International Trust and Divorce Litigation

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Second Edition

JORDANS

Family Law

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FOREWORD

'This is a much needed book', as I opened my foreword to the first edition published over five years ago. This second edition takes in significant developments since then in English divorce case-law and in jurisdictions hosting trusts, now covering Australia, Bahamas, Bermuda, BVI, Cayman Islands, Cyprus, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Liechtenstein, Mauritius, New York, Singapore and Switzerland. It provides practical advice and insights, soundly based on clear legal analysis. The editors have done a remarkable job in bringing much clarity to complex areas of domestic and private international law.

It explains how an increasing number of jet-setting spouses with an English base can invoke the English courts' divorce jurisdiction focusing upon the sharing principle, rather than the needs of the parties, and providing a diverse range of financial remedies. It spells out the exceptionally limited extent to which trusts set up by a spouse can be attacked as a sham and sets out other principles of trust law which may be used to impeach the validity of a spouse's trust. It considers the extensive jurisdiction of the English divorce courts to vary the beneficial provisions even of a foreign trust set up by a spouse or spouse's parent or other relative as an ante or post-nuptial settlement (as broadly defined), though explaining the unlikelihood, unless the relevant assets are located in England, of such variation being recognised in the foreign trust jurisdiction. More significantly, therefore, it examines the extent to which assets comprised in a trust can be considered to be an available resource of a spouse, as opposed to property of a spouse, when making financial orders against a spouse.

Available resources of a spouse are 'financial resources which' he or she 'has or is likely to have in the foreseeable future' under s 25(2)(a) of the Matrimonial Causes Act 1973. The availability of such resources to a respondent beneficiary of a trust can lead the judge to make a financial order against the respondent that is much greater than that which would be ordered taking account only of the respondent's own property. Such greater order, according to Waite LJ in *Thomas v Thomas,* 'affords judicious encouragement' to the trustee to provide the respondent with the means to comply with the court's view of the justice of the case, so that the respondent's standard of living is not unduly depressed.

The *intra vires* exercise of a foreign trustee's powers does not fall foul of 'firewall' provisions designed to refuse recognition to English court orders (eg orders varying a trust's beneficial terms). However, the pressure on the trustee to exercise its distributive powers to ameliorate the respondent's position does interfere with the discretion of the trustee and will normally make it seek confirmation from its local court that the distribution it proposes to make is within the parameters allowed for the exercise of its discretion, taking account of the interests of other beneficiaries. Indeed, looking ahead to such possibility, it may well be sensible for the trustee to obtain leave from its local court to provide the English divorce court with relevant honest information as to the likelihood of it making financial resources available to the respondent in the foreseeable future, without it becoming a party to the English proceedings.

In making findings as to available resources of a respondent who is a beneficiary under a trust, especially if he were the settlor, divorce judges have taken a robust sceptical approach to what he and the trustees allege. Some took too much of a robust cavalier approach, but Sir James Munby was an exception in emphasising the need for respect for the integrity of trusts (see his excellent Chancery Bar Association Annual Lecture, 2011, reproduced in (2011) 17 Trusts & Trustees 809) and he has become the new President of the Family Division. He has made clear the need to identify the trustee's untrammelled power, how the power has been exercised in the past and how the power is likely to be exercised in the foreseeable future eg if the respondent requests financial assistance, taking account of the position of other beneficiaries – unless the terms of a trust provide for the respondent to be regarded as the principal beneficiary to whom payments may be made without considering the interests of other beneficiaries.

The Hong Kong Court of Final Appeal (including Lord Clarke of the UK Supreme Court) has taken the same approach in 2013 in *Kews v NCHC* and, indeed, has indicated that it would be better if the term 'judicial encouragement' were no longer to be used. Its use could mislead some judges to make financial orders that put undue pressure upon a father to use his own money, or trustees to use trust money to assist the respondent beneficiary. However, if trust resources are regarded as available for the respondent when he requests them due to any particular need, then it does not matter that the order of a divorce court against him in favour of his ex-wife creates his need for money from the trust.

The powers of divorce courts in 15 other jurisdictions are then considered as well as a brief summary of the difficulties there are in those jurisdictions in attacking trusts or recognising and enforcing foreign divorce court orders, especially where there are 'firewall' provisions. 'Practice and Procedure for Divorcing Spouses and Trustees' are then

covered in practical detail followed by a learned enlightening chapter on 'International Enforcement Issues Relating to Trusts'.

I am delighted to welcome this second edition as even more useful than the first edition. It well deserves a place in the bookcase of trust lawyers and divorce lawyers, incidentally providing a pro-active primer to help to avoid problems while providing a practical re-active guide once divorce proceedings have commenced.

The Honourable Mr Justice David Hayton LLD, TEP (Hon), ACTAPS (Hon)
Caribbean Court of Justice, Trinidad
27 May 2013

PREFACE

This book aims to provide a practical guide for divorce and trust lawyers, trust practitioners, private bankers and others representing high net worth clients. We hope it will help those in the wealth planning and trust world to understand better the approach of the English Family Division to trusts on divorce, and matrimonial lawyers to understand trusts better, as well as giving an insight into how the courts of other jurisdictions deal with trusts on divorce.

Since the First Edition, there have been substantial developments in this fascinating area of law and, further, undoubtedly significant changes are on the horizon. As we go to press, the Supreme Court's judgment in *Prest v Petrodel Resources Limited and others*, which could significantly impact upon the Family Division's approach to trusts, is awaited. [Now see *Addendum* following.] Likewise the Law Commission's final recommendations on marital agreements, the treatment of non-matrimonial property and the issue of needs, due later this year, will aim to provide a greater certainty of outcome for divorcing spouses.

Our thanks go to our co-authors and everyone at Withers who has helped us with this book, in particular, Richard Walker, Karen Lai and Myfanwy Probyn. We also thank Mr Justice Hayton for writing the Foreword, and the many foreign lawyers who have provided invaluable contributions and have helped us to understand their law on this subject.

Mark Harper
Dawn Goodman

London, May 2013

ADDENDUM – IMPACT OF *PREST V PETRODEL RESOURCES LIMITED AND OTHERS*

The Supreme Court decision in *Prest v Petrodel Resources Limited & Others*[1] was handed down on 12 June 2013, too late for the text of this book to be amended.

The judgment is key in confirming the limited circumstances in which the Family Division has the power to order the transfer of an English property direct to a spouse when the legal title is held by an offshore company. Those circumstances are circumscribed by principles of corporate law and resulting trusts. The court confirmed that the Family Division has no wider power and has to apply the same principles, in common with other divisions of the court, in determining property rights.

Lord Sumption said 'courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere'.

Prest has a critical impact on trusts and divorce in two respects:

The first is: in what circumstances the purchase or provision of a property by a company for use by a married couple could constitute a nuptial settlement? This was not argued at first instance or in the Court of Appeal. The wife sought leave to argue the point in the Supreme Court but that was refused during the course of the hearing. In paragraph 53 of Lord Sumption's leading judgment he said 'the point was not argued below and does not appear to be seriously arguable here'.

This could be read to mean that decisions such as *N v N and F Trust*,[2] *Ben Hashem v Al Shayif*[3] and *DR v GR*[4] are wrong, but the authors are not certain.

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1 [2013] UKSC 34.
2 [2006] 1 FLR 856, FD.
3 [2009] 1 FLR 115.
4 [2013] EWHC 1196 (Fam).

The second is the impact on the concept of 'telescoping' – so labelled by Mostyn J in *Hope v Krejci*;[5] where a nuptial settlement is varied and the judge orders the underlying property owned by a an offshore trust via an offshore company to be transferred to a spouse. Given the Supreme Court's insistence on the sanctity of the separate legal personality of companies, telescoping must now be bad law.

This is strengthened by the fact that Mostyn J in *Hope* referred to 'the form of piercing of the veil that is the telescoping order'.[6]

Lord Sumption concluded in relation to the principle of piercing the corporate veil:[7]

'There is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.'

Prest confirms that the power to pierce the corporate veil does exist in very limited circumstances, but there is no special power to do so in the Family Division, whether generally or under MCA 1973, s 24.

Therefore the most the Family Division can do is order the trustees to transfer the shares in the intermediate company to the other spouse. That order will then need to be recognised and enforced, if possible, in the offshore company jurisdiction.

The judgment also emphasises the importance of properly created, documented and run structures. The fact that Mr Prest failed to properly document loans or capital subscription and drew funds from the companies at will and without proper authority acted against him enabling the Supreme Court (in the absence of any evidence from Petrodel supporting its claim to be beneficially entitled to the properties) to conclude that Mr Prest had funded the purchase of the properties. Accordingly, the properties were held on resulting trust by Petrodel for Mr Prest and so available to be transferred to Mrs Prest.

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5 [2013] 1 FLR 182.
6 Paragraph 22.
7 Paragraph 35.

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