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THE IMPACT ON ONSHORE AND OFFSHORE TRUSTS OF ENGLISH MATRIMONIAL LITIGATION

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Introduction

1 In recent years, it has been very fashionable to discuss trusts as a means of avoiding unwelcome rules of forced heirship, and to discuss the impact upon forced heirship of trusts, and *vice versa*. But trusts are also used in relation to matrimonial obligations, in particular to avoid unwelcome matrimonial obligations. These obligations may be ones existing during the marriage, or, more likely, taking effect at its end (typically through divorce). But trusts also have an impact on those obligations. Conversely, those obligations have an impact on trusts. Indeed, increasingly today they can have an impact on commercial transactions being carried out by one spouse, and even litigation in which one party is engaged. It is an unusual characteristic of matrimonial litigation that it can be launched not only to *hinder* the other spouse in the conduct of his or her commercial life, but sometimes also to *assist* him or her.

2 The law of matrimonial regimes differs significantly from one system to another, and in particular between the common law systems and the civil law systems of the world. Foreign matrimonial regimes generally accord spouses a fixed entitlement to property rights. This may be because the assets belonging to the spouses form part of some community of property, or because the property acquired after the marriage is treated in a different way from property before the marriage and so on.[1] On divorce there is a rather mathematical analysis of the assets subject to the different sets of rules, and, unless there is provision for alimony to be awarded (but that would be a *personal* obligation of one of the spouses), that is that.[2]

3 The common law world typically did not have any such regimes. Before the Married Women's Property Act 1882, in English law the husband was the owner at common law of the wife's assets,[3] although equity permitted the wife to have separate property held on trust.[4] Certainly, in English law there is no equivalent system provided by the state. However, it should be borne in mind that in England and some other common law countries it was very common in the 18th, 19th and even the 20th centuries to provide for a functional equivalent to a matrimonial regime by means of a marriage settlement. This was an arrangement involving the use of the trust, being entirely voluntary (in the sense

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[1] See *e.g.* the French *Code Civil*, art 1400 *et seq*.
[2] See *e.g. Re Representation of I* (2001) 4 ITELR 446, R Ct Jer.
[3] 1 Bacon Abr. (1736), 286-90; *Goodill v Brigham* (1798) 1 B.& P. 192 (realty); *Re Bellamy* (1883) 25 Ch. D 620 (leases); *Ashworth v. Outram* (1877) 5 Ch. D 923 (pure personalty).
[4] *Bennett v Davis* (1728) 2 P Wms 316; *Ashworth v Outram* (1877) 5 Ch D 923.

that it was not necessary for anybody to have such a settlement), using a private sector device, namely the trust, drafted to fit the exact circumstances required in the particular case, and providing for the devolution of matrimonial assets and indeed for the capture and inclusion in such devolution of after acquired matrimonial assets. Mainly for fiscal reasons, such settlements are rare these days.[5]

The matrimonial context

4 Although the state rules of matrimonial obligations are generally fixed in civil law legal systems, they are not normally fixed in common law systems. The state's power, conferred on the judges, is either to work out which individual spouse owns what (the old approach),[6] or to exercise discretion at the termination of a marriage, and award assets or a share in assets to whichever of the spouses it is considered should receive them (the new approach). Certainly, in England today the judges of the Family Division of the High Court have a very wide discretion to make orders to provide for the financial well-being of a spouse to a marriage but also the children of the marriage. In general terms, an English judge on a divorce can look at the combined wealth of both parties and allocate it as he sees fit.[7] The breadth of this power sometimes leaves foreigners aghast. In the past it was common, in so called 'big money' cases (where the amount of assets available to the parties far exceeded what they could reasonably need) for the court to take a very narrow view of its discretion and simply to award a sum that was sufficient for the needs of the 'other' spouse. However, in the last 5 years the courts in England have begun to take a much wider view and in big money cases they are now apt to look at matters in terms of fairness rather then need.[8] A result other than 50:50 has to be justified. It has even reached the point where some academic lawyers argue that this discretionary regime amounts to a kind of common law version of 'community of property'. In Jersey and Guernsey the discretion is not perhaps as wide as in England, but it is still very large.[9]

5 The idea plainly is that the judges should be able to do justice in each individual case. Unfortunately many judges fall victim to 'judgitis', the idea that they can – and, by golly, they *will* – do justice in the one case before them, ignoring the thousands of cases that need never come to court if they give clear guidance for the future by drawing a simple line. So every case is reduced to one where more or less complete discretion is exercised, and each decision "turns on its facts". The difficulty with this approach is not

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[5] Though see *X v A* [2005] EWHC 2706 (Ch) for a case concerning a marriage settlement made in 1964, and for a current precedent see *The Encyclopedia of Forms and Precedents*, 5th ed, 2005 reissue, vol 40(1), paras 2690-2800.

[6] Prior to the Matrimonial Causes Act 1973, there were many cases between spouses concerning constructive and resulting trusts; after the 1973 Act they largely disappeared, as the discretion given to the court by that Act made such disputes unnecessary. Such cases involving spouses now largely arise only where there are third parties – such as trustees – involved: see *e.g. Lloyds Bank plc v Rosset* [1991] 1 AC 107, HL.

[7] See Matrimonial Proceedings Act 1973, s 25.

[8] *White v White* [2000] 2 FLR 981, HL; *Cowan v Cowan* [2001] 2 FLR 192, CA; *Lambert v Lambert* [2003] 1 FLR 139, CA.

[9] Matrimonial Causes (Jersey) Law 1949, arts 28, 29; Matrimonial Causes (Guernsey) Law 1939, ss 46, 47.

that it is not *fair* (it may be fair in the individual cases), but that it is *unpredictable*. It therefore requires litigation, and considerable expenditure in time and money, in every case. Indeed the big money cases are the worst of all, because the ill-feeling between the spouses is not restrained from turning into litigation by the usual preventive, *i.e.* sheer cost. This unpredictability and the need for litigation therefore means that the costs overall are greater then they would be if there were clearer and more fixed rules of entitlement. So there is a choice between greater individual case fairness at greater communal cost and less individual fairness at a smaller communal cost.[10] Unfortunately the value of certainty and lower costs seems rarely to be taken into account by the legislator. (Nor do they consider the unfairness of having a discretion exercised by lots of different judges, so that like cases are not treated alike. But that is for another occasion.)

6 In this discretionary context, then, judges must look at the overall circumstances and make up their minds. The judges of the Family Division of the English High Court are, as one would expect, very clever people. They are all former advocates, at the top of their profession, and well used to litigants who do not tell the truth, who seek to hide their assets, or who use whatever structures are legitimately permitted in order to make it more difficult or even impossible for the court to award an appropriate fraction of assets to the other spouse.

7 This of course is where the trust comes in. The trust is *par excellence* a device for separating the ownership or management of property from its enjoyment. One person, the trustee, is the legal owner of the property, but another person or persons is or are the beneficiaries of the trust and have the right to enjoy it. Such a device lends itself well to estate planning exercises, looking after children or other relatives who either for mental or other reasons are not able to look after their own financial affairs. But it also lends itself to the avoidance of mandatory rules which would otherwise apply, such as rules imposing taxes. Spouses have learned that trusts may be used also in an attempt either to avoid, or at least to mitigate, the impact of matrimonial obligations. Consequently, the experience of Family Division judges of the High Court has been that trusts are often a suspicious device, they are only a means to hide assets or obfuscate issues and they are therefore there to be seen through. They are there to be shown up for what they are, mere devices and not matters of substance. The attitude of the family judge is thus rather 'anti-trusts', to be contrasted with that of the Chancery Division judge, for whom (by contrast) the trust is one of the greatest products of the English legal intellect.

The relevance of trusts to matrimonial litigation

8 Trusts may become relevant to matrimonial litigation in a number of contexts.

Disclosure of trusts

[10] See *e.g. Sheddon v Goodrich* (1803) 8 Ves 481, 497; *London Street Tramways Ltd v LCC* [1898] AC 373, 380.

9 The first of these is at a preliminary stage, when information is disclosed by the parties to matrimonial litigation as to the assets which are available to them.[11] This will undoubtedly include reference to trusts of which either spouse is a beneficiary. It may be that one spouse knows of the existence of a trust of which the other is a beneficiary, or it may be that the first spouse does not know. In the former case it is obviously easier for the disclosure by the other spouse to be policed. But it is desirable from a tactical point of view not to suppress reference to relevant trusts, particularly offshore ones. Failure to do so, if later uncovered (as often happens) leads to a presumption by the judge of anything up to and including "skulduggery".[12] It is much safer to disclose, and to ride out the resultant storm of information requests. This will include demands to know what information is available to be supplied to the other party. An English court will typically order a spouse beneficiary to disclose such information to the other spouse,[13] and, in an appropriate case, so too may an offshore one.[14]

10 One common response in cases where a trust is known to exist is that the spouse beneficiary does not have the right to obtain information, in particular trust documents, from the trustees.[15] (This has long been a response – not usually well received – to Revenue requests of taxpayers who are beneficiaries of offshore trusts.) Indeed, this point has now reached the attention of trusts draftsmen, even in offshore jurisdictions that know little of English matrimonial litigation, so that commonly such trusts are drafted in such a way that spouse beneficiaries expressly have no rights to information. Even more sophisticated versions perhaps confer such rights at the outset but withdraw them from the spouse at the point when the matrimonial litigation begins. Thus by the time that the disclosure obligation comes to be fulfilled, the spouse will find that it is either difficult or impossible to obtain compliance with the disclosure obligation relating to the trust.

11 Most offshore trust laws (including that of Jersey)[16] make statutory provision for disclosure by trustees to beneficiaries. A few (such as that of the Bahamas)[17] do the opposite, and expressly provide that the trustees have no obligation to disclose trust documents to the beneficiary.

12 Even in cases where the spouse does not have a right however it is still possible for the trustee to be asked to provide the information. This commonly arises in relation to documents such as letters of wishes, which fall in some jurisdictions into a different category from trust documents strictly so called. Thus in *Re Rabaiotti* [18] the Jersey Royal

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[11] Family Proceedings Rules 1991, r 2.61B, and Form E; see also *Livesey v Jenkins* [1985] AC 424, HL; Moor and Allport (1999) 3 JLRev 306.
[12] See *J v V (Disclosure: Offshore Corporation)* [2004] 1 FLR 1042.
[13] *T v T* [1996] 2 FLR 357.
[14] *E.g. M v G* 2003 JLR N-28.
[15] On this, see now *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, PC; in Jersey, see *M v G* 2003 JLR N-28.
[16] Trusts (Jersey) Law 1984, art 25 (although this is cast negatively, it has been interpreted in a positive sense: *Re Rabaiotti* 2000 JLR 173, 183-84).
[17] Trustee Act 1998, s 83.
[18] 2000 JLR 173.

Court had to decide whether it was in the best interests of the trust as a whole in that case that the trustees of a Jersey trust should disclose information about the trust to a spouse beneficiary embroiled in English matrimonial litigation so that it could be disclosed to the other spouse.[19] One problem with the trustees not allowing the information to be disclosed is that it may cause the suspicious English judge to draw adverse inferences about the likely beneficial entitlement and future prospects of the spouse beneficiary, and, if these are incorrect (*i.e.* there are none), then this may lead to final orders being made which are unrealistic in all the circumstances.

13 The English judge takes the view that in normal circumstances all the information (however sensitive) must be disclosed in order that justice may be done to the other spouse. Unfortunately this approach rather overlooks the impact on the other beneficiaries of the genuine trusts. Why should their otherwise confidential information be released to the spouse of one of their fellow beneficiaries who is not herself or himself a beneficiary of the trust? The answer, of course, is that they are innocently mixed up in the disputes of others, just like (for example) comparison cases in other contexts,[20] and it is every citizen's duty to assist in the state's resolution of disputes between others, though this public spirited explanation is usually of little comfort to them.

14 Where the divorcing spouses are in England, but the trustees are offshore, the English judge has a further weapon in his armoury. This is the issue of a letter of request to the court for the place where the trustees are based. The traditional problem with letters of request, however, is that they are not capable of being used to obtain general discovery. According to decisions of the House of Lords which have never been questioned, it is necessary to specify the documents required, to show that they probably exist, and to confirm that what is being sought is intended to be adduced in evidence.[21] These principles have been held to apply to outgoing as to incoming letters of request.[22] However, a recent English Court of Appeal decision has now held, for the first time, that in the context of matrimonial litigation it is not necessary in outgoing letters of request to specify documents or to show that they probably exist.[23] This represents a sea change in outlook for the English court, which hitherto has applied the principles laid down by the House of Lords in all kinds of litigation.

15 Of course, that does not mean that the foreign court to which the letter of request is addressed will accept it in all its width. The test for the propriety of outgoing letters of request in a given jurisdiction is not necessarily the same as the test for incoming ones.[24] In the same case that the English Court of Appeal had been concerned with, when the

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[19] It was.
[20] See *e.g. Science Research Council v Nasse* [1980] AC 1028, HL (comparisons amongst employees of the same employer).
[21] *Re Asbestos Insurance Coverage Cases* [1985] 1 WLR 331, HL; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] A.C. 547, HL.
[22] *Panayiotou v Sony Music Entertainment (U.K.) Ltd* [1994] Ch 142.
[23] *Charman v Charman* [2005] EWCA Civ 1606.
[24] *Cf* per Wilson LJ in *Charman v Charman* [2005] EWCA 1606 at para 29.

letter of request was considered by the offshore court, it refused *all* the documentary requests, as being in the nature of a fishing expedition, and only allowed six oral questions to be put to the trustees, with no right to ask supplemental questions.[25]

16 US courts are not always so generous to foreign third parties as even to go to the trouble of issuing letters of request to their courts. In one recent case the US court, in family litigation concerning child support, simply ordered the trustees (who were based in Jersey, and moreover were not even parties to the litigation) to produce trust documents. The trustee sought the directions of the Jersey court, which were that the trustee should not comply, and should not take any part in the US proceedings. The court also declined to give detailed reasons, on the basis that this might threaten the confidentiality of the trusts![26] But, then, the US courts have never really seen the value of the doctrine of comity.[27]

Trusts to avoid matrimonial obligations

17 Secondly, a further context in which the point arises is where trusts have been created (or indeed any other transactions have been entered into) with the intention of avoiding future matrimonial obligations. Under section 37 of the (English) Matrimonial Causes Act 1973 such trust or other transaction can be set aside by the court. It is a kind of fraud on a special kind of contingent future creditor. Such cases are not these days very common, in England at least, because the court has such wide powers of asset division in the first place. But in the past, when the court had fewer discretionary powers in relation to the assets of the parties, it was used more. There is no direct equivalent of s 37 in Jersey or Guernsey,[28] though in an appropriate case it may be that such a trust could be set aside under the insolvency legislation.[29]

Sham trusts

18 Thirdly, an apparent complex trust for the benefit of many others may be a sham, and in reality amount to no more than a bare trust or nomineeship for the settlor spouse. There is nothing special about such claims in the matrimonial context.[30] Claims of sham here are like claims of sham elsewhere.[31] In this case, if a sham is established, and the *real* trust is one for the settler spouse absolutely, the trust assets would belong to that spouse and hence be clearly subject to the English court's redistributive powers.

Trusts as resources

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[25] *Charman v Charman*, Supreme Court of Bermuda (Bell J), 22 December 2005.
[26] *Re L & M Trusts* 2003 JLR N[6].
[27] As to which see, *e.g., R Griggs Group Ltd v Evans* [2005] Ch 153, 159-160, and also Hanson and Renouf [2005] Fam Law 794.
[28] See Hanson [2005] Fam Law 36. But the local equivalents of s 24 may assist: see note 40.
[29] For Jersey see the Bankruptcy (Désastre)(Jersey) Law 1990, art 17.
[30] See *e.g. Minwalla v Minwalla* [2005] Fam 357; in Jersey see *CI Law Trustees Ltd v Minwalla* [2005] JRC 099; Hanson and Renouf [2005] Fam Law 794.
[31] See *e.g. Re Esteem Settlement* 2003 JLR 188.

19 A fourth area, and perhaps the most important, is that trusts are regarded as *resources* which may be available to a spouse in appropriate circumstances.[32] So, for example, if a spouse is a beneficiary of a trust (say, discretionary) in an offshore jurisdiction, and the trustees have hitherto looked with favour upon any requests made from time to time by the spouse by income or capital, then the court is very likely on a divorce to treat the assets of that trust as assets 'available to' the spouse and so take them into account in deciding what orders should be made for the distribution of assets on divorce.[33] This may go to the extent of making an order for payment of a sum by one spouse to another, which the spouse ordered to pay cannot in fact pay out of his or her own resources, but can only pay with the assistance of the trustees. There have even been instances in the past where spouses were actually committed to prison because of a failure to pay sums they had been ordered to pay, which could have been obtained from the trustees, but which the spouse in question refused to do.[34] On the other hand, the trustees of a discretionary trust, faced with the order against one of their beneficiaries to pay a sum beyond his or her means, may very well properly form the view that it is in the best interests of the beneficiary to make the payment on his behalf, and the court asked for its approval may well give it.[35]

Variation of trusts

20 A final area is where a trust in some way involved in matrimonial litigation is varied by an order of the High Court Family Division.[36] The curiosity here is that variation by the English court may be of a trust whose proper law is not English, say the law of Jersey or the Isle of Man etc.[37] Some offshore courts have expressed the view that such a variation, where the trust had offshore trustees and administration, and no connection with England save the residence of beneficiaries, would infringe "the normal bounds of comity".[38] Nonetheless, in one recent English case, *Charalambous v Charalambous,*[39] the Court of Appeal in England held that it was open to the High Court to vary a Jersey trust with just those characteristics as part of its disposal of the matrimonial litigation between the spouses. And it is notable that some offshore jurisdictions' matrimonial laws also contain a power to vary at least some marriage and post-nuptial settlements, and expressly even though governed by foreign law.[40]

21 One problem with this approach is that a trust may have been created with specific attainable advantages in mind, whether fiscal or commercial, the attainment of which

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[32] *Calder v Calder* [1976] 6 Fam Law 242, CA.
[33] *Thomas v Thomas* [1995] 2 FLR 668, CA; *J v M* 2002 JLR 330, R Ct.
[34] See *e.g. Browne v Browne* [1989] 1 FLR 291, CA (but the order was suspended on terms, and by the time of the appeal the funds had arrived from Jersey).
[35] See *e.g. Re X Trust* 2002 JLR 377.
[36] Matrimonial Causes Act 1973, s 24(1)(c); see *Brookes v Brookes* [1995] 2 FLR 13, HL.
[37] For an early example, see *Goff v Goff* [1934] P 107.
[38] *Re Rabaiotti* 2000 JLR 173, 194; *CI Law Trustees Ltd v Minwalla* [2005] JRC 095, para 23.
[39] [2004] 2 FLR 1093.
[40] Matrimonial Causes (Jersey) Law 1949, art 27; Matrimonial Causes (Guernsey) Law 1939, s 45; see *J v M* 2002 JLR 330; *Re the X Trust* 2002 JLR 377; Hanson [2005] Fam Law 36.

depends on particular features being maintained in the form of the trust. Varying the trust may wreck this exercise and reduce the value to everyone. At the very least, therefore, local legal advice must be taken before any variation is implemented. Under English law, the trustees must be served with notice of the application,[41] though taking this step this does not of itself make the trustees parties to the proceedings.[42] And if they are not parties, it will usually be necessary to bring further proceedings in their home jurisdiction to make the variation effective.[43] But if the trust assets are in the variation jurisdiction, of course, the position may be otherwise.

The position of the trustees

22 It is necessary to consider the position of the trustees. Unless the litigating spouses themselves are trustees (or one of them is a trustee), they are not original parties to the matrimonial litigation. Nor is there usually any rule which requires that they must be joined.[44] The reason why trustees may be joined to the litigation is generally because the spouse who is not a beneficiary seeks an order that the trustees should pay a sum of money or transfer some assets to him or her, and, in order for the order to be enforced against trustees, as with any other non-party, it is normally necessary that they should be bound by it by becoming parties.[45] If they are not so bound, it will be necessary to bring proceedings in their home jurisdiction for this purpose.[46] The rules on whether trustees should be joined as a party to the proceedings must depend on the particular forum of the matrimonial litigation.[47] In England, for example, third parties should not be joined merely to obtain disclosure of information.[48]

23 If the trustees are in another jurisdiction, then there is an additional aspect to the matter, and that is whether the trustees having been joined to the litigation should actually take any part in it. In general terms, if the trustees having been joined by order of the court of the forum decide to take part in the proceedings then they will not normally thereafter be able to argue that the court of the forum did not have jurisdiction over them.[49] This may mean that a ground of defence against the enforcement in their own jurisdiction of the order made by the court is no longer available to them.

24 On the other hand, if the trustees are joined to the proceedings by the court of the forum, but they take no part in those proceedings, and remain outside the jurisdiction,[50]

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[41] Family Proceedings Rules 1991, r 2.59(3).
[42] *T vT* [1996] 2 FLR 357.
[43] *E.g. Compass Trustees Ltd v McBarnett* 2002 JLR 321; *Re the Bald Eagle Trust* 2003 JLR N[16].
[44] One exception is in the case of a nuptial settlement where an order is sought that the trustees pay direct, when the spouse must notify the trustees, and in practice will seek to join them.
[45] See *e.g. Vandervell Trustees Ltd v White* [1971] AC 912, HL.
[46] *E.g. Lane v Lane* 1985-86 JLR 48; *Compass Trustees Ltd v McBarnett* 2002 JLR 321; *CI Law Trustees Ltd v Minwalla* [2005] JRC 095.
[47] In England see RSC Ord 15 r 6(2)(b), still effective in matrimonial litigation since the introduction of the CPR 1998, by virtue of the Family Proceedings Rules 1991, r 1.3.
[48] *Re T* [1990] 1 FLR 1.
[49] *Cf T v T* [1996] 2 FLR 357.
[50] As in *Re L & M Trusts* 2003 JLR N-6.

then it will be much more difficult to enforce that order against the trustees in the offshore jurisdiction. The question may therefore turn on whether or not the trustees are either present or have assets within the jurisdiction of the court of the forum. If they do, then having been joined as parties to the proceedings it may not matter to the non beneficiary spouse whether the trustees take part or not. The order can be enforced against the assets within the jurisdiction, or their person can be attached and committed to prison. But if there are no assets and no presence within the jurisdiction, then the trustees may consider it more appropriate not to take part in the proceedings, on the basis that the order will have to be enforced if at all outside the jurisdiction of the court of the forum and, in particular, in the jurisdiction where the trustees are. But without their active participation, they have not submitted to the jurisdiction of the court of the forum, and therefore the order cannot be enforced against them in that jurisdiction either. Seeking to set aside the joinder order will normally mean submitting to the jurisdiction.[51]

25 In some cases it is not the non beneficiary spouse that seeks to have the trustees joined in order to make it easier to enforce an order against them. The non-beneficiary spouse is not obliged to sue persons she or he does not wish to.[52] Instead it is the trustees who themselves seek to intervene in the proceedings. Now this may be, for example, because the danger from the trustee's point of view is perceived to be that the bona fides of the trust itself is attacked. The non beneficiary spouse may say that the trust instrument is a sham, and the trustees fear that without their active participation this allegation is likely to succeed.[53] Another argument may simply be that if the matrimonial litigation is taking place in a civil law country, where trusts are not understood,[54] the trust will be treated as some other kind of device or legal institution, and the wrong rules will be applied, or even the appropriate proper law of the trust will not be applied, but instead the law of the forum will be applied.[55] In such cases the trustees may consider that there are advantages to be gained by taking part in the proceedings and therefore they seek to intervene. The problem with intervening is of course that the trustees thereby submit to the jurisdiction of the court of the forum, and if any question thereafter arises as to the enforceability of the order made by the court of the forum in their own jurisdiction offshore, then that point of submission will have been made against them.[56]

26 Where the trustees decide not to seek to intervene, it is conceivable that the other beneficiaries of the trust will seek to do so. Generally speaking, the English courts prefer that where there is a dispute about who should benefit from a trust fund, it is better fought between the existing beneficiaries on the one hand and those who would take it away from

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[51] *T v T* [1996] 2 FLR 357.
[52] *Dollfus Mieg v Bank of England* [1951] Ch 33.
[53] See *e.g. Lloyds Bank v Byleven* 1994-05 CILR 519.
[54] See *e.g. Lemos v Coutts & Co* 1992-93 CILR 460.
[55] See *e.g. Re Ojjeh* 1994-95 CILR 118.
[56] A concern of the trustees in *Re Rabaiotti* 2000 JLR 173, 194, which led the Jersey court at 195 to direct that the trustees should not intervene in the English matrimonial litigation despite the English court's having given leave for them to do so.

them on the other, with the trustees remaining neutral.[57] On the other hand, some offshore courts have supported the desire of trustees of discretionary trusts to defend the integrity of their trusts.[58]

27 Of course, the trustees may not need to be joined to put pressure on them to satisfy any award in favour of the non-beneficiary spouse. We have seen how a spouse beneficiary may be threatened with imprisonment in case of non-payment.[59] Another potent threat, where the spouse beneficiary is a professional person, is the spectre of bankruptcy. The trustees may well consider that it is in the interests of the spouse beneficiary not to be made bankrupt, and provide the funds needed to avoid this. Alternatively, if he is made bankrupt, this may create further risks for him and for the trust funds.[60]

Forum shopping

28 One of the features of the global village in which we now live is forum shopping. This means that a party bringing a claim chooses to bring it in one jurisdiction rather then in another, because of some perceived juridical or other practical advantage. The question here is whether there is room for forum shopping in relation to trust litigation when there are matrimonial proceedings on foot. Suppose that there are matrimonial proceedings ongoing between spouses in the English High Court. Some question may arise in the future as to a trust (let us say offshore) one of the beneficiaries of which is one of the spouses. Obviously the trustees could simply wait for the issue to arise in the English proceedings and then decide what to do. If the non beneficiary spouse seeks their being joined to the proceedings, then they can decide at that point what their attitude should be. If, on the other hand, the non beneficiary spouse does not seek to join them to the proceedings, they can decide whether or not they should intervene. There will of course be significant potential costs consequences in being joined or intervening.

29 But, instead of waiting for this issue to arise, they might decide to take the bull by the horns and bring proceedings in another jurisdiction. Typically, this would be the jurisdiction in which the trustees are themselves based. Or it might be the jurisdiction where the trust assets are, if that jurisdiction has a court system used to giving directions to the trustees and dealing with trust litigation. The typical procedure in such a case in any event will be that the trustees having decided what they were going to do, would seek the directions of the court of their own jurisdiction for confirmation that it was appropriate for them to take the steps to which they proposed to take. This would be the equivalent of a kind of *Beddoe* proceeding in England.[61] In most jurisdictions,[62] the beneficiaries will be

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[57] *Alsop Wilkinson v Neary* [1995] 1 All ER 431; in Jersey see *Re Representation Bank America Trust Co (Jersey) Ltd* 1995 JLR N-29 (court could join beneficiaries if no effective defence by the trustee); *Showlagv Bank America Trust Co (Jersey) Ltd* 1995 JLR N-30.
[58] See *e.g. Lemos v Coutts & Co* 1992-93 CILR 460.
[59] *Browne v Browne* [1989] 1 FLR 291, CA.
[60] *Cf Ashurst v Pollard* [2001] 2 All ER 75, CA.
[61] *E.g. Re M Trust* [2003] WTLR 491, RCtJer.

parties to the application. But in some offshore systems this is not the practice, and the trustees approach the court *ex parte*.[63]

30 However the question is whether the trustees in fact should go further. Suppose, for example, that the trustees fear that in the English matrimonial proceedings an allegation will be made that the trust is a sham or is simply some nominee arrangement for the benefit of the beneficiary spouse. In such a case the trustees might decide that they will get a more sympathetic hearing of that issue in their own jurisdiction then they will in the English court. For one thing, the judge to whom the matter would be referred in their own jurisdiction may be a *trust* specialist, rather then a *divorce* specialist, whereas in the English court the reverse is likely to be the case. The other point is that the English family judges are perhaps rather unsympathetic to the use of trusts, especially offshore, whereas in the offshore trust jurisdiction the judges will see the importance of trusts to the local economy.[64]

31 So the trustees might consider it appropriate to bring an action straight away in the local jurisdiction for a declaration that the trust is not a sham.[65] There is a little difficulty in the formulation of the issue, because almost certainly it will not have been precisely formulated yet in context of the English matrimonial proceedings. Yet correspondence may have passed between the parties making allegations, particularly if there has been disclosure of the existence of the trust, and so on. So it should be possible in most cases for the trustees to formulate some kind of general statement of the issue which is likely to be raised later on in the English proceedings. Plainly the next question is, Who should be the parties to these proceedings? Obviously the trustees would be the claimants and the spouse beneficiary will be a defendant. Another beneficiary may also need to be a representative defendant.

32 The more interesting question is whether the non beneficiary spouse, being the person who will raise the issue in the English proceedings, ought also to be a party. The trustees and the spouse beneficiary would obviously wish that person to be bound by the decision. So, in order to provide a kind of issue estoppel in the English proceedings, normally that non beneficiary spouse should also be a defendant.[66] The difficulty then is that the proceedings may have to be served out of the jurisdiction, which may require special formality, or at least the permission of the court. In any legal system basing itself on the English rules of court (and most of the offshore jurisdictions – including Jersey and Guernsey – fall into this category) if the proceedings are brought by the trustees against some beneficiaries (who could be relied on to submit to the jurisdiction), then the non

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[62] Including England, Jersey and Guernsey.
[63] *E.g.* Bermuda.
[64] See *e.g. Re Esteem Settlement* 2003 JLR 188, at para 527.
[65] *Cf Re M Trust* [2003] WTLR 491, RCtJer.
[66] *Cf Vandervell Trustees Ltd v White* [1971] AC 912, HL.

beneficiary spouse (who will not submit willingly) can be brought in under the 'necessary and proper party' provision which will undoubtedly form part of the local rules.[67]

33 The next issue will be what the stance should be of the non beneficiary spouse. The non beneficiary spouse probably does not want to submit to the jurisdiction of the offshore court, fearing that it will reach a decision which will be inimical to his or her own interests. If the non beneficiary spouse *does* become a party then he or she will be bound by the result, and if the issue is then raised in the matrimonial proceedings it is likely that the English court would recognise that the matter could not be raised again but was settled.[68] (Of course, it would depend on the precise issue being raised. The English court might – ingeniously – find that another issue arises peculiar to English matrimonial law, which has not been decided in the offshore proceedings, and then the offshore decision would not be conclusive).

34 If the non beneficiary spouse decides *not* to take part in the offshore proceedings for fear of an issue estoppel arising, the question is, What is the effect of the offshore proceedings? As a general proposition the offshore proceedings will not constitute an issue estoppel binding on the English court. However, it may be relevant when considering the extent to which the English court should allow issues to be raised which have been raised and indeed decided, and where the defendant had the opportunity to take part, but decided not to. In other words it goes very much to a discretionary aspect of the procedure and not to a substantive legal aspect.

35 The English court may also be unsympathetic to the trustee's tactics in this case, seeking to produce a favourable result in another jurisdiction. However, it cannot normally come straight out and say that they do not trust the decision reached by the offshore judge. The comity of nations[69] demands at least politeness, if not trust in the decisions of offshore courts.

Representation

36 It goes without saying that the trustees should have legal representation distinct from that of the spouse beneficiary. Nothing is more calculated to excite the suspicion of the English judge then seeing that the lawyers instructed by the husband have also been advising or in any way suggesting to the (offshore) trustees the position they should adopt and the tactics which they should follow. There are obvious conflicts of interest between the trustees of a genuine trust and one of their beneficiaries who has become embroiled in matrimonial litigation, and especially so when there are many other beneficiaries or potential beneficiaries than the spouses themselves.

Pre-nuptial agreements

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[67] Based on RSC Ord 15 r 6 (see now CPR r 19.2 in England).
[68] *Cf Tebbutt v Haynes* [1981] 2 All ER 239, CA.
[69] See note 27 above.

37 A further point here concerns the impact of prenuptial agreements. These are becoming more popular, particularly in the United States, but now also in the UK. Although in many civil law states a marriage contract can override the general law of matrimonial regimes,[70] in English law prenuptial agreements are not directly and automatically enforceable.[71] Certainly such an agreement could not oust the jurisdiction of the English court in matrimonial proceedings. Nonetheless they are taken into account by judges exercising a discretion in England, as a factor which weighs in some cases quite heavily on the exercise of that discretion. It appears that they have more impact in the case of short childless marriages then they do in the cases of long marriages where there have been children.

38 Do such prenuptial agreements have any effect in relation to trusts? Plainly it is possible for the parties of a prenuptial agreement to agree that such and such a trust which is already established is not to be treated in any way as the resource of a particular party and is not to be treated as a sham. Whether such agreements will weigh heavily on the judge before whom the allegation is made of something different must depend on the circumstances. But if the parties have had the opportunity to review the whole situation at the time, all the evidence was available, and the parties entered into an agreement to that effect, it is thought that an English judge would not view with great enthusiasm an allegation apparently made, for purely mercenary reasons, that went in the opposite direction.

Offshore legislation

39 Finally there is the question of legislation passed in the offshore jurisdictions which seeks to protect assets settled in those jurisdictions against orders made in home jurisdictions which in some way shape or form attack those trusts.[72] In a sense such legislation could be described as generally anti creditor legislation. For this purpose it does not much matter whether the creditor concerned is a commercial creditor of the settlor, a person entitled to inherit the property of the deceased settlor, or the disgruntled former spouse of the settlor. In each case there is a claim on the settlor, but the settlor has transferred assets away from himself or herself to trustees. Offshore jurisdictions have enacted anti creditor legislation of different kinds. Some have restricted themselves to legislation which is intended to protect against claims arising from forced heirship.[73] Others have done so in relation to both forced heirship and matrimonial claims.[74] Yet others have done it in relation to all including commercial claims.[75] The particular stance of a particular jurisdiction must depend on political choices to be made there as to what kind of business it wishes to attract.

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[70] See the French *Code Civil*, art 1497.
[71] See *M v M* [2002] 1 FLR 654; *K v K* [2003] 1 FLR 120.
[72] See *e.g.* the Trusts Law (Revised), ss 91-93, of the Cayman Islands.
[73] *E.g.* Jersey and Guernsey.
[74] *E.g.* the Cayman Islands.
[75] *E.g.* the Cook Islands.

40 Where legislation intended to protect trusts in that jurisdiction against claims arising from matrimonial proceedings is concerned, the question to be asked is, What exactly is the legislation aiming to protect against? What other things is the legislation *not* intending to protect against? For example, it would be rare to find a jurisdiction whose anti creditor legislation sought to protect the settlor against the allegation of a sham trust.[76] If there is no intention to create a real trust, but documents are created to dress up the situation and make it appear that there is a trust, it would be a bold jurisdiction which said that the appearance of the trust was, in that jurisdiction at least, to be treated as the reality. (Plainly it would not be so treated elsewhere.)[77] On the other hand it may be that the legislation is intended to prevent the claim being made under the order of the foreign court to some assets which the settlor used to have once they have been transferred into trust and (let us say) a certain period of time has elapsed. This would be a kind of limitation provision.

41 Whether the particular legislation achieves its objective must depend again on a number of factors. First and foremost amongst these will be the wording actually used. It is not uncommon to find that the wording used does not cover all the possible ramifications, simply because nobody thought of them all at the time of the enactment of the legislation. That is the nature of law making. It is a static process, compared to the dynamic process of case development. If the legislation indeed achieves its objective, it may mean that assets that are within the offshore jurisdiction are protected from the claims of the other spouse in the home jurisdiction. But that is not always the case. In some situations it may be that that assets are not in the trust jurisdiction at all but in the home jurisdiction[78] or in some third jurisdiction and it may be possible for the order of the home court to be enforced directly there or in the third jurisdiction. That will depend on other features such as whether or not there are conventions or treaties which apply to the recognition and enforcement of judgments. There may also be an issue in the future as to whether the home court – say, English – can vary a trust governed by a foreign law with anti-matrimonial order legislation – say, Caymanian, when the trust assets are not within the home jurisdiction (whether in Cayman or otherwise). No English case has yet gone so far.[79]

Civil partnerships

42 My main theme ends here. But there is a kind of postscript, which may turn out in future to have been in fact a preface. I have spoken throughout of *matrimonial*

[76] *Cf* the 'reserved powers' provisions found in the trust laws of many offshore jurisdictions nowadays, which do not, however, go quite so far.
[77] *Cf* Hanson and Renouf [2005] Fam Law 794, 795-97.
[78] *Cf C v C* [2003] 2 FLR 493.
[79] *Charalambous* was actually about whether the court *in principle* had the power to vary.

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proceedings and *matrimonial* litigation. But we live in interesting times. A number of jurisdictions now have instituted legal relationships which fall short of marriage, typically because the partners are of the same sex. In England in particular the Civil Partnership Act 2004 has as from 5 December 2005 introduced such a legal regime into English law. In order to equalise the position between opposite sex persons who get married and same sex persons who become civil partners, much of the existing law relating to matrimonial breakdown and property allocation and distribution on divorce will be automatically applied to the civil partnership regime. So when we consider in the future the possibility of English matrimonial litigation having effect on the offshore trust industry, we must also bear in mind that this English litigation may in future concern civil partners and not merely married persons.

Conclusion

43 I hope that this short survey of the trust/matrimonial litigation interface has shown how far matrimonial litigation may impinge on trusts, both on and offshore. It also points up the importance of obtaining 'joined-up' specialist divorce and trust law advice for all concerned, not only for the warring spouses but also for the trustees. The appropriate teams should include both kinds of specialist. The trustees also need to realise that they cannot simply sit on the fence, refusing to take any positions for as long as possible. They must instead decide their strategy and their tactics, at an early stage. Careful planning is the key.

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