

# MOURANT OZANNES

## BRIEFING

## Update: Direct disclosure obligations resulting from the joinder of adult beneficiaries to matrimonial proceedings affecting trusts - Tchenguiz-Immerman -v- Immerman [2013] EWHC 3627 (Fam)

FEBRUARY 2014

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In our briefing of October 2013 entitled "[Joinder of adult beneficiaries to matrimonial proceedings affecting trusts – Tchenguiz-Immerman -v- Immerman](#)", we discussed an application by three adult Beneficiaries (the **Beneficiaries**) of certain offshore trusts who were joined as parties to financial remedy proceedings in England despite having previously supported the decision of four Trust Companies (the **Trustees**) not to participate. As a result of joinder, the English Family Division (the **Court**) made an order requiring the Beneficiaries to disclose copies of documents which had been provided to them for the purpose of the application made by the Trustees to the Royal Court of Jersey and the Eastern Caribbean Supreme Court for approval of their decisions not to participate, in spite of a request from the Jersey Court not to order such disclosure.

### Background

The Trustees had previously applied to the Royal Court of Jersey and the Eastern Caribbean Supreme Court for (and obtained) those Courts' respective approval of their decisions not to participate in the English financial remedy proceedings, supported by the Beneficiaries. The Trustees provided some information about the ten discretionary Trusts (the **Trusts**) but declined to provide a considerable part of the information and documents sought by the wife and, it appeared, were not willing or were unlikely to be willing to provide evidence as witnesses. The Beneficiaries subsequently successfully applied to be joined as parties to the financial remedy proceedings with the Court concluding that there were considerable advantages to the direct participation of the Beneficiaries as it would assist with investigation and resolution of matters in dispute. The Beneficiaries would also be

subject to direct disclosure obligations and cross examination, as well as being entitled themselves to cross examine other witnesses and parties.

The key issue concerned the potential disclosure of documents provided and/or related to the applications to the Royal Court of Jersey and the East Caribbean Supreme Court by the Trustees for approval of their non-participation, which were heard in private. Both Courts had granted permission for the Beneficiaries to disclose this material if ordered to do so but the Jersey Court had specifically asked the English Court not to order disclosure.

The Royal Court said that it was unlikely that the material would add to the relevant knowledge about the Trusts. The court stated that the issues considered in the Jersey application, namely whether the Trustee should provide information to the grandfather and whether it should submit to the jurisdiction of the Family Division, did not seem relevant to the issue of how much 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 Royal Court went on to say that it was of vital importance that any information or documents received in such applications should be held in confidence. Difficulties could arise if trustees felt inhibited when making such applications to the court because of a risk that the information provided might become available to others. In the interests of justice, trustees should be able to come before the court in private, confident that any document or information produced will not be used for purposes other than the private proceedings. Nonetheless, disclosure was ordered, with the English Court explaining its reasons in its judgment.

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### Two key issues

There were two key issues in the financial remedy proceedings:

1. Whether the Trusts were nuptial settlements for the purposes of section 24 of the Matrimonial Causes Act 1973 (the **MCA 1973**) and thus subject to the powers given to the Court.
2. Whether the assets of the Trusts were financial resources available to the husband, having regard to the financial resources each party has or is likely to have in the foreseeable future.

Moylan J referred to a previous decision of his in *RK v RK (Financial Resources: Trust Assets)* [2013] 1 FLR 329 which concerned English trustees participating and giving evidence in financial remedy proceedings. He said that examining financial resources is a question of fact which requires the court to 'assess the evidence' in order to reveal the 'reality of the situation'.

Moylan J further referred to *Charman v Charman* [2006] 2 FLR 422 where Lloyd LJ commented on the consequences if the trustee did not assist the English court. Lloyd LJ said that in the absence of evidence from the trustee, the court 'will draw inferences' as to the likelihood that the respondent had access to the trust fund.

Moylan J referred to these cases to demonstrate the nature of the exercise that the Court is required to undertake in order to resolve issues in financial remedy proceedings. Where possible the Court will make their decision based on direct evidence, 'rather than assumptions and inferences'. As the Trustees did not participate in proceedings they could not give direct evidence which would subsequently help to resolve the issues in dispute. Therefore, he said, the Court would have been forced to make assumptions and inferences in order to resolve these issues. The Beneficiaries, however, were subsequently joined to proceedings to rectify this issue and to protect the Beneficiaries' interests. Accordingly, they should, he said, be required to disclose documents which would assist the Court in resolving these issues, the next best option to ensure the Court had all the necessary information to make an informed decision.

### Explanation for disclosure

Moylan J explained that disclosure was ordered because of its 'potential relevance and importance'. He said that despite the Royal Court's concerns regarding disclosure and his limited understanding of what the material comprised, he believed that the information may assist in the resolution of matters. The Trustees had previously provided disclosure which included information and the history surrounding the structure of the Trusts, but very little information directly related to the two issues at the centre of the financial remedy proceedings. In particular, Moylan J said that the information provided to the Court so far seemed to contain limited evidence directly addressing whether the assets of the Trusts were available to the husband. Moylan J stressed that what the Trustees consider to be in the best interests of beneficiaries and the reasons surrounding this are essential elements of factual determination. In his view, the Trustee's reasoning for coming to its conclusion was in fact highly relevant as it could inform the issue of whether the Trusts were nuptial.

Moylan J remarked that he was puzzled as to why a trustee should not consider it in the interests of the beneficiaries to provide the evidence which will rebut a case if the trustee has evidence available to it. As very little information existed which would assist with whether and how the Trustees might decide to benefit the husband, Moylan J stated that, absent disclosure, it would seem likely that the Court would be 'forced to rely on assumptions and inferences'. Moylan J stressed that this was 'not the optimum manner' in order to achieve justice. As the Trustees had declined to participate in proceedings, the Court would be unable to rely on their testimony. As a result, Moylan J stated that any evidence which appeared to give the prospect of providing a window into this factual issue was relevant evidence potentially of 'considerable significance'.

### Conclusion

Disclosure was ordered as Moylan J considered it necessary and proportionate to assist the court in determining the two issues at the centre of the financial remedy proceedings. Moylan J was quick to point out

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that he did not believe this order impeded or undermined the interests of comity. He hoped that co-operation would continue to develop between the English Court and the Royal Court of Jersey to assist the interests of justice not only for spouses and civil partners, but also for trusts and beneficiaries.

This decision does, nonetheless, give rise to concerns in these situations about the ability of trustees and others to be full and frank with the Court exercising supervisory jurisdiction over the relevant trusts and the other interested parties who would ordinarily be convened to that application, given the risk that disclosure of the information and documentation relating to that application may be ordered by the family court. On the one hand, it accords with principles of natural justice that those with an interest in a matter being determined by a court should, wherever possible, have access to the same information as the court to allow them to make properly informed submissions in their interests. On the other, it may be that trustees in appropriate circumstances will have to seriously consider whether to seek orders from the supervisory court allowing them to withhold information and documentation from beneficiaries and/or consider whether certain beneficiaries should be excluded from those proceedings, to save them from themselves. The decision of Moylan J may also act as a further deterrent to those considering participating in the financial remedy proceedings, whereas Moylan J has recognised that it is undesirable for the family

court to be required to proceed in the absence of direct evidence relating to the trust, and on the basis of assumptions and inferences. Although the Family Court recognises that one of the benefits to the beneficiaries of a trust in the trustee staying out of the divorce proceedings is to make enforcement of any order made more difficult, if there is no direct evidence from the trustee, the court will do the best it can on the limited evidence available to it and will reach its own conclusions, with potentially damaging consequences. What is also interesting in this case is that the Beneficiaries of the Trust, having supported the Trustee staying out of the divorce proceedings, by their own action in intervening in the financial remedy proceedings, potentially undermined the very protection which the Trustee had obtained for them from an order directing it to stay out of the divorce.

The tension between the different roles and priorities of the courts exercising supervisory jurisdiction over trusts, and the family court seeking to do justice between divorcing spouses, looks set to continue.

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