

## IMK Trust

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Deputy Bailiff
<b>Judgment Date:</b>	15 August 2008
<b>Neutral Citation:</b>	[2008] JRC 136
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<b>Court:</b>	Royal Court
<b>Date:</b>	15 August 2008

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### Text

[2008] JRC 136

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Le Brocq **and** Liddiard.

In the Matter of the Imk Family Trust

Between  
Aaliya Mubarak  
Representor  
and  
Iqbal Mubarak  
First Respondent  
Salem Mubarak and Noor Mubarak  
Second Respondent

Advocate M. P. Renouf (as guardian ad litem of the minor beneficiaries Osman Mubarak and Hamza Mubarak and representative of the unborn or unascertained beneficiaries)

Third Respondent

The Craven Trust Company Limited

Fourth Respondent

**Advocate C. G. P. Lakeman for the Representor.**

**The First Respondent did not appear and was not represented.**

**The Second Respondents did not appear and were not represented.**

**Advocate M. P. Renouf in person.**

**Advocate J. M. P. Gleeson for the Fourth Respondent.**

## **Authorities**

[Matrimonial Causes Act 1973.](#)

[Re B Trust \[2006\] JRC 185.](#)

[Re the Fountain Trust \[2005\] JLR 359.](#)

[Saunders v Vautier \(1841\) 4 Beav 115.](#)

Trusts (Jersey) Law 1984.

Trusts (Amendment No 4) (Jersey) Law 2006.

Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

Conflict of Laws (14th Edition) Dicey Morris and Collins.

[Lane v Lane \[1985-86\] JLR 48.](#)

[Compass Trustees Limited v McBarnett \[2002\] JLR 321.](#)

[In Re the H Trust \[2006\] JLR 280.](#)

[Re the A Trust \[2006\] JRC 020A.](#)

[In Re B Trust \[2006\] JLR 562.](#)

[Re the H Trust \[2007\] JRC 187.](#)

[In Re the A and B Trusts \[2007\] JRC 138.](#)

[Showlag v Mansour \[1994\] JLR 113.](#)

[Chapman v Chapman](#) [1984] AC 429.

Lewin on Trusts (18th edition).

*Charalambous v Charalambous* [2004] 2 FLR 1093.

*Re the Turino Consolidated Limited Retirement Trust* [2008] JRC 100.

Deputy Bailiff

THE

- 1 This is an application by the representor for an order enforcing or giving effect to an order made on 30th March 2007 by Holman J in the Family Division of the High Court in England. Under that order, Holman J, pursuant to Section 24(1)(c) of the [Matrimonial Causes Act 1973](#) ("the 1973 Act") varied a Jersey trust known as the IMK Family Trust ("the Trust") so as to require the trustees of the Trust to pay to the representor all sums owing to her under an order of Bodey J made in the Family Division on 10th December 1999. By that order Bodey J had, *inter alia*, ordered the first respondent to pay the sum of £4,875,000 to the representor. The Court made certain orders at the conclusion of the hearing and we now give our reasons.
- 2 Although the parties are divorced, we propose for convenience to refer to the representor as the wife and the first respondent as the husband. The second respondents, who are the adult children of the marriage did not appear at the proceedings but they wrote stating that they supported the wife's application. The minor and unborn beneficiaries were represented by Advocate Renouf. The husband has been represented by Advocate Begg who has appeared on his behalf in certain interlocutory hearings. However, Advocate Begg then wrote to the Court to say that he had been dis-instructed by the husband and would not appear at the main hearing. The reason given for this decision related to the fact that, at an interlocutory hearing on 6th February 2008, I had indicated a provisional view that, in the light of a letter dated 25th August 2006 which the husband had written to the trustees pursuant to an order of Bodey J, to which we shall refer in due course, it would not be open to him to oppose the wife's application, although the Court would of course still need to be satisfied that it should make the order requested. The upshot was that the husband elected not to appear and was not represented at the main hearing, although we have considered the material which Advocate Begg had lodged on his behalf prior to the hearing.
- 3 The application requires us to consider the circumstances in which this Court can enforce or give effect to an order of the English Family Division relating to a Jersey trust.

## The Trust

- 4 The husband and the wife were both born and brought up in India. The husband is 49 and the wife is 48. In 1980 the husband moved to Kuwait and set up a jewellery business. The parties married in 1983 and the wife moved to join the husband in Kuwait. In 1986 the husband set up a further business manufacturing and trading in jewellery in Hong Kong and the family moved there. The husband's business expanded and he opened shops in Paris and London. In 1994 the husband caused a holding company, Twenty First Century Holdings Limited ("TFCH") to be incorporated in Bermuda. This owns, directly or indirectly, the shares in the relevant subsidiary companies to which we shall refer shortly.
- 5 In August 1997 the parties moved with their family to live in London. Immediately before the move there was a corporate re-organisation in relation to TFCH. Prior to the re-organisation TFCH had an issued share capital of US\$34,903,500 divided into 34,903,500 common shares of US\$1 each. Of these, 34,344,522 had been issued to the husband and 558,978 to the wife. By resolution dated 5th August 1997 it was agreed that TFCH would re-purchase all of the above shares at par save for 11,000 held by the husband and 1,000 held by the wife. The purchase price remains unpaid with the result that TFCH owes US\$34,333,522 to the husband and US\$557,978 to the wife.
- 6 By deed dated 2nd September 1997, the husband and the wife, as settlors, created the Trust. The trustee was and remains The Craven Trust Company Limited ("the Trustee"). The Trust is a discretionary trust governed by the law of Jersey. The beneficiaries are described in the trust deed as the settlors, their children Salem, Noor and Osman together with any other children or remoter issue of the settlors born thereafter. A fourth child, Hamza has been born since the date of the Trust. Salem and Noor have attained the age of 18 whereas Osman and Hamza are minors.
- 7 Under the terms of the Trust, the husband has the power to add and exclude beneficiaries, to appoint and remove the protector and to appoint new or additional trustees. The protector is the husband's father and he has the power to remove any trustee. A number of the trustees' powers can only be exercised with the prior written consent of the protector.
- 8 On the same day as the Trust was created the husband transferred his 11,000 ordinary shares and the wife transferred her 1,000 ordinary shares in TFCH to the Trustee to hold upon the terms of the Trust. However, they did not transfer the debts owed by TFCH, which accordingly remained owed to each of them personally. The effective result of these transactions was that the value of TFCH (and its underlying assets) as at September 1997 was retained by the husband (and the wife to a limited extent) and only the benefit of any subsequent increase in value would accrue for the benefit of the Trust.
- 9 In March 1998 the husband left the matrimonial home and the parties have not since cohabited. By deed of exclusion dated 20th April 1998, the husband exercised the power given to him by Clause 10 of the Trust by revocably excluding the wife as a beneficiary and declaring her to be an Excluded Person for the purposes of the Trust.

10 . There are two letters of wishes in relation to the Trust. The first is dated 2nd September 1997 and is signed by both the husband and the wife. It provides that the Trustee should consult the husband during his lifetime "on all aspects concerning the Trust [including] matters of administration and also the distribution (or accumulation) of income and capital to either of us". The letter of wishes also provided that following the husband's death, the settlors would like the Trustee to "hold the trust assets equally for the benefit of [the wife] and [their] children". The second letter of wishes was signed by the husband on 8th July 1998 and is described as clarification of the earlier letter of wishes. It provided that the Trustee should regard any reference in the original letter of wishes which had the effect of conferring a benefit on the wife as having been deleted: "In particular, in the event of my death, the trust assets should be held for the benefit of my children and not divided between [the wife] and the children as originally stated....." As we shall see, the wife had instituted divorce proceedings in England in July 1998, which was the same month as the second letter of wishes was written.

### **The assets of the Trust**

- 11 As already stated, the Trust owns a group of companies engaged in the international jewellery business known as the Dianoor Group. The Trust owns all the issued share capital of TFCH, which is the holding company for the Group. The Court has seen a chart setting out the Group structure. TFCH owns 100% of Dianoor Jewels International Limited ("the Jersey company") which is an intermediate holding company. The Jersey company directly or indirectly owns 100% of Dianoor Jewelcraft Limited ("Jewelcraft"), a Hong Kong company, Dianoor International Limited ("International"), also a Hong Kong company, Dianoor Jewels Limited ("the London company") and DN Impex DMCC ("the Dubai company"). TFCH also owns, directly or indirectly, 90% of Verney SARL ("the French company") which runs a jewellery shop in Paris. TFCH also owns 100% of Checkers Limited ("Checkers"), another Hong Kong company. All of the companies are engaged in different aspects of the jewellery business whether in shops, manufacture etc.
- 12 The Trustee has three representatives on the board of TFCH and six on that of the Jersey company. The remaining two directors of both those companies are the husband's brother-in-law Mohammed Wani ("Mr Wani") and Mr Vembu Aiyer ("Mr Aiyer"). Mr Wani and Mr Aiyer are the sole directors of all the operational companies in the Group and the day to day control of the business therefore lies with them.
- 13 As stated earlier, TFCH owes approximately US\$35m, mostly to the husband. TFCH in turn has made loans in a broadly matching total to its various subsidiaries. No consolidated accounts have been prepared but, from the individual accounts of the various companies, the Trustee has prepared a statement of net assets by reference to the 2007 accounts which shows a deficit of £8.3m. However, this is after allowance for the debt of US\$35m (£18.1m). If the debt is treated as a form of equity, there is a net surplus of approximately £10m. The Trustee had undertaken a similar exercise by reference to the 2004 accounts. This showed a net surplus of £819,000. If one again added back the debt (£19.6m. at the

then exchange rates) there was a net surplus of approximately £20.4m.

- 14 A report from KPMG suggests that the group has an unusually high level of stock by comparison with other jewellery businesses from which it is inferred that the husband may be arranging this deliberately so as to keep cash levels low, thereby enabling him to argue that there is no cash with which to meet the award made by the English court to the wife. There are also said to be a substantial number of loans to and from related parties.
- 15 The Trustee has historically been dependent on Messrs Wani and Aiyer facilitating the repayment of loans from the underlying companies in order to provide cash for TFCH and the Trust to meet their costs. At present, the Trustee is significantly out of pocket. It has received no funding since December 2006. As at February 2008, there were outstanding legal fees in the sum of £105,000 and there was also trustee remuneration of some £84,000 owing. These amounts will have increased since then.

### **The divorce proceedings**

- 16 In July 1998 the wife commenced divorce proceedings against the husband in the Family Division in England and was subsequently granted a decree nisi. As long ago as 10<sup>th</sup> November 1999, after a contested hearing, Bodey J ordered the husband to pay the wife a lump sum of £4.875m with periodical payments until payment of the lump sum.
- 17 At the hearing before Bodey J, it was contended by the husband that he had an agreement with Mr Wani the terms of which were that the Dianoor Group was owned as to 45% by Mr Wani. This meant, he claimed, that the amount owed by TFCH was in fact owed as to 45% to Mr Wani. At the hearing before Bodey J in December 1999, the husband and Mr Wani admitted forging a joint venture agreement purporting to show Mr Wani's interest and the judge concluded that this was with a view to conveying the impression to the English court that the husband's assets were considerably smaller than in truth they were. The judge found that Mr Wani did not have any interest in the Group.
- 18 The English proceedings are said to be notorious within the Family Division as being one of the longest running, most bitterly contested and expensive pieces of litigation in recent English divorce law history. There have been numerous hearings before the Family Division and the Court of Appeal. The wife has commenced a variety of proceedings both in England and in Jersey to try and enforce payment of the sum awarded but, so far, with no success. The amount awarded by the English court remains essentially unpaid and has increased greatly because of unpaid periodical payments.
- 19 A flavour of the exceptional nature of the proceedings can perhaps be obtained from the fact that, according to the judgment of Holman J, the husband has incurred costs of some £1,580,000 since the conclusion of the hearing before Bodey J in December 1999 and the wife has incurred costs since that hearing of at least £1,250,000. The total costs for all the

parties are, he said, something in the region of £4.1m.

20 In his judgment Holman J said this at para 2:-

**"This case has now become very well known and continuous litigation of great intensity now spans over seven years.** It has been before at least thirty different judges in England. There are, in the present bundle, no less than twenty transcribed judgments (and there have been others). Five of those judgments are now reported, or about to be reported, in law reports."

21 When the husband sought leave to appeal to the Court of Appeal against the judgment of Holman J, Wall LJ said this at para 2 of his judgment [\[2007\] EWCA Civ 879](#):-

**"2 The case of [Mubarak v Mubarik](#) has, I regret to say, become notorious and in my judgment represents a serious blot on the otherwise carefully written pages of family jurisprudence.** Its level of notoriety is measured by the terms in which Thorpe LJ refused permission to appeal: "..... the applications falls to be considered in the context of over seven years of litigation, rightly described by Holman J as 'Titanic'. The husband is and has been for years in contempt. He cynically incurs and discharges massive litigation bills with, as I infer, the intention of depriving the wife of her entitlement to independent affluence. This court should not encourage or collude in his apparent strategy."

Wall LJ went on to say at para 31 "..... that this is not a case of cannot pay; it is a case of will not pay, and one of the worst of its kind." Finally, having quoted the observations of the Bailiff in [Re B Trust](#) [\[2006\] JRC 185](#) Wall LJ said this at para 36:-

**"In my judgment, for the record, this case falls fair and square into the category of cases identified by Sir Philip; from an English perspective it is about as bad a case as it is possible to imagine.** What the Jersey courts do with it is, of course, a matter for them; but they should be in no doubt that Thorpe LJ's comment, with which this judgment began, undoubtedly reflects the view of the English judiciary."

22 Eventually, in a further attempt to secure payment of the lump sum ordered in 1999, the wife applied to the Family Division in March 2005 seeking:-

That is the matter which came before Holman J in December 2006 and in respect of which he made the order dated 30th March 2007 which the wife seeks to enforce by these proceedings.

(i) to set aside her exclusion as a beneficiary of the Trust by reason of the deed of exclusion dated 20th April 1998;

(ii) to set aside the transfer of the shares in TFCH to the Trust; and



(iii) an order under the [Matrimonial Causes Act 1973](#) varying the terms of the Trust so as to require the Trustee to pay to the wife an amount equal to the amounts owed by the husband to the wife under the orders of the Family Division.

23 However, before then, there was a hearing in March 2006 concerning an application by the wife for an order that the husband be barred from any further participation in the English proceedings under the Hadkinson principle i.e. the principle that where a party is in default of a court order that party should be barred from further participation in the proceedings.

24 On 9th May 2006 Mr Justice Bodey made an order on the Hadkinson application. In summary the order stated that, if the husband wished to participate in the hearing before Holman J, he would have to fulfil a number of pre-conditions, one of which was to write a letter to the Trustee. After an unsatisfactory attempt to comply with this order on 20<sup>th</sup> July 2006, the husband wrote to the Trustee on 25th August 2006 and we think it necessary to quote the essential part of that letter in full:-

*"Dear Sirs*

*IMK Family Trust*

*I refer to my letter to you dated 20 July 2006 relating to the Order made by Mr Justice Bodey on 9 May 2006. I confirm by this letter that I now wish you to disregard it completely and to rely instead solely on the contents of this letter.*

*I write this letter intending its terms to be irrevocable.*

*I wish to inform you of the following matters:*

*(i) that I accept that I am bound, as a matter of English law, by the Court's Orders, awards and findings of 10 December 1999 (save to the extent that these have been subsequently revised) and that I cannot go behind them (including the finding that Mr Wani has no interest in the trust assets);*

*(ii) that I wish you, the Trustees, to assist me in meeting my obligations under the Orders of the Court and wish you not to take any steps having the effect of making it more difficult for me to do so; and*

*(iii) that I accept that (subject to appeal) I will be bound as a matter of English law by whatever Orders the Court may make on my former wife's pending applications in December 2006 and that (again) I wish you, the Trustees, to give effect to those Orders."*

We shall refer to this letter as the August 2006 letter.

25 Having written that letter the husband was then permitted to appear at the hearing before Holman J in December 2006 (which apparently took nine days) through leading and junior counsel. He strenuously opposed the relief sought by the wife. Holman J delivered his



judgment on 12th January, 2007, which was reflected in the order made on 30th March, 2007. He rejected the first two applications referred to at para 22 above but made an order under [the 1973 Act](#) varying the terms of the Trust so as to require the Trustee to pay the wife an amount equal to the balance owing under the lump sum order of Bodey J, any arrears of periodical payments under that order and the balance of any costs still due from the husband to the wife. We shall refer to that order as the Holman order and it is the order which the wife now seeks to enforce.

- 26 The judge made it clear that he did not vary the terms of a Jersey trust lightly. Having referred to observations of Bailhache, Bailiff in [Re the Fountain Trust](#) and [Re the B Trust](#), he said this at para 159:-

***"I have very carefully considered all the submissions of Mr Howard as to discretion, both separately and cumulatively. I bear very firmly and carefully in mind the observations of Sir Philip Bailhache, the Bailiff of Jersey, in his post-script in In the matter of the B Trust. I do appreciate the very rare and exceptional nature of the course I am asked to take, namely, to make a further property adjustment order years after the 'main' order and essentially as a method of enforcement.*** I deeply appreciate that "as a general rule it will be an exorbitant exercise of jurisdiction for this court to purport to vary the terms of a Jersey settlement". But, as Mr Justice Bodey said many years ago, this is, or has become, a wholly exceptional case. It no longer attracts general rules. I do appreciate, and indeed tremble at the thought of the long haul and further litigation that almost certainly lies ahead of the wife. But ultimately it is for her to decide whether she has the stamina to face up to it. If I decline to make the requested order, all her past endeavours will almost certainly be rendered wasted. It is indeed, as Mr Williams said, her 'last throw'."

- 27 It has occasionally been the case in the past that the Family Division has made orders in connection with overseas trusts without much apparent regard to the fact that those trusts were governed by the law of the overseas jurisdiction. However, this is not such a case. A reading of the judgment of Holman J shows that he was very conscious of the fact that the Trust is governed by the law of Jersey and he specifically accepted that, as a general rule, it would be an exorbitant exercise of jurisdiction for the Family Division to vary the terms of a Jersey trust (see para 159 of his judgment). However, he felt that, in the light of the husband's prolonged recalcitrance, he had no alternative but to make the order and this Court can well understand why he came to that conclusion.
- 28 The husband sought to appeal the order of Holman J but leave to appeal was refused on the papers by Thorpe LJ and after an oral hearing by Wall LJ. We have already referred to some of the observations which Wall LJ made in the course of refusing leave.
- 29 The total amount owing under the English order is now said on behalf of the wife to be something in the region of £7.6m, being made up by the original lump sum and unpaid periodical payments together with various costs orders in the English litigation.

- 30 . The financial position of the wife and the children is dire. On many of the applications attempting to enforce the original order, the wife acted in person having exhausted her funds. At other times she has been represented by lawyers who have been prepared to wait for payment until she effects recovery from the husband. She has had to rely on family and friends in order to get by. On 21st August 2006 the adult beneficiaries sent a letter to the Trustee which was produced to Holman J and which he quoted at para 130 in his judgment. In the letter they refer to being " .... *totally dependent on our mother's family and friends for our most basic survival, which is a matter of great shame and humiliation for us*". The husband, on the other hand, appears to live the life of a wealthy individual.
- 31 . It is indeed an astonishing feature of this case that, rather than pay the wife £4.8m, the husband has been willing to incur costs of not less than £1,580,000 (as at the date of the hearing before Holman J) on avoiding compliance with the order.

### **The application**

- 32 Although he concentrated initially on the first ground, Mr Lakeman, following a suggestion put forward by Advocate Renouf and Advocate Gleeson, ultimately put his application on two alternative grounds:-

We shall consider each of these grounds in turn.

(i) He submits that this Court has power to enforce the order of Holman J on the grounds of comity and therefore has power to vary the Trust in accordance with the Holman order.

(ii) Alternatively, for the purposes of the rule in [Saunders v Vautier \(1841\) 4 Beav 115](#), he submits that the Court should treat all the adult beneficiaries as having agreed to a variation of the Trust in the terms contained in the Holman order and the Court should consent to the variation on behalf of the minor and unborn beneficiaries pursuant to Article 47 of the [Trusts \(Jersey\) Law 1984](#) ("the 1984 Law").

#### **(i) Can the Court enforce the judgment of Holman J?**

- 33 Mr Lakeman submitted that this Court has jurisdiction to vary a Jersey trust in order to enforce an order of an overseas court to that effect. He further submitted that this jurisdiction has survived the introduction in October 2006 of Article 9(4) of the 1984 Law by virtue of the [Trusts \(Amendment No 4\) \(Jersey\) Law 2006](#).
- 34 The Trustee was neutral in these proceedings. However, in accordance with counsel's duty to ensure that all material legal arguments are put before the Court, Advocate Gleeson suggested that the Court did not have jurisdiction to vary the Trust (save under Article 47 of

the 1984 Law) and therefore it could not enforce the Holman order unless the matter could be brought within Article 47. We must therefore consider these competing submissions.

35 In this respect we were referred by counsel to three recent articles in the 2007 edition of the Jersey and Guernsey Law Review. The first at page 9 was 'Jersey's new private international law rules for trusts - a retrograde step?' by Professor Jonathan Harris of Birmingham University; the second at page 20 was 'Jersey's new private international law rules for trusts - a response', by Mr Daniel Hochberg, a chancery barrister from Wilberforce Chambers; and the third a response by Professor Harris at page 184 entitled 'Comity overcomes statutory resistance — in the matter of the B Trust'. We would wish to place on record the considerable assistance which we have derived from these three thought provoking and penetrating articles.

### **(a) Enforcement of overseas judgments generally**

36 Under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, a judgment of a superior court in England and Wales may be registered in Jersey (and therefore enforceable as if it were a Jersey judgment) if it is a final and conclusive judgment under which a sum of money is payable and the English court has jurisdiction for the purposes of the statute. A judgment exercising a power under the 1973 Act to vary the terms of a Jersey trust is clearly not a judgment to which the 1960 Law applies. Furthermore, in most cases, the trustee will not have submitted to the jurisdiction of the English court with the result that that court will not have had jurisdiction for the purposes of the 1960 Law.

37 Overseas judgments may also be enforced under customary law. The principles are conveniently set out in Dicey Morris and Collins, the Conflict of Laws (14th edition) at Rule 35. Under that Rule, the overseas judgment may only be enforced if it is for a debt or definite sum of money and the overseas Court had jurisdiction for the purposes of Rule 35 (as set out in Rule 36) over the judgment debtor. Again, it is hard to see how Rule 35 can assist in the case of a judgment varying the terms of a trust. In the first place it is not a judgment for payment of a debt or definite sum of money and secondly, unless the Jersey trustee has submitted to the jurisdiction of the overseas court, that court will almost invariably not have had jurisdiction under Rule 36.

38 Dicey states at para 14-003 that a judgment such as a declaratory judgment is not enforceable at common law because it is not a judgment for a debt or a sum of money. Similarly, it is pointed out at para 14-020:-

***" [The judgment] must order X, the defendant in the English action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, though it may be res judicata".***

It would seem therefore that, under English law, an order of an overseas court varying an English trust would not be capable of enforcement in England.

- 39 If we have correctly understood the position under English law, it may be that Jersey law has gone somewhat further. In *Lane v Lane* [1985-86] JLR 48 the husband and wife were joint owners of a house in Jersey. Subsequently they were divorced in England and reached an agreement on ancillary matters, including that the wife should transfer her interest in the Jersey property to the husband. This agreement was embodied in an order of the Family Division of the High Court. Subsequently the husband died but the Family Division made a declaration that the order concerning the Jersey property remained in force and was enforceable by the plaintiff as heir to the immovable estate of the husband. The plaintiff brought proceedings in Jersey seeking an order that the wife transfer the property to the plaintiff pursuant to the English order. The Royal Court held that, where there was a declaration of a competent English court, properly made, submitted to by the same parties and not appealed, the doctrine of comity enabled the declaration of the English court to be given effect to, provided that it was clear that the defendant had had every opportunity to raise all relevant defences at that hearing. The Court made the order requested by the plaintiff.
- 40 Dicey states at 14-006 that, although it was at one stage thought that the basis of enforcement of overseas judgments was to be found in the doctrine of comity, that theory had later been superseded by the theory of obligation, namely that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in England are bound to enforce. However this is in the context of money judgments which are enforceable under Rule 35. It is not clear that the same principle necessarily applies where a judgment is not enforceable under that Rule but the Royal Court determines to enforce it on the grounds of comity. Although *Lane v Lane* did not address the matter specifically, the language of the judgment is more consistent with the Royal Court having a discretion as to whether to enforce a non monetary judgment than it being a matter of entitlement. However we do not have to resolve that matter for the purposes of the present case. What was clear from *Lane v Lane* however was that the party against whom enforcement was sought in Jersey had to have submitted to the jurisdiction of the overseas court (see the headnote at 49).

#### **(b) Decisions on trusts prior to the enactment of Article 9(4)**

- 41 The first case to which our attention has been drawn where this Court made an order concerning a Jersey trust for the purposes of giving effect to an English order concerning that trust is [Compass Trustees Limited v McBarnett \[2002\] JLR 321](#). In that case the sole asset of the Jersey trust was the matrimonial home in England. The trust was discretionary and the beneficiaries included the husband, his children and any wife of the husband. The English Family Division made an order varying the trust by directing the trustees (who had not submitted to the jurisdiction of the English court) to pay the wife the sum of £200,000. The trustees then sought directions from this Court under what is now Article 51 of the 1984

Law. The complication was that, after the decision of the Family Division but before the matter came before this Court, a decree absolute was granted with the result that the wife was no longer a beneficiary of the trust. The wife argued that under a combination of the doctrine of comity and the powers under Article 51, the Court should direct the trustees to make the payment of £200,000. That was opposed by the advocate appearing for the minor children and his submissions were summarised in para 18 of the judgment as follows:-

**" 18. Advocate Renouf, appearing for various minor children, raised an interesting and potentially fatal objection to the application. In an application under Art [51], the court is standing in the shoes of the trustees. Therefore, although the trustees could make a payment to a beneficiary, Mrs McBarnett is not a beneficiary and is excluded, being a former wife as a result of obtaining the decree absolute. Had she been a beneficiary, there was little doubt but that the court would have made the order sought. The problem now is that neither the trustees nor the court have the power to make such an order. In other words, the court cannot do what the trustees cannot do....."**

- 42 The Court acknowledged the force of this argument. However it sought to circumvent the problem by saying that it should consider the position as it stood on the date that the Family Division made its order (when she was still a beneficiary). It held that, had the matter been before the Court at that time, a combination of Article 51(1) and the doctrine of comity would have resulted in the Court making the order sought. It went on to say that the mere obtaining of the decree absolute after that date was not sufficient to disqualify the wife. It has to be said, however, that the reasoning which enabled the Court to come to this latter conclusion does not appear from the judgment. The Court does not appear to have noted that in *Lane* the party against whom enforcement was sought had submitted to the English jurisdiction whereas, in the [Compass](#) case itself, the trustees had not so submitted.
- 43 In [In Re Fountain Trust \[2005\] JLR 359](#) the Family Division of the English High Court found that the husband, Mr Minwalla, had concealed his assets, ignored his obligations under various court orders and was determined that his wife should receive nothing. The husband had established a trust in Jersey known as the Fountain Trust but the Family Division held that that trust was a sham and that the assets were accordingly held for the husband. The Court then ordered that some £4m. should be paid to the wife. Subsequently, the trustees of the Fountain trust applied for directions from this Court as to how they should respond to the English judgment.
- 44 The important aspect of the case for our purposes is that the trustees had submitted to the jurisdiction of the English court. This Court held that, despite the fact that the English court had wrongly applied English law in determining whether the trust was a sham, the fact that the trustees had submitted to the jurisdiction of English court meant that, as a matter of comity, the Court would as a matter of discretion give substantial (although not complete) effect to the English judgment. It is important to note that this was not an order for variation of the trust and consideration of the Court's powers under Article 51 did not arise. It was



simply a question of enforcement of a declaratory judgment as to the validity of the trust in circumstances where the relevant parties had submitted to the English jurisdiction. In that sense the case was in many respects similar to *Lane v Lane*, save that that case had involved an order that the wife convey immovable property in Jersey rather than a declaratory judgment as to the validity of a trust.

- 45 In [In Re the H Trust \[2006\] JLR 280](#), the trustees of a Jersey trust sought directions from this Court as to whether they should submit to the jurisdiction of the English Family Division in divorce proceedings between the husband and wife, both of whom were beneficiaries of the trust. The Court directed that the trustees should not submit and, in passing, made the following observations:-

**" 12. Significant consequences may flow from a decision by a trustee of a Jersey trust to submit to the jurisdiction of the Family Division of the High Court or indeed any other court considering the matrimonial affairs of beneficiaries of a trust. Any order subsequently made by the Family Division would be made in proceedings to which the trustee had voluntarily submitted and in which therefore it had full opportunity to put forward submissions on the order which the court should make. It follows that the trustee would be in some difficulty in arguing subsequently before this court against the proposition that any order of the Family Division relating to the trust should be enforced without reconsideration of the merits of such order.**

**13. Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this court would have complete discretion as to the course it should take .**

.....

**16. The observations which we have made do not lead to the conclusion that this court will ignore a decision of the Family Division or other overseas court. Far from it. That court will have investigated the matter very fully and will have made a decision intended to achieve a fair allocation as between the spouses. In such cases, the interests of comity as well as the interests of the beneficiaries will often point strongly in favour of this court making an order which achieves the result contemplated by the order of the Family Division. Indeed, this court has made such orders in the past and will no doubt do so again in the future. But the significant factor, from the point of view of whether the trustee should submit to the jurisdiction of the overseas court, is that it will remain a matter of discretion for this court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without**

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***reconsideration of the merits....."***

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Although these observations have been referred to in a number of other cases, it is worth noting that they were entirely obiter in that no order had been made in the English matrimonial proceedings at the date of the judgment and there was accordingly no application for enforcement of any English order. Furthermore the Court was careful to refer to this Court making an order which achieves the result contemplated by the English order, rather than to 'enforcement' of the English order.

- 46 The next case is [Re the A Trust \[2006\] JRC 020A](#), 6th February 2006. This again involved acrimonious matrimonial litigation in the Family Division where the judge had found that the husband and his family were determined to do all they could to ensure that the wife did not receive anything upon her divorce. There was a Jersey trust which had originally been a discretionary trust of which the husband, the wife and the children were beneficiaries but the trustees had sometime earlier exercised a power of appointment pursuant to the trust deed whereby the trust fund was held upon trust to pay the income to the wife during her life with power to advance her capital; subject thereto to pay the income to the husband for his life with a like power to advance capital; and subject thereto upon discretionary trusts for the children of the husband and the wife. The trust owned the matrimonial home in England in which the wife and children still lived.
- 47 The Family Division made an order under [the 1973 Act](#) varying the trust by extinguishing the husband's interest under the trusts constituted by the deed of appointment and ordering the husband to transfer to the wife the benefit of a loan to the trust. The trustees had not submitted to the jurisdiction of the English Court.
- 48 The husband did not appear in the Jersey proceedings. There appears therefore to have been no adversarial argument. The Court simply recorded at paragraph 12 of its short judgment that it had jurisdiction to vary the terms of a trust in order to give effect to a foreign judgment in the interests of the comity. It cited *Lane v Lane*, the [Compass Trustees](#) case and the [Fountain Trust](#) case as authority for this proposition. It emphasised that, where the trustee had not submitted, it was a matter of discretion for this Court as to whether the interests of justice and comity led the Court to give effect to the foreign court's order or not. The Court added that it would prefer not to talk in terms of enforcing the foreign judgment. A foreign judgment could have no effect as such in Jersey or under Jersey law. The Court considered it was more a question of the Court making such orders as it might think appropriate to enable the decision made by the foreign court to be given effect to in Jersey if this Court so determined. The Court then ordered the trustee to execute a deed of exclusion declaring the husband to be an excluded person and secondly it varied the trust by deleting certain clauses of the deed of appointment which had the effect of deleting the life interest of the husband and the ability to advance capital to him. Thirdly the Court ordered the husband to assign the benefit of his loan account to the wife and ordered that if this was not done by a certain date the Judicial Greffier should execute the same on his behalf pursuant to Article 52 of the 1984 Law. Whilst it appears that the first of these orders may well have been something which the trustee was entitled to do pursuant to the terms of



the trust deed, it would seem that the second order was something which the trustee did not have power to do under the trust deed.

### **(c) Decisions on trusts since the enactment of Article 9(4)**

49 The relevant provisions of Article 9 of the 1984 Law, as amended in October 2006, provide as follows:-

" 9

**(1) Subject to paragraph (3), any question concerning -**

**(a) the validity or interpretation of a trust;**

**(b) the validity or effect of any transfer or any other disposition of property to a trust;**

**(c) the capacity of a settlor;**

**(d) the administration of a trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal; or**

**(e) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment and the validity of any exercise of such powers, shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question .**

**(2) .....**

**(3) The law in Jersey relating to -**

**(a) legitime; and**

**(b) conflicts of law ,**

**shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey .**

**(4) No foreign judgment in respect to a trust shall be enforceable to the extent that it is inconsistent with this Article irrespective of any applicable law relating to conflicts of law .**

**....."**

50 Coincidentally, the day after the amended Article 9 came into force, the case of [In Re B Trust \[2006\] JLR 562](#) came before the Royal Court. The beneficiaries of the Jersey

trust in that case consisted of two branches of the B family, namely those of the husband and his brother. The trust was a discretionary trust and the wife was a beneficiary. In the divorce proceedings in England the Family Division made an order varying the trust by directing that the sum of £1.5m. be appointed into a sub trust in which the wife would have a life interest with power to advance her capital. The trustees submitted to the jurisdiction of the English court and subsequently sought directions from this Court as to whether effect should be given to the English order.

- 51 It was submitted on behalf of the husband and other adult beneficiaries that the Court could not make an order giving effect to the English order because to do so would be contrary to Article 9(4). In particular, it was submitted that Article 9(4) had removed the jurisdiction to enforce a foreign judgment on the basis of comity. Bailhache, Bailiff, rejected this submission. Although in certain passages the Bailiff referred to 'enforcement' on the grounds of comity, a close reading of the judgment makes it clear that what the Court had in mind was the exercise of its jurisdiction under Article 51 of the 1984 Law to give directions to a trustee and that in doing so it could, in the interests of comity, give substantial effect to the English judgment. It made directions which gave effect to most of the English order but not all of it. An important aspect of the case was that the variation (namely the appointment of a sub-trust in favour of the wife) was something which the trustees had power to do under the trust deed.
- 52 The case of [Re the H Trust](#) (referred to at para 45 above) returned to this Court following the decision of the English Family Division and appears in the unreported series at [\[2007\] JRC 187](#). All the assets available for the maintenance of the husband and wife in that case were contained in the Jersey trust; indeed there was not enough to maintain them at the rate to which they had become accustomed. The husband and the wife were beneficiaries together with the children of the husband.
- 53 The trustee had not submitted to the jurisdiction of the Family Division. It would seem from the judgment of this Court that the English court had not made an order varying the trust. It had made orders against the husband directing him to procure the transfer by the trustee of certain trust assets to the wife, with the remainder of the trust fund then being made available solely for the husband.
- 54 The trustee did not agree with the decision of the English court and put forward an alternative proposal to the husband and the wife but this was rejected by the wife. The trustee then decided, in what was described in the judgment as the second decision, to defer making any further decision until it had proceeded with a claim to enfranchise the lease of one of the properties owned by the trust. The wife objected to that course and it appears to have rendered her almost destitute through lack of funds. She then sought an order from this Court directing the trustee to exercise its powers so as to give effect to the English order.
- 55 In a judgment delivered by Clyde-Smith, Commissioner, this Court decided as follows:-

As in [Re B Trust](#), the action which the trustee was directed to take fell within the powers conferred by the trust deed.

- (i) [Re B Trust](#) had decided that Article 9 had no bearing upon the exercise by the Court of its jurisdiction under Article 51;
- (ii) the Court agreed with that decision and held that the only issue for the Court was whether and to what extent the trustee should be directed to exercise its powers under the H Trust in such a way as to give effect to the English order;
- (iii) the second decision of the trustee was unreasonable; and
- (iv) the Court considered that it was in the interests of the beneficiaries to direct the trustee to exercise its powers so as to give substantial (but not complete) effect to the English order.

56 The final case to which we were referred is that of [In Re the A and B Trusts \[2007\] JRC 138](#). We do not think it takes the matter any further but we will mention it briefly. In that case the trustees of the Jersey trust had submitted to the jurisdiction of the Family Division which was hearing divorce proceedings between the husband and the wife. The Family Division made an order giving 'judicious encouragement' to the trustee to exercise its powers under the trust deed so as to fund the ongoing legal costs of the husband and the wife in the divorce proceedings as well as certain maintenance payable by the husband to the wife. Having received this judicious encouragement, the trustee had determined that it was unable to assist to the extent envisaged by the Family Division because the trust assets were much less than that court had been led to believe; but the trustee had determined to exercise its powers to give assistance to the extent that it was able to do so. It sought the approval of that decision by this Court. The Court gave directions under Article 51 approving the trustee's decision.

#### **(d) Discussion**

57 Before turning to a discussion of the issues, we think it would be helpful to differentiate between two different senses in which the word 'vary' or 'variation' is used, particularly in the context of orders made by the English Family Division under [the 1973 Act](#), which permits the variation of certain settlements.

58 In the first sense, the 'variation' alters the terms of the trust deed itself. In other words it authorises or requires the doing of something by the trustees which is outside the powers conferred upon them by the trust deed. An example of this would be an order that part of the trust fund be held upon trust for a person who is not a beneficiary and who is not capable of being added as a beneficiary under any power to add contained in the trust deed.

- 59 The second type of 'variation' is where the existing trusts upon which the trust property (or some of it) is held are varied, but in a way that the trustees themselves could have done by exercising a power in the trust deed. A simple example of this would be where the wife is a beneficiary of a discretionary trust with the usual powers of appointment and the English court 'varies' the trust under [the 1973 Act](#) by directing that £1m. is held on trust for the wife absolutely rather than continue to be held upon the general discretionary trusts. Although it is true that this 'varies' the trusts upon which the £1m. is held, it is nevertheless something which the trustees could have achieved themselves by exercising the relevant power of appointment in favour of the wife. The 'variation' does not therefore involve a departure from the trust deed or the authorising or directing of the trustees to act in a manner which is at variance with the trust deed.
- 60 For the purpose of distinguishing between these two different meanings of 'variation', we would propose for the purposes of this judgment to use the word 'alter' or 'alteration' to cover the first situation i.e. where the 'variation' involves a departure from the trust deed.
- 61 We also think it would be helpful to explain what we understand by 'enforcement' in the context of a foreign judgment. As referred to at paragraph 40 above, the basis of the enforcement of overseas judgments is now generally thought to be found in the theory of obligation, namely that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment was given, which the courts in the enforcing jurisdiction are bound to enforce. Although given in the slightly different context of the doctrine of *res judicata*, the comments of Lord Keith of Kinkell on behalf of the Privy Council in [Showlag v Mansour \[1994\] JLR 113](#) at 118 are relevant:-
- "It is common ground between the parties that the doctrine of res judicata forms part of the law of Jersey and that it applies to foreign judgments. In Owens Bank Limited v Bracco Lord Bridge of Harwich said ([1992] A.C. at 484): "a foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the defendant will not be permitted to re-open issues of either fact or law which have been decided against him by the foreign court."***
- That statement holds good in Jersey as it does in England. ...."***
- 62 We consider that 'enforcement' of a foreign judgment means the situation where the judgment creditor comes to this Court and requests that this Court give effect to the judgment in Jersey, either by registration (in the case of judgments covered by the 1960 Law) or by giving a judgment in identical form to the foreign judgment without reconsidering the merits, which can then be enforced against the debtor here in Jersey in the same way as any other Jersey judgment.

63 We turn next to consider what powers the Court has to alter (in the sense described earlier) a trust.

64 Like the English Chancery Division, the Court has an inherent supervisory jurisdiction in connection with trusts. The 1984 Law is not a codification of the trust law of Jersey but the general nature of the supervisory jurisdiction of the Court finds convenient expression in Article 51 of the 1984 Law which provides as follows:-

***" (1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit.***

***(2) The court may, if it thinks fit —***

***(a) make an order concerning -***

***(i) the execution or the administration of any trust ,***

***(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise ,***

***(iii) a beneficiary or any person having a connection with the trust, or***

***(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;***

***(b) make a declaration as to the validity or the enforceability of the trust;***

***(c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration .***

***(3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with the leave of the court, by any other person .***

***(4) ..... .***

***(5) .....".***

65 In our judgment the Court has no general jurisdiction to alter the terms of a trust under Article 51 or its general supervisory jurisdiction. We would summarise our reasons for so holding as follows:-

- (i) Subject to certain minor historical exceptions, this is the position in relation to the equivalent supervisory jurisdiction of the English Chancery Division. That court has no general power to alter a trust. See [Chapman v Chapman](#) [1984] AC 429; and [Lewin on Trusts](#) (18th edition) para 45-11.
- (ii) The wording of Article 51 does not suggest any power to alter the terms of a trust; on the contrary paragraph (1) refers to directions concerning the manner in which the trustee should act in connection with the trust (which suggests that it is concerned with the manner of exercise of powers conferred on the trustee under the trust deed) and paragraph (2), although dealing with a number of things which the court may do, makes no reference to variation or alteration.
- (iii) Article 47(1) of the 1984 Law confers an express power on the Court to approve an alteration of a trust on behalf of minor, unascertained and unborn beneficiaries in circumstances where all the adult beneficiaries agree to the alteration. Article 47(3) establishes an express power on the Court to confer an administrative power upon the trustee in circumstances where such power is lacking in the trust deed. If Article 51 or the general supervisory jurisdiction of the Court enabled it to alter the terms of a trust generally, there would be no need for these two provisions of Article 47.
- (iv) There is no reason in principle for the Court to assume such a power. A settlor determines the provisions of a trust when he establishes it. He is entitled to insert such provisions as he thinks fit provided they are lawful. It is his decision as to how and in what manner he chooses to benefit the beneficiaries and what powers he chooses to give the trustees in relation to the beneficiaries. Why should the Court assume a power to override the expressed intentions of the settlor when it is the settlor who is contributing his assets to the trust for the benefit of the beneficiaries. It seems to us that the position is not far removed from the situation under the law of contract. A court has no power to re-write a contract entered into by the contracting parties simply because it thinks it would be beneficial to do so; parties are entitled to expect that the Court will uphold and enforce the very bargain which they have entered into. Similarly, a settlor is entitled to expect that the Court will uphold and enforce the provisions of the trust which he has established. The need to look after the interests of beneficiaries as part of its general supervisory jurisdiction does not require the Court to have the ability to re-write the dispositive terms of a trust.
- (v) It is true that Article 59(2)(b) provides that nothing in the 1984 Law should derogate from the powers of the Court which exist independently of that Law to vary a trust. However, the provision is silent as to any such power which might exist. The provision would, for example, ensure that the 1984 Law did not derogate from the power of the Court to alter the terms of a marriage settlement or post-nuptial settlement conferred by Article 27 of the Matrimonial Causes (Jersey) Law 1949 following a decree of divorce or nullity granted by this Court.

66 How does this relate to the enforcement of an order of the English Family Division altering the terms of a Jersey trust? The only two cases prior to the enactment of Article 9(4) of the 1984 Law where the Court appears to have made an order in support of an English order



altering the terms of a Jersey trust pursuant to [the 1973 Act](#) are the [Compass Trustees](#) case and the [Re A Trust](#) case. In the former case, the order originally made by the Family Division was a variation (in the sense that we have used it) of the trust, in that the order was for a payment out of the trust to the wife who was a beneficiary. However, by the time the matter came before this Court, the wife was no longer a beneficiary. The order being applied for was therefore an alteration to the trust. In the latter case, the English order appears to have involved an alteration of the trust.

67 Significantly, in neither case had the trustees submitted to the jurisdiction of the English court. As we have seen, the enforcement of a foreign judgment is based upon the foreign court having had jurisdiction (for the purposes of enforcement of that judgment overseas) over the person against whom enforcement is now sought in Jersey. The position in relation to an order varying a trust is somewhat more complicated than a conventional civil action between A and B. In the latter case, it is merely a question of whether A and/or B has submitted to the jurisdiction of the English Court. In the case of the variation or alteration of a trust, those affected are likely to include all the beneficiaries as well as the trustee. The effect of any variation order is not usually confined to the husband and wife. Other beneficiaries may be affected. Furthermore the trustee has legal title to the trust fund and is responsible for holding the trust assets in accordance with the terms of the trust deed. Quite apart from other beneficiaries, a trustee is clearly someone who will be substantially affected by an order of an English court altering a trust. Accordingly, unless a trustee of a Jersey trust has submitted to the jurisdiction of the Family Division, it is very hard to see how any judgment of the Family Division varying or altering a Jersey trust can be enforced in Jersey under the ordinary rules of private international law because the Family Division will not have had jurisdiction over the trustee for the purposes of the enforcement of foreign judgments in accordance with Rule 36 of Dicey.

68 As we have just indicated, this Court does not have any inherent jurisdiction to alter a Jersey trust. Whilst one can at any rate see an argument that, where the trustee has submitted to the English jurisdiction, a judgment altering a Jersey trust is capable of being enforced in Jersey even though this Court would not have jurisdiction to make such an order itself, it seems highly doubtful that, where the trustee has not submitted to the jurisdiction of the English court and is therefore not bound by any such order, this Court can somehow find jurisdiction to alter the terms of the trust simply because the English court, exercising a power conferred by an English statute, has such a power. Given that the trustees in those two cases did not submit to the English court and given that the order in each case amounted to an alteration of the trust, we would therefore question whether [Compass Trustees](#) and [Re A Trust](#) (in the latter of which I have to admit to having been the presiding judge) were correctly decided.

69 But whatever may have been the position when these two cases were decided, this Court now has to consider the position in the light of Article 9(4) of the 1984 Law which we set out at para 49 above.

70 Professor Harris raised an interesting argument on page 12 of the first of his articles



referred to earlier to the effect that, because Article 9(1) is itself a conflict of laws rule, the effect of Article 9(3)(b) is to confine Article 9(1) to cases where the settlor is domiciled in Jersey. We agree that the relationship between these two provisions is not as clear as it might be and that a literal construction might lead to the conclusion postulated by Professor Harris. However, we agree with Hochberg that such a construction would lead to an absurd result which was manifestly not the intention of the legislature. We adopt a purposive construction so as to read Article 9(3)(b) as being subject to the implied qualification that it does not apply to the provisions of Article 9(1) itself. Accordingly Article 9(1) applies to cases where the settlor is domiciled outside Jersey.

- 71 So what is the effect of Article 9(4) in connection with the enforcement of an order of the English Family Division varying or altering the provisions of a Jersey trust pursuant to [the 1973 Act](#)? It is clear from *Charalambous v Charalambous* [2004] 2 FLR 1093 that the Family Division is applying English law when it varies or alters a foreign trust pursuant to the powers conferred on it by [the 1973 Act](#). However, Article 9(1) of the 1984 Law provides that questions of variation of a Jersey trust shall be determined solely in accordance with the law of Jersey. It follows that a judgment of the Family Division varying a Jersey trust under English law is 'inconsistent' with Article 9(1) and is accordingly not enforceable in Jersey by reason of Article 9(4).
- 72 Does this mean that there are no circumstances in which the objectives of an order of the Family Division varying or altering a Jersey trust can be given effect under the law of Jersey? In our judgment it does not. We agree with Bailhache Bailiff in [Re B Trust](#) and Clyde-Smith Commissioner in [Re H Trust](#) that the giving of directions under Article 51 does not amount to enforcement of the overseas judgment in question for the purposes of Article 9(4). Why do we say that?
- 73 Let us take a simple example. Suppose that, in the case of a conventional discretionary Jersey trust where the beneficiaries include the husband, the wife and their children, the English court varies the Jersey trust under [the 1973 Act](#) by ordering that the sum of £1m. be paid to the wife out of the trust. This is something which the trustee could do under the powers conferred upon it under the trust deed. The trustee would not necessarily have to seek directions from the Jersey court. It would be open to the trustee to take note of the English judgment, to consider the desirability of bringing any financial dispute between the husband and wife to an end and to reach the view that it was in the best interests of all the beneficiaries (including the children) for a capital distribution of £1m. to be paid to the wife so that everyone could get on with their lives. This would not amount to 'enforcement' of the English judgment. It would be a conventional case of a trustee taking account of all the relevant circumstances (including in this case the existence of an English judgment) and deciding how to exercise its dispositive powers under the trust deed in the best interests of the beneficiaries.
- 74 Although a Jersey trustee might in such circumstances be content to exercise its powers without recourse to this Court, it might wish to seek the approval of this Court to its decision.

In those circumstances, this Court would no more be enforcing the English judgment than the trustee itself. The Court would simply be fulfilling its usual function of considering the exercise by a trustee of its discretionary powers and deciding whether those powers were being exercised reasonably. Alternatively, the trustee might surrender its discretion to the Court; in that event the Court would stand in place of the trustee and consider how the powers under the trust deed should be exercised in the interests of the beneficiaries taking account of all relevant circumstances, including the existence of the English judgment. Alternatively, the Court might be asked to exercise its power to give directions under Article 51 on the basis that a decision of the trustee to exercise its powers in such a way as to give effect or not give effect (as the case may be) to the English judgment was unreasonable. In all of these cases there would be no question of any 'enforcement' of the English judgment for the purposes of Article 9(4). All that the Court would be doing is exercising its supervisory jurisdiction on conventional grounds.

75 However, as described above, the inherent supervisory jurisdiction of the Court does not authorise the Court to depart from the terms of the trust deed. It follows that if the order of the English Family Division alters the trust (in the sense described earlier), there will be no ability under Jersey law for the trustee to exercise its powers so as to give effect to that alteration, nor will this Court have jurisdiction under Article 51 to direct the trustee to act in accordance with the English judgment. Our conclusion on this aspect is entirely consistent with the three decisions of this Court since the enactment of Article 9(4). In each of [Re B Trust](#), [Re H Trust \(No 2\)](#) and [Re A and B Trusts](#), the actions which the Court directed the trustee to take were matters which fell within the powers conferred on the trustee by the relevant trust deed. To use the terminology we have described earlier, they were variations, not alterations.

76 In summary:-

(i) By reason of Article 9(4) of the 1984 Law, this Court cannot enforce a judgment of the Family Division varying or altering a Jersey trust under [the 1973 Act](#) even where the trustees have submitted to the jurisdiction of the Family Division. Whether that is an appropriate outcome is not for us to comment. It is the effect of the introduction of Article 9(4).

(ii) Where the variation ordered by the Family Division does not amount to an alteration (in the sense that we have described above), this Court may give directions under Article 51 of the 1984 Law which have the effect of achieving the objectives of the English judgment. Whether this Court will do so in a particular case is a matter of discretion having regard to the interests of the beneficiaries.

(iii) Where the variation ordered by the Family Division does amount to an alteration, there is no jurisdiction in this Court to give directions under Article 51 which authorise or direct the trustees to act in a manner which is outside the powers conferred on them by the trust deed.

77 We should add a qualification to the above conclusion. As the hearing progressed, it became clear that Mr Lakeman faced considerable difficulties in relation to his primary submission and the emphasis of the hearing switched to consideration of the position under Article 47. When the Court indicated at one stage that it would nevertheless propose to deal fully with the first ground, Advocate Renouf indicated that there were certain points he would like to make in relation to the first ground; in particular he thought there were important arguments concerning the Hague Convention on the Recognition of Trusts of which the Court should be aware before coming to a final conclusion. It is right to acknowledge that we indicated a willingness simply to record in the judgment the competing arguments on the first ground and the case proceeded on the second ground without Mr Renouf making his oral submissions on the first ground (although he had of course filed a skeleton argument).

78 When the time came to draft the judgment, we considered that this was an unsatisfactory way of proceeding and we ought to offer what assistance we could to the Island's jurisprudence in relation to the first ground, which we know is a matter of considerable practical interest to practitioners and where there is some uncertainty as to the present position. Accordingly we have dealt fully with the topic. However we do place on record that these conclusions have been reached without the benefit of Mr Renouf's oral submissions and, in particular, we heard no argument on the Hague Convention. That is therefore a matter to be taken into account when deciding what weight to place upon this judgment in any future case, particularly where arguments on the Hague Convention are raised.

79 We would add one further possible qualification although we emphasise that we reach no conclusion on this. It may be that, in some cases, the assets of a trust are within the jurisdiction of the overseas court in question with the result that that court can enforce its order against the trust assets without the need for intervention by this Court. The trustee may nevertheless seek the comfort of an order from this Court that it may properly comply with an order of the overseas court notwithstanding that that would be inconsistent with the terms of the trust deed. In those exceptional circumstances, it may be that this Court would have no alternative but to give the trustee some comfort. As the Court said at paragraph 49(iii) of its judgment in *Re the Turino Consolidated Limited Retirement Trust* [\[2008\] JRC 100](#):-

**" A trustee should not be criticised for bowing to the inevitable by complying with an order of the court in whose jurisdiction the real property in question is situated."**

However, this is a point for decision as and when it arises.

80 We turn finally to apply these principles to the facts of this case. Until 20th April 1998, the wife was a beneficiary of the Trust. However, Clause 10(a) of the trust deed contains a power for the husband to declare that a person who is a beneficiary shall cease to be a beneficiary or shall become an Excluded Person. By virtue of Clause 23 of the trust deed, no Excluded Person is capable of taking any benefit of any kind under the Trust. On 20th April 1998 the husband exercised the power conferred upon him under Clause 10(a)

revocably to declare that from that date the wife was an Excluded Person. Although Clause 9 confers a power to add beneficiaries, that power is vested in the husband during his life and in any event cannot be exercised in favour of an Excluded Person. It follows that the Holman order (which directed that various sums be paid out of the Trust to the wife) amounts to an alteration of the Trust in the sense that, unless or until the husband revokes his deed of exclusion, it is not something which the Trustee has power to do under the trust deed. For the reasons given earlier, this means that it is not something which this Court has jurisdiction to direct the Trustee to do. Accordingly, however much we might wish to assist in a case where the husband's behaviour has been as unmeritorious as it has in this case, this Court cannot enforce the Holman order, nor can it direct the Trustee under Article 51 to comply with it.

## **(ii) Article 47**

81 Mr Lakeman's alternative ground is based upon Article 47 of the 1984 Law, the relevant parts of which read as follows:-

***" (1) Subject to paragraph (2), the court may, if it thinks fit, by order approve on behalf of -***

***(1) a minor or interdict having, directly or indirectly, an interest, whether vested or contingent, under the trust;***

***(2) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;***

***(3) any person unborn; or***

***(4) any person in respect of any interest of his or hers that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined ,***

***any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the terms of the trust or enlarging the powers of the trustee of managing or administering any of the trust property .***

***(2) The court shall not approve an arrangement on behalf of any person coming within paragraph (1)(a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person .***

***(3) .....***

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***(4) An application to the court under this Article may be made by any person referred to in Article 51(3)."***

- 82 Article 51(3) refers to an application being made by the Attorney General or by the trustee or a beneficiary or, with the leave of the Court, any other person. This application is brought by the wife who is not currently a beneficiary. However we give leave to her to bring the application.
- 83 The adult beneficiaries of the Trust presently comprise the husband and the two children Salem and Noor. Salem and Noor have consented to the alteration contained in the Holman order. We therefore need to consider two questions;
- (i) Should the husband be treated as having consented to alteration?
  - (ii) If so, should the Court agree to the alteration contained in the Holman order on behalf of the minor and unborn beneficiaries?
- 84 In order to consider the husband's position, we must remind ourselves of the circumstances in which the August 2006 letter (set out at para 24 above) came to be written. As already mentioned, the husband was ordered to pay the wife a lump sum of £4.8m as long ago as 1999. Despite consistent efforts by the wife, she has been unsuccessful in recovering more than about £260,000. Eventually, in a further attempt to secure payment of what the Family Division had ordered, she applied for the relief described at para 22 above including an order varying the Trust under [the 1973 Act](#). This was the matter which came before Holman J in December 2006 and in respect of which he made his order on 30th March 2007.
- 85 The question arose as to whether the husband should be permitted to participate in the hearing before Holman J given his failure to comply with the order for payment of the lump sum. That matter came before Bodey J in May 2006 and we have read his judgment. The husband was represented by leading and junior counsel and the matter was fully and strongly argued. Bodey J found the husband to be in contempt of court and held, in accordance with the Hadkinson principle, that the husband should not be permitted to participate in the hearing before Holman J unless he took certain steps. Those steps included writing to the Trustee in the terms of the August 2006 letter. The husband's appeal against the decision of Bodey J was dismissed.
- 86 The husband had a choice at that stage. He could refuse to write the letter, in which event he would not be able to participate in the hearing before Holman J. Alternatively, he could write the letter, in which event he would be able to participate. It was a matter entirely for him. He chose the latter course. He wrote the letter. He therefore obtained the advantage of appearing before Holman J and he did this by leading and junior counsel who argued strongly against the wife's application. It is of interest that the hearing before Holman J apparently took 9 days.

- 87 The terms of the August 2006 letter are clear. The husband confirms that he is bound by the Holman order and wishes the Trustee to give effect to it i.e. he wishes effect to be given to the alteration to the Trust made by Holman J. Is he now to be allowed to renege on that letter? We do not think so. The husband chose to write the letter and to participate in the hearing before Holman J. The whole purpose of the Hadkinson order made by Bodey J was to require the husband to agree to be bound by the outcome of the hearing before Holman J if he wished to participate. In exchange for this assurance, the husband was permitted to participate in the hearing and to seek to persuade Holman J not to accede to the wife's application. In this respect he was successful on two out of the three heads of application described in para 22. He therefore obtained a tangible advantage by agreeing to write the August 2006 letter.
- 88 We strongly deprecate the idea that, having obtained this advantage, he should now be permitted to disown the August 2006 letter as, for example, he has sought to do in a recent undated letter to the Trustee indicating that he opposes the wife's application to this Court. He has made his choice and he is bound by it. We therefore have no hesitation in finding that he should be treated as consenting to the alteration to the Trust contained in the Holman order notwithstanding his later attempt to renege.
- 89 We would emphasise that our decision to treat the husband as having consented on the basis of the August 2006 letter is wholly exceptional in the light of the particular circumstances of this case. Firstly, the husband was in flagrant and longstanding contempt of the English order; but secondly and most importantly, he exercised his free will in choosing to write the letter. This was not a case of an overseas court ordering the husband to write a letter or making him do so under duress. He was given a free choice by the Family Division and he chose to do so. The position is, for example, quite different from the *Turino Consolidated* case where the husband was ordered by the Dutch court to write to the trustee agreeing to a variation of the trust. This Court placed no weight upon that letter.
- 90 Having held that all the adult beneficiaries should be treated as consenting to the alteration to the Trust contained in the Holman order and noting that the Trustee is content to abide by such order as the Court may make in this respect, the question then arises as to whether the Court should consent to the alteration on behalf of the minor and unborn beneficiaries. This requires us, in accordance with Article 47(2), to consider whether the alteration is for their benefit.
- 91 Advocate Renouf, on behalf of the minor and unborn beneficiaries, argued forcefully that the alteration of the Trust in accordance with the Holman order would undoubtedly be for the benefit of those whom he represented. He pointed out that, as appeared from the evidence of the wife and the letter from the two adult children, the family had been reduced to a relative state of poverty by the father's war of attrition whereas he lived in very different circumstances. The minor children needed funds now rather than the vague possibility of receiving funds in many years time, possibly after the husband's death. In any event, the husband could easily remarry and, because of his power of exclusion, he could exclude the



minor children in favour of the children of any new marriage. Thus the balance was strongly in favour of funds being made available now rather than opting for the vague hope of receiving funds from the Trust in many years time. Although altering the Trust in accordance with the Holman order would put money in the wife's hands rather than in the children's, the Court had to look at the realities of the situation. If the wife obtained the lump sum out of the Trust, she would spend it for the benefit of the children who lived with her. They would benefit considerably. Conversely, although beneficiaries of the Trust, the children had not received a penny from the Trust so far and it was highly unlikely they would do so as long as the battle between the husband and the wife continued. Indeed the value of the Trust was minimal in that the Group did not appear to have increased in value since the creation of the Trust in 1992 and the entire value of the Group was reflected in the loan to TFCH, which essentially belonged to the husband. There was no liquidity in the Trust which would enable the Trustee to make distributions to the children at this stage and the Trustee was not in a position to obtain liquidity without the cooperation of the directors of the trading companies, who were allies of the husband. Furthermore, the position of the minor children was similar to that of the adult children and it was of note that the latter were strongly supportive of their mother's application.

92 The Court acknowledges the force of the points made by Advocate Renouf but we must consider the practical consequences of any order we may make in order to ascertain whether it would in fact be for the benefit of the minor and unborn beneficiaries. In this connection there are two particular points which arise:-

- (i) What is the effect of the loan from the husband to TFCH; and
- (ii) Even if the Trust is altered, how can cash be extracted and can this be done without damaging the underlying business?

93 Turning to the first point, we have described at paragraph 5 above how TFCH is indebted to the husband in the approximate sum of \$34m. and to the wife in the sum of \$500,000. It follows that, even if cash can be extracted from the underlying companies and paid up to TFCH, it would at that stage have to be paid to the husband (for the most part) rather than up to the Trustee as shareholder of TFCH. This issue seems to have received comparatively little consideration in the Family Division and we have to say that we never really received a very satisfactory explanation as to why the wife had not sought an order from the English court in connection with the loan as an asset of the husband. However, there is evidence that the terms of the loan are such that the husband cannot call for repayment of any of the loan unless or until TFCH has sufficient funds with which to pay it. Accordingly unless the wife can obtain some additional relief which will result in cash being paid up to TFCH, merely obtaining recourse against the loan would not assist her.

94 Mr Lakeman stated that, if the alteration to the Trust were approved, the wife would then take steps before the courts of Bermuda to obtain recourse against the loan by way of enforcement of the sum which the husband owes to the wife under the lump sum order of the Family Division. However, he emphasised that, without the alteration to the Trust, it



would not be possible to take steps to procure the release of funds from the trading companies. The alteration of the Trust would enable the Trustee to take action to obtain liquidity from the underlying structures in order to fulfil the altered terms of the Trust. When the funds came up to TFCH, they would then have to be paid in reduction of the loan owed to the husband but the wife could take steps to attach the loan at the time. If the wife merely went against the loan without an accompanying alteration to the Trust, she would be met by the terms of the loan and would have no standing to obtain relief at the trading company level.

95 Although we were initially troubled by the point, we accept, for the reasons put forward by Mr Lakeman, that recourse by the wife against the loan, unaccompanied by an alteration of the Trust, would not produce any cash for the wife and children, whereas alteration of the Trust combined with action in Bermuda against the loan offers the best prospect of obtaining cash from the structure.

96 We turn therefore to the second issue.

97 The Court has received a report dated 23rd November 2006 from Mr G Mesher of KPMG and a further report dated 31st March 2008 from Mr Kevin Mawer of the same firm, who also gave oral evidence before us. In addition the Court received an affidavit from Mr Kevin Mercury, an officer of the Trustee, exhibiting a considerable amount of financial material concerning the Group. It has to be said however that all three of these witnesses made it clear that it was difficult to get an accurate picture of the financial position of the Group as a whole. Firstly, there were no consolidated accounts; and secondly the accounts of the various companies had been produced by Mr Wani and Mr Aiyer and did not contain explanations for many of the figures.

98 Mr Mesher pointed out in his report that, by reference to the accounts of the various companies on various dates in 2004, there appeared to be a very high holding of stock. Thus International held stock broadly equivalent to 5.1 years of sales; in other words its ratio of stock to turnover was 5.16. It had risen considerably since 2000. He compared that rate to those found in three leading international jewellers, whose ratios were 0.48, 0.55 and 0.25 respectively. Similarly, whereas in 2000 International's trade receivables had been the equivalent of 22 debtor days, they had risen to 200 debtor days by 2004. This compared to 22, 71 and 29 days respectively for the three International jewellers previously referred to. The high level of stock combined with the high level of trade receivables would have a significant effect on the cash flow of the business. There was clearly a suspicion that this was done in order to minimise the apparently available cash.

99 Although the figures taken from the various accounts have changed more recently, Mr Mawer stated in his report that the stock levels still appeared to be very high as did the trade receivables. Mr Mawer's evidence, when combined with his report, came to this. He is part of the KPMG team which specialises in insolvency. They are experienced in realising assets in contentious situations. He believed that, if the alteration to the Trust were made,

there would be valid grounds for the appointment of provisional liquidators of the various companies. KPMG personnel were willing to be appointed. The provisional liquidators would then seek to realise liquidity from a combination of the reduction in stock and a gathering in of trade receivables. Whilst he could not be sure of the position (because of the inadequate financial information available) until the provisional liquidators were able to gain access to the books of the various companies, he thought it likely that, provided the directors were cooperative, sufficient liquidity could be raised to pay up the required amount to TFCH, which could in turn pay the wife the amount due under the English order provided that appropriate steps were taken to attach in some way the loan owed by TFCH to the husband. He also said that, save only for the initial application to the Hong Kong court for the appointment of provisional liquidators of the various companies, all subsequent costs would be payable out of the assets of the relevant companies. KPMG would be willing to act on the basis that this was where they would be remunerated from.

100 On the basis of the evidence before us, we have concluded that there are reasonable prospects of KPMG being able to realise liquidity from the underlying group structure sufficient to pay the amount due to the wife without doing irretrievable damage to the Group. These prospects will be affected by the level of cooperation shown by the directors but the responsibility will lie upon them should their lack of cooperation lead to serious damage being done to the future prospects of the Group.

101 In all the circumstances, we agree that, for the reasons put forward by Mr Renouf, it would be for the benefit of the minor and unborn beneficiaries for the Trust to be altered in accordance with the contents of the Holman order, so that KPMG can seek to realise liquidity which can be used to pay the wife and thereby benefit the children. They are more likely to benefit in this way than from leaving the trust fund in the control of the husband in the vague hope that one day the Trust might acquire some residual value (after repayment of the loan) and that this might be applied for their benefit. We therefore give our approval to the alteration under Article 47(1).

### **(iii) Practicalities**

102 The question then arises as to who should be responsible for taking the matter forward in the manner described by Mr Mawer. Mr Gleeson argued strongly on behalf of the Trustee that it would be unreasonable to expect the Trustee to do so. It was a small trust company. It was already out of pocket to the extent of £200,000 in respect of unpaid remuneration and legal fees. There was authority for the proposition that a trustee is not expected to litigate at its own expense unless the lack of funds has been brought about by the Trustee's own breach of duty. (See Lewin para 21-57 and 34-21 and the cases cited therein). The Trustee could not be expected to fund speculative and contentious litigation in a number of jurisdictions in the hope that funds might be recovered from the underlying assets in due course. Furthermore, the Trustee had no expertise in running a jewellery business or in realising assets from trading companies.

- 103 Nor would it be right, submitted Mr Gleeson, for KPMG to be appointed as agents or delegates of the Trustee. This could result in the Trustee being liable for actions taken by KPMG on its behalf of which it did not necessarily know and over which it would have no control.
- 104 Whilst reserving his client's position as to whether the Trustee should have taken active steps earlier to assume control of the underlying companies, Mr Lakeman accepted that the Trustee was not well qualified in terms of resources or expertise to undertake the activities outlined by Mr Mawer. The alternative, he suggested, was to appoint representatives of KPMG as receivers of the Trust.
- 105 It is clear that, as part of its general supervisory jurisdiction in respect of trusts, the Chancery Division of the English High Court has power to appoint receivers of a trust (see Lewin para 38-28 to 38-39 and the cases there cited). It is an exceptional remedy to be granted only where there is a clearly identified need to do so. An example of where it may be appropriate is where there is an application for the appointment of a new trustee amidst claims of breach of trust and the court is unwilling to remove the trustee pending the determination of those claims but the evidence is sufficiently strong to warrant the protection afforded by a receivership.
- 106 In our judgment this Court also has power to appoint a receiver of a trust under its inherent supervisory jurisdiction although the power is to be exercised very sparingly. We consider this to be an appropriate case in which to exercise that jurisdiction. For the reasons put forward by Mr Gleeson, we accept that it would be unreasonable to expect the Trustee to embark upon the course of action envisaged by Mr Mawer to realise the necessary liquidity from the underlying assets. We agree that persons with the expertise of the representatives of KPMG should undertake the necessary actions. Furthermore, in the particular circumstance of this case, we think it far more appropriate that KPMG should be appointed as receivers rather than as agents or delegates of the Trustee. In the latter case there would be endless uncertainty as to who had the ultimate authority to authorise a particular action and there would also be room for doubt as to where responsibility lay for the consequences of any such action. Nor do we think there is any practical likelihood of finding an entity licensed to act as trustee and willing to take on the trusteeship in the present circumstances. KPMG is not willing to be appointed as trustee. Having concluded that the expertise of KPMG is required, we think that they should be appointed as receivers with authority to take the relevant action.
- 107 It was for these reasons that we appointed Mr Mawer and a colleague as receivers of the Trust and spelled out in detail the powers conferred upon them in the Act of the Court. The Court also imposed a gagging order for a short period so as to enable the receivers to apply to the relevant court in Hong Kong for the appointment of provisional liquidators for the relevant companies without the husband being alerted in advance to the proposed course of action.

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## Conclusion

108 In summary:-

(i) The Court does not have jurisdiction to enforce the Holman order, nor has it jurisdiction to give directions under Article 51 so as to achieve the effect of the alteration to the Trust contained in the Holman order.

(ii) Pursuant to the rule in [\*Saunders v Vautier\*](#), all the beneficiaries may alter the Trust. The Court treats the August 2006 letter as being the husband's consent to the alteration to the Trust contained in the Holman order and notes that the other adult beneficiaries agree to that alteration. Pursuant to Article 47(1) of the 1984 Law, the Court approves of the alteration as being for the benefit of the minor and unborn beneficiaries of the Trust.

(iii) The Court appoints two representatives from KPMG as receivers of the Trust with defined powers, with a view to their taking the necessary steps to realise liquidity from the underlying assets of the Trust so that the wife may be paid the sums due to her under the Trust as altered by paragraph (ii) above. In order for the wife (and therefore the children) actually to receive any benefit, she will need to take action before the courts of Bermuda in order to obtain some form of security or attachment over the loan owed by TFCH to the husband.