Family law news: disclosure of trust documents by beneficiaries

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This is a follow-up to the article on the joinder of beneficiaries to English divorce proceedings in our Family Law News of September 2013. In the case of *Tchenguiz – Imerman v Imerman* [2013] (in which Diana Parker and Michael Gouriet represented the wife), Mr Justice Moylan has handed down a further judgment explaining the rationale for his decision to order disclosure of trust documents by adult beneficiaries who had been joined to English divorce proceedings where the trusts of which they were beneficiaries were the subject of a variation claim. Contrary to its normal practice, but owing to the unusual circumstances of the case, the Royal Court of Jersey gave permission to the beneficiaries to make disclosure, but firmly invited the English Family Court not to require the disclosure to be made – perceiving that the material was 'highly unlikely' to add to the English Court's 'relevant knowledge' about the trusts.

The Judge commented that whilst information had been disclosed regarding the structure of the trust (for example trust deeds and schedules of trust assets) very little information had been provided on 'the critical question of whether the trustee was likely, immediately or in the foreseeable future, to exercise its powers in favour of or in some way for the benefit of the husband'. Although the Royal Court had questioned the relevance to the Family Court of the internal thinking of the trustee, Moylan J held that the trustee's thinking was an essential element of the factual determination of the twin issues of whether (a) the trusts were nuptial settlements (and therefore subject to the Court's powers of variation) or (b) a resource available to the husband. As the trustee had decided not to participate in the English proceedings even though properly joined as a party, the Judge held that 'given the lack of evidence from the trustee as to its likely approach to the exercise of its powers, any evidence which appears to give the prospect of providing a window into this factual issue is relevant evidence potentially of considerable significance' and that significance 'is enhanced in the circumstances of this particular 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 Judge concluded that any light shone on the internal thinking of the trustee would be significantly preferable to none and would reduce the need for the Court otherwise to rely on assumption and inference. As the evidence was not likely to be forthcoming from any other source, he ordered the adult beneficiaries to disclose the material, including what had been categorised by the Royal Court in Jersey as sensitive material (albeit not legally privileged material) in order to assist the Court in determining the issues raised (which, ultimately in this case, the Court did not have to determine as the case settled prior to the final hearing).

Whilst the Judgment may alarm trust lawyers in England and offshore as to the range and angle of the English Family Court's spotlight on the discretionary exercise by trustees of their powers, this Judgment does explain clearly (and by reference to previous case law) the English Court's approach and nature of enquiry to trust interests on divorce. It should also be noted that the circumstances of the case were unusual in that the adult beneficiaries had applied to be joined as parties to the English proceedings (with the disclosure obligations that flow from that) and had supported the trustee's decision not to participate. The effect of the Judgment may be to make trustees more circumspect about the extent of the information provided to their beneficiaries.

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