TRUSTS, DIVORCE COURTS AND ENFORCEMENT—AN OFFSHORE UPDATE[1]

Michael Birt

The author examines the sometimes difficult relationships between family courts dealing with matrimonial disputes between husband and wife and chancery courts (usually offshore) dealing with the interests of the beneficiaries of a trust.

1 The situation in the field of trusts and divorce is sometimes portrayed as a contest between the Family Division of the High Court of England and Wales ("the Family Division") and the Chancery courts, whether onshore or offshore. Of course there is scope for differences of view between these courts and I shall deal with some of the areas of potential tension. But it is certainly wrong to see the offshore courts as simply placing obstacles in the way of the Family Division achieving justice between the spouses. The Royal Court of Jersey is a court of general jurisdiction which hears divorce cases as well. The court fully appreciates the importance of ascertaining what assets would really have been available to the parties had the marriage continued and how those assets should be divided. Indeed, the test now applied by the Family Division in connection with trusts in deciding whether the trust should be treated as a resource available to the parties—namely, if the husband were to request the trustees to advance capital from the trust fund, whether the trustees would be likely to do so—is a test that has also been applied in Jersey.[2]

2 In a previous article in this *Review* on the topic of trusts and divorce from the perspective of an offshore court ("the 2009 article")[3] I considered the subject under three headings.

1. The provision of information about the trust directly or indirectly to the Family Division;

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[1] This article is based upon a lecture delivered at the annual conference of Wilberforce Chambers, London on 2 February 2015.

[2] *Leapingwell v Sinclair* [2012] JRC 215.

[3] "Trusts and Divorce Courts—an Offshore Perspective" (2009) J&G Law Rev 5; ACTAPS Newsletter Issue 110 December 2008.

2. Whether the trustee should participate in the divorce proceedings and therefore submit to the jurisdiction of the Family Division; and

3. Issues concerning enforcement of any order made by the Family Division.

3 This remains a convenient way of considering the issues which are likely to arise in the context of divorce and trusts and I shall take each of these in turn and see how matters have developed in recent times.

4 However, before doing so, there is one particular area where potential difficulties are emerging which is worthy of discussion.

Applications in private to the Royal Court

5 When beneficiaries of a Jersey trust become involved in divorce proceedings, the trustees may have some important decisions to take. For example, as just mentioned, should they supply information to one or other of the divorcing spouses and, if so, what information should they provide? Secondly, should they submit to the jurisdiction of the divorce court? These are of course decisions which the trustees may well decide to take on their own without reference to the court. There is certainly no requirement for them to obtain the court's approval of whatever they decide. However, because it might be regarded as a "momentous" decision, the trustees may well feel that they want to obtain the court's blessing to their decision.[4]

6 The ability of the Royal Court to give assistance to trustees is an important part of its supervisory jurisdiction. Whilst there are cases where the court will refuse to give approval on the basis that the matter is not significant enough and the trustees should decide the matter on their own, the Royal Court by and large adopts a reasonably generous approach in allowing trustees to apply for the comfort of court approval. This is generally regarded by those in the trust industry as being a beneficial jurisdiction, which not only helps trustees but also allows beneficiaries to have their say in a non-adversarial manner so as to ensure that all points of view are considered before the relevant course of action is taken.

7 However, for this jurisdiction to work properly, the trustees and any beneficiaries convened to the hearing must be able to lay their cards on the table and speak openly and frankly. It must always be borne in mind that the effect of the court's approval is to prevent a claim for breach of trust being brought against the trustee for the action which is

[4] *Re S Settlement* 2001 JLR *N* 371; [2001] JRC 154.

approved. It is therefore vital that the court has the fullest possible picture. As the Royal Court said in *Re M Trust*[5] at para 15—

> "The trustee is under a duty and must feel able to make full and frank disclosure in relation to the application. It must be able to summarise the arguments for and against the proposed course of action, including any weaknesses or possible risks in relation to what is proposed."

8 As a result, such applications are invariably held in private. They will often concern legally or commercially sensitive matters and of course they are administrative rather than adversarial proceedings; they do not determine civil rights for the purposes of art 6 of the European Convention on Human Rights. As William Bailhache DB explained in *Deery v Continental Trust Co Ltd*[6] at para 6—

> "6(d) . . . it is absolutely necessary that a trustee should be able to come to court under Article 51 to make a candid appraisal of his position and the problems which are to be addressed. If trustees thought that such affidavits and applications might be provided to those with hostile eyes upon the trust or the trust fund, they would be less likely to be candid and the whole purpose underlying the Article 51 procedure would be liable to be frustrated."

9 Consistently with that view, the Royal Court in that case refused to give assistance to a letter of request from the Family Division which had sought disclosure of material produced to the Royal Court in the private trust application. The court held that the public interest in preserving the confidentiality attaching to such proceedings outweighed the demands of comity.

10 The approach of the Royal Court is consistent with what certainly used to be the approach to similar applications in England. Thus in *Midland Bank Trust Co Ltd v Green*,[7] Templeman J said this—

> "[O]f course, it is necessary for defendants (*i.e.* the applicants for *Beddoe* relief) to open their hearts to the judge and tell him exactly what the action looks like. The judge is acting in some respects as though he were the adviser and trustee giving guidance. The application is invariably heard in chambers, and nothing is published because of the jurisdiction of the judge to look after the estate, and because any information made public

[5] 2012 (2) JLR 51; [2012] JRC 127.
[6] [2010] JRC 001.
[7] [1980] Ch 590, at 606.

> would be available to the plaintiff in the action, and might well be prejudicial to the defence and the estate which the judge is there to protect. Over the whole of such an application there is an aura of confidentiality, which is preserved by hearing everything in chambers."

11 That observation was made in the context of a *Beddoe* application strictly so called; *i.e.* where a trustee seeks directions as to whether to institute or defend legal proceedings. But it seems to me that the principle is equally applicable to other decisions which the court is asked to approve. The need for the court to be alerted to all the arguments for and against what the trustees are suggesting means that there must be protection of confidentiality for what is said at the hearing and for the material produced for it. I am conscious from the interesting talk given by Robert Ham QC at the annual Wilberforce Chambers Conference on 2 February 2015 that the position may be changing in England.[8] Nevertheless, for the reasons I have given, I think the arguments in favour of maintaining the present Jersey position are very powerful.

12 That is why in *Re M Trust*, the Royal Court held that it would be a contempt of court to disclose the content of private trust proceedings or material which a party had only received as a result of such proceedings.

13 And it is in the case of *Re M Trust* that the problem in question first reared its head. It involved a number of trusts where the beneficiaries were the children of the husband. The husband and wife had become involved in divorce proceedings. Although they were not beneficiaries of the trusts with which the Royal Court was concerned, the husband and the wife could have been added with the consent of the protector. The trustee sought approval of its decision to disclose information about the assets of the trusts to the husband's father (who *was* a beneficiary) in the knowledge that he was likely to pass it on to the husband, from which the information would of course become available to the Family Division; and also to its decision not to participate in the divorce proceedings and thereby submit to the jurisdiction of the Family Division. The court approved both decisions.

14 Subsequently, the adult beneficiaries (*i.e.* the children of the husband) sought leave to intervene in the divorce proceedings in the Family Division. As a condition of being granted leave, they had to undertake to produce the documents supplied to them in the earlier Jersey private trust proceedings, if called upon to do so by the divorce

[8] See for example V v T&A [2014] EWHC 3432 (Ch), Morgan, J.

court. As can readily be seen, they were therefore on the horns of a dilemma. If they produced the documents, they would be in contempt of the Royal Court and liable to punishment; conversely, if they refused to produce the documents when called upon to do so by the Family Division, they would be in contempt of that court, being the jurisdiction where they were resident. Not surprisingly, they therefore applied to the Royal Court for permission to disclose the documents and information they had received in the private trust proceedings.

15 In its judgment, the court confirmed, as I have already said, that it would be a contempt of court for the beneficiaries to disclose such material without consent. It went on to emphasise the importance of the supervisory jurisdiction and the need for trustees and others to be able to make full and frank disclosure in relation to the application. The court reminded itself that the only issues raised in the trust proceedings had been whether the trustee should provide information to the grandfather and whether it should submit to the jurisdiction of the Family Division. The information had subsequently been provided. The court accepted that it was not viewing the matter from the perspective of the Family Division but said that it seemed highly unlikely that the material disclosed in the July proceedings would add to the relevant knowledge about the trusts on the part of the Family Division or be relevant to the issue which the Family Division had to resolve. The court said this at paras 23 and 24—

> "23. We accept that we cannot view the matter from the perspective of the Family Division but it does seem to us highly unlikely that the material disclosed for the July proceedings will add to the relevant knowledge about the Trusts on the part of the Family Division or will be relevant to the issue which the Family Division has to resolve. The only issues raised in the July proceedings were whether the trustee should provide information to the grandfather and whether it should submit to the jurisdiction of the Family Division. Following the court's ruling, the information has been provided to the grandfather (and onwards) and the trustee has not submitted to the jurisdiction. The *reasons* for the trustee and the court reaching that view do not, with respect, seem relevant to the issue of how much, if anything, the husband should be ordered to pay the wife or whether there should be a variation order in relation to any of the Trusts. The internal thinking of the trustee as to what it considers to be in the best interests of the beneficiaries and the decision of the court in relation to that matter seems very different from the issue of what order should be made by the Family Division in relation to the financial position of the husband and the wife.

> 24. We would therefore respectfully invite the Family Division to consider very carefully whether it needs to make any order that the adult beneficiaries disclose material relating to the July proceedings. If this court were to find that the Family Division began routinely to make orders requiring disclosure of applications by trustees brought in private, the court would have to consider amending its procedures either so as to heavily redact any material served on English resident beneficiaries or to preclude material from being sent out of the jurisdiction and allowing only inspection within the jurisdiction. This would seem to be in no one's interests. If, despite this, the Family Division considers that some disclosure should be made, we hope that it will have regard to the remarks of this court in relation to the different categories and material referred to in the remainder of this judgment."

16 The court then went on to divide the material produced in the private trust proceedings into three categories, namely legally privileged material, what it called "sensitive material" and other material. All parties agreed that there was no problem with disclosure of the other material and the court refused consent to disclosure of privileged material. In relation to what it called sensitive material, the court considered the circumstances to be very unusual and gave consent but subject to a caveat. It said this at para 33—

> "In the very unusual circumstances of this case and taking into account the nature of the material in question (which we do not think is particularly sensitive), we consider that, if required to do so by the Family Division even after it has heard arguments to the contrary, the adult beneficiaries should be given leave to disclose the sensitive material . . . However, we hope very much that the Family Division will respect the nature of the July proceedings and not order disclosure of the sensitive material."

17 The matter duly came back before Moylan J in the Family Division.[9] It is clear that he did not simply brush aside the views of the Royal Court. He engaged with those views and considered carefully whether it was necessary to order production of the material. He accepted without question that the legally privileged material should not be produced. Nevertheless, even though he had not seen the material and was aware of the view expressed by the Royal Court that it seemed highly unlikely that the material would add to the relevant knowledge of the Family Division, he concluded that he should order

[9] [2013] EWHC 3627 (Fam).

the adult beneficiaries to disclose the sensitive material as well as the other material.

18 Moylan J referred at para 35 of his judgment to the last sentence of para 23 of the Royal Court's judgment (quoted above) with its reference to the "internal thinking of the trustee", and said at para 36 of his judgment—

> "The English court's decision in this case, at the trial of the financial remedy application, would have depended very significantly on the court's determination of the two issues referred to above including the extent to which, if at all, the resources held within the Trust are resources likely to be available to the husband and as such part of his resources for the purposes of Section 25 of the MCA 1973 . . . What the trustee considers to be in the best interests of the beneficiaries, and why, are, I would suggest, essential elements of this, factual, determination because it is the trustee who controls the availability of this wealth through the exercise of its discretion. The trustee's reasons for coming to its conclusion—its thinking—are highly relevant to this determination. . . ."

19 He went on to say this at paras 43 and 44:

> "43. The significance of [the likelihood of the husband benefitting from the trust] is enhanced in this case because it appears that the bulk of the wealth accumulated as a result of the husband's endeavours during the course of the marriage is held in the Trusts. The outcome of the case at trial would have hinged to a considerable extent on whether the Trusts were nuptial settlements and/or whether the Trusts' resources were likely to be available to the husband.
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> 44. Given the pivotal importance of these issues and given the importance of seeking to understand how and why the trustee was likely to exercise its powers, I ordered disclosure of the material because I concluded that its potential relevance and importance, including in particular the sensitive material, was such that I must order its disclosure notwithstanding the strong judgment of the Royal Court and the demands of comity. I should also add that I, of course, recognise the specific concerns which flow from trustees being able to apply confidentially to the Court for directions.
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> 45. However, in my judgment, any light on the 'internal thinking' of the trustee would be significantly preferable to none . . ."

20 As it happens, the divorce proceedings settled and therefore we shall never know whether the material would in fact have been of assistance, as Moylan J thought it might, or would not have assisted, as the Royal Court thought.

21 It is clear that Moylan J engaged with the Royal Court's concerns but nonetheless his decision has troubling implications. In essence, his reasoning was that the Family Division needed to ascertain the likelihood of the husband benefitting from the trusts and that, although he could have no direct knowledge of it because he had not seen the material, it was likely that, in the course of an application for directions, a trustee would provide information to the Royal Court which might assist the Family Division in its task. It is hard to see therefore why his reasoning should not apply in almost every case where a trustee has sought directions from the Royal Court about divorce proceedings involving one or more beneficiaries.

22 As the court said in *Re M* in the passage quoted above, if it were to become the case that the Family Division routinely ordered disclosure of material produced in private proceedings before the Royal Court, the Jersey court would have to decide how to respond. Both the Royal Court and Moylan J made reference to the interests of comity and this is an important consideration. The situation now has very much improved from that which it was, say, 10 years ago and there is a greater mutual understanding and appreciation of the respective roles of the Family Division and the offshore trust court. In my view, the Royal Court has been supportive of the need for the Family Division to be provided with information about the trusts and in return, I would hope that the Family Division would show an appreciation and understanding of the need for the Royal Court to hear trust applications in private. The benefits of that procedure should not be undermined by routine disclosure orders in the UK. I am already aware of one subsequent case where, as a consequence of Moylan J's decision, the trustees asked that a UK resident beneficiary only be allowed to inspect the evidence in Jersey and the court agreed to this.

23 It remains to be seen how this situation develops, but it is greatly to be hoped that a *modus operandi* can be achieved which is satisfactory to both jurisdictions.

24 With that introduction, I turn to consider the three headings mentioned above.

1. Disclosure of information

25 In the 2009 article, I concluded that the basic approach of the Royal Court was that, if a beneficiary would normally be given access to trust documents and information, the fact that he needs them for the

purposes of his divorce proceedings is not a reason to refuse disclosure. Thus in 2006 in *Re H Trust*[10] the court said, at para 17—

> "It seems to us important, in this case, that the husband and wife should have the fullest information concerning the financial affairs of the trust so that any compromise which they reach, failing which any decision of the Family Division, is based upon the true financial position."

26 There are some exceptions. So, in *Re L & M Trusts*,[11] the court ruled that it would not be in the interests of the beneficiaries as a whole for information to be provided to a wife in order for her to attack the validity of the trust in certain American proceedings. Similarly, in *Re Avalon Trust*,[12] the English divorce court had ordered disclosure of various categories of trust documents. The Royal Court held that there should be disclosure of documents so as to give a picture of the financial position of the trusts but the court refused to order disclosure of correspondence between the trustee and any beneficiaries other than the husband in that case.

27 There has been no material change since 2009. It is still the general approach of the Royal Court that it is appropriate for a trustee to provide information to a beneficiary about that beneficiary's interest under the trust and the trust assets generally so that the Family Division can properly fulfil its role of making a fair allocation of assets, and make a decision which is based upon the facts rather than upon conjecture and, possibly, suspicion.

28 An example is *Re M Trust* itself, where neither the husband nor the wife were beneficiaries of any of the relevant trusts—although they could have been added—and therefore the trustee felt unable to supply information to the husband. The court nevertheless approved of the trustee's decision to disclose all relevant financial information to the grandfather (who *was* a beneficiary) in the knowledge that he would pass this on to his son.

(ii) Submission to the jurisdiction

29 The next issue for offshore trustees is likely to be whether, if they are made parties to the divorce proceedings, they should participate and so submit to the jurisdiction of the divorce court. I think this is an area where thinking is still developing and where it may sometimes be

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[10] 2006 JLR 280.
[11] [2003] JRC 002A; 2003 JLR *N* [6]; (2002–03), 5 ITELR 656.
[12] [2006] JRC 105A; 2006 JLR *N* [19].

finely balanced as to whether the interests of the beneficiaries as a whole are best served by submitting or not.

30 The original approach of the Royal Court was summarised in *Re H Trust*[13] where the court pointed out (at para 14) that, whereas the Family Division was concerned to do justice between the two spouses before it, the primary consideration of the offshore court was to make or approve decisions in the interest of the beneficiaries. It therefore had a very different focus from the Family Division and the view was that, because submission to the jurisdiction of the divorce court would make subsequent enforcement in Jersey easier, whereas a judgment where the trustees had not submitted could not be enforced in Jersey on ordinary private international law grounds, it was more likely to be in the interest of a Jersey trust that the trustees should not submit.

31 However, that was before the introduction of the so called firewall legislation in art 9 of the Trusts (Jersey) Law 1984. The Royal Court held in *Re IMK Settlement* (Mubarak)[14] at para 76(1)—

> "By reason of art. 9(4) of the 1984 Law, this court cannot enforce a judgment of the Family Division varying or altering a Jersey trust under the 1973 Act, even where the trustees have submitted to the jurisdiction of the Family Division . . ."

32 It might be thought therefore that the position had changed and that there would now be no disadvantage to trustees joining in divorce proceedings.

33 The advantage of such a course is that they can do their best to ensure that the divorce court is reminded of and takes full account of the interests of the other beneficiaries. They can also ensure that the correct position in relation to the trust and the trust assets is fairly and squarely before the divorce court. In particular they can do their best to reduce the risk of the court wrongly drawing adverse inferences simply because of the failure of the trustees to appear. As Mostyn J put it in *BJ v MJ (Financial Remedy Overseas Trusts)*,[15] at para 18—

> "If the trustees have refused to participate meaningfully or helpfully in the enquiry then neither they nor their beneficiary can complain if the Court draws robust conclusions as to the likelihood of future benefits."

34 As against that, once trustees have submitted to the jurisdiction of the divorce court, they may find themselves being ordered to do

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[13] 2006 JLR 280.
[14] 2008 JLR 250.
[15] [2011] EWHC 2708 (Fam).

something by that court which is inconsistent with their obligations under the proper law of the trust. They may end up in the unenviable position of either disobeying the order of a court to which they have submitted (with the risk of suffering penalties for the contempt of court) or dealing with trust monies otherwise than in accordance with the trust deed (with the risk of being sued for breach of trust under the proper law of that trust).

35 Even if the variation ordered by the divorce court is within the terms of the deed, *e.g.* that a capital distribution be paid to the wife who is a beneficiary—the trustees may be strongly of the view that such a payment is not in the interests of the beneficiaries as a whole. Take the example of a trust where the sole asset is a business which is illiquid. Any capital distribution from the trust ordered by the divorce court may only be capable of being paid by gearing up the trust assets to a level which the trustees consider imprudent and therefore not in the interests of the trust estate as a whole. If they have submitted to the jurisdiction, they may feel they have to comply. If on the other hand, they have not submitted, they retain a free hand—assuming the assets are outside the jurisdiction of the divorce court.

36 Another consideration may be the likelihood of the trustees' submissions to the divorce court having any effect. In *Re Otto Poon Trust*,[16] the Royal Court agreed to the trustee submitting to the jurisdiction of the Hong Kong court hearing the divorce between the settlor and his wife, on the grounds that many of the assets were in Hong Kong but also on the basis that the trustee wished to make submissions about the trust to the divorce court. The situation there was that the beneficiaries comprised the husband, the wife and their adult child. In the divorce proceedings in Hong Kong, the court at first instance and the Court of Appeal accepted the submission of the trustee that, although the trust was discretionary, one third should be notionally allocated to the adult daughter, thereby leaving two thirds to be treated as a resource of the husband and/or wife. However, this was overturned by the Court of Final Appeal[17] which disagreed and held that the whole of the trust fund should be treated as a resource of the husband. It ordered him to pay a lump sum to the wife which was half the total assets of the parties including the trust which made up the major part of those assets. The trustee's intervention did not therefore achieve anything in the end.

37 *Otto Poon* was an example of where it was felt that the trustee should submit; *Re M Trust* was a case where the opposite view was

[16] [2011] JRC 167.
[17] FACV 20 of 2013.

taken by the trustees and approved by the court. The situation there was that there were four trusts governed by BVI law but administered in Jersey. Although the assets of the M Trust itself were situated in the UK, the assets of the other trusts were situated elsewhere, and overall the vast majority of the assets were outside the UK. The wife was seeking an order that the trusts should be varied so as to provide for her. In those circumstances, the court agreed with the trustees' decision that it would be preferable not to submit to the jurisdiction.

38 Of course an alternative to submitting to the jurisdiction is for the trustee simply to provide evidence, including oral evidence as necessary. As Mostyn J said in the *BJ* case at para 21—

> "I can therefore see why overseas trustees may not want to submit to the jurisdiction of the English Court. They may prefer to keep their powder dry and wait to see what judgment emerges before deciding whether or not to resist enforcement proceedings in their local court. I have to say, however, that I find it hard to see why participation by the trustees in a helpful or meaningful way in this Court's enquiry *qua witness* could be construed as a submission to the jurisdiction." [Emphasis in original.]

39 It may be that this is a course of action which trustees may be more inclined to adopt in the future. Certainly trustees (and offshore courts) have to accept that if a trustee does not submit and does not provide any evidence, there is a substantial risk that the divorce court will draw adverse inferences against the trust and its relationship to the husband wherever this is possible. Whether this matters may depend upon the location of the trust assets. If they are in England and Wales, this may be very important; if on the other hand they are elsewhere, it may not be such a significant consideration.

(iii) Enforcement

40 Again, there has been little change in approach here since the 2009 article. The three most likely orders of a divorce court in this context are first, a finding that the trust is a sham, secondly an order that the trust be varied, or thirdly an order that the husband pay the wife a lump sum. As to sham, this is now likely to be a comparatively rare finding given that the trustee has to be a party to the sham for the trust to be invalid.[18] If the divorce court has ruled that a Jersey trust is a sham, that decision will not be capable of enforcement in Jersey if the Family

[18] *In re Esteem Settlement* 2003 JLR 188; *Shalson v Russo* (2003), EWHC 1637 (Ch).

Division has applied English law.[19] If it has applied Jersey law, the decision will not be enforceable if the trustees have not submitted to the jurisdiction and the wife would have to start all over again in Jersey. If the trustees have submitted, then this being a form of declaratory judgment, it would be a matter of discretion for the Royal Court as to whether to enforce such a judgment in Jersey.

41 Alternatively, the Family Division might make an order varying the trust under the Matrimonial Causes Act 1973. As already mentioned, in *Mubarak* the court held that such a judgment is not capable of enforcement in Jersey. As a matter of Jersey law, the trust would therefore remain in its original form. If the purported variation by the Family Division is within the powers of the trustees under the trust deed, the trustees *could* choose to make a decision which gives effect to the variation and the Royal Court *could* approve that decision if it thought that this was in the best interests of the beneficiaries as a whole. If, on the other hand, the order of the English court amounted to an alteration of the trust (in the sense that it required something to be done outside the terms of the trust deed) then neither the trustees nor the Jersey court could give effect to it.

42 The third type of order is simply an order that the husband pays a lump sum to the wife which takes into account the court's finding that the trust assets are a resource available to him. There can be no objection to the principle of such an order as it is an *in personam* order against a party who is before the divorce court. But of course it may well be a sum which the husband cannot pay without recourse to the trust assets. The question then for the trustees is whether they should make a distribution out of the trust assets to the husband to enable him to pay the lump sum to the wife. This will turn on the facts.

43 A recent example of this situation was in the *Otto Poon* case itself. The award of the Court of Final Appeal was in the region of HK$770 million. The husband then requested the trustee to make a capital distribution of this sum so as to enable him to pay that sum to the wife. Fortunately in that case there was not a liquidity issue. Although the payment amounted to half the trust assets, the trustee wished to make such a distribution but it also wished thereafter to exclude the wife as a beneficiary.

44 The matter came back before the Royal Court recently.[20] The court had little difficulty in agreeing that the trustee should make the distribution. It was in the interests of all beneficiaries that the long-

[19] Trusts (Jersey) Law 1984, art 9.
[20] [2014] JRC 254A.

running litigation between the spouses should be ended and that everyone should be able to get on with their lives. But the wife objected to the suggestion that she should be excluded as a beneficiary. On this aspect, the court also agreed with the trustee. It accepted that a power to exclude a person as a beneficiary was an unusual power which should be carefully exercised but the court found that the circumstances of the case were perhaps a classic example of an instance where it would be right to exclude a beneficiary. It concluded by stating—

> "The wife has, in effect, received half the trust fund. She is aged 75 and will now have HK$770.5m plus certain other assets giving her a total of HK$832.5m in her own right. She therefore has ample financial resources to last her for the rest of her life and there is no need for her to remain as a beneficiary of the trust on financial grounds. Furthermore, the money has been paid to her as part of a divorce order intended to achieve a clean break. It is entirely reasonable in those circumstances that the trustees should conclude that the remaining assets of the trust should be held exclusively for the remaining beneficiaries of the trust."

Summary

45 In summary, issues about offshore trusts and divorce courts continue to arise. Such issues should not be regarded as a contest between divorce courts and the offshore chancery courts. Ultimately, all courts of justice should seek to achieve a just outcome. Nevertheless, it cannot be denied that the roles of the two courts are different. The divorce court is concerned to achieve fairness between the husband and the wife. That may lead it to take a particular view of trust assets and their availability to one or other of the parties. The offshore chancery court and the trustees, on the other hand, have a duty to act in the best interests of the beneficiaries as a whole. Whilst a material consideration for trustees and offshore courts, when deciding how to respond to the order of a divorce court, may be the desirability of bringing an end to hostile litigation between spouses which may well be affecting the family as a whole, the trustees cannot escape from their fiduciary duty to the beneficiaries as a whole, and the offshore court cannot escape from its duty to supervise the activities of the trustees in fulfilling that duty.

Sir Michael Birt held the office of Bailiff of Jersey between 2009 and 2015, having previously been Attorney General of Jersey (1995–2000) and Deputy Bailiff (2000–2009) He is a Commissioner of the Royal Court and remains a judge of the Jersey Court of Appeal.