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*Peter Steen and Bethan Byrne consider firewall legislation and analyse the continued conflict with the English Family Division*



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**'This article explores what chinks there are in the armour of offshore jurisdictions and considers how efforts are increasingly being made to sidestep the firewall rules.'**

The current buzzwords of the offshore worlds are 'transparency' and 'accountability'. In that context, asset protection legislation, commonly known as 'firewall' legislation, can increasingly seem something of an anomaly. Firewall legislation seeks to defend and protect offshore trusts from attack – whether from creditors, spouses or heirs – and from pressure from the onshore world. Matters concerning trusts established in offshore jurisdictions are, instead, for the local court applying local law. The message from jurisdictions in which such legislation has been enacted is that local courts will not simply kowtow to orders made by onshore courts.

There are number of cases which indicate that, to the extent that offshore firewalls may be impenetrable, other means are used to put orders made by onshore courts into effect. One recent case is the Jersey case *In the Matter of the R Trust* [2015] explored below. One of the reasons for trying to give effect to an onshore order – even though, strictly, it is unenforceable – may be the increasing pressure on offshore jurisdictions to be open and transparent. This article explores what chinks there are in the armour of offshore jurisdictions and considers how efforts are increasingly being made to sidestep the firewall rules.

## Firewall legislation

The desire for asset protection has been one of the primary drivers of the success of the offshore world in recent decades. The attraction of one particular jurisdiction over another for the would-be settlor may well be determined, or at least influenced, by the apparent strength of the asset protection regime in that jurisdiction. This has led

to offshore jurisdictions competing with each other over the levels of asset protection that they provide.

The first firewall legislation was introduced in the Cayman Islands in 1987, the Trusts (Foreign Element) Law. Other jurisdictions followed suit, including the BVI, Bermuda and the Bahamas among others. Regular updates and amendments to asset protection laws have therefore been commonplace in recent years. It is Jersey and Guernsey in which we have seen interesting recent developments, both in case law and subsequent legislative amendments: the Trusts (Guernsey) Law 2007 and the Trusts (Jersey) Law 1984 Art 9(4) (as amended).

This is perhaps because the Jersey and Guernsey law trusts continue to come under fire from the English Family Division.

While the drafting of the legislation varies from one jurisdiction to another, the common thread is the insulation of trusts from foreign judgments (including ancillary relief orders) from attacks from creditors, and from forced heirship regimes. This is achieved by expressly making unenforceable an order of a foreign court which is inconsistent with the rules of the local jurisdiction. An example is the provisions of Art 9 of the Trusts (Jersey) Law 1984 (as amended) in Jersey. Article 9(4) provides:

- 9(4) No –
- (a) Judgment of a foreign court; or
  - (b) Decision of any foreign tribunal (whether in an arbitration or otherwise) With respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent

with this Article, irrespective of any applicable law relating to conflict of laws.

**Historical tension with the English Family Division**

Since the seminal decision in *White v White* [2000], London has arguably been the go-to jurisdiction for the divorcing spouse seeking a fair division of the assets between the parties. Often one party has made a ‘non-financial contribution’ (para 604 of *White*), raising the children borne of the relationship and running the family home. The ‘yardstick of equality of division’, as the court put it in *White*, and the generosity of the London courts to the poorer spouse makes London an attractive option.

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Under the Matrimonial Causes Act 1973 the English courts are required to look at all the assets and resources of each of the parties when making their ancillary relief assessment. The court can consider trust assets if those assets are considered to be a ‘resource’ available to either of the parties, or if the trust is a sham established with a view to defeating a claim for financial relief.

This was evident in the 2004 case of *Charalambous v Charalambous* [2004], in which the court granted the wife an ancillary relief order varying a Jersey law trust. The trust, however, contained a Jersey jurisdiction clause. The frustration of the Royal Court of Jersey was evident in the 2006 Jersey case of *In the matter of the B Trust* [2006], which followed almost immediately after the firewall provisions of Art 9 of the Trusts (Jersey) Law 1984 (TJL) had come into force, with a view to preventing the English courts from trying to vary a Jersey trust in the manner it had sought to do in *Charalambous*. In that case, Jersey trustees had sought directions from the Jersey court in relation to an

English court order varying a trust governed by Jersey law. The Royal Court of Jersey stated at para 784:

It would, in our view, avoid sterile argument, and expense to the parties, if the English courts were, in cases involving a Jersey trust... to exercise judicial restraint and to refrain from invoking their jurisdiction under the Matrimonial Causes Act to vary the trust...

However, it gave effect to the order.

**Enforcement, comity or judicious encouragement?**

It is helpful to consider the basis on which the Jersey courts have reached

their decisions on the enforcement of orders made by the English Family Division which have come before them over recent years, leading most recently to *In the Matter of the R Trust*.

It is clear that an offshore trustee does not have to submit to the jurisdiction of the English court by appearing voluntarily in the proceedings for the subsequent ancillary relief order to be enforced, at least indirectly, against the trustee. In certain cases comity (namely legal reciprocity, the principle of recognising and enforcing foreign proceedings) has been invoked to the aid of the applicant spouse. This was seen in the 2006 case *Re the H Trust*, in which the court noted at paras 15 and 16:

... in most circumstances, it is unlikely to be in the interests of a Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment of the beneficiaries of a trust when the

primary focus of that court is the interests of the two spouses before it...

... [However] 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.

In *Mubarak v Mubarak* [2009] however, the court sought to limit the scope of comity. The case involved a wife seeking to enforce an English court order against the trustees of a Jersey trust, which sought to vary that trust. It was made clear that legal reciprocity does not extend to wholesale variation of a trust, which was a matter to be determined in accordance with Jersey law, and even if the trustees had submitted to the jurisdiction, the position would have been the same. Comity is not a basis for enforcement or for the court to act beyond its powers.

Leaving aside any arguments of sham, where the trust assets are treated as being a resource of the parties, the question of enforcement does not arise for the trustees. The trustees may, however, be on the receiving end of a ‘judicious encouragement’ order. This stems from the English case of *Thomas v Thomas* [1995], which confirmed that the court should look past complex structuring arrangements and determine whether the assets are in reality available to the party. In *Thomas*, it was stated at para 678:

If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. In that situation if the court decides that it would be reasonable for a husband to seek to persuade trustees to release more capital or income to him to enable him to make proper financial provision for his children and his former wife, the court would not in so deciding be putting improper pressure on the trustees.

In deciding whether to take heed of the judicious encouragement of the Family Division, it is likely that a trustee will seek guidance from their local court before taking further steps.

### **In the matter of the R Trust and the approval of a momentous decision**

The recent Jersey case of *In the matter of the R Trust* went one stage further, as it considered an order of the English court in matrimonial proceedings which purported to set aside the disposition of the trust assets by the husband (the settlor), for the trustee to remit the trust funds to the husband and for him to pay those sums to his soon-to-be former wife.

The background to the case was that Mr B was the settlor of the R Trust, a discretionary trust governed by Jersey law. The beneficiaries of the trust were two minor children of Mr and Mrs B. Mr and Mrs B became embroiled in hostile divorce proceedings in England. The Family Division made an ancillary relief order, which purported to set aside the dispositions of the trust assets by Mr B and ordered that they should be distributed to Mrs B.

Under Art 9 of the TJL, the English Order was unenforceable in Jersey. The trustee had not submitted to the jurisdiction of the English court. However, the trustee took what it considered to be a pragmatic approach. Having an express power to add beneficiaries, it sought the court's approval of its decision to add Mr B as a beneficiary of the trust and to pay the entirety of the trust fund to Mr B for onward transmission to Mrs B. It was noted that the judge in the Family Division had given thorough consideration to the interests of the children in making the order and that this was accepted by the trustee. The Jersey court was therefore asked to approve this 'momentous decision' (para 19).

Applications for approval of a momentous decision, as set out in the 2001 case of *Public Trustee v Cooper*, are widely used both on and offshore, and have the advantage of protecting a trustee from criticism or challenge by beneficiaries. In considering the trustee's application, the court

considered the test set out in *Re S Settlement* [2001], which required that in such cases:

- the trustee has reached its decision in good faith;
- that the decision was one that a reasonable trustee properly instructed could have reached; and
- no potential or actual conflict of interest existed to vitiate the decision.

The Royal Court of Jersey had no difficulty in approving the steps

the robust wording of that legislation) and there is a continued effort to look for clever ways to give effect to financial orders without falling foul of the relevant firewall provisions.

### **Conclusions for practitioners**

There are no signs of the tension between the English Family Division and the offshore courts abating. It is clear that offshore trustees will continue to find themselves between a rock and a hard place when faced with orders made by onshore courts. As practitioners will be all too aware, it can be very difficult to advise a trustee on how to proceed in these circumstances. Due consideration

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that the trustee planned to take. But how does this decision fit alongside the seemingly robust firewall legislation? The decision was not one of enforcement of an English order, neither was it based on comity. The Royal Court of Jersey was not giving effect to the order of the English court, but was focusing on the interests of the beneficiaries. As confirmed in the oft-quoted passage at para 713 from *Armitage v Nurse* [1997]: 'The duty of the trustees [is] to perform the trusts honestly and in good faith for the benefit of the beneficiaries...'. The trustee had formed the view that putting into effect the English court order would be in the best interests of the beneficiaries, not least because access to the trust assets was required to enable Mrs B to keep the family home where the children lived.

Clearly it would have been senseless for the Royal Court of Jersey to prevent a trustee from taking a course of action solely because such acquiescence could be viewed as enforcing an order made by a foreign court pursuant to a different system of law. However, it remains clear that the English courts seem determined to make financial orders in matrimonial proceedings regardless of whether they fall foul of the firewall provisions of the offshore jurisdictions (notwithstanding

should of course be given to the governing law of the trust, the interests of the beneficiaries and the specifics of the case, such as the location of the assets. However, in a world of increased openness and transparency, and in which offshore trustees are expected to be cooperative, the expectation that offshore trustees will take steps to give effect to foreign court orders – even if they are strictly unenforceable – is becoming greater and greater. ■

*Armitage v Nurse*  
[1997] EWCA Civ 1279  
*In the matter of the B Trust*  
[2007] WTLR 1361 RC (Jersey)  
*Charalambous v Charalambous*  
[2004] WTLR 1061 CA  
*Re the H Trust: X Trust Co Ltd v RW*  
[2007] WTLR 677  
*Mubarak v Mubarak*  
[2009] WTLR 1543 RC (Jersey)  
*Public Trustee v Cooper*  
[2001] WTLR 901  
*In the Matter of the R Trust*  
[2015] JRC 267A  
*Re S Settlement*  
[2001] JLR N37  
*Thomas v Thomas*  
[1995] EWCA Civ 51  
*White v White*  
[2000] UKHL 54