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Battle bound

An amicable farmland succession continues to elude

A trustee's dilemma

To what length and at what point should trustees become involved in a divorce settlement involving a member of their trust, consider *Hilary Rodgers* and *Gordon Hopkinson*

In divorce proceedings, where one of the parties is a beneficiary of a trust, there has long been confusion about the extent to which trustees should be involved. Some recent cases have provided greater clarity, which are dealt with below.

A trust is relevant in divorce proceedings if it is a nuptial settlement or a financial resource to one of the parties. A nuptial settlement is defined in the case of *Brooks v Brooks* [1996] AC 375 as one which makes 'some form of continuing provision for both or either of the parties to a marriage, with or without provision for their children'.

A nuptial settlement can be varied by the court to confer a benefit on the spouse. If not nuptial, the trust cannot be varied but the court has shown itself willing to exercise 'judicious encouragement' by for example, making an order against the beneficiary that is so onerous, that the trustees are bound to have to help.

The trustees' dilemma is whether, and to what extent, they should be involved in the proceedings. Trustees must always assess all the facts and issues in the case, as judging the level of participation is a delicate art.

With the help of Mr Justice Mostyn's judgement in *DR v GR* [2013] EWHC 1196 (Fam), and the guidance from the Royal Court of Jersey from the judgement in *Representation of HSBC International Trustee Limited* [2011] JRC 167 and [2014] JRC 254A, one can draw together some general guidelines about trustees' involvement in proceedings.

It has to be considered whether they should be formally joined to court proceedings as a third party, or just participate, disclose documents and appear as witnesses, or not involve themselves in proceedings at all.

Adverse inferences

If trustees are properly served with a copy of an application seeking to vary the trust by the applicant spouse, they risk adverse inferences being drawn if they do not participate in proceedings.

The court may make an order against the trust assets within this jurisdiction in their absence. They do not need to be formally joined but will be expected to appear as witnesses, and to make disclosure of all relevant facts and documents.

Mostyn J gave a stark warning to trustees who chose not to cooperate: 'If trustees do not voluntarily participate as witnesses and give proper disclosure, they cannot complain if robust findings are made about the realities of control and the likelihood of benefit'.

If trustees do not cooperate, orders for disclosure can be made against them regardless of their level of participation, under Family Procedure Rule (FPR) 22.4.

Previously trustees may have taken the view that if they avoided formally joining, they could avoid enforcement orders. Mostyn J disagrees: 'If they have been served in accordance with the rules and do nothing, then it is clear, beyond a shadow of a doubt, that any variation order will be binding on them'.

This opinion is supported by FPR 33.2, which applies the same enforcement provisions used in the civil courts, the Civil Procedure Rules (CPR) to the family courts. CPR 70.4 states: 'If a judgement or order is given or made in favour of or against a person who is not a party to proceedings, it may be enforced by or against that person by the same methods as if he were a party.'

The same is true for a trust located offshore, but with assets in England and Wales. The fact that the trust is resident in Jersey for example, does not matter as the English court could enforce directly against the English assets. Offshore trustees cannot be criticised for 'bowing to the inevitable' (*Mubarik v Mubarik* [2008] JRC 136) in these circumstances.

The assets of the trust are at a greater risk if the trustees do nothing. If the trustees participate, they will be able to put forward arguments and produce evidence in order that the interests of the other beneficiaries are fully considered. The Jersey trustees in these circumstances should involve themselves as if they were resident in England and Wales.

It does not matter if the assets are owned by a company underlying the trust. The English divorce court can look through the company to the trust and make orders in relation to the underlying assets.

The provisions in the Family Procedure Rules

It may be advised, depending on the circumstances of the case, for the trustees' applicant spouse's representatives (or the trustees themselves) to seek formal joinder of the trustees.

By intervening in this way the trustees' position is elevated from witness to party. The representatives of the opposing party will not be able to advance arguments without the trustees, in the presence of their own counsel, having the opportunity to rebut them.

This position will also provide the trustees with the opportunity to appeal in the event that a court order is made relating to the trust assets. However once the trustees are joined, they will be subject to the same obligations for full and frank disclosure as the two main parties. This could be useful to the applicant spouse.

> **"Disclosure and enforcement obligations can be made against a third party regardless of whether or not they are joined"**

In this case, Mostyn J states that practitioners must comply with the provisions of the FPR when making applications for joinder.

The FPR provides that the court may direct that the trustees be added to proceedings for a financial remedy, if it is 'desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings' (9.26b(1)). This decision can be taken 'on the court's own initiative or on the application of an existing party, or a person or body, who wishes to become a party' (9.26B 4).

Under 9.26b(1) the applicant for joinder must show that there is an existing matter in dispute that requires for its resolution, the joinder of the new party. Arguments relating to the effectiveness of disclosure and enforcement against a third party may not, in themselves, be enough to satisfy this rule.

Disclosure and enforcement obligations can be made against a third party regardless of whether or not they are joined (FPR 22.4 and FPR 33.2), so those arguments alone may not satisfy the condition under FPR 9.26b(1).

Accurate compliance with the provisions of the FPR is more likely to bring about the desired outcome.

Offshore trustees

If the trustees are resident outside England and Wales and the assets are outside of this jurisdiction, then the English courts will be unable to make a successful enforcement order. In these circumstances, the trustees must make their duties to all the beneficiaries their priority. If the assets are not at risk, then they should not submit themselves to the English jurisdiction.

The ways in which trustees may be said to have submitted are not straightforward, but broadly they will be held to have submitted if they involve themselves in any way with proceedings. This usually means any formal response to the English court orders will be seen as submission, but appearing to challenge jurisdiction will not.

Summary

- If English trustees are served with a copy of an order under the Family Procedure Rules 9.13(1), it is important that trustees involve themselves as the court will draw adverse inferences if they fail to do so.
- Jersey trustees with assets in England and Wales should take the same attitude to participation as trustees resident in England and Wales.
- Practitioners should adhere strictly to Family Procedure Rules 9.26B if they want a new party to be joined.
- Jersey trustees with assets in parts of the world where the English courts do not have jurisdiction should not submit to the English courts. ■

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