

# Foreign Courts' Invasion of Jersey Trusts Repelled

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**On 15 August 2008, the Royal Court of Jersey delivered a landmark judgment regarding the circumstances in which it will enforce or give effect to a foreign court order varying the terms of a Jersey trust.**

The decision in **In the Matter of the IMK Family Trust (Mubarak v Mubarak)** (2008) JRC 136, recently upheld by the Court of Appeal, is a significant development of the case law concerning the enforcement in Jersey of foreign court orders against Jersey trusts.

Mr and Mrs Mubarak established the IMK Family Trust (a discretionary trust governed by Jersey law) in September 1997. Mrs Mubarak was originally a beneficiary under the trust. Under the terms of the trust, Mr Mubarak was granted the power to add and exclude beneficiaries. In 1998, Mr Mubarak exercised this power by removing his wife as a beneficiary and declaring her to be an excluded person. Mrs Mubarak subsequently commenced divorce proceedings against her husband in the English High Court.

In 1999, the English High Court ordered Mr Mubarak to make a lump sum payment of £4.875 million to his wife. Since that date, Mr Mubarak consistently sought to avoid compliance with the order and Mrs Mubarak has been engaged in notoriously protracted litigation to have the order enforced.

In 2007, Mrs Mubarak obtained an order from the English High Court varying the terms of the trust and requiring the trustees to pay to her the sums due by her husband under the 1999 order. Mrs Mubarak then sought to enforce this order in Jersey.

## **TWO TYPES OF VARIATION**

The Royal Court helpfully differentiated between two types of variation of trust; firstly, a variation which alters the terms of the trust deed itself in a way which is outside the powers of the trustees (which the court referred to as an alteration) and, secondly, a variation in which the trust is varied in a way that the trustees themselves could have done by exercising a power in the trust deed.

The Royal Court considered the extent of its general supervisory powers and held that it had no jurisdiction to alter the terms of a trust under Article 51 of the **Trusts (Jersey) Law 1984** (concerning applications for directions) or under its general supervisory jurisdiction.

The Royal Court then considered whether it could enforce the English order obtained in 2007 in Jersey. The Royal Court took into account the effect of Article 9 of the Trusts Law. Article 9(1) provides (inter alia) that all questions concerning the variation of a Jersey trust shall be determined in accordance with Jersey law. Further, Article 9(4) provides that no foreign judgment in respect of a Jersey trust shall be enforceable to the extent that it is inconsistent with Article 9(1).

The Royal Court held that by virtue of Article 9(4), it could not enforce a judgment of a foreign court varying or altering the terms of a Jersey trust even where the trustees have submitted to the jurisdiction of the foreign court.

## **JURISDICTION OF A FOREIGN COURT**

Where an order of a foreign court varies, but does not alter, the terms of a Jersey trust in a manner which is within the powers of the trustees, the Royal Court has power to give directions under Article 51 of the Trusts Law to the trustees to put the variation into effect if that would be in the interests of the beneficiaries. The Royal Court emphasised that the giving of directions under Article 51 did not amount to enforcement of a foreign judgment.

## **ORDER OF A FOREIGN COURT**

However, where an order of a foreign court alters the terms of a Jersey trust, there is no jurisdiction on the part of the Royal Court to give directions which authorise or direct the trustees to act in a manner which is outside the powers conferred on them by the trust deed.

Turning to the facts of the case, Mrs Mubarak was no longer a beneficiary and the trustees had no power to add her as a beneficiary. Therefore, the English order which Mrs Mubarak was seeking to

enforce in Jersey amounted to an alteration to the terms of the trust. As a result, the Royal Court had no power to direct the trustees to comply with the English order.

## **NO POWER**

However, all was not lost for Mrs Mubarak. As a condition of being allowed to participate further in the English proceedings, the husband had written a letter of irrevocable instruction to the trustees in 2006 confirming that he was bound by the 1999 order to make payment to his wife and that he wished the trustees to give effect to whatever orders the English Court may make. Pursuant to the rule in **Saunders v Vautier (1841)**, all the adult beneficiaries of a trust may agree to alter the trust. In applying this rule, the Royal Court treated the 2006 letter sent to the trustees as evidence of the husband's consent to the alteration of the trust.

The Royal Court also found that the alteration was for the benefit of the minor and unborn beneficiaries and approved the alteration on their behalf pursuant to Article 47 of the Trusts Law (which confers an express power on the Royal Court to approve an alteration of a trust on behalf of minor and unborn beneficiaries in circumstances where all the adult beneficiaries agree to the alteration). As a result of the unusual circumstances of this case, the alteration ordered by the English High Court was accordingly given effect.

## **IMPORTANT PRINCIPLE**

The important principle which stems from this judgment is that the Royal Court, in exercising its supervisory jurisdiction, will only put a variation of a Jersey trust ordered by a foreign court into effect if the variation ordered does not amount to an alteration to the terms of the trust and is within the powers of the trustees.

## **INFLUENTIAL**

The extent to which this judgment will be influential in other offshore jurisdictions which are

asked to put into effect the terms of orders from the English, and other courts remains to be seen.

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