

Enforcement of onshore matrimonial awards against offshore trusts

The enforcement of foreign matrimonial orders relating to Jersey trusts has, until recently, been fraught with uncertainty. The landmark decision in *Mubarak v Mubarik* [2008] JRC 136 has provided welcome clarity as to the legal basis upon which the Royal Court of Jersey may give effect to foreign matrimonial orders varying Jersey trusts. It has also enhanced the island's reputation as a jurisdiction in which the integrity of its financial structures will be robustly defended by the courts.

Decisions Prior to Mubarak

Prior to *Mubarak*, Jersey was perceived as being rather too eager to enforce foreign orders in respect of Jersey trusts. The trend was established in the case of *Lane v Lane* [1985] JLR 48. In that case, the Royal Court gave effect to an English order requiring the wife to transfer her interest in Jersey property to the heir to the husband's immovable estate. This was despite Rule 35 of Dicey & Morris to the effect that an overseas judgment may only be enforced if it is a final and conclusive judgment for a debt or definite sum of money. The Royal Court held that where there was a declaration of a competent English court submitted to by the same parties, the doctrine of comity enabled the declaration of an English court to be given effect to. That judgment proved the foundation for many subsequent judgments whereby the Jersey Court gave effect to foreign non-money judgments involving trusts.

For example, in *Compass Trustees Limited v Barnett* [2002] JLR 321, the Royal Court gave effect to an English order varying the trust under by directing the trustee to pay the wife the sum of £200,000. This despite the fact that the wife was no longer a beneficiary by the time the matter came to Jersey and the trustee had not submitted in England. Perhaps the most extreme example of this trend was that of *Re Fountain Trust* [2005] JLR 359, where an English order declaring a Jersey trust to be a sham was substantially implemented, albeit in this case at least the trustee had submitted.

It could be argued that the decision in *Lane* was 20 years ahead of its time. In the recent decision of *Brunei Investment Agency v Fidelis Nominees Limited* [2008] JRC 152, the Royal Court followed developments in Canada, the Isle of Man and the Cayman Islands which have adapted the common law rule preventing the enforcement of non-money judgments. Recent decisions in these jurisdictions have held that non-money judgments can be enforced, but that there was a discretion whether to do so. The Royal Court in *Brunei* held that Jersey law was to like effect.

Amendment No. 4 to the Trusts (Jersey) Law 1984 ("Trusts Law")

In October 2006, an important change to the Trusts Law was implemented by the introduction among other amendments of a new Article 9. Article 9(1) provides that a number of matters concerning Jersey trusts, including issues of validity, dispositions into the trust and variation or revocation must be determined in accordance with Jersey law. Article 9(4) provides as follows: "No foreign judgment in respect to a Jersey trust shall be enforceable to the extent that it is inconsistent with this article, irrespective of any applicable law relating to conflicts of law". On the basis of Article 9(4), an English matrimonial judgment, decided in accordance with English law, relating to a Jersey trust would be unenforceable.

Coincidentally, this legislative amendment was placed under immediate scrutiny, when the case of *Re B Trust* [2006] JLR 562 came before the Royal Court the day after the Amendment No. 4 came into force. In *Re B*, the trustee submitted to the jurisdiction of the English Court and the latter made

an order varying the Jersey trust by directing that the sum of £1.5 million be appointed into a sub-trust in which the wife would have a life interest with power to advance her capital. The Royal Court gave substantial effect to the order, with one or two minor modifications. The submissions of the husband, to the effect that Article 9(4) had removed the jurisdiction of the Jersey court to enforce a foreign judgment on the basis of comity, were rejected.

The basis for the making of the order appears to have been that the Royal Court did not regard itself as enforcing the English judgment but rather as deciding in the exercise of its discretion, in administrative proceedings in relation to a Jersey trust, to give directions to a Jersey trustee in the light of the existence of an English variation order. In the subsequent decision in the case of *Re H Trust* [2007] JLR 569, the Royal Court upheld *Re B*, noting that Article 9(4) had no bearing upon the exercise by the court of its supervisory jurisdiction under Article 51 and that the only issue for the court was whether and to what extent the trustee should be directed to exercise its powers under the trust in such a way as to give effect to the English order. However, it is important to note that as in the case of *Re B*, the action which the trustee was directed to take fell within the powers conferred by the trust deed.

Against this background, the case of Mubarak came to be heard before the present Bailiff (then the Deputy Bailiff) in April 2008.

Mubarak: Background

As with so many cases of its kind, *Mubarak* is the story of a husband cynically determined, at any cost, to prevent his wife ever receiving a penny. Having obtained an award of just under £5 million in December 1999, Mrs Mubarak had since 1999 tried every conceivable means (without success) to enforce her lump sum award.

In 1997, Mr Mubarak set up together with his then wife, the IMK Family Trust. The main asset of the trust comprised shares in a company called Twenty First Century Holdings Limited, which in turn owned shares in a number of companies incorporated in a variety of jurisdictions (the Dianoor Group). Mr Mubarak reserved to himself a number of powers including in particular the power to add and exclude beneficiaries. In April 1998, Mr Mubarak duly excluded Mrs Mubarak as a beneficiary and designated her an Excluded Person.

Having failed in her various attempts to enforce the judgment since 1999, Mrs Mubarak, in March 2005, finally decided to direct her fire against the family trust. Following a two week trial before Holman J., the English High Court Family Division varied the trust so as to require the trustee to pay to Mrs Mubarak an amount equalling the sums outstanding under the 1999 lump sum award, notwithstanding that the wife was designated an Excluded Person.

As part of the English proceedings, Mrs Mubarak applied under the Hadkinson Principle to debar the husband from further participation due to his contempt of the 1999 order. The upshot of this application was that Mr Mubarak, as a precondition of his continued participation, was required to write to the trustee in terms expressed to be irrevocable confirming that he wished the trustee to give effect to whatever orders the English court may make. After writing in the required terms in August 2006, Mr Mubarak was permitted to participate.

Mubarak: The Issues

The application raised two issues: first, whether the court had power to enforce Holman J.'s order on the grounds of comity and therefore to vary the Trust as ordered by him; alternatively, whether the court should treat all the adult beneficiaries, including Mr Mubarak by virtue of his August 2006 letter, as having agreed to a variation of the trust and the court should lend its consent to the variation on behalf of the minor and unborn beneficiaries in accordance with Article 47 of the Trusts Law.

The Royal Court held that by reason of Article 9(4), a judgment of the Family Division varying or altering a Jersey trust under English law cannot be enforced, even where the trustee had submitted to the jurisdiction of the Family Division. The Royal Court went on to draw a helpful distinction between variation, on the one hand, and alteration on the other. Where the order varies the trust in a manner which the trustee itself had power to do the court may, on an application for directions, give effect to such an order, but under its general supervisory jurisdiction over trusts and not as a matter of enforcement. Where the variation ordered by the English court involved an alteration of the trust deed itself, in the sense that it required the trustee to do something not authorised by the trust deed, such an order is unenforceable and cannot be implemented.

Thus, an order varying a Jersey trust may be implemented, as a matter of discretion, under Article 51 of the Trusts Law. The trustee has no ability, however, to give effect to an order altering a Jersey trust, nor can the Royal Court direct it to do so. The problem in Mubarak was that Holman J.'s order, in purporting to confer bounty on an Excluded Person, constituted an alteration to the terms of the trust.

However, the Court found a way around the problem. This was because all the adult beneficiaries consented to the variation. Furthermore, Mr Mubarak could properly be regarded as having consented by virtue of his August 2006 letter to the trustee. Finally, pursuant to Article 47, the Court could supply its consent on behalf of the minor, unborn and unascertained beneficiaries. The Court thus applied the rule in *Saunders v Vautier* (1841) 4 Beav 115 and varied the trust as sought by the wife.

The Court emphasised that its decision to treat Mr Mubarak as having consented was wholly exceptional in the light of his flagrant contempt of the 1999 order. Moreover, the husband when presented with the Hadkinson order had been presented with a choice: either he could refuse to write the letter and leave the English Court to make whatever orders it felt appropriate, taking his chances in Jersey; or he could write the letter and thereby secure the right to fight Mrs Mubarak in England. He chose the latter course and was, as a consequence, flanked by both senior and junior counsel at trial, who succeeded in defeating Mrs Mubarak in relation to two out of her three claims. Having made his choice, of his own free will, he should accordingly be bound by it. The case was therefore distinguishable from that of *In re Turino Consolidated Trust* [2008] JRC 100, where the Royal Court placed no weight on a letter which the husband had been ordered by the Dutch divorce court to write to the trustee, agreeing to an alteration of the trust. In September 2008, Mr Mubarak appealed unsuccessfully against the judgment.

Conclusion

This is an important judgment providing much needed clarity on the enforcement of foreign orders varying Jersey trusts. The distinction between variation and alteration is an important and timely reminder that the Jersey Courts will take action to prevent the Island's financial structures, governed by Jersey law, being rewritten by English High Court divorce judges.

James Gleeson appeared for the trustee in Mubarak' in both the Royal Court and the Court of Appeal.

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