AN OVERVIEW OF RECENT TRUST CASES

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Caribbean Court of Justice

1. Setting aside gifts for mistake: England v Jersey

In *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400 Lindley LJ held that a voluntary transfer can be set aside where "the donor or settlor was under a mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him."

The English Court of Appeal, however, in *Pitt v Holt* [2011] EWCA Civ 197 [2011] 3 WLR 19 refused to accept such a broad test holding that the English court's approach had become more refined. In particular, *Lady Hood v Mackinnon* [1909] 1 Ch 476 held that a mistake as to an existing fact which was basic to the making of the gift enabled the court to set aside the gift. Lady Hood appointed €x to her younger daughter on the daughter's marriage and shortly thereafter appointed €x to her elder daughter to bring about equality of treatment. In fact Lady Hood had eighteen years earlier already appointed €x to her elder daughter, but she had forgotten this, so bringing about inequality of treatment. Thus there had been an operative mistake.

More significantly, in *Gibbon v Mitchell* [1990] 1 WLR 1304, Millett J made it clear that in his opinion a mistake as to the legal *effects* of a voluntary disposition enabled the court to set it aside but not a mere mistake as to the *consequences* of such a disposition. Thus, he set aside a father's gift of his life interest to his adult children, as remaindermen after his life interest, when the trust was a protective trust so the life interest was forfeited and a discretionary trust arose for the father and his children.

In *Pitt v Holt* Mrs Pitt's husband received €800,000 damages for a very severe head injury that had led Mrs. Pitt to become his receiver under the Mental Health Act. She took advice as to how best to deal with this from a tax viewpoint. She was poorly advised so that she created a discretionary trust incurring a charge to inheritance tax and exposures to future charges when this could have been avoided if she had created a special trust for disabled persons satisfying s. 89 IHTA 1984.

The Court of Appeal refused to allow the discretionary trust to be set aside for mistake. Mrs. Pitt deliberately created a discretionary trust which had the effect intended by her. There was no mistake as to the effect of the trust. She was simply under a mistake as to the legal consequences of her deliberate act. This was not an operative mistake, following the *Gibbon* v *Mitchell* approach that distinguished consequences from effects. Lloyd LJ stated at [210], "the fact that the transaction gives rise to unfortunate fiscal liabilities is a consequence, not an effect, for this purpose, and is not sufficient to bring the jurisdiction into play."

The Jersey Royal Court in *Re R and the S Settlement* [2011] JRC 117 has since rejected this approach where Mrs. R, like Mrs. Pitt, had created a trust which she would not have created if she had appreciated its very significant adverse tax consequences.

The Jersey Court made two justifiable points. Why should so much hinge upon the alleged distinction between effects and consequences when some dictionaries regarded them as being the same. Moreover, if a mistake of *fact* basic to a transaction sufficed as an operative mistake why should not a mistake of *law* basic to a transaction suffice?

Founding itself upon the broad approach in *Ogilvie v Littleboy* the Jersey Court allowed Mrs R to set aside the discretionary trust that she had deliberately created. She could thus have another attempt to save as much tax as possible, but the Royal Court was not at all concerned about this. Indeed, it considered that the outcome for Mrs. Pitt in *Pitt v Holt* was "unjust and unfair" and stated at [39]

> "The preference accorded to the interests of the tax authority in the UK is not one, however, with which we are sympathetic. In our view, Leviathan can look after itself. We should not be taken as indicating any sympathy for tax evasion, which we regard as fraudulent and as entirely undeserving of any favourable discretionary treatment. But in Jersey it is still open to citizens so to arrange their affairs, so long as the arrangement is transparent and within the law, as to involve the lowest possible payment to the tax authority. We see no vice in this approach. We accordingly see no reason or adopting a judicial policy in this country which favours the position of the tax authority to the prejudice of the individual citizen, and excludes from the ambit of discretionary equitable relief mistakes giving rise to unforeseen fiscal liabilities. We see no fairness in such a policy."

Does this mean that there is in Jersey an indefeasible human right to ensure "the lowest possible payment to the tax authority", so that the taxpayer can try and try again until no mistake is made in his tax-avoiding arrangements?

I currently have a problem with the Royal Court's approach. Where a taxpayer, whether an individual or a trustee, is seeking to make a gift or an appointment of assets to avoid or mitigate tax he has to be conscious in this complex area that he is taking a risk that his arrangements will not achieve the desired minimisation of tax because his advisers are human and so may err. When he consciously takes a risk, and the risk materialises, should not the loss lie where it falls so that he cannot recover his property and have a better try at minimising tax?

Indeed, consider *Re Griffiths* [2009] Ch 162 where the settlor made a factual mistake as to his state of health when making an intended tax-efficient gift to trustees that was potentially increasingly exempt from IHT if he survived from three to seven years. He died just over a year later, having had no knowledge of his terminal cancer that had existed at the time of his gift, so that the gift had no chance of avoiding IHT. Lloyd LJ in *Pitt v Holt*, commenting at [198] adversely on this case, where all parties were happy for the gift to be set aside, picked on the fact that the judge should have taken note that the settlor had been recommended to take out term assurance on his life to cover the risk of his not surviving long enough to save any IHT, but had deliberately rejected the recommendation, being prepared to take the risk. In such circumstances Lloyd LJ considered the *Ogilvie v Littleboy* requirements would not be satisfied because it would not then be unjust for the beneficiaries of the gift to retain their benefit.

Would it not have been better if Lloyd LJ had focused not on the conscience of the beneficiaries, happy for the donor to benefit them better on trying again, but on the settlor's conscience, and had justified his instinct to refuse relief on the basis that if a donor/settlor consciously takes a *factual* risk and that risk materialises, the loss lies where it falls? Thus, the donor/settlor cannot seek to set aside his gift.

Similarly, if a donor/settlor consciously takes a *legal* risk as to the effect or consequences of his gift and the risk materialises why should he be able to complain? Why should not the gift remain valid?

It may well be that the Supreme Court will take this view. As Lord Hoffmann stated in *Deutsche Morgan Grenfell v HM Commissioners of Inland Revenue* [2006] UKHL 49 at [26] when considering an action for "relief from the consequences of a mistake" within s. 32(1) (c) Limitation Act 1980

> "The real point is whether the person who made the payment took the risk that he might be wrong. If he did then he cannot recover the money."

2. Personal or proprietary liability for bribes and secret profits: CA v PC & Australia

Last year, the English Court of Appeal in *Sinclair Investments (UK) Ltd* [2011] EWCA Civ 347 [2011] 3 WLR 1153 held that there is only a personal liability in respect of bribes and secret profits made by a fiduciary exploiting his fiduciary *position* as opposed to exploiting fiduciary *property*. The Court applied its earlier 1890 decision in *Lister v Stubbs* (1890) 45 Ch D 1 despite the Privy Council in *Att-Gen for Hong Kong* v *Reid* [1994] 1 AC 324 having fully examined and rejected *Lister v Stubbs.* The Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining (No 2)* [2012] FCAFC 6 at [569-584] after full examination of the authorities has now come down in favour of the Privy Council decision and against the English Court of Appeal decision in *Sinclair Investments*

Thus, in Australia and jurisdictions having the Privy Council as their final court there can be a proprietary trust over bribes and secret profits but not in England, where *Sinclair Investments w*as accepted by the English High Court in *Cadogan Petroleum plc v Tulley* [2011] EWHC 2280 (Ch) at [22]. This is crucial where the defendant is insolvent.

The UK Supreme Court will need to sort matters out. My impression is that commercial lawyers are wary of the width of possible interests under trusts of beneficiaries who will have priority over the interests of unsecured creditors who would know nothing of the beneficiaries. Trust lawyers naturally see little wrong with this special protection afforded beneficiaries by their having proprietary equitable interests. The 'reputed ownership' clauses in bankruptcy legislation never extended to trust property held by a bankrupt trustee and, indeed, the Insolvency Act 1986 now no longer treats as part of a bankrupt's estate property reputedly owned by him. If creditors seek to protect themselves they should not be concerned with physical inspections of outward shows of wealth (especially when much wealth these days consists of invisible choses in action and interests under trusts): they should be concerned to take security if having any fears over their debtor's solvency. A bona fide purchaser of a *legal* security without notice of beneficiaries' equitable interests will then take free from such interests.

It would seem that commercial considerations concerned with creditors who only have *equitable* security interests (and so postponed to earlier equitable interests) may well have influenced Lord Neuberger to regard a fiduciary bribe-taker as a *wrongdoer* against whom only a monetary claim can lie in respect of the bribe. Such claims rank the claimant amongst the ordinary unsecured creditors of the bankrupt bribe-taker.

A trust lawyer's instinct, however, is to wonder why it should be unjust for the claimant to rank above ordinary creditors and equitable charges in respect of the bribe and property purchased with it. As Lawrence Collins J (as he then was) stated in *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [2005] Ch 119 at [86], "There is no injustice to the creditors in their not sharing in an asset for which the fiduciary has not given value and which the fiduciary should not have had".

Why should the claimant not be entitled to claim that the bribe was *rightly received* as an authorised receipt for the claimant in pursuance of the fiduciary's fundamental obligation not to profit himself, only to profit his beneficiaries? The fiduciary cannot deny this claim because as Lord Greene MR said in *Re Diplock* [1948] Ch 465 at 525 "he is, of course, precluded from setting up a case inconsistent with the obligation of his fiduciary position." Thus, as Kekewich J pointed out in *Re Smith* [1896] 1 Ch 71 at 77, the court "treats the trustee as having received such a bribe not on his own behalf but on behalf of and as agent for the trust estate." To similar effect see also Cockburn CJ in *Morison v Thompson* (1874) LR 9 QB 480 at 486. Does not the trustee immediately hold the bribe on the terms of his trust, and does not a fiduciary agent immediately come under a duty to pay the bribe over to his principal, with Equity looking on as done that which ought to be done, so that the principal has an immediate equitable interest in the bribe?

Answers will be required from the Supreme Court when the opportunity arises.

3. Duration of liability of strangers to a trust: CA v Lord Hoffmann & Singapore

Recent case law deals with the applicable limitation period for dishonest assistants in a breach of trust or other fiduciary duty and for recipients of trust property who do not return it once becoming aware of the situation but unconscionably deal with it inconsistently with their restorative obligation.

The English Court of Appeal in *Central Bank of Nigeria* v *Williams* [2012] EWCA Civ 415 held on 3 April 2012 that where a trustee or other fiduciary (like a company director or a partner) is liable indefinitely under Limitation Act 1980 s. 21(1)(a) for a fraudulent breach of trust or other fiduciary duty, then so is a dishonest assistant in such breach and a recipient of trust property who did not return it on becoming aware of the breach.

If, however, the trustee or fiduciary liable for a breach of trust or fiduciary duty was not fraudulent, then the normal six year period applies under s. 21(3) to such strangers involved in a breach of trust.

It appears a little odd that the limitation period for such strangers differs according to whether the trustee or fiduciary was honest or dishonest. Hence, in *Cattley v Pollard* [2006] EWHC 3130 (Ch) [2007] Ch 353 and in *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 16 at [25] - [26] the English High Court and the Hong Kong Final Court of Appeal featuring Lord Hoffmann held that strangers were subject to the usual six year period, irrespective of the honesty or dishonesty of the trustee or fiduciary.

The Court of Appeal rejected this as a matter of construction of s. 21(1) (a) agreeing with the view of the English High Court in *Statek Corp v Alford* [2008] EWHC 32 (Ch) (rejected in *Cattley v Pollard*) that actions by beneficiaries within s. 21(1) (a) were not restricted to actions against a trustee or fiduciary but also covered actions “in respect of any fraud or fraudulent breach of trust” so as to extend to actions against strangers. This is a strict narrow construction of s 21 which states.

“(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust being an action –

(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use".

The Court of Appeal noted that the main body of s. 21 (1) did not conclude with the italicised words "being an action *against the trustee*", while in s. 21(1) (a) "in respect of" was broad terminology.

It may be that in due course the Supreme Court will reject such an approach to construction that produces the odd result that the period for strangers differs according to whether the trustee was honest or dishonest. It might take a purposive approach so that the six year period applies to strangers, irrespective of the trustee's honesty or dishonesty. Intriguingly, a week before the *Central Bank of Nigeria* judgment was delivered, the Singapore High Court so held in *Panweld Trading Pte v Yong Kheng Leong* [2012] SGHC 57 after examining the position fully.

After all, the liability of dishonest assisters and dishonest dealers is separate from that of the trustee, and at common law a six year period applies to dishonest defendants liable for the tort of deceit. Why should there not therefore be a six year period for those dishonestly involved in a breach of trust?

4. Liability of "unconscionable recipients"/dishonest dealers

The Court of Appeal in *Independent Trustee Services Ltd v GP Noble Trustees Ltd and Susan Morris* [2012] EWCA Civ 195 has usefully clarified the position of beneficial recipients of trust property in a context that proved most unfortunate for Mrs Susan Morris when she divorced her fraudster husband. She received £1.48 million financial relief from him pursuant to a divorce court order made by the judge taking account of an agreement put forward by the spouses. Susan thus qualified as a bona fide purchaser without notice of any equitable interests affecting the money. She then discovered very good grounds for believing that her “ex” had failed fully to disclose all his wealth so that the judge’s exercise of discretion in making the order was fundamentally flawed. This justified an application to set aside the order in order to enable the issue to be dealt with afresh. Her application succeeded so that the order was set aside, with nothing being done about the money that she had received, it being anticipated that at the new hearing for financial relief she would receive more than the £1.48 million. Susan then obtained notice by solicitors’ letter that the money she had received was money owned by the corporate trustee of a pension trust that her “ex” had arranged to be paid to his solicitors and then paid on to her solicitors.

At the new hearing the judge awarded £6 million to her, but without prejudice to any claims on behalf of pension trust beneficiaries.

The Court of Appeal, allowing an appeal from Peter Smith J [2010] EWHC 1653 (Ch), held that the equitable interests of the pension beneficiaries prevailed over Susan’s interest in the £1.48 million that she had received. On her successfully setting aside the original order she could not be a purchaser but only a volunteer. Thus she was bound by any equitable interests affecting the £1.48 million that she had received.

Lloyd LJ pointed out that to the extent that the £1.48 million could be traced into assets retained by her (eg assets purchased with trust money or the proceeds of sale of such assets) or traceable assets gifted to others, the pension beneficiaries had proprietary rights to recover the traced assets.

As to any personal claims for what could not be so recovered the position seems to be as follows, in the light of dicta of Lloyd LJ though he was not as careful as Megarry V-C in *Re Montagu's ST* [1987] Ch 264 (cited by him) to distinguish between the "cold calculus of constructive notice" in the case of proprietary claims and the requirement of "knowledge" in personal claims. Once Susan received the letter from the pension trustee's solicitors giving her notice of its claim her conscience became affected by knowledge that she could well have received trust assets. She then could not deal freely with the money as if it were her own because it could well be that the claim was a valid one requiring her to return the money once the claim was established. Before receiving the letter her conscience was clear so that she was free to mix the money with her own money and dispose of it as if it were her own without any liability arising. Thereafter, she would be personally liable (as a constructive trustee) for doing anything inconsistent with her likely obligation to have to return the remaining money: such would be dishonest dealing with the money.

It thus seems to me that it can be appropriate to regard strangers' personal liability (as constructive trustees) as arising where there is dishonest assistance in a breach of trust or a similar fiduciary obligation (like that of directors owed to their company) or a dishonest dealing with property subject to a trust or other fiduciary obligation.

Dishonesty can only arise after one has "knowledge" that one is dealing with property of another in a way inconsistent with one's likely obligations to that other. "Knowledge" covers a defendant's

(i) actual knowledge,

(ii) actual knowledge he would have had but for wilfully shutting his eyes to the obvious,

(iii) actual knowledge he would have had but for wilfully or recklessly failing to make such inquiries as an honest and reasonable person would make in the circumstances, or

(iv) knowledge within (i), (ii) or (iii) of circumstances that would indicate the position to an honest and reasonable man but not the morally obtuse defendant: *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476, *Starglade Properties Ltd v Nash* [2009] EWHC 148 (Ch) (receipt claim succeeded against Nash but not the dishonest assistance claim) and EWCA Civ 1313 (allowing appeal as to dishonest assistance so Nash liable).

One appreciates that in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 that the Court of Appeal laid down that recipients of trust property would only be personally liable if in all the circumstances it would be unconscionable for then not to be personally liable, but it seems to me that it does help in analysing cases to refine such a broad test.

5. Vulnerabilities of settlor's power of revocation or power to appoint to himself

The Privy Council decision in *TMSF v Merrill Lynch Bank and Trust Company (Cayman) Ltd* [2011] UKPC 17 has made trust assets vulnerable to claims by judgment creditors of a settlor who had created a revocable trust or its equivalent, as where he had reserved a power to appoint all the trust property to himself or his nominee. For most purposes this is tantamount to ownership, though unless and until the power of revocation or appointment is exercised the settlor is not the owner of the property subject to the power. Technically, a power may result in property, but is not in itself property.

Notwithstanding this technical distinction, the Privy Council held that it could develop the law incrementally so as to hold that under the courts' statutory powers to grant injunctions and appoint receivers found in s 11(1) of the Cayman Grand Court Law (the same as s. 37(1) of the English Senior Courts Act 1981) the court can, by way of equitable execution, appoint a receiver in respect of a judgment debtor's power of revocation of his trust. The debtor can be ordered to delegate his power of revocation to the receiver and, in default, the court can empower an officer of the court or the receiver to execute the delegation on the debtor's behalf. Once the receiver exercises the delegated power of revocation the debtor becomes the owner of the trust property so that it is available to satisfy judgment debts.

By parity of reasoning the court should be able to make similar orders in respect of a power of appointment exercisable by the settlor in favour of himself. Where, however, a power of revocation or appointment is exercisable only with the consent of X, this is not tantamount to ownership of the trust property (as pointed out in *Re Triffit's Settlement* [1958] Ch 852), so that no such order can be made unless the court is bold enough to find that the need for X's consent is a mere pretence or sham.

Indeed, the *TMSF* case opens the way for it to be argued that a settlor's release of a power of revocation or of a power to appoint to himself and others or the exercise of the latter power in favour of another, can amount to a transaction defrauding creditors or a transaction at an undervalue within a prescribed period before being made bankrupt.

Note that by virtue of most trust law countries' bankruptcy legislation (e.g. Cayman s. 100(b) Bankruptcy Law (1997 Revision) and English s. 283 Insolvency Act 1986) a settlor's personal beneficial powers that enable him on his own to obtain trust assets automatically vest in his trustee in bankruptcy, but under Turkish law there was no such assistance for the person equivalent to a trustee in bankruptcy. Most common law courts will recognise and assist a foreign trustee in bankruptcy: *Al-Sabah v Grupo Torras* [2005] 2 AC 333, *Cambridge Gas v Official Committee of Unsecured Creditors* [2007] 1 AC 508; *Schmidt v Deichmann* [2012] EWHC 62 (Ch).

It was of concern to the Privy Council that if the Grand Court, on referral to it of the decision whether or not to appoint a receiver, did appoint one for the benefit of the judgment debtor, whether this would give TMSF an improper advantage over the settlor's bankruptcy estate in Turkey to the prejudice of his unsecured creditors. At [64] however, it appears that TMSF indicated that it would be prepared to give an undertaking to use the trust assets for the benefit of all the settlor's creditors. Presumably, however, TMSF (like a trustee in bankruptcy) would wish first to be entitled to reimburse itself for all the costs involved in obtaining the trust assets before making the then net assets available for the settlor's other creditors.

Note that another situation where a settlor's rights are vulnerable as above, is where trustees hold income *and capital* for him during his lifetime with remainders over after his death, so as to take full advantage of statutory provisions such as those in Bahamas' Trustee Act s. 3(2)(i)

> "Any beneficial interests of the settlor (including absolute beneficial interests) in the capital or income of the trust property or in both such capital and income" ... "shall not invalidate a trust or the trust instrument or cause a trust

created inter vivos to be a testamentary trust or disposition or the trust instrument creating it to be a testamentary document."

Thus, if T holds capital and income to the order of S during S's life, remainder to S's children equally or as S may otherwise appoint in writing, the trust assets will be available for judgment creditors of S and his trustee in bankruptcy. The trust is an illusory trust in S's lifetime: *BQ v DQ* [2011] WTLR 373, [2010] SC (Bda) 40 Civ.

6. Trust assets as an available resource on divorce

As well summarised by Moylan J in *B v B* [2009] EWHC 3422 (Fam) at [75]

"Trust assets are relevant in the determination of an application for ancillary relief [under the Matrimonial Causes Act 1973] when they consist of resources which are or may be available to one of the parties. The 1973 Act requires the court, when deciding how to exercise its powers, to have regard to 'the financial resources which each of the parties to the marriage has, or is likely to have in the foreseeable future': section 25(2)(a). In respect of trust assets, this will often be a two-stage exercise. First, it might be necessary to determine whether trust assets are resources in which a party has an interest or a potential interest at all. Secondly, if he has, it will be necessary to determine what, if any, legitimate expectations he has and, accordingly, the extent to which they are resources available to him or likely to be available to him in the foreseeable future. In this exercise the court will, of course, take into account the interests of other beneficiaries."

To ascertain whether a spouse has an interest or potential interest in foreign trust assets the English divorce court can issue a letter of request seeking documents to be produced or oral evidence to be given (e.g. from directors of the foreign trust company). Such documents extend beyond specified documents to conjectural documents that are more than likely to exist: see *Charman v Charman* [2005] EWCA Civ 1606 and *Jennings v Jennings* [2009] SC (Bda) 62 Civ, 23 December 2009.

Interests under foreign discretionary trusts of a spouse, H, can lead to trust assets being taken into account as an available resource of his to the extent that, after a financial award is made against him, it is more probable than not that a request from him for financial assistance will be facilitated by the trustees, whether to make a payment direct to W, if a beneficiary under the trust, or a payment to him. Such a payment to him will be for his "benefit" by enabling him to pay it on to W or by enabling him to have a reasonable lifestyle after using his own resources to pay W: *Netherton v Netherton* [2000] WTLR 1171.

There is no need in English proceedings to join the foreign trustees as parties. Indeed, normally, foreign trustees will not submit to the jurisdiction as this could prejudice their position in their foreign court if intending not to exercise their intra vires powers to the full extent indicated by the English divorce judge.

It will, however, normally benefit H if the trustees disclose whatever the court needs to know to come to a fair decision, a trustee perhaps even appearing as a witness to be cross-examined, which could be under the taking of evidence abroad. Trustees should not fetter the exercise of their discretion but, while reserving their position till an actual decision has to be taken, they can give some indications of the extent to which they might possibly assist - as Jersey trustees have been inclined to do eg *BJ* v *MJ* [2011] EWHC 2708. The approach of the English divorce court is to regard assets settled by H or by H's father for the purpose of benefiting H and his spouse and issue as just that, so that they should be brought into account on divorce to fulfil that purpose. Thus the court's intervention does not undermine the integrity of the trust. The Jersey courts now seem to appreciate this in supporting trustees who seek to provide information to the English courts.

In Cayman, however, in *RBS Coutts (Cayman) Ltd* [2010] CILR 348 Henderson J advised Cayman trustees not only not to submit to the jurisdiction of the Hong Kong divorce court but to make no response to those proceedings. In particular, he said that no indication should be given as to how the trustees might exercise their discretion to assist the husband: this could shape the parties' expectations and so would be fraught with difficulty. If the trustees, however, stay aloof from the proceedings the robust inference may well be drawn that they are likely to fall in with whatever judicial encouragement the court provides for them to make a distribution of trust assets for H's benefit: *B v B* at [77], *BJ v MJ* [2011] EWHC 2708 at [18]. Even if the trustees are positively hostile to providing any assistance to H it is still open to the court to refuse to believe that their hostility is genuine: *SR v CR (Ancillary relief: family trusts)* [2008] EWHC 2329 at [70].

In determining whether or not it is likely that the trustees will honour H's request for money, the court takes into account the wishes of the settlor, as always an important consideration for trustees, so the claimant is in a strong position where the settlor was the spouse-beneficiary, H, rather than, say, his father. The court, however, as in *SR v CR,* can exercise worldly realism and choose to disbelieve the father's purported views against the trustees benefiting H or to find it likely that the trustees will feel justified in disregarding the father's wishes.

The court, of course, takes account of what has happened in the past when the beneficiary requested payments and whether a clause in the trust instrument entitles the trustees in exercising their discretion to have regard only to be interests of the principal beneficiary, the settlor-spouse-beneficiary, or to ignore the interests of all beneficiaries other than the one in whose favour they are contemplating exercising their discretion: *Whaley v Whaley* [2011] EWCA Civ 617. It will also be important if a letter of wishes indicates that the spouse-beneficiary is to have the fullest possible access to the capital and income of the trust: *Charman v Charman* [2007] EWCA Civ 503 at [52].

The whole process "involves an exercise in both fact-finding and prediction, and therefore necessarily a large element of uncertainty": *SR v CR* [2008] EWHC 2329 at [33]. As Potter P stated in *Charman v Charman* [2007] EWCA Civ 503 at [57], and recently relied upon by Charles J in *G v G* [2012] EWHC 167 (Fam) at [89-90], the court brings to this process "a judicious mixture of worldly realism and of respect for the legal effect of trusts, the legal duties of trustees and, in the case of offshore trusts, the jurisdiction of the offshore courts."

The bold approach of the court is revealed by *Whaley* v *Whaley* [2011] EWCA Civ 617 dismissing an appeal where H was a discretionary beneficiary under the Farah trust created by his father many years earlier (before the father and his wife were removed as beneficiaries), though under the Yearling Trust created by the Farah trustees H was only the object of a power to add beneficiaries (though a prime candidate to be added). Both Trusts' assets were regarded as resources likely to be available to H. The judge considered it likely that

(i) the trustees of the Yearling Trust would decide to add him as beneficiary;

(ii) the protectors would agree to that addition;

(iii) the trustees would resolve to distribute capital to him;

(iv) the protectors would agree to that distribution.

This was because the judge had found that in the past the trustees of the Trusts and the protectors had always been prepared to go along with H's wishes and there was no reason to think that this would not continue. Considering this and the clause entitling the trustees to ignore the interests of beneficiaries other than the one they contemplated benefiting, the CA held that when the judge had made an order for H within 10 months to pay £3 million to W where the trust assets were worth £7 million and £3 million represented 94% of non-trust assets, the judge had not crossed the line by going beyond "judicious encouragement" of the trustees to exerting "undue pressure" upon them. Indeed, when H requested funds from the trustees with the protectors' consents the court considered that those functionaries would not find themselves "pressurised", let alone "unduly pressurised", when requested by H to fall in with his wishes in accordance with their usual practice.

Earlier the Court of Appeal in *Charman v Charman (No 4)* [2007] EWCA Civ 503 had been prepared to make £48 million provision for the wife representing 87% of the non-trust assets where the Bermudian Dragon Trust was worth £68 million.

In *BJ v MJ* [2011] EWHC 2708 (Fam) there were Jersey trust assets worth £4.31 million of which £1.87 comprised English property. Though joined to the proceedings, the Jersey trustee refused to submit to the jurisdiction, but complied partially with orders for disclosure and made an offer to lend £700,000 to W for her life to enable her to buy a home and to pay her £500,000 outright to provide income.

The judge decided that the trustee ought to pay £500,000 offshore to W, and a further £750,000 ought to be settled on independent trustees for W for life, remainder to the only child of W and H (with power to appoint all or part of capital to W), and by deleting W, as beneficiary. Moreover, in favour of the independent trustees, there was to be a charge over the English Green Farm owned by the trustees to the extent of 58% of the proceeds of sale (currently c £900,000) enforceable at the earliest of H's death, the sale of the Farm or further order of the court. In this respect the court pointed out that it expected the trustees to produce the necessary £1,250,000 but, if this was not forthcoming, the court would have the Farm sold and would increase W's 50% share of H's pension to 100% so that she received about £2million. Drawing up the order of the court was to await the decision of the trustees. Some judges often make their order subject to the approval of the trust jurisdiction's court, with liberty to apply if a problem develops.

Limitations upon the divorce court jurisdiction and its impact

If there is someone with a prior life interest e.g. in favour of H's settlor-father's wife or widow, and any exercise of a *power of advancement* of capital prejudicing her interest requires her written consent which she will not give, that means the trust assets are not a resource until after her death. No pressure can be exerted by the court against her: *C v C* [2009] EWHC 1491 (Fam) [2009] WTLR 1419 at [19]. If there were a *power of appointment* of capital without her consent in favour of H and his siblings, the trustees and, therefore, the court would need very seriously to consider to what extent, if at all, this was consistent with the trustees' duty to the life tenant and other beneficiaries. As Munby J (as he then was) recognised in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 at [97-98] when concerned with a discretionary trust, trustees "must jealously guard their independence", they need to "make it clear that they have a number of beneficiaries to consider and they will do what they think is right for the class of beneficiaries as a whole. If that requires them to disregard any judicious encouragement then – respectfully but firmly - disregard it they will."

It would seem from *C v C* above that if the widow had no life interest but her personal consent (to be given or withheld at her unfettered uncontrolled discretion) was necessary before the trustees could make any discretionary distribution of trust assets, and she withheld her consent, then the trust assets could not be considered available resources in her lifetime. In *Whaley,* however, no-one considered whether the protector's consents required for distributions were personal or fiduciary; it sufficed that they were prepared to go along with what was requested of them. Query what the position would be if trustees, antagonistic to W, added to the class of beneficiaries X, H's new cohabitant, and appointed a (perhaps revocable?) life interest to X and made her personal written consent requisite to exercise of any powers in favour of H. On *C v C* principles this would prevent the trust assets being a resource of H in X's lifetime, though *Whaley* indicates that a court might boldly be prepared to find that X and the trustees would be likely to go along with H's wishes if he requested her to allow the trustees to appoint capital to him.

Where the divorce court order needs the foreign trustee to exercise *intra vires* powers the judge should make his order subject to the approval of the trustee's foreign court or not to be perfected until it is clear that the trustee will give effect to his order. After all, in most cases the trustees will usually protect themselves by seeking the approval of the local foreign court that they are acting within the parameters of discretion afforded to them in all the circumstances if they give effect fully or substantially to the judicious encouragement given them by the divorce court. The Jersey court has advised Jersey trustees not to submit to the English courts' jurisdiction (unless the majority in value of the trust assets are located in England) but to provide the English court with full information to enable the court to do its job fairly in dividing up the family resources. The Jersey court will then be happy to approve the trustees giving effect fully or substantially to the court order.

There is on the face of it a problem if the court order would depend upon the trustees acting ultra vires e.g. (i) in making a payment to a wife who had previously been excluded from being a beneficiary by H exercising his power to remove beneficiaries or (ii) in making a payment to H who had similarly been excluded by the trustees or (iii) in making a payment for the benefit of H or W as beneficiaries, when a proviso in the trust instrument expressly prohibits the trustee from making any distribution to either in order to cope with the effects of a foreign divorce court order, though this could boomerang against a settlor. The trustees cannot act ultra vires unless, in a rare case, it is possible for them to have the trust varied under local law to make giving effect to the order intra vires, as in *Mubarak v Mubarik* [2008] JLR 280. There H was treated as having given his consent to any Jersey variation in a letter provided to the divorce court as the condition for being afforded the opportunity to appeal the divorce judge’s order to the English Court of Appeal despite his earlier contumacious behaviour.

It is, however, possible in (i) above for the trustee to make a payment to H in order for him to benefit W, while in (ii) the payment to H would be possible if the trustee added H back as a beneficiary pursuant to a power in that behalf. In (iii) the trustee cannot benefit W or H unless the particular proviso is held to be a pretence or sham or void for uncertainty.

It will be noted that legislation in offshore trust jurisdictions to prevent enforcement or recognition of foreign judgments against trustees is irrelevant where the trustees can be effectively pressurised to act intra vires so as to enable full or substantial effect to be given to divorce court rulings against a beneficiary.