

**Trusts and marital agreements:
a comparative exercise**

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THE ENGLISH COURTS' APPROACH TO TRUST INTERESTS ON DIVORCE (1)


- 'Central question is how trusts should be treated in division of assets following divorce. Trusts have always aroused controversy in this exercise.' Mostyn J in *BJ v MJ* 2011



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THE ENGLISH COURTS' APPROACH TO TRUST INTERESTS (2)


- Family courts have viewed trust and company structures with scepticism
 - 'These sophisticated offshore structures are very familiar nowadays to the judiciary who have to try them. They neither impress, intimidate, nor fool anyone. The Courts have lived with them for years.' Coleridge J in *J v V* (disclosure: offshore corporations 2003)
 - To allow removal of the parties as beneficiaries to erase the 'nuptial' element of the settlement 'would be contrary to all good sense. We should reject the introduction of another evasive device into a field of litigation in which evasion abounds and in which, there has never been any shortage of litigants who easily justify to themselves questionable tactics'. Thorpe LJ in *C v C* 2004.
 - 'In the circumstances of the present case it would have been a shameful emasculatation of the Court's duty to be fair if the assets which the husband had built up in [the trust] during the marriage had not been attributed to him.' Potter LJ in *Charman* 2007




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THE ENGLISH COURTS' APPROACH TO TRUST INTERESTS (3)

- Duty to consider all circumstances including the financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future (section 25 MCA 1973)
- Power to vary for the benefit of the parties and/or their children, any ante-nuptial or post-nuptial settlement made on the parties to the marriage (section 24(1)(c) MCA 1973)
- A non-nuptial trust can be treated as a resource eg enabling court to make award out of non-trust assets by way of offsetting




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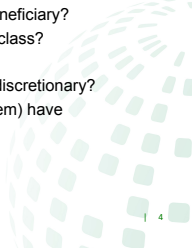


THE ENGLISH COURTS' APPROACH TO TRUST INTERESTS (4)

- Points to consider:
 - When were the trusts made?
 - Are spouses named specifically as a beneficiary?
 - Are 'spouses' included in the beneficial class?
 - Breadth of beneficial class?
 - Nature of trust interests - fixed interest/discretionary?
 - Extent to which spouses (or either of them) have benefited from the trusts?
 - Terms of Letters of Wishes




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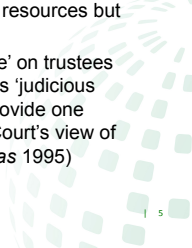


TRUSTS AS A RESOURCE - ENGLAND (1)

- Key question is whether trustees likely to advance all or part of the trust funds immediately or in the foreseeable future (*Charman* 2006)
- The question is not one of control of resources but access (*Whaley v Whaley* 2011)
- Court should not put 'undue pressure' on trustees but may frame an order which affords 'judicious encouragement' to third parties to provide one spouse with means to comply with Court's view of justice of the case (*Thomas v Thomas* 1995)



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TRUSTS AS A RESOURCE - ENGLAND (2)

- *Charman 2007* - CA
 - 30 year marriage – H & W mid 50's
 - Trust set up in 1987 with marital assets
 - Aggregation of trust and personal assets
 - Total of £131m of which £68m in Bermudian trust
 - All £68m in trust held to be a resource of H
 - W awarded £48m (37% of overall total because of H's special contribution)



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PARTICIPATION BY TRUSTEES IN DIVORCE PROCEEDINGS – ENGLAND (1)

- Fiduciary obligations to whole beneficial class
- Inevitable tension between
 - protecting trust assets and preserving confidentiality of trust affairs; and
 - cooperation with requests for information
- Fear of submission to court's jurisdiction where trustees offshore re concerns as to enforcement
- More complicated decision where some trust assets onshore



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PARTICIPATION BY TRUSTEES IN DIVORCE PROCEEDINGS – ENGLAND (2)

- Mostyn J (in *BJ v MJ 2011*) suggests participation by trustees 'qua witness' should not be construed as submission
- The Court assesses the evidence adduced by the parties and, if applicable, the trustee, in quest for factual determination on the issues of (a) whether the trust is a nuptial settlement and/or (b) a resource available to one spouse
- 'The Court is engaged in a fact-finding exercise as to whether the trustees will likely benefit their beneficiary if called on to do so'. (Mostyn J in *BJ v MJ 2011*)



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PARTICIPATION BY TRUSTEES IN DIVORCE PROCEEDINGS - ENGLAND (3)

- The Court searches for underlying reality where wealth held in 'diverse and sophisticated' structures (*Thomas v Thomas* 1995).
- The Court welcomes evidence from trustees, whether as a witness (eg *C Trust Company Limited v Temple and others* [2010]) or as party (eg *A v A* [2007])
- The less direct evidence available to the Court, the more it will be driven to draw inferences or make assumptions
- Court expects trustees to respond positively to outcome if it concludes interests of trust and other beneficiaries not appreciably damaged if trustees were to provide spouse with resources required to enable proper financial provision for other spouse and children



ENGLAND V RUSSIA: TRUSTS

England	Russian Federation
Trust interests will often be treated as a resource available to the family (<i>Charman v Charman</i> [2007] EWCA Civ 503).	The common law concept of the trust is alien to Russian law. (Russian law with regard to trusts was examined in <i>Slutsker v Haron Investments Limited</i> [2013] EWCA Civ 430). However trusts are often used by well-to-do Russians as a wealth management and succession tool.



RECENT DEVELOPMENTS REGARDING TRUSTS IN RUSSIA (1)

- New rules on taxation of controlled foreign companies (CFCs): trusts are defined as "foreign non-corporate structure"
- Tax and reporting obligations are imposed on Russian resident "controlling person"
- Control is a key criteria to define whether an entity is CFC. It is defined very broadly as "exerting a determining influence" or "the ability to exert a determining influence" and decisions will be made by Russian court
- Russian UBO's still tend to control trusts/ foundations. If this is the case, UBO (Russian tax resident) is liable for taxes of profits of trusts/possible criminal liability



CLIENTS' RESPONSE TO THE RECENT DEVELOPMENTS IN RUSSIA

- Reporting
- Relocation
- Restructuring
- Doing nothing ("How would they know?")



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COMMON REPORTING STANDARD (CRS) BY OECD

- CRS is a globally co-ordinated approach to the disclosure of income earned by individuals and organizations outside their country of tax residence.
- Under the standard, jurisdictions obtain financial information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis.



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CRS (1)

CRS it is designed with a broad scope across three dimensions:

- 1) The financial information to be reported with respect to reportable accounts includes all types of investment income (including interest, dividends and etc.), but also account balances and sales proceeds from financial assets
- 2) The financial institutions that are required to report under the CRS do not only include banks and custodians but also other financial institutions (including certain trusts with professional corporate



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CRS (2)

3) Individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities

Information will be exchanged on the entity and the controlling persons, settlors, trustees, protectors or any other private individual exercising ultimate effective control. It is likely that information on beneficiaries will only be exchanged if the settlement is non discretionary. Once a beneficiary has received a contribution, his/her information will be exchanged.



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CRS: STATUS OF COMMITMENTS (97 JURISDICTIONS HAVE COMMITTED)

As at 11 December 2015

JURISDICTIONS UNDERTAKING FIRST EXCHANGES BY 2017 (56)

Anguilla, Argentina, Barbados, Belgium, Bermuda, British Virgin Islands, Bulgaria, Cayman Islands, Colombia, Croatia, Curacao, Cyprus, Czech Republic, Denmark, Dominica, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Greenland, Guernsey, Hungary, Iceland, India, Ireland, Isle of Man, Italy, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Mauritius, Mexico, Montserrat, Netherlands, Niue, Norway, Poland, Portugal, Romania, San Marino, Seychelles, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Trinidad and Tobago, Turks and Caicos Islands, United Kingdom



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STATUS OF COMMITMENTS (2)

JURISDICTIONS UNDERTAKING FIRST EXCHANGES BY 2018 (41)

Albania, Andorra, Antigua and Barbuda, Aruba, Australia, Austria, The Bahamas, Belize, Brazil, Brunei Darussalam, Canada, Chile, China, Cook Islands, Costa Rica, Ghana, Grenada, Hong Kong (China), Indonesia, Israel, Japan, Kuwait, Marshall Islands, Macao (China), Malaysia, Monaco, New Zealand, Panama, Qatar, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Singapore, Sint Maarten, Switzerland, Turkey, United Arab Emirates, Uruguay



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TRUSTS AND DISCLOSURE

- PREPARE FOR DISCLOSURE
- Although CFC and CRS rules are mainly tax driven, disclosure of information regarding trusts and other structures would mean that this information will become more accessible in divorce cases



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TRUSTS AND FORUM SHOPPING

- Civil law countries will generally not assume jurisdiction over any offshore trusts or similar structures
- Trusts vulnerable in England whilst largely ignored in Scotland and in many European and CIS jurisdictions
- Careful consideration should be given to jurisdictions where the settlor (often a family office principal) may wish to relocate



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TRUSTS IN SCOTLAND

It has long been held that the Scottish Discretionary Trust may be an extremely secure way of keeping assets safe for future generations and immune from divorce proceedings.



MARITAL AGREEMENTS: EUROPE

Country	Marital agreement*	Foreign marital agreements
France	Permitted. Executed before notary.	Recognised. Hague Convention 1978
Germany	Permitted. Executed before notary.	Recognised, subject to limitations.
England	Radmacher - v - Granatino [2010] UKSC 42. Test by which marital agreements are binding: must be fair, independent representation and disclosure of assets may be considered.	Trend in favor of upholding such agreements (Radmacher v Granatino Test).
Scotland	Permitted.	Recognised.
Austria	Permitted, subject to conditions. Not very common.	Recognised. Hague Convention 1978
Russia	Valid and enforceable. Executed before Notary.	Not recognised.



* Mostly regarding matrimonial property rights
See also Family Law: A Global Guide (3rd Edition 2015, Thomson Reuters)



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