

Learned Friends Family Trusts – An International Perspective

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Introduction

- Why trusts are important
- English asset division on divorce
- Variation of nuptial settlements
- Trust assets as a resource
- Enforcement issues – telescoping
- Obtaining information
- Offshore enforcement issues



The importance of trusts

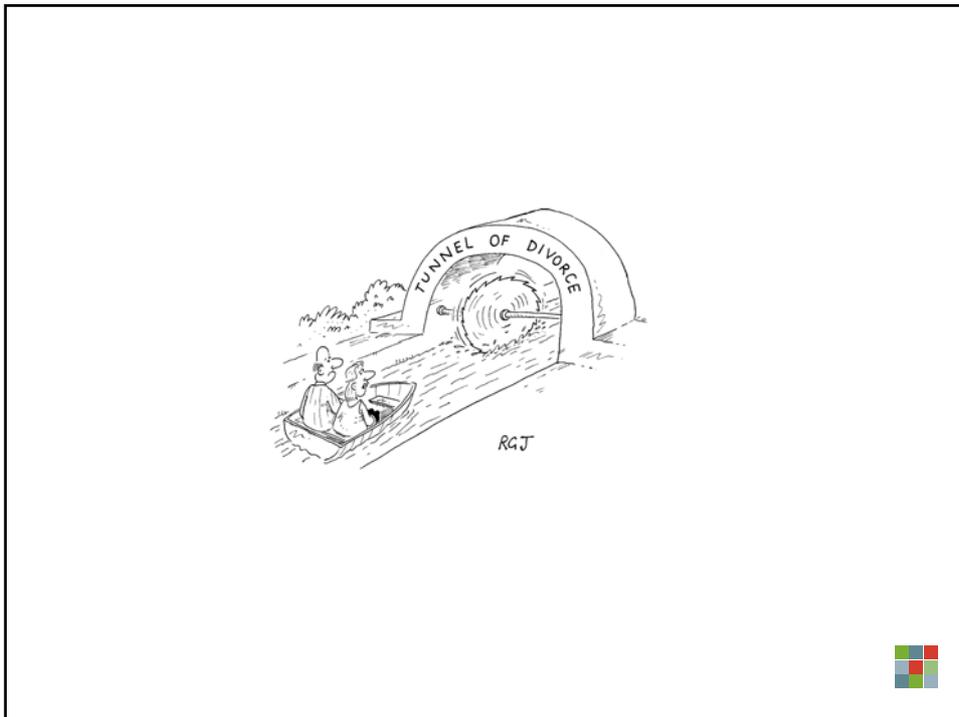
- Control and preservation of wealth
- The non-UK domicile rule
- The excluded property rule, for Inheritance Tax purposes
- London a magnet for the internationally wealthy



White v White revolution (I)

- House of Lords, 2000
- Reasonable requirements out, needs in
- No discrimination
- Provisional award
- “The yardstick of equal division”





White v White revolution (2)

- *Miller and McFarlane 2006*
- Needs, sharing and compensation
- *Charman 2007*
- Special contribution survives
 - Making £30-50m counts as special – but does it still?
- Aggregation of trust and personal assets



Charman - interpretation of White and Miller

- The provisional award and the yardstick
- HL in *Miller* abolished the yardstick and introduced a presumption of sharing so says CA in *Charman*
- Sharing principle applies to all property of any type
- Matrimonial property
 - “the property of the parties generated during the marriage otherwise than by external donation”



“Someday, son, 50% of this will belong to your ex-wife.”





Variation of nuptial settlements (I)

- Nuptial element
 - Continuing provision for H and/or W with reference to married state
- Add/exclude beneficiaries, fire trustees
- Settlor can be third party
- Applies to offshore trusts, trustees and assets
- Order for trustees to pay to non-beneficiary spouse
- Enforceability?



Variation of nuptial settlements (2)

- *D v D and M Ltd 2011* – Isle of Man
 - One trust set up before marriage by H's father - separated into many trusts during marriage, each with underlying companies
 - A “cell” for each family member - W not beneficiary of cell
 - Individual trust and cell held to be nuptial as money generated from the cell funded ‘every facet of family life’
- *Bj v Mj 2011* – Mostyn J
 - Two trusts set up at same time during marriage – H, W and son beneficiaries of first, only grandchildren beneficiaries of second
 - Trust held interests in interlocking companies
 - The two trusts were held a nuptial settlement and so trustees ordered to pay W assets from second trust



Variation of nuptial settlements (3)

- *Hope v Krejci 2012* – Mostyn J
 - Court had the power to “telescope”; to order the transfer to W of English assets held by the trust via an offshore company
 - Power to ‘travel right down the lift-shaft from top floor to basement, without having to stop at any floor in-between
 - No piercing the corporate veil/finding of “impropriety” needed
 - ‘Telescoping’ likely to be wrong now after decision in *Prest*



Variation of nuptial settlements (4)

- *DR v GR and Others* 2013 – Mostyn J
 - Jersey trust owning Liberian company, owning UK companies holding UK retirement villages
 - Clearly a post-nuptial settlement on the facts
 - Held *Prest* not apply to settlement variation powers under s24(1)(c) MCA
 - *Brooks* definition of settlement
 - The companies could be a settlement
 - No requirement to join trustees/underlying companies
 - No impact on enforcement offshore?



Quan v Bray [2015] 2 FLR 546 aka “Chinese Tigers” (I)

Facts

- 11 year marriage – H and W set up Save China’s Tigers UK (SCT UK), a charitable trust
- Also set up a Mauritius trust (CTSAT), with SCT UK as sole beneficiary
- Both worked extensively on charity during marriage. W removed as director of SCT UK on breakdown of marriage
- W sought to argue CTSAT was a nuptial settlement
- Both charities joined as parties



Chinese Tigers (2)

Findings

- SCT UK not taken into account as charitable trust – non-matrimonial
- CTSAT found not to be nuptial – created for benefit of tigers and no one else. Did not later become nuptialised
- Coleridge J set out test for when a trust can become nuptialised –
“if there has been a regular flow of receipts paid from CTSAT to the parties (in their capacity as spousal beneficiaries) for their benefit that could be evidence of a pre-existing intention to benefit them whatever the instrument said on its face. It would evidence an existing disposition and render the trust a post-nuptial settlement”



Chinese Tigers (3)

- Important to note –
- “if all that is established is a vague, unspecified intention at some time in the future, depending on the circumstances then prevailing, to benefit the parties possibly by way of amending the trust deed or in other ways, that is not enough to turn a non-nuptial settlement into a post-nuptial settlement”
- Jurisdiction – Coleridge J – even if was nuptial settlement, would not order variation as enforcement unlikely given Mauritius firewall legislation



Trusts as a resource (1)

- *Charman* still the leading authority
- Key question is whether trustees likely to advance all or part of the trust funds
 - Self-settled trusts vulnerable especially if settled during marriage
 - Power to remove trustees



Trusts as a resource (2)

- *Charman* – 2007
 - 30 year marriage
 - Trust set up in 1987 with marital asset
 - Judge held assets of £131m
 - £68m in Bermudian trust
 - W awarded £48m – 37% because of H's special contribution
 - All £68m in trust held to be a resource
 - Aggregation of trust and personal assets



Trusts as a resource (3)

- *Whaley v Whaley* 2011 – CA
 - H's father set up main trust with separate funds for H and siblings
 - That funded second trust - only H's children were beneficiaries
 - Both trusts were a resource - H likely to be added to second trust
- *G v G* 2012 – Charles J
 - W beneficiary of father's trusts owning property companies
 - Large undistributed profits, dividends rarely declared
 - Held to be a resource, reducing capital and income needed from H



Prest – attacking offshore company onshore assets (1)

- Piercing corporate veil - *Prest v Petrodel* June 2013
- CA overturned orders transferring London properties direct to W which were held by offshore companies, solely owned by H
- Family Court's 'heretical approach ... must cease'
- SC approved Munby P's test in *Ben Hashem v Ali Shayif* 2008 to pierce corporate veil
 - Impropriety required – fraudulent misuse of corporate personality as device to conceal wrongdoing



Prest – attacking offshore company onshore assets (2)

- SC found H intended to be beneficial owner/despite Moylan J finding companies set up for valid tax reasons
- Therefore ordered transfer of properties direct to W
- Still can be a resource available to spouse
- SC approved Munby P's test in *Ben Hashem v Ali Shayif* 2008 to pierce corporate veil
 - Impropriety required – fraudulent misuse of corporate personality as device to conceal wrongdoing



M v M and Barkov – first post *Prest* decision

- H via Cypriot/Nevis companies owned 4 UK properties; others via UK company
- Evidence of solicitors acting on purchase was H wished to save tax
- Neither H nor company directors gave evidence
- Resulting trust not rebutted – H provided purchase funds direct
- King J found H was a maverick, never paid tax or concerned by it and so intended to be beneficial owner of properties
- Lack of clean hands by H ignored



Disclosure in English divorce (1)

- Form E - disclosure of trust interests, including discretionary with estimate of value of interest and when likely to be realisable
- *J v V* 2004
 - “Respondents...are required to be even fuller and franker in the exposure and explanation of their assets than in conventional onshore cases”
 - “These very sophisticated offshore structures are familiar nowadays to the judiciary who have to try them”



Disclosure in English divorce (2)

- Standard request for:-
 - Trust Deed and subsequent Deeds
 - Trust accounts for the last three available years
- Authenticated schedule of capital and income distributions, and loans
- Correspondence/exchanges between settlor and trustee
- Letters of Wishes – *Re Rabaiotti* 2000
- *Schmidt v Rosewood Trust Ltd* 2004
- Letters of Request – *J v Tully* [2016] JRC 110 the latest from Jersey



Practical points – intervening

- The Court's power to join trustees
- *T v T* 1996 Wilson J
 - *"I have to get to the bottom of the reality surrounding this Trust"*
- But Mostyn J in *DR v GR* says no need to join?
- Greater opportunity to put the trustee's case
- Greater expense and powers to order disclosure
- Danger of intervening – variation of settlement more enforceable?



Enforcement offshore

- Any submission to English jurisdiction?
- Impact of comity?
- Firewall legislation and effectiveness
- *Mubarak* Jersey decision; not followed in Cayman?

