

## An important Trust Case - Jersey Royal Court decision in Mubarak v Mubarik

**Trustees, marriage breakdown and the enforcement of foreign orders**

**In the Matter of The IMK Family Trust (Mubarak v Mubarik and others) [2008] JRC 136**

**Royal Court – judgment given 15 August 2008**

### **Background**

The problems and issues for trustees which are thrown up when a beneficiary becomes involved in divorce proceedings are well known and have in recent years given rise to litigation in a number of jurisdictions. In cases where the trustee is resident in one jurisdiction and the divorce proceedings take place in another the issues are made even more complex if orders are made against the trustees in the divorce proceedings and attempts are then made to "enforce" those orders in the jurisdiction where the trustees are resident.

In two recent reported cases in Jersey (In the matter of the B Trust [2006] JRC 185 and In the matter of the H Trust [2006] JRC 057, [2007] JRC 187 & [2007] JRC 213) the Royal Court made orders which gave substantial effect to orders made against Jersey resident trustees by English divorce courts. Some concern was raised among practitioners and others that the Jersey courts would be unwilling to stand in the way of parties seeking to "enforce" against Jersey trustees orders made in non Jersey matrimonial courts. In the B Trust case the Jersey court was exercising its jurisdiction under what is now Article 51 of the Trusts (Jersey) Law 1984 (the "Law"), in the interests of comity, to give directions to a trustee the result of which could be to give substantial effect to the order of the English matrimonial court. In the H Trust case the

English court had not made an order purporting to vary the trust, but had made orders against the husband directing him to procure the transfer by the trustee of certain trust assets to the wife. The Jersey court directed the trustee to exercise its powers to give substantial (but not complete) effect to the English court's order.

Furthermore, in both Re B and Re H the "foreign" court had ordered the trustee to take actions which fell within the powers conferred on the trustee in the relevant trust instrument

A case has now come before the Royal Court of Jersey with rather different facts and the judgment is an important one in this area.

### **Facts**

Aaliya Mubarak and Iqbal Mubarik (the "Wife" and the "Husband" respectively) married in 1983. In 1997 the couple, as settlors, transferred their shares in the main holding company of their successful jewellery manufacturing business to The Craven Trust Company Limited (the "Trustee") as trustee of a new trust known as the IMK Family Trust (the "Trust").

The Trust was a discretionary trust governed by the law of Jersey and the trustee was and remains resident in the Island. The beneficiaries were named in the trust deed as the two settlors, their children and remoter issue. The couple had four children at the date of the hearing in Jersey, two of whom were minors. Under the terms of the Trust, the Husband had the power to add and exclude beneficiaries, to



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appoint and remove the protector (the Husband's father) and to appoint new or additional trustees. The protector had the power to remove any trustee.

The couple separated in March 1998 and a few weeks thereafter the Husband exercised his power to exclude the Wife as a Beneficiary of the Trust. In July 1998 the Wife commenced divorce proceedings against the Husband in the Family Division of the High Court in England. In November 1999, after a contested hearing, Bodey J ordered the Husband to pay the Wife a lump sum of £4,875,000 with periodical payments until payment of the lump sum. Numerous, bitterly contested, expensive and protracted court hearings ensued as the Wife attempted to enforce the order. The Trustee did not submit to the jurisdiction of the English courts at any time.

In May 2006 the High Court barred the Husband from further participation in the English proceedings (on the grounds that he was already in breach of an earlier order) unless he complied with certain conditions one of which was to write a letter to the Trustee asking it to give effect to any order which the English courts may make in favour of the Wife. The Husband wrote and sent that letter to the Trustee in August 2006. A few months later, in March 2007, the High Court made an order under the Matrimonial Causes Act 1973 varying the terms of the Trust so as to require the Trustee (which, as indicated, had not submitted to the jurisdiction of the court) to pay the Wife an amount equal to the balance owing under the lump sum order of Bodey J, any arrears of periodical payments under that order and the balance of any costs still due from the Husband to the Wife (a total amount in the region of £7,600,000).

The Wife then issued proceedings in Jersey seeking the enforcement of the English order against the Trustee in Jersey on two alternative grounds:-

- (a) notwithstanding Article 9 of the Law, (which was amended in 2006 to confirm that certain questions concerning Jersey trusts "shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question.." and that such questions shall be determined without consideration of whether the trust "avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship to the settlor...") the Royal Court had the power to enforce the order of the English court on grounds of comity and should use that power to vary the Trust in accordance with the English order; or
- (b) the Royal Court should treat all the adult beneficiaries as having agreed to the variation and then sanction the variation of the Trust on behalf of the minor/unborn beneficiaries pursuant to Article 47 of the Law (a provision modelled on Section 1 of the English Variation of Trusts Act 1958) which permits the Jersey courts to approve on behalf of certain classes of beneficiaries any arrangement varying or revoking all or any trusts.

The couple's two adult sons were convened as parties to the proceedings and, although they did not appear at the hearing, wrote stating that they strongly supported the Wife's application. The Husband elected not to appear at the main hearing although he had appeared and been represented by Counsel at an earlier interlocutory hearing. The minor and unborn beneficiaries were separately represented.



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### Decision

First Ground – enforcement of the English Order on grounds of comity

Having reviewed the relevant authorities the Royal Court decided against the Wife on this ground. It held as follows;

- (a) There were two sorts of "variation", the first category being where the court is doing something which the trustee itself has no power to do (a departure from the terms of the trust deed) (the Royal Court defined this sort of variation as an "alteration") and the second where the court is doing something which the trustee has the power to do itself (a variation in the strict sense).
- (b) By reason of Article 9, the Jersey courts cannot enforce a judgment of a foreign court applying foreign (non Jersey) law ordering the variation or alteration of a Jersey trust even where the trustee has submitted to the jurisdiction of that foreign court.
- (c) The giving of directions by the Jersey court under Article 51 (the provision of the Law which permits beneficiaries to apply to the court for directions) did not amount to the enforcement of a foreign judgment for the purposes of Article 9.
- (d) Where the variation ordered by the foreign court does not amount to an alteration, the Royal Court may give directions under Article 51 which have the effect of achieving the objectives of the foreign order. Whether the Royal Court will do so in a particular case is a matter for its discretion having regard to the interests of the beneficiaries.

- (e) Where the variation ordered by the foreign court does amount to an alteration, the Royal Court has no jurisdiction under Article 51 to give directions which authorise or direct the trustees to act in a manner which is outside the powers conferred on them by the trust deed.
- (f) On the facts of the present case, the English order amounted to an alteration of the trust (the Trustee did not have the power to revoke the Husband's exclusion of the wife as a beneficiary) and therefore the Royal Court could neither enforce the English order nor direct the Trustee under Article 51 to comply with it.

Second Ground - Saunders v Vautier coupled with a variation for benefit of minors/unborn

It was held as follows;

- (a) Pursuant to the rule in Saunders v Vautier, (an English case but one considered to apply in Jersey) all of the beneficiaries may alter the terms of a trust.
- (b) The Husband had consented to a variation of the trust of his own free will (albeit that he only did so to remove a bar to his participation in the English proceedings) by means of his letter to the Trustee and the two adult sons had also given their consent to the Royal Court.
- (c) Having heard expert evidence on how sufficient cash could be realised within the companies held in the Trust and then distributed up to the Trustee, the Royal Court concluded that it was in the best interests of the minor and unborn beneficiaries for the Trust to be altered and accordingly it gave its consent to the alteration on their behalf under Article 47.



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Having found for the Wife on the second ground the Royal Court considered how the variation ought to be put into effect. It felt that the Trustee should not be expected to litigate (ie take steps against the underlying companies to raise the required cash) at its own expense where, as in this case, the lack of cash at trust level had not been brought about by the Trustee's own breach of duty.

The Royal Court found that as part of its inherent supervisory jurisdiction with respect to trusts it had the power to appoint receivers of a trust. Noting that this was an exceptional power which was to be exercised very sparingly, the Royal Court nevertheless felt that it was appropriate in this case to appoint a firm of accountants to act as the receiver of the Trust with authority to realise liquidity from the underlying companies. In addition the Royal Court imposed a gagging order on the parties for a short time so that the receiver would have the opportunity to apply to the courts in the relevant jurisdictions for the appointment of provisional liquidators of the underlying companies without alerting the Husband in advance to the proposed course of action.

### Comment

The Royal Court's decision on the first ground is to be welcomed. It confirms the effectiveness of Article 9, thus dispelling any lurking doubt that Jersey is a "soft touch" when it comes to the enforcement of foreign orders, and brings a great deal of clarity to the way in which the courts should deal with any application for directions brought under Article 51.

The ruling on the second ground raises an interesting point. The Royal Court applied the rule in *Saunders v Vautier* to a case involving a fully discretionary trust which had a mixture of adult and minor beneficiaries and contained a power (exercisable by the Husband) to add additional beneficiaries. The issue does not seem to have been raised or considered but there is authority which suggests that the existence of certain dispositive powers (such as a power to add beneficiaries) vested in the trustees (or others) will prevent the beneficiaries from terminating a trust under the principle in *Saunders v Vautier*. It is therefore open to speculation whether in any future case the Royal Court would be prepared to apply the rule in *Saunders v Vautier* again in the same way.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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