided to submit or not to submit, an offshore trustee will want to seek *Beddoe* relief on advice and persuade the offshore court why the chosen course would be in the best interests of the trust and its beneficiaries.

When faced with an English Court order purporting to vary a trust or otherwise deal with trust assets, the offshore trustee will often have sufficient ammunition for a challenge in the form of local “Firewall” legislation. For example, under Guernsey law, all questions regarding a Guernsey trust and the disposition of property from that trust are reserved to the Royal Court of Guernsey, which will not recognise the judgment of a foreign court purporting to vary a trust if it is inconsistent with Guernsey Law.⁶ Similar provisions also apply under Jersey law.⁷

However, such legislation is not a panacea as the Royal Courts will always seek to do justice between the matrimonial parties. Whilst they urge restraint of the English Courts and recommend that they request the assistance of the offshore courts rather than seek to vary Guernsey and Jersey trusts directly, the Royal Courts will often choose to enforce much of an English Order on the grounds of judicial comity (*In the Matter of the B Trust*⁸). This is particularly so in circumstances where one of the parties has persistently sought to frustrate enforcement of an English matrimonial order (*Re IMK Family Trust*⁹). The key question in such situations will be whether the English Court order purports to alter the terms of the trust by ordering

⁵ c.f. sub-sections 26(2) and 26(3) of the Trusts (Guernsey) Law, 2008.

⁶ Section 14 Trusts (Guernsey) Law, 2008.

⁷ Article 9 Trusts (Jersey) Law, 1984, as amended.

⁸ *In the Matter of the B Trust* [2006] J.R.C. 185.

⁹ *Re IMK Family Trust* [2008] J.L.R. 250.

the offshore trustee to do something outside its powers, or simply to vary it. As confirmed in *IMK Family Trust*, in the former situation the offshore court's hands are tied whereas with the latter, it can give serious consideration as to whether or not to direct the trustee to comply.

Amicable Settlements

The final, and often most overlooked, forms of attack are the ones that arise out of successful Alternative Dispute Resolution (ADR) or an independent amicable settlement between the divorcing couple, which in some way seeks to carve up or purports to deal with the trust or its assets as if they were part of the matrimonial estate. If the trustee is not consulted, or is consulted too late as to the mechanics of what is proposed, then there may be very little that it can do to assist the matrimonial couple, particularly in trusts where a wider class of beneficial interests are involved.

A responsible trustee, cognisant of its duties, will invariably wish to assist the parties and their children (who are most likely also going to be beneficiaries under the trust) to avoid acrimonious and costly divorce proceedings—but it can only do so under the terms of the trust deed whilst considering the interests of all those with a beneficial interest. It is therefore always best in such circumstances for the trustee to be consulted at an early stage in such discussions in order to ensure that what is being proposed is within its powers and in the interests of all the beneficiaries. Once an agreement is reached between the matrimonial couple, provided all beneficiaries consent, it is worth then considering whether to seek directions blessing the proposal and thereby binding any minors and unborn children, which ought to be a relatively simple and inexpensive process for the Trustee.

Conclusion

The Office of National Statistics estimates that 42 per cent of marriages in England and Wales will end in divorce¹⁰ and so it is highly likely that a professional offshore trustee will be faced with some or all of the situations referred to above. If dealing with an onshore attack, an offshore trustee will have little option but to seek the protection of its local courts and the costs of so doing out of the trust assets as a necessary cost of its administration. Although such costs will be inevitable, the benefits of ADR, amicable discussions and early consultation between the trustees and the beneficiaries, in helping to keep such costs to a minimum, are clear.

¹⁰“What Percentage of Marriages End in Divorce”, ONS, February 9, 2013 <http://www.ons.gov.uk/ons/rel/vsobl/divorces-in-england-and-wales/2011/sty-what-percentage-of-marriages-end-in-divorce.html> [Accessed June 8, 2014].