

How to side-step valid trust and corporate structures

Andrew Mold* and Jonathan Hilliard†

Abstract

As the vehicles used for business become ever more complex, trusts, the use to which trusts are put and the structures that trusts are asked to hold become more sophisticated. The involvement of trusts as part of complex corporate and commercial structures opens up potential additional avenues for attacking such structures and for defending them, by using techniques that one more often finds in the commercial and corporate contexts. In this paper, the authors explore recent developments in some of these techniques.

Introduction

In this article, we explore recent developments in some of the techniques that are available to litigants in order to circumvent valid trust and corporate structures. We use the term ‘valid’ to distinguish these structures from those that may be held by the Courts to be shams.

In a world where the vehicles used for business are becoming ever more complex, trusts, the use to which trusts are put and the structures that they are asked to hold have also become more sophisticated. Therefore, trusts increasingly find themselves part of a complex corporate structure. This article is about the additional avenues available for attacking such structures and what hurdles those avenues face, taking into account relevant recent developments, in each case

focusing on the areas in which the authors have been involved.

We shall deal with the following four specific routes:

- i. attacking such structures using the Court’s matrimonial jurisdiction;
- ii. veil-piercing post-*Prest*;
- iii. using a resulting trust analysis to attack; and
- iv. bypassing restrictions on trust information in order to obtain information that can be used for an attack.

The first three categories start out with a discussion of the cases that arise in the context of divorce proceedings because this is a particular area in which there have been some important recent developments. However, many of the principles from these cases have general application to other contexts in which trust and corporate arrangements are in place.

It will be apparent from the cases that we consider below¹ that there is an ongoing struggle, which particularly comes to the fore in the matrimonial context, between the Court’s desire to provide effective relief to what it considers to be a deserving litigant but at the same time respect the legal boundaries of corporate and trust structures. At times, the lower courts have failed to maintain the correct balance between these competing interests and it takes a landmark decision, such as *Prest v Petrodel Resources Ltd*,² to bring the law back into line.

* Andrew Mold, member of Wilberforce Chambers.

† Jonathan Hilliard, member of Wilberforce Chambers.

1. Each of the authors has been involved in a number of the cases mentioned.

2. [2013] 3 WLR 1.

There is an ongoing struggle, which particularly comes to the fore in the matrimonial context, between the Court's desire to provide effective relief to what it considers to be a deserving litigant but at the same time respect the legal boundaries of corporate and trust structures

It is important both for those who are involved in establishing trusts and corporate structures and also for those who administer them to have an understanding of how such a structure might be side-stepped in the event of a dispute, which may originate either between those within the structure or from an outside party. Whilst these matters become most acute once a dispute has actually arisen, understanding the extent and limits of the techniques that may be relied upon before the Courts will enable ameliorative action to be taken at an earlier stage when such action is, of course, more likely to be effective.

The latest approach in matrimonial cases

The two main routes open to the Courts in matrimonial cases to take account of trust assets are:

- i. by varying an 'ante-nuptial' or 'post-nuptial' settlement under Section 24(1)(c) of the Matrimonial Causes Act 1973; and
- ii. by including trust assets as a 'financial resource' of a divorcing spouse under Section 25(2)(a) of the 1973 Act in accordance with the guidance set down by the Court of Appeal in *Charman v Charman*.³

We have previously addressed these two topics in detail in a paper appended to this one for reference.⁴ In this article, we shall instead focus on some

interesting recent developments in the case law affecting this area.

The typical factual scenario is one in which some UK assets (normally high value residential property) are held through offshore companies which are linked to the 'paying' spouse (normally, though not invariably, the husband). The 'link' with the paying spouse may be either because:

- i. the offshore companies are owned by the paying spouse; or
- ii. the offshore companies are owned by an offshore trust of which the paying spouse is a beneficiary.

In addressing this scenario, the Courts have been grappling with a clear tension between: (i) granting the 'receiving' spouse an effective remedy which will be enforceable against the underlying assets which are of worth: and, at the same time (ii) recognizing the separate proprietary rights of the actual owner of those assets (ie the relevant company which holds the underlying property).

It is this tension that explains many of the decisions which have been delivered over recent years by the Family Courts. It has also led, as things stand, to the factual distinction between (i) and (ii) above to become particularly important.

Where the offshore companies are owned by an offshore trust—*Hope v Krejci*⁵

In *Hope*, the underlying assets that were of value (and situated in the UK) were owned by companies the shares of which were held by a Jersey discretionary trust. When the husband failed to satisfy a lump sum order made against him, the wife sought a variation of the Jersey trust under Section 24(1)(c) of the 1973 Act by pulling out the underlying assets to be held for her absolutely.

3. [2007] EWCA Civ 503.

4. Wilberforce Chambers Trusts Day 2012 paper. 'Dealing with Divorce: Claims For Financial Provision Involving Trusts'.

5. [2012] EWHC 1780 (Fam).

The fact that a company (or chain of companies) had been interposed between the trust and the underlying assets did not make any difference in Mostyn J's view as to whether an order could be made dealing with the underlying property. As he explained:

In most overseas trust situations there will likely be an offshore company interposed between the trust and the underlying asset. This is the position here. The fact that there is an interposition of a company has to my knowledge never been argued, let alone found, to be an impediment to making an effective variation.⁶

After referring to the decision of Ewbank J in *E v E (Financial Provision)*⁷ in which a matrimonial home in Hampstead was held by a Panamanian company the shares of which were held on trust by a Swiss trust company, Mostyn J stated:

Given that the power of variation is almost limitless it would be absurd were the interposition of the Panamanian company to have prevented the variation that Ewbank J intended. I suppose a technically pure variation would have involved directing the corporate trustee (i) to take steps to wind up the Panamanian company, (ii) to distribute the company's property to the trustee, (iii) to sell the property and (iv) to appoint £50,000 to the wife absolutely and £200,000 to the trustees of the new trust, and in default making a direct order for sale of the property in Hampstead and directing a distribution of part of the proceeds to the wife and the new trust. I suppose (although I cannot recall) that it is possible that the order actually provided for that. But even if it did not but merely reflected the actual words of Ewbank J's judgment, I see no problem with that, it being an example of the 'short-circuiting' (but which I prefer to call

'telescoping') approach rightly and legitimately (in my opinion) identified by Bodey J in *Mubarak v Mubarak* [2001] 1 FLR 673. In my judgment, in a variation of settlement case, the court can, metaphorically speaking, travel right down the lift-shaft from the top floor to the basement, without having to stop at any floor in between.⁸

In light of his support for this approach, Mostyn J duly went on to order that the Jersey trust be varied so as to provide that the underlying UK assets (which were, of course, owned by the subsidiary companies and not by the trustee) were to be appointed absolutely to the wife.⁹

Mostyn J considered the above approach to be separate from a veil-piercing approach, because he went on to consider separately whether veil-piercing would have been appropriate, and considered that it would have been.

Where the offshore companies are owned by the paying spouse—*Prest v Petrodel Resources Ltd*¹⁰

In *Prest* (unlike in *Hope*), the husband was the sole owner of a group of complexly structured offshore companies. Those companies were the registered owners of several high value UK residential properties. In making her claim for financial provision, the wife ultimately hoped to obtain an order for the direct transfer of the UK properties to her. In order to achieve this, the wife ran a number of arguments (which we shall also address in later sections below).

For present purposes, the wife argued that the husband was 'entitled' to the properties (within the meaning of Section 24(1)(a) of the 1973 Act¹¹) since he had the practical means by which to procure their transfer. Accordingly, she argued that the Court

6. At [12].

7. [1990] 2 FLR 233.

8. At [13].

9. Mostyn J also went on to consider the approach under s 24(1)(a) but his comments were obiter.

10. [2013] 3 WLR 1.

11. s 24(1)(a) of the 1973 Act contains the Court's property adjustment power to make an order that a party to a marriage shall transfer to the other party, 'property to which the first-mentioned party is entitled, either in possession or reversion'.

could make a property transfer order in respect of those properties.

This argument was accepted by Moylan J at first instance. Accordingly, he ordered the husband to transfer (or cause to be transferred) to the wife the UK properties that were registered in the names of the companies. He also directed the companies to execute such documents as might be necessary to give effect to the transfer of the properties.

However, this approach was rejected by the majority in the Court of Appeal and then by the Supreme Court.

In the Supreme Court, Lord Sumption considered that there was no special principle applicable in matrimonial proceedings that enabled the Courts to disregard established property rights. By referring to 'property to which [a spouse] is entitled, either in possession or reversion', Section 24(1)(a) of the 1973 Act invoked concepts of the law of property with established legal meanings. These concepts could not be suspended or mean something different in matrimonial proceedings.

Lord Sumption considered that there was no special principle applicable in matrimonial proceedings that enabled the Courts to disregard established property rights

As Lord Sumption explained:

... I find it impossible to say that a special and wider principle applies in matrimonial proceedings by virtue of section 24(1)(a) of the Matrimonial Causes Act 1973. The language of this provision is clear. It empowers the court to order one party to the marriage to transfer to the other 'property to which the first-mentioned party is entitled, either in possession or reversion'. An 'entitlement' is a legal right in respect of the property in question. The words 'in possession or reversion' show that the right in question is a

proprietary right, legal or equitable. This section is invoking concepts with an established legal meaning and recognised legal incidents under the general law. Courts exercising family jurisdiction do not occupy a desert island in which general legal concepts are suspended or mean something different. If a right of property exists, it exists in every division of the High Court and in every jurisdiction of the county courts. If it does not exist, it does not exist anywhere.¹²

Lord Sumption also went on to say that whilst the breadth of the term 'resources' under Section 25(2)(a) of the 1973 Act means that a spouse's

ownership and control of a company and practical ability to extract money or money's worth from it are unquestionably relevant to the court's assessment of what his resources really are

... it does not follow from the fact that one spouse's worth may be boosted by his access to the company's assets that those assets are *specifically transferable* to the other under section 24(1)(a) (at [38]).

Accordingly, whilst a Court may take into account one spouse's access to the assets of a company which he or she owns in calculating that spouse's overall financial resources, it cannot make an order for the transfer of those underlying assets where they are owned by the company and not by the spouse.

Although the Supreme Court rejected the existence of any special principle in matrimonial cases, in the end, on the facts of *Prest*, it was able to make an order for the transfer of the underlying properties to the wife on what it considered to be conventional resulting trust principles. The Supreme Court considered that, on the particular facts, the properties were held by the companies on resulting trust for the husband. Accordingly, they were property which fell within Section 24(1)(a) and were, therefore,

12. At [37].

transferrable. This aspect of the decision will be considered in the 'Resulting trust analysis' section.

Does the approach in *Hope* survive the Supreme Court's decision in *Prest*?

Mostyn J's decision in *Hope* was given following the first instance judgment in *Prest* but prior to the Court of Appeal and Supreme Court decisions. Therefore, a question that arises is whether the approach taken in *Hope* survives following the re-orientation of the case-law in *Prest*

In *Hope*, Mostyn J was dealing with an application to vary a nuptial settlement under Section 24(1)(c) whereas in *Prest*, the Court was considering a property transfer order under Section 24(1)(a) on the basis that the husband was 'entitled' to the underlying properties. However, as a matter of principle, given that in both cases the underlying assets are owned by a separate legal entity (ie the underlying company), one may wonder why it should make any difference whether that company is owned by an individual (ie the husband) or by a trust. In neither case are the underlying assets those of the shareholder of the company.

Indeed, if anything, one might argue that the potential for 'telescoping' should be more limited where the structure is *not* owned by the paying spouse than where it is.

Moreover, while Mostyn J distinguished the first approach that he took in *Hope* from a veil-piercing approach, one might argue that the ultimate foundation of both approaches, namely that one can ignore the intermediate entities between the asset and paying spouse, are the same.

There was also a passing reference made by Lord Sumption in *Prest* to Section 24(1)(c) where he stated (at [53]):

The wife sought special leave to argue that the companies constituted a nuptial settlement within the

meaning of section 24(1)(c) of the Act. The court ruled in the course of the hearing that leave would be refused. The point was not argued below and does not appear to be seriously arguable here.

The telescoping approach of Mostyn J under Section 24(1)(c) also has the potential to work to the disadvantage of the creditors of the relevant underlying company. As Lord Sumption noted in *Prest*:

The effect of the judge's order in this case was to make the wife a secured creditor. It is no answer to say, as occasionally has been said in cases about ancillary financial relief, that the court will allow for known creditors. The truth is that in the case of a trading company incurring and discharging large liabilities in the ordinary course of business, a court of family jurisdiction is not in a position to conduct the kind of notional liquidation attended by detailed internal investigation and wide publicity which would be necessary to establish what its liabilities are.¹³

However, one should not overstate this objection, because often the companies in question will not have any business.

In any case, Mostyn J himself has helpfully provided further consideration of what approach is open to the Family Courts after *Prest*...

Mostyn J's answer—*DR v GR*?¹⁴

In *DR v GR*, certain UK sited assets (including two retirement villages) were owned by two UK companies which were ultimately owned (though a number of other companies) by the trustee of a discretionary Jersey trust (called the Brown Sugar Trust). The wife applied for a variation of the Brown Sugar Trust under Section 24(1)(c) of the 1973 Act.

Mostyn J's decision in *DR v GR* was delivered following the Court of Appeal's decision in *Prest* but shortly before the Supreme Court's decision.

13. At [41].

14. [2013] EWHC 1196 (Fam).

Mostyn J set out his own view of the impact of the Court of Appeal's decision in *Prest* on his approach in *Hope*.

In my later decision of *Hope v Krecji* [2012] EWHC 1780 (Fam) [2013] 1 FLR 182 I addressed a further aspect which I had not considered in *BJ v MJ*. That aspect was whether the interposition of companies between the trust at the top of the tree and the assets at its bottom acted as any kind of impediment to making a variation which disposed of the actual assets at the bottom. I concluded in reliance on authority never before doubted, as well as my own experience over decades of dealing with this class of case, that there was certainly no such impediment . . .

. . . In *Hope v Krecji* (at paras 14-27) I also offered some comments as to the power of the court when exercising the jurisdiction under s24(1)(a) of the 1973 Act to penetrate the carapace of a company owned by a respondent and to transfer to an applicant assets owned by the company. Again, in reliance on high authority never before doubted, as well as on my experience, I expressed the view that where the company was under the control of the respondent and where there were no material minority interests such property could be so transferred as it constituted property to which the respondent was 'entitled' within the meaning of the section. However, in *Petrodel Resources Ltd & Ors v Prest & Ors* [2012] EWCA Civ 1395 [2013] 2 WLR 557 Rimer LJ, with whom Patten LJ agreed, politely but firmly held that my view about the scope of s24(1)(a), and the many antecedent authorities to like effect upon which I had relied, were all quite wrong, as they violated the long-standing principles stated in the decision of the House of Lords in *Salomon v. A. Salomon & Co Ltd* [1897] AC 22 (see paras 132-150 per Rimer LJ and para 161 per Patten LJ). But nothing was said about the s24(1)(c) point. The decision of the Court of Appeal was strictly confined to the question whether s 24(1)(a) allowed the court to get under a corporate

carapace and to dispose of assets within the company in favour of an applicant.

It was argued on behalf of the relevant companies in *DR v GR* that Mostyn J's approach in *Hope* in the context of an application to vary a nuptial settlement under Section 24(1)(c) was wrong and that the Court's variation powers were confined to adjustments in the shareholdings of the ultimate parent company which was in fact owned by the trustee of the Brown Sugar Trust. The interposition of the chain of companies meant that the Court could not directly deal with the assets at the bottom of the tree.

This argument was firmly rejected by Mostyn J who considered that its acceptance would almost totally emasculate the Section 24(1)(c) jurisdiction since in the vast majority of cases an offshore company is interposed at some level in a nuptial settlement. Mostyn J's reasons for taking this approach were the following:

The language of the two sub-sections is completely different. *Prest* was squarely based on the language of Section 24(1)(a) and not Section 24(1)(c). The term 'settlement' under Section 24(1)(c) has consistently been given a very wide meaning. In *Brooks v Brooks*,¹⁵ Lord Nicholls referred to it simply as

one which makes some form of continuing provision for both or either of the parties to a marriage with or without provision for their children.

It followed that

a family company which under an arrangement makes some form of continuing provision for both or either of the parties to a marriage is capable of *itself* of amounting to a variable nuptial settlement whether or not the company is owned by a trust of which the spouses are formal beneficiaries.¹⁶

15. [1996] AC 375.

16. At [16] (Mostyn J).

It also followed that,

if under an arrangement ‘some form of continuing provision for both or either of the parties to a marriage’ (which would include, on the authorities, the provision of accommodation) has been made from assets held by a group of family companies then the entire set-up, when viewed as a whole, is capable of amounting to a variable nuptial settlement. If the top company is owned by a trust of which the spouses are formal beneficiaries then the position is a fortiori.¹⁷

Accordingly, by treating the ‘entire set-up’ as a nuptial settlement, Mostyn J felt that he was empowered to deal directly with, and to make orders in respect of, the underlying assets owned by the companies. This ability remained despite the disapproval of the Court of Appeal (confirmed by the Supreme Court) in *Prest* of the use of ‘telescoping’ under Section 24(1)(a).

By treating the ‘entire set-up’ as a nuptial settlement, Mostyn J felt that he was empowered to deal directly with, and to make orders in respect of, the underlying assets owned by the companies

By bringing the whole corporate and trust structure within the wide definition of ‘settlement’, Mostyn J’s reasoning in *DR v GR* differed from his reasoning in *Hope*. In *Hope*, his focus was on the variation of the terms of the actual trust (see [13] of the judgment quoted above) rather than an expansion of the concept of ‘settlement’.

Moreover, it will not always be possible to find that the entire trust structure is a nuptial settlement, so in that respect the reasoning is narrower than in *Hope*.

However, *DR v GR* does not deal directly with the question of whether Mostyn J’s first line of reasoning

in *Hope* survives the Supreme Court decision in *Prest*, so this will need to be considered in a future case where treating the whole structure and all parts of it as a nuptial settlement is not a viable course.

Veil-piercing post-*Prest*

There has been a tendency for lawyers (and, also, some judges) to use the term ‘piercing the corporate veil’ in a rather indiscriminate way as if it was a principle of general application which could be invoked whenever an individual could be identified with a company.

For example, over the years, and particularly following the decision of *Nicholas v Nicholas*,¹⁸ there arose a practice of some Family Division Judges to treat the assets of a company controlled by a spouse as if they were his (or her) assets and accordingly to order the transfer of that company’s own assets directly to the recipient spouse (rather than just ordering the transfer of the company’s shares which is what the paying spouse in fact owns).

It was this rather liberal approach towards piercing the corporate veil that led to the consideration of the principle by the Supreme Court in *Prest*.

Underling basis of the principle—abuse of rights

In *Prest*, Lord Sumption complained that this area of the law was, ‘heavily burdened by authority, much of it characterized by incautious dicta and inadequate reasoning’. Accordingly, he considered it necessary to go back to basics, starting with *Salomon v A Salomon & Co Ltd*¹⁹ and reminded everyone that in that case the House of Lords had underlined: (i) the separate legal personality of a company; and (ii) the fact that the property of the company (even one wholly owned and controlled by a single person) belonged to the company and not to its shareholder or ‘controller’.

17. At [18] (Mostyn J).

18. [1984] FLR 285.

19. [1897] AC 22.

However, Lord Sumption also explained that the law defines the incidents of most legal relationships between persons (both natural and artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if those persons' dealings are not honest (see Denning LJ's famous dictum to this effect in *Lazarus Estates Ltd v Beasley*²⁰).

Accordingly, if there has been some dishonesty (or what might be termed 'abuse of rights') then the normal *Salomon v Salomon* principles will not necessarily follow. This rationale is the underlying justification for 'piercing the corporate veil' that, properly understood, means disregarding the separate legal personality of a company (contrary to the normal *Salomon v Salomon* rule).

It is important to distinguish this concept from other situations that do not, from a legal standpoint, disregard (but rather recognize) the separate personality of a company and its controller. In particular, examples include:

- i. agency (whether the controller acts as the company's agent or vice versa);
- ii. where a company holds property as a trustee or nominee for the controller; and
- iii. where both the company and the controller are jointly liable as joint actors in tort.

The 'concealment principle' and the 'evasion principle'

Lord Sumption explained that there were two distinct principles at play:

- i. the concealment principle; and
- ii. the evasion principle.

According to Lord Sumption:

The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'facade', but only looking behind it to discover the facts which the corporate structure is concealing.²¹

In contrast:

The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.²²

The distinction and operation of these two principles can be best seen from considering a couple of examples from the case law.²³

First, *Gilford Motor Co Ltd v Horne*:²⁴

- i. Mr Horne had been the managing director of Gilford Motor and his contract of employment precluded him from engaging in any competing business in a specified geographical area for 5 years after the end of his employment.
- ii. Mr Horne left Gilford Motor and formed a company (in which his wife and a business associate were shareholders) through which he carried on a competing business in the specified area.
- iii. Injunctions were granted against both Mr Horne and the competing company he had established.

20. [1956] 1 QB 702 at 712.

21. At [28].

22. Also at [28].

23. See also *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734.

24. [1933] Ch 935.

- iv. As against Mr Horne, the injunction was granted on the concealment principle. The purpose of using the company had been to conceal that Mr Horne was in truth carrying on the competing business (and thereby acting in breach of covenant). The Court could, therefore, look behind the corporate veil to see the reality.
- v. As against the company, the injunction was granted on the evasion principle. The company was restrained in order to ensure that Mr Horne was deprived of the benefit which he might otherwise have derived from the separate legal personality of the company. Essentially, the Court treated the obligation owed by Mr Horne as also owed by the company (thereby disregarding the separate legal personalities).

Second, *Jones v Lipman*:²⁵

- i. Mr Lipman sold a property to the plaintiffs but then, thinking better of it, before completion, sold the property to a company (which Mr Lipman wholly owned and controlled) in order to prevent the plaintiffs from obtaining specific performance.
- ii. The Court ordered specific performance against both Mr Lipman and the company.
- iii. As against Mr Lipman, this was done on the concealment principle. Since Mr Lipman owned and controlled the company, he was in a position specifically to perform his obligation to the plaintiffs by exercising his powers over the company. This did not involve piercing the corporate veil but only identifying Mr Lipman as the man in control of the company. The company, said Russell J (at p 836), was

a device and a sham, a mask which [Mr Lipman] holds before his face in an attempt to avoid recognition by the eye of equity.

- iv. As against the company, the order was made based on the evasion principle. In the circumstances, the

company was to be treated as having the same obligation to convey the property to the plaintiffs as Mr Lipman had, even though the company was not party to the contract of sale. Essentially, the Court attributed a legal obligation owed by Mr Lipman to his company (thus, like in *Gilford Motor*, disregarding the separate personalities).

The true principle and a critical distinction

Having discerned the true basis for the principle, Lord Sumption provided the following formulation (at [35]):

I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

It is important to note a critical distinction which arises from Lord Sumption's formulation.

- i. The abuse which the principle is aimed at remedying is interposing the separate corporate personality of a company in order to evade an *existing* legal obligation or its enforcement.
- ii. It is not an abuse for a controller of a company to cause a legal liability to be incurred by that company in the first place or to rely upon the fact that a liability is not the controller's but is in fact the company's.

The abuse which the principle is aimed at remedying is interposing the separate corporate

25. [1962] 1 WLR 832.

personality of a company in order to evade an existing legal obligation or its enforcement

This distinction can be seen from the case of *VTB Capital v Nutritek*²⁶ in which a claim for piercing the corporate veil was rejected. In that case, it was argued that the corporate veil should be pierced in order to make the controllers of a company jointly and severally liable on the company's contract. The fundamental objection to that argument was that the principle was being invoked so as to create a new liability that would not otherwise have existed.

Other JJSC in *Prest*

Although reading Lord Sumption's analysis, one might think that the law was now clear and well settled, it is interesting to look at the views of the other Supreme Court Justices.

Lord Neuberger was less enthusiastic about whether there was in fact the need for such a doctrine at all. He thought that the few cases in which the doctrine had been applied could have been decided on other grounds. However, ultimately, given its long-standing recognition, he accepted that there was a limited role for piercing the corporate veil—limited, like Lord Sumption, to the evasion principle. He appeared to consider that it should just be seen as an application of the wider principle of 'fraud unravels everything'.

Baroness Hale and Lord Wilson were not sure that all previous cases could be classified within the concealment and evasion principles. Instead, in their view, they may simply be examples of a principle that individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business.

Lord Mance and Lord Clarke did not want to foreclose all possible future situations in which the doctrine might be invoked outside of the evasion

principle. However, they accepted that such occasions were likely to be rare.

Lord Walker did not think it was a doctrine at all but simply a label used to describe the disparate occasions in which some rule of law produces apparent exceptions to the principle of separate corporate personality.

The future

In light of the lack of agreement between their lordships in *Prest* over the common principle justifying piercing the corporate veil, further development of the law may not be easy for the Courts given that development of common law and equity is incremental and by analogical reasoning.

However, the Courts have felt able to apply the 'concealment' and 'evasion' principles expounded by Lord Sumption in *Prest*: see the recent decision of Rose J in *Pennyfeathers Ltd v Pennyfeathers Property Company Ltd*.²⁷

Resulting trust analysis

In *Prest*, the Supreme Court felt strongly that Mrs Prest should not be left empty handed as a result of their decision on veil-piercing. The tool that they used to give effect to this was the doctrine of resulting trusts.

In the trust context, resulting trusts have often taken a back seat over the last few years to constructive trusts, with constructive trusts being used to deal with the proceeds of fraud and taking an ever great role in cases dealing with how the family home is held by unmarried couples.

However, *Prest* should give us pause to examine whether they should be at the forefront of attempts to attack corporate structures, where we want to argue that assets purportedly placed into trust in fact remained held beneficially for the settlor.

26. [2013] 2 WLR 398.

27. [2013] EWHC 3530 (Ch). Although the reasoning in the third sentence of [119] appears to be rather oddly expressed.

When does a presumption of resulting trust arise?

Reminding ourselves of the basics, a rebuttable presumption of resulting trust arises if:

- a. there is a gratuitous lifetime transfer of property, or
- b. the purchase of property by one person using funds provided by another.

Applying the presumption: general points

Where property is transferred directly to a trustee of a trust governed by a written trust deed, then there is an express trust of the property unless it can be shown that the transfer in was a sham. Therefore, the doctrine of sham regulates such situations.

However, often property does not find its way into a trust structure by such a direct route, particularly where the structure is not set up or operated as perfectly as it should be. These features may often be present where the structure is set up or property transferred into it as part of a hasty asset protection strategy. For example,

- i. money may be transferred directly to a company owned by the trust in order to buy an asset, or
- ii. that asset simply transferred to the company for no consideration.

In either situation, the doctrine of resulting trust is of potential practical use because the presumption of resulting trust will arise.

The use of the doctrine in *Prest*

In *Prest*, subject to one caveat, the acquisition of the UK properties was through one of the two routes set out above. Therefore, the Supreme Court held that a

presumption of resulting trust arose and it was not rebutted.

In reaching this conclusion, the Court was influenced by the husband's persistent non-disclosure, and therefore was inclined to be robust in applying the resulting trust doctrine. It felt that he was simply using the companies as pockets to hold legal title to the assets in order to keep them out of the reach of his wife without having any genuine interest to part with the beneficial interest in them.

The application of *Prest* in the matrimonial context: *M v M*²⁸

As one would expect, the doctrine received a similarly robust treatment by the Family Division in *M v M*.

M v M is also useful in re-emphasizing that often the Court will be able to draw its own conclusions about the parties' *actual* intentions as to how the property was to be held, so that a constructive trust will arise and there will be no need to consider the doctrine of resulting trusts.

The application of the doctrine outside the matrimonial regime

In principle, there is nothing to stop greater use of the resulting trust concept to attack at the company level trust structures that hold companies.

While the desire to do justice to the claiming spouse and widespread non-disclosure by the paying spouse in matrimonial cases undoubtedly provides fertile ground for a robust application of the doctrine, so too do cases where assets are transferred into trust structures at the company level in dubious circumstances outside the matrimonial context.

Therefore, while Chancery Division judges tend not to take such a broad approach to trust doctrines as the Family Division, the doctrine is nevertheless worthy of consideration outside the

28. [2013] EWHC 2534 (Fam).

matrimonial context to attack trust structures. For example, the doctrine could be useful in the following contexts:

- i. enforcing against an individual that has transferred his assets into a structure at the company level;
- ii. establishing that particular property forms part of an individual's estate; and
- iii. establishing that the property remains the transferring individual's for tax purposes.

Rebutting the presumption

One of the most important practical questions is how one can go about rebutting the presumption.

The first way is to show that the transfer was made because the transferor wished to obtain something in return for the property transferred. While consideration of £1 did not impress the Supreme Court in *Prest*, proper consideration (even if left unpaid as a loan) can be sufficient, as can receipt of shares in the company in return for the transfer.

Similarly, if the property was transferred as a loan, then this will explain why the transferor wished to part with beneficial ownership of the property.

However, undocumented loans are likely to be treated with suspicion by the Court. More generally, the Court is likely to have regard, as it did in *M v M*, to how the trust was run, and if it sees the transferor treating the assets as his own, it is likely to infer that they were intended to remain his.

Third, if the company is a trading company, then transferring the property for the company to use in the company's business suggests that there was an intention to give the company beneficial ownership of the asset. While the Court will wish to understand what the transferor was getting out of the transfer, the answer may be that he or his family members were beneficiaries of the trust that is the ultimate owner of the company.

Fourth, if the transfer was part of or accompanied by tax planning such that the tax objective would

only be achieved if the company was beneficial owner, then that will be useful evidence of an intention that beneficial ownership was meant to pass to the company.

Fifth, establishing that a gift was intended suffices to rebut the presumption, but this may well be difficult in circumstances where the transfer was to a company rather than an individual and the transferor retained effective control of the property.

Lastly, if there is an express document dealing with beneficial ownership, this will prevent the presumption arising, and the claimant would then need to invoke the doctrine of sham to attempt to get around this.

Bypassing restrictions on trust information

Obtaining information about the trust is often a prerequisite to attacking it successfully.

As trusts and the running of them become ever more sophisticated, so too do the strategies aimed at restricting the access of beneficiaries and objects to trust information.

As trusts and the running of them become ever more sophisticated, so too do the strategies aimed at restricting the access of beneficiaries and objects to trust information

Routes for doing this include inserting restrictions in the trust deed on information provision, drafting the deed so as to seek to place sole rights to information in someone other than the beneficiaries, like a protector or other enforcer, and locating the trustees in jurisdictions that are more likely to endorse a trustee's decision not to disclose on an application by the trustee for blessing for such a course.

Often the concerns at providing such information and the steps taken to prevent this may be entirely legitimate and appropriate. The practical question they raise for someone who knows a little bit about

the trust but wants to know more is whether they can be circumvented, and if so how.

Five particular routes have been tested in recent case-law that merit consideration.

Invoking the Court's supervisory jurisdiction so as to get information from the trustee

The first is to invoke the supervisory jurisdiction of the Court so that even if there are restrictions in the trust deed on information provision, such as conditioning such disclosure on protector consent and such protector has declined to provide consent, nevertheless the Court retains a supervisory jurisdiction to order disclosure.

Stated as such, this route sounds relatively straightforward, particularly in a post-*Schmidt v Rosewood*²⁹ world where the exercise of such jurisdiction is meant to be a matter of discretion. However, the question raised where there is a disclosure mechanism in the trust is slightly more subtle, because if the trust contains a valid mechanism regulating disclosure, this raises the question of whether there is any role for the supervisory jurisdiction and if so, in what circumstances such jurisdiction should be exercised.

These questions were dealt with in the recent Bermudan case of *In The Matter Of An Application For Information Concerning a Trust*,³⁰ which has been litigated so far to the level of the Court of Appeal in Bermuda. There, the clause in question provided that protector consent was required if the trustee was to disclose information, and on the facts the protector (who was also a beneficiary) had not provided such consent, on the basis of alleged concerns as to the use to which the plaintiff might put the information and as to the motives behind the information request.

Kawaley CJ considered that the application raised two broad questions of principle: (i) was the clause restricting the provision of information valid on its face or were the terms incompatible with the

irreducible core obligations inherent in a valid trust: (ii) assuming the clause was valid on its face, what principles delineated the scope of the Court's jurisdiction to grant relief in circumstances which arguably entail a departure from the strict terms of the governing instrument?

As to (i), the Court concluded that the clause was not invalid as infringing the irreducible core obligation of accountability because it did not eliminate the trustee's duty to account or purport to oust the Court's jurisdiction to ensure accountability (through ordering disclosure) which could still be exercised in the face of such a clause.

Turning to the second question, the Court rejected the submission that the Court could only exercise its original supervisory jurisdiction to order disclosure if it was shown that the protector had misused the veto power in withholding consent to disclosure. Kawaley CJ stated:

... I do not construe [the trust provisions] as in any way limiting the circumstances in which a beneficiary under the Trust can invoke this Court's supervisory jurisdiction in circumstances where the Protector has vetoed an information request made by the beneficiary to the Trustees. P in the present case must simply make out a prima facie case that the Court's intervention is required to meet the minimum requirements for trustee accountability in objective terms. And this entails assessing how the Trust information control mechanism operated in all the circumstances of the relevant information request. Putting aside for present purposes the potential impact of any breakdown in the information control mechanism, one neither starts off with a presumption in favour of disclosure... nor does P have to show a capricious or perverse use of the Protector's veto powers...

Rather, as Mr Ham effectively submitted in distilled form, the Court must show due deference for the terms of the Trust Deed and only order disclosure if this is shown to be necessary in the proper

29. [2003] 2 AC 709.

30. [2013] SC (Bda) 16 Civ.

exercise of this Court's supervisory jurisdiction over the Trust.³¹

On the facts, the Court concluded that the plaintiff had made out a prima facie case for the Court's intervention applying the threshold test of whether or not such intervention was required in order to hold the trustee accountable for the due administration of the trust. Furthermore, for reasons detailed in a confidential appendix, the Court considered that in all the circumstances its discretion should be exercised in favour of ordering disclosure to the plaintiff.

The current state of play is that both the first instance Court and Bermudan Court of Appeal accepted that the Court should exercise its supervisory jurisdiction to order disclosure. However, an appeal to the Privy Council is outstanding.

Obtain information from the settlor in exercise of the Court's supervisory jurisdiction?

The second route canvassed in the recent case law is to go after the *settlor* by seeking information from him under the Court's *Schmidt v Rosewood* supervisory jurisdiction. This was attempted without success on the facts in the recent Jersey case of *Re the HHH Employee Benefit Trust*.³² The reasoning in the case is illuminating.

A settlor may often have trust information in his possession and may be in a jurisdiction that is easier for the beneficiary to access. Therefore, seeking information from the settlor may seem like a sensible shortcut if it can be successfully done.

In *HHH*, an offshore employee benefit trust was set up which involved discretionary sub-trusts for each employee and where the settlor had a number of powers under the trust, namely the power to appoint and remove trustees, the power to appoint a protector and the power with trustee consent to amend the trust. An ex-employee sought information from both the trustee and settlor. The Court held that:

- i. The distinguishing hallmark of the Court's supervisory jurisdiction over trusts was that it was regulating *fiduciaries*;
- ii. Therefore, information would be ordered to be provided where appropriate to allow the exercise of such fiduciary functions to be policed;
- iii. This meant that if a settlor retained fiduciary powers and disclosure was necessary to allow a beneficiary or object to police the exercise of such powers, information disclosure would be ordered of the settlor;
- iv. In the case before it, the above approach therefore required the Court to identify which of the settlor powers were fiduciary, and whether disclosure was appropriate to police the exercise of those particular powers. It was accepted by the settlor that the power to appoint trustees and protectors was fiduciary, and the Court found that the power to amend was not fiduciary. On the facts, it was not necessary for the beneficiary to have information in order to police the exercise of these functions.

Therefore, on appropriate facts, one can seek disclosure from settlors. It depends on whether their powers are fiduciary and to the extent that they are, whether information disclosure is appropriate.

This seems a sensible touchstone and will work in the majority of cases. It does raise interesting questions at the margins, which future Courts may have to deal with, about whether there is really a rigid requirement that a power or function be 'fiduciary' before the Court can become involved. Over recent years, there has been a blurring of the line between fiduciary and non-fiduciary powers, as the increasing sophistication of trusts gives rise to an increasing sophistication in setting the limits on the exercise of particular powers and to approaches which go beyond just putting a particular power into the fiduciary or non-fiduciary box. For

31. At [43] to [44].

32. (2012) (2) JLR 64.

example, one can have powers where there is no duty to consider the exercise of the power but which must be exercised for the benefit of the beneficiaries if it is exercised. Therefore, in some respects it looks like a fiduciary power, in others not.

Obtain information from the settlor using the Family Court's matrimonial powers?

The third route, which is linked to the second, relates to divorce and other similar Family Division cases. Where one spouse appears to have a link with a trust, the other spouse will naturally normally want to obtain chapter and verse on the nature of the link, to evaluate the extent of the resources of the first spouse and whether the Court's power to vary nuptial settlements might be invoked. Often the trustees of such trusts are offshore, decline to become involved in the proceedings and decline to provide trust information for such proceedings. However, the settlor, for example, someone else in the family, may often be in the jurisdiction and therefore in principle susceptible to a disclosure (eg under Rule 21.2 of the Family Procedure Rules 2010) or even a joinder application.

We have seen such an approach threatened or attempted in a number of recent cases. The spouse seeking information banks on the Family Division wishing to give itself as much information as possible to be able to judge the parties' resources and therefore starting from the position that trust information should be provided by someone.

However, it is suggested that this must be balanced by a number of countervailing considerations:

- i. the settlors are not a party to the divorce;
- ii. if the settlors are older family members that have set up the trust to pass on wealth to their children rather than do so through their estate on their deaths, one should take into account

the Court's unwillingness to get into divorcing parties' inheritance prospects and to compel older family members to go into what their intentions are in this regard; and

- iii. there may be good reasons why the offshore trustees will not provide the information.

Obtain information from the protector?

The fourth route is seeking information from the *protector*, who may—like the settlor—be within easier reach than the trustee. The reasoning in *Re HHH* means that a protector is in principle susceptible to such an application in respect of his fiduciary functions, so this is not a route that one should lose sight of.

Obtain information from other beneficiaries?

On the basis of the reasoning in *Re HHH*, as beneficiaries do not have any fiduciary role in the trust *qua* beneficiaries, then the Court's supervisory jurisdiction should not be used to order disclosure from another person who is only a beneficiary.

However, where the trust is being considered in the matrimonial context, disclosure from other adult beneficiaries should be considered, particularly where they have been made parties to a divorce case.

In *Tchenguiz-Imerman v Imerman*, the adult beneficiaries were joined against the wishes of the wife, following a contested hearing.³³ The Court was slightly suspicious of the reason behind the joinder application, considering that it might have been tactical in some respect, and therefore ordered fairly significant disclosure of documents in the adult beneficiaries' possession, including those relating to offshore directions proceedings concerning the trusts of the husband's family.³⁴

The first lesson to be taken from this is that when deciding on what stance an adult beneficiary of a

33. Reported at [2012] EWHC 4277 (Fam).

34. Reported at [2013] EWHC 3627 (Fam).

family trust should take in relation to divorce proceedings to which he or she is not a party, the disclosure consequences of joinder should be taken into account along with the other considerations that one would normally factor in, such as whether such participation would have any effect on the enforceability offshore of a Family Division judgment. The other lesson is that the likely disclosure orders on joinder of the adult beneficiary should be taken into account by the trustee when seeking directions offshore, in deciding whether and how to involve such an adult beneficiary in the proceedings, what documents the adult beneficiary should see, and what if any confidentiality orders should be sought offshore in respect of the documents put before the offshore Court.

Appendix—Dealing with divorce: claims for financial provision involving trusts³⁵

Varying nuptial settlements

Understanding when trusts can be varied as nuptial settlements is important both in attacking and defending trusts on divorce and in drafting trusts. However, while there is a lengthy body of case-law dealing with such issues, it is often difficult to extract general principles that can be easily applied to specific cases. Moreover, although there may be cases proceeding through the Courts that might deal with this issue in some depth, there is no detailed recent treatment of the issue. Therefore, the aim of the first part of this article is to try to identify some threads running through the case-law that can be applied when we come across such issues in practice, and to deal with recent developments in the area.

The jurisdiction to vary ante- and post-nuptial settlements (together '*nuptial settlements*') on divorce currently arises under Section 24(1)(c) of the Matrimonial Causes Act 1973.

There are parallel provisions for civil partners under Sections 6 and 7 of Civil Partnership Act 2004 and overseas divorce (providing certain jurisdictional criteria are met) under Matrimonial and Family Proceedings Act 1984. We shall refer to 'spouses' in which follows to include civil partners.

Section 24(1) of the 1973 Act provides that:

24 Property adjustment orders in connection with divorce proceedings, etc.

1. On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—
 - a. an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
 - b. an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
 - c. an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any [1] ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) [2] made on the parties to the marriage, other than one in the form of a pension arrangement (within the meaning of section 25D below);
 - d. an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement, other

35. This article summarizes the law as it stood at 1.12. More recent developments are dealt with in the main paper to which this is an appendix.

- than one in the form of a pension arrangement (within the meaning of section 25D below);
- e. subject, however, in the case of an order under paragraph (a) above, to the restrictions imposed by section 29(1) and (3) below on the making of orders for a transfer of property in favour of children who have attained the age of eighteen. (emphasis added)

The jurisdiction has existed since the Matrimonial Causes Act 1859, which accounts for the lengthy body of case-law.

The questions that it gives rise to can be broken down into:

- a. What is a 'settlement' for these purposes?
- b. When will such a settlement be an 'ante-nuptial' or 'post-nuptial' settlement 'made on the parties to a marriage'?
- c. If the jurisdiction is engaged, what principles will the Court apply in deciding whether and how to vary the settlement?
- d. What parties should be represented in any dispute on the above issues and how?

The answer to (a) is that a 'settlement' for these purposes extends considerably beyond a trust. Therefore, we shall touch on (a) insofar as it is necessary to understand the jurisdiction in the trust context, but not go beyond this.

The focus of our inquiry shall be on issues (b) to (d), particularly (b), because this is the most important issue in determining in the trusts context whether a variation application will get off the ground and it is on this issue that most of the case-law is to be found.

The place of an application to vary a nuptial settlement

In order to understand the practical role of the jurisdiction to vary nuptial settlements, it is helpful to

consider its place in the armoury of weapons for dealing with trusts in divorce.

One way to deal with a trust of the other spouse is to allege that it forms part of his or her *resources*, a topic which we shall be addressing in the next section of this paper. On some facts, this may be easier to establish than to show the trust is nuptial, such as if the trust was set up long before the marriage, distributions have been made to the other spouse on request, and nothing has happened to the trust during the marriage to give rise to an argument that any property subject to it is part of a nuptial settlement.

However, if the Court goes down the resources route, it makes a lump sum order. This may work for the applicant if there are substantial assets outside the trust in the jurisdiction, but may not allow the applicant the necessary relief if much of the assets are tied up in offshore trusts and the trustees (acting in accordance with the duties) do not advance sufficient to the husband and/or wife to satisfy the Order. Indeed, the trust may contain a clause specifically barring the use of the money to satisfy a divorce award against an ex-spouse of the beneficiary.

Therefore, it may be necessary for the applicant to seek, either as a substantive head of relief or as a means of enforcement an order already made in her favour,³⁶ an order varying the trust as a nuptial settlement, with the aim of then enforcing that judgment abroad directly against the trust.

This gives the nuptial settlement jurisdiction some practical advantages that the resources jurisdiction does not have.

In comparing the two, it is important not to assume that the two routes will necessarily reach the same result. The Court of Appeal cautioned against this assumption in *Charman v Charman (No 4)*³⁷ in responding to an argument that the resources argument should have only led the first instance judge to award the same sum as if an application

36. *Mubarak v Mubarak* [2007] EWHC 220 (Fam) being an example of the latter.

37. [2007] EWCA Civ 503 at [56(b)].

to vary the trust as a nuptial settlement had been made:

There is a fundamental conceptual confusion in linking the court's duty in every application for ancillary relief to enquire into the extent of a party's resources with its power to redistribute assets which are not the resources of only one party but are susceptible to redistribution because they are held in a settlement which is nuptial.

Therefore, assets in a nuptial settlement are not merely the resources of one party, even though—as we shall see below—a settlement can be nuptial even if it is for the benefit of only one of the parties to the marriage. Rather, the Court of Appeal appears to suggest, they are treated as common assets of the marriage. This captures one aspect of a nuptial settlement but does not give the full picture because an asset in a nuptial settlement is not just an asset of the parties to the marriage: it may well also be an asset in which others have interests that need to be protected. However, the important point for present purposes is that the Court's ordinary (and very broad) Section 25 ancillary relief discretion applies to variation of nuptial settlements but is applying to a slightly different sort of asset to that in a 'resources' claim. We will come back at the end to what impact this has on how the Court will exercise its discretion as to the quantum of relief.

The other jurisdiction to set the nuptial settlement jurisdiction alongside is that under Section 37 of the 1973 Act to set aside transactions that have been entered into to prevent or reduce financial relief. A transfer of assets *into* trust with this aim would be caught by this section.³⁸

Section 37 is therefore dealing with actions taken to protect a spouse on the *breakdown* of marriage. In contrast, the nuptial settlements jurisdiction is focusing on the making of continuing provision during the

course of the marriage. Accordingly, Section 37 brings out this aspect of the nuptial settlement jurisdiction as well.

When the provision is made under a trust by one party to the marriage for himself and his children but not for the other spouse, the two jurisdictions may overlap if he is doing it with one eye on housing these assets safely in the event of a later divorce. However, the jurisdictions start from different ends of the telescope.

'Settlements'

A 'settlement' for these purposes extends well past a trust to any form of continuing provision for a party to the marriage, such as covenants for the benefit of or bonds for one of the parties to a marriage.

For present purposes, much of this extended definition does not concern us directly. However, as we shall see, where it does play a part is in relation to trusts that as set up are not nuptial, but which then carry out an action (such as the purchase of a property) which can give rise to a nuptial settlement in this broader sense. We shall deal with this in more detail later.

The general test for nuptuality

We will start with the general test, and then seek to examine specific cases at the boundaries.

Many different judges down the years have attempted to expand slightly upon what is now Section 24(1)(c) of the 1973 Act means by an '*ante-nuptial settlement or post-nuptial settlement... made on the parties to the marriage*'.

The modern law can be found in the cases since the House of Lords decision in *Brooks v Brooks* [1996] AC 375, principally:

- *Brooks v Brooks* [1996] AC 375 (HL)

38. One point to note on s 37 is that an instrument excluding a beneficiary from a trust is not a disposition such as to engage s 37: *Mubarak v Mubarak* [2007] EWHC 220 (Fam) at [67]–[77].

- *Charalambous v Charalambous* [2004] 2 FCR 721 (CA)
- *N v N* [2005] EWHC 2908 (Fam)
- *K v K* [2007] EWHC 3485 (Fam)
- *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam)
- *BJ v MJ* [2011] EWHC 2708 (Fam)

However, to our mind, the best attempts at expanding the definition can be found in some of the earlier cases and other authorities, such as:

Princep v Princep:³⁹

Is it upon the husband in the character of husband or [upon] the wife in the character of wife, or upon both in the character of husband and wife . . . ? . . . [I]t should provide for the benefit of one or other or both of the spouses and with reference to their married state.

Hargreaves v Hargreaves:⁴⁰

This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. It refers to it because what it is dealing with is what we commonly know as a marriage settlement, that is *a settlement, made in contemplation of or because of marriage, and with reference to the interests of married people, or their children.*

1969 Law Commission Report Number 25 (which led to the 1973 Act):

We think too, that the power to vary should continue to be limited to ante- or post-nuptial settlements (ie *those made on the parties qua husband and wife*) and not to all settlements⁴¹

Brooks v Brooks:⁴²

In the Matrimonial Causes Act 'settlement' is not defined, but the context of s.24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement 'made on the parties to the marriage'. So *broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage with, or without provision for their children . . .*

These quotes bring out that there must be a particular link to one or more parties to the marriage in question. Specifically, the settlement must as a minimum make:

- provision for one or both of the parties to the marriage
- as parties to the marriage in question.

Therefore, the best example of where (a) will be fulfilled is where the husband and wife are beneficiaries of a trust. Where they are both beneficiaries, it is *likely* that they will be beneficiaries in their character as parties to the marriage in question (although not certain that the trust could be set up in advance of marriage with no particular marriage in mind). This is all the more so where they are already married because then it is overwhelmingly likely that they will have been made beneficiaries because they are currently married. As was said in *Worsley v Worsley and Wignall*:⁴³

The court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a

39. [1929] P 225, 232 (Hill J) (emphasis added).

40. [1926] P 42, 45 (Hill J) (emphasis added).

41. Emphasis added.

42. [1996] AC 375, 382 (Lord Nicholls) (emphasis added).

43. (1869) LR 1 P&D 648, 651 (Sir JP Wilde JO).

post-nuptial settlement. It would not be justified in narrowing the reasonable scope of the words used in the section. The substance of the matter is, that the legislature by this section has armed the court with authority to make special arrangements in the case of a woman found guilty of adultery, in reference to property settled upon her in her character as a wife. The substantial feature to bring the case with the clause of the statute is, that a sum of money is paid to a women in her character as wife, or is settled upon her in that character and while she continues a wife

Accordingly, if the trust is set up before the marriage in question, condition (b) is more likely to be an issue than for a trust set up afterwards. For example:

- Even if the parties are in a longstanding relationship, (b) will not be satisfied if marriage is not contemplated, such as because of an ideological opposition to it, as in *K v K*.⁴⁴
- If the husband is already married, a trust that includes as beneficiaries all spouses present and future will not be nuptial in respect of a future marriage (*Burnett v Burnett*⁴⁵).

The other point to note from the test is that if it makes provision for a party to the marriage, the motive for doing so does not matter (see eg *Prinsep v Prinsep*⁴⁶). One does not need to take this step deeper into the reasoning for setting up the trust as it has been.

Having made these general remarks, we shall now take some cases towards the margins of the definition, starting with the clearest case first and then working outwards to more difficult examples.

Cases towards the margins

A trust for the benefit of only one of the parties to the marriage

If this suffices, then potentially a very wide range of trusts are caught, because being a discretionary beneficiary or object of a trust settled after marriage would count for example, providing that the spouse was a beneficiary in their capacity as spouse (rather than just as say employee of a particular company).

The summary of the law by the House of Lords in *Brooks* (set out above) suggests that provision for one party to the marriage suffices, as do some statements in earlier cases (eg *Prinsep v Prinsep*,⁴⁷ *Melvill v Melvill & Woodward*⁴⁸), although the decision in *Brooks* itself focused for its finding that the trust was nuptial on the possibility of benefiting the wife as well as the husband.

Settling' a power under a trust

Brooks suggests that the disposition has to benefit one or both of the parties to the marriage in some way to constitute a nuptial settlement, so that if from the outset neither party is beneficiary of a particular trust,⁴⁹ one might think that this was the end of the matter and the trust could not be nuptial.

However, *Brooks* might not be taken to be intended to provide an exhaustive definition and *Compton (Marquis of Northampton) v Compton (Marchioness of Northampton)*⁵⁰ suggests that matters might not be so simple. In that case, a husband set up four settlements for the benefit of the parties' children. He made his wife trustee of all four settlements, and gave her a contingent life interest in the daughters' settlements and a power of appointment under the

44. [2007] EWHC 3485 (Fam).

45. [1936] P 1.

46. [1929] P 225.

47. *Ibid.*

48. [1930] P 159.

49. And there may be no sign that they will become a beneficiary in the future (and may even be specifically excluded by the trust instrument from doing so).

50. [1960] 3 WLR 476.

sons' settlements. The Court held that a post-nuptial settlement could be one that settles *power over the disposal of property* as well as over the property itself:

These settlements are settlements of property made in the course of marriage, and they deal with the interests of the children of the marriage. In the disposal of the property for the benefit of each child the respondent wife has been given a voice both as trustee and under the power of appointment even though it is the husband who provides all the money. Under the settlements on the two daughters she also has a beneficial interest in reversion. *A settlement can settle on parties to a marriage power over the disposal as well as over the property itself* (emphasis added).

In assessing how far this case goes, one should bear in mind the following:

- a. The wife both had a power of appointment and was trustee; and
- b. She also had an interest in reversion in half of the trusts.

However, from the final sentence of the extract, neither of these factors appears to have been critical to the Court's decision.

It is important to note that, taking the above extract literally, the nuptial settlement is of the *power* of disposal of trust assets, not of the trust assets themselves.

One important question here is whether and if so why giving someone a power under a trust *from which they cannot benefit* (slightly different from the situation in *Compton*) could make the trust a nuptial settlement. One can understand that holding a personal power that could be used for one's own benefit might be considered equivalent to owning the property and therefore treated similarly by the matrimonial regime, but where (as is often the case) the power is not a personal one that can be exercised for the donee's benefit, why is the power regarded as the subject-matter of a nuptial settlement?

Part of the practical reason for this is that hinted at by Wilson J at first instance in *C v C (Ancillary relief: nuptial settlement)*,⁵¹ in stating that '*under the deed of settlement the parties remain its joint protector and must so remain during their joint lives. In parenthesis I ask: can one readily conceive a provision of a trust which demands variation upon divorce more obviously than this?*' If the divorce Court is to effect a sensible clean break, it must be able to ensure that this extends to powers over assets as well as the assets themselves.

This ties in with the way that the Court in *Compton* approached the task of examining *what* variation should be made. It extinguished the wife's contingent life interest and then considered whether the powers as trustee or otherwise under the trust should come to an end (concluding that they should not). It did not contemplate that the powers conferred on the wife by the trust should themselves be used as a way to vary the beneficial provisions of the trust.

One can see why the Court may want to vary a *power* under a trust where it is held by a party to the marriage. This is essentially what was done in *Compton* (the wife was also a beneficiary and her beneficial interest was varied but taking her status as beneficiary out of the equation, all that was done was to consider whether her powers under the trust should be varied). However, what may require further justification is why the fact that a party to the marriage holds a *power* under a trust should of itself justify the Court varying the *beneficial interests* under the trust, particularly where the power cannot be used for the benefit of the spouse in question. It might be said that the fact that the spouse has a power under the trust does not really affect whether it should be regarded as 'marital property', because the parties to the marriage cannot access the money.

Therefore, one should be careful not to move too readily from the proposition that the *power* under the trust is settled on a nuptial settlement to the idea that the underlying *trust assets* are part of the nuptial settlement.

51. [2004] 2 WLR 1467, at [26(a)].

The next case to deal with the issue (albeit only in passing) is *Dharamshi v Dharamshi*.⁵² In that case, shares in a company were settled by the husband's mother on her grandchildren, appointing the husband and wife trustees of the settlement. Thorpe LJ said at [2] of judgment that

Equally surprising to me was the wife's application brought under section 24 of the Matrimonial Causes Act 1973 for the variation of the children's settlement to restrict the beneficial class to the two children of the marriage. I cannot see how it could be said that the settlement in question constituted a post-nuptial settlement made upon the parties to the marriage.

However, it is not clear from the report what the terms of the trust were in that case: it may for example have been a fixed interest trust and therefore the trustee might not have had any dispositive powers at all.

The most recent case on the topic is *Charalambous v Charalambous*⁵³ (the appeal from the *C v C* decision of Wilson J mentioned above). In that case, the parties to the marriage had originally been among the beneficial class of the discretionary trust in question along with their children. The spouses were also joint protectors with power to veto any appointments of the trust property, additions or removals from the beneficial class and so forth. On being pursued by their creditors ([2]) they were removed as beneficiaries (but could be added back in again in the future). The question for the Court on their subsequent divorce was whether the trust was a post-nuptial settlement given that the husband and wife were not beneficiaries at the time of the divorce.

The Court held that the trust was originally nuptial and had not ceased to be by the removal of the spouses as beneficiaries, for a number of reasons, principally their remaining joint protectors, the children remaining in the beneficial class, the removal

being motivated by the potential claims of creditors and the possibility that they might be reinstated as beneficiaries ([45]). One might also note that the husband had continued to receive substantial benefit from the trust even after his removal, albeit on arm's length basis.

Therefore, the powers given as protector were only one of the reasons given for the Court's conclusion. That said, this was treated as an important reason, Thorpe LJ setting out with approval the extract above from *Compton* and Arden LJ saying (at [53]) that

[T]he still extant and significant powers of Mrs Charalambous as joint protector, particularly her powers to refuse to join in a consent to distributions by the trustees . . . are of themselves sufficient to invest the settlement with a post-nuptial character: see *Compton v Compton* . . . [T]hese powers would be a sufficient form of continuing provision for Mrs Charalambous within the definition given by Lord Nicholls in *Brooks v Brooks*. It is, therefore, not necessary that either spouse should be a beneficiary at the date of the order under section 24(1)(c).

Moreover, it was clearly envisaged that any variation could give Mrs Charalambous property from the trust rather than just dealing with the powers that she and her husband held under it (although this was not one of the issues before the Court at the hearing in question). Therefore, the nuptial settlement was treated as the entirety of the trust rather than just the powers under it.

One can understand this reasoning in a case where the spouses had both been beneficiaries, had only been removed to protect the trust from creditors and at least one of them could well be added back in the future, because they could in substance be regarded as beneficiaries of the trust. However, it is submitted that one might need to be slightly more

52. [2001] 1 FLR 736, 738 (CA).

53. [2004] 2 FCR 721.

careful before allowing significant variations to the whole of a trust of which someone is not a beneficiary just because they hold a particular power under it.

What sort of powers may lead to a settlement being nuptial? It appears from *Compton, Dharamshi* and *C v C* that it is powers of disposal that are important. Therefore, powers of appointment (even if—as in *C v C*—requiring the trustee's involvement) are the classic example, together with powers to add and remove from beneficial classes, as opposed to administrative powers. Powers to add and remove trustees and protectors may also be relevant (for example, if they are thought to allow in practice the donee to decide how the trust assets should be distributed).

A trust where neither spouse is a beneficiary or has a power under the trust: a trust that starts off nuptial

So far we have dealt with a case where only one spouse is a beneficiary and a case where one or both spouses have a power under the trust.

We shall now examine a case where neither spouse is a beneficiary or has any power.

One situation where this has been considered is where the settlement starts off nuptial and then the spouse or spouses are removed. This was the other issue considered in *C v C*: is it ever possible for a settlement that was nuptial when set up to cease to be nuptial?

The Court of Appeal held that it could ([44] and [53]) because the settlement had to be nuptial at the time that the order is made, but that whether removal of spouses as beneficiaries would have this effect would depend on the facts of the case.

Therefore, if the spouses were removed for a genuine tax reason, this should be able to make the settlement cease to be nuptial.⁵⁴ However, if the Court considers that the spouse has been removed because

of impending relationship breakdown or on a temporary basis, then this may not suffice. In the latter case, irrevocable removal and exclusion from benefit is the best way to demonstrate that the trust is no longer nuptial.

It should be remembered that in *Charalambous*, there were a number of other factors that the Court considered made the trust retain its nuptiality (eg retention of powers under the settlement, children remaining in the beneficial class). Therefore, it is not wholly clear whether in the absence of these factors the trust would have been found to have remained nuptial. Therefore, the precise extent to which a trust from which the spouses have been removed as beneficiaries remains nuptial remains slightly open in this regard.

A trust where neither spouse is a beneficiary or has a power under the trust: a trust closely linked to a nuptial trust

Another situation in which the Courts have suggested that a trust may be nuptial despite the spouses not being beneficiaries is where the trust is inextricably linked with another trust and the latter trust is nuptial.

This was the situation in the recent decision of Mostyn J in *BJ v MJ*.⁵⁵ In that case, H made money with fellow directors from setting up a company. In anticipation of a flotation, he set up an arrangement that mitigated CGT, involving 2 trusts. Trust 1 was a discretionary trust settled by H for H, W, their child C, H's siblings, any employee of the company and charity. Trust 2 was for everyone apart from H, W and C, those 3 being specifically excluded from class of beneficiaries. Both had offshore trustees. Dividends went to Trust 1 but capital gains were attributed to Trust 2.

Mostyn J held (unsurprisingly) that Trust 1 was obviously post-nuptial. He also held that Trust 2 was a post-nuptial settlement despite all 3 of H, W

54. See the example given by Thorpe LJ at [44].

55. [2011] EWHC 2708 (Fam).

and C being excluded from benefit. The reason given for this was that ([60]):

60. [I]t is an integral, indeed key, component of the overall scheme. It is the left hand to the No.1 Trust's right hand. In *Parrington v Parrington* [1951] 2 All ER 916 Pearce J held that two separate but contemporaneous deeds by which a husband and wife divided up their hotel business between themselves was in substance one transaction which qualified as a nuptial settlement between spouses within the meaning of s25 of the Matrimonial Causes Act 1950

63. In this case I have no hesitation whatever in finding that the three entities 'viewed as a whole' constitute a variable post-nuptial settlement. It would be absurd and arbitrary for me not to do so, for the question of whether the value of Giloch ends up in the No.1 Trust or the No.2 Trust is just a question of the timing of a particular meeting. If the Trustees of the No.1 Trust cause a directors' meeting of Giloch to be held which then votes all the assets of Giloch as a dividend in specie then all the value goes to No.1. If the trustees of No.2 Trust (who are the same as for No.1) cause a general meeting to be held and vote to wind up Giloch then all the value goes to No.2. The result of W's claims for a financial remedy surely cannot hang on the fortuity of which meeting comes first.

Therefore, what convinced him was that the trusts were absolutely inseparable, and one could regard the assets as in reality as much as part of Trust 1 as Trust 2, so it made no sense to draw any distinction between the two trusts such as to leave any assets out of the matrimonial jurisdiction.

It should also be noted in this regard that there were in that case:

- a. There was inconsistent accounting as to whether the value of the company was held in the No.1 Trust ([58]);
- b. H initially suppressed a report showing that the value of the company could be distributed via

No.1 Trust rather than No.2 Trust ([55]-[57]); and

- c. H threatened at the outset to draw out the proceedings for as long as possible if W sought to bring contested divorce proceedings, and then lied to the Court about having done so ([52]).
- d. None of these factors helped H.

Moreover, the trustees offered to make money available from the capital of the trust assets to be paid to W [66], which also helped the Court to conclude that funds could be made available to her out of the trusts.

The lesson to draw from this from a drafting perspective is to make very sure that if you set up some trusts that are meant to be nuptial (or that it is recognized are nuptial), one draws a sufficient demarcation between them and any trusts that it is intended to be non-nuptial, to avoid any contamination of the latter by the former.

The inter-relationship of the two trusts in *BJ* was fairly extreme (although not necessarily uncommon in practice), and one should take care not to generalize from it too much, but nonetheless it is important to be careful in this regard in keeping the different sets of trusts as separate as possible.

Other cases where the spouses are not beneficiaries

The question remains of what other situations there might be where the Court might be tempted to find that a trust might be nuptial despite the spouses not being beneficiaries.

There are some dicta which might be taken to suggest that the mere fact that a trust is set up *because* of a marriage or that a marriage is *taken account of* in setting up a trust should suffice. For example, in *Joss v Joss*⁵⁶ Henn Collins J said:

It is not enough that it should have been made by a spouse after the marriage. It must also have been made

56. [1943] P 18, 20.

'because of' the marriage... The particular marriage must be a fact of which a settlor takes account in framing the settlement...

However, it is suggested that this is not sufficient for the trust to be nuptial. For example:

- a. In *Joss* itself, the husband was a beneficiary, there was a power of appointment in favour of the wife, and the Judge was in the above extract accepting the manner in which the argument was put against the trust being nuptial;
- b. Many settlements could be made because of a marriage (eg a settlement for a brother-in-law) that are clearly not nuptial, so the 'because of' test is not the correct one, at least on its own;
- c. The same is true of a settlement for the children of the marriage but not the parents and without any powers for the parents;
- d. It does not satisfy the summary test set out in *Brooks v Brooks* and is difficult to reconcile with *C v C*.

The other situation where the Court might be tempted to step beyond the approach in the cases set out above is where there are very few assets outside the trust and the resources route of attack will not work because the trust prevents payments being made that are going to be passed to ex-spouses. However, it is submitted that the Court should not act on such a temptation unless one of the orthodox routes to finding a nuptial settlement is made out.

Tainting a non-nuptial settlement

We have already dealt with one way to taint a trust that would not be nuptial on its own: set it up in such a way that it is inextricably linked to a nuptial trust.

However, there is another, more likely way that a non-nuptial settlement can be tainted, which was foreshadowed above in the section on the breadth

of the concept of a 'settlement' (paragraph 20 above) and is well illustrated by *N v N*.⁵⁷

In that case, a trust that was not nuptial purchased an onshore property for the husband and wife to use, allowing them to occupy it through a tenancy. Even though:

- a. The original trust was not nuptial;
- b. The trustees were acting within the parameters of the trust; and
- c. No new trust was created by their actions,

it was nevertheless held to have created a nuptial settlement of the property, the Judge placing great store by the facts that it was bought in contemplation of a specific marriage, made ongoing provisions for the parties to that marriage and provided for them as husband and wife.

This area was considered again slightly more recently in *K v K*.⁵⁸ In the case, the settlor was H's mother, who set up in 1985 a discretionary trust for her children (H and his brother), together with any spouses and children. At that stage, H was in a relationship but both parties to the relationship were ideologically opposed to marriage so there was no question of the settlement being nuptial. H's brother then married someone that his mother considered undesirable so she executed a power of appointment in favour of H, together with any spouse and children. Again, the settlement was not nuptial at this stage. In 2005, after the husband had married his spouse (putting their ideological objections to one side), a further deed of appointment was executed to exclude H's brother irrevocably from benefit, the recital to the deed making clear that this was its purpose. The deed also made clear that the property was to be appointed for H, any spouse and his children. The spouse argued that this last deed created a nuptial settlement because he was his wife by this stage. However, the Court held that this was not the case because even though

57. [2005] EWHC 2908 (Fam).

58. [2007] EWHC 3485 (Fam).

it was made during the marriage and both H and W were beneficiaries under it, the deed was clearly made to exclude H's brother and his family from any possibility of benefit, not to confer a benefit on W.

Therefore, *K v K* shows that there are limits to the approach in *N v N*, but nevertheless, those limits are not very severe. Therefore, great care needs to be taken in adding property that might be used by the other spouse to a settlement that is not nuptial.

Deciding whether, and if so, how the nuptial settlement should be varied

The settlements that have been varied to date are moderately simple in structure. In many cases the settlements have not even amounted to trusts but just fallen within the broader definition of 'settlement' discussed above.

Therefore, the Courts have not really had to grapple with how you might go about partitioning a sophisticated structure with (for example)

- a number of trusts
- underlying trading companies
- interconnection between companies with cross-guarantees
- a decent number of staff involved
- complex tax issues if partitioning is to be carried out.

Moreover, there is little case-law on precisely how the Court should go about deciding whether and how to vary the trust, beyond saying that the Court is simply exercising its broad Section 25 discretion.

In this regard, two modern cases are important.

The first is *Ben Hashem v Ali Shayif*,⁵⁹ where the question was considered in some detail.

The following points emerge from the case:

- a. Particularly where the settlement is not what we would term a trust, it is important to be clear

as to what's in it. This is important when (for example) there is found to be a settlement by a trust allowing a couple to live in the house. In *Ben Hashem*, no trust was involved but a company owned a property that it allowed the wife to stay in (the shareholders of the company being children of earlier marriages). The Judge held that there was therefore a settlement in respect of the property, but that this settlement was limited to an interest analogous to a licence determinable on reasonable notice because it had never been intended that she should have a greater right than that.

- b. When deciding how to vary the trust, the Court is exercising its ordinary and very broad discretion under Section 25.
- c. However, the Court ought to be slow to deprive innocent third parties of their rights under the settlement. If their interests are to be adversely affected then the Court will normally seek to ensure that they receive some benefit that is approximately equivalent so that they do not suffer substantial injury.

This last principle is important. It also ties in with the discussion above about not being too willing to vary significantly beneficial interests where all a spouse has under a trust is a particular power rather than being a beneficiary (paragraphs 39 to 50).

In *Ben Hashem*, the Court reasoned that:

[A]ll the Company (or the children) ever intended to part with when the wife was permitted to remain in the property was an interest in the nature of a revocable licence. That being so, what basis would there be, either in fairness or in justice, to give the wife a greater interest?. There can, in my judgment, be only one answer to that question. Why should the Company be deprived of its property to meet the ancillary relief claims of the wife of one of its shareholders? Why should the children be deprived of part of

59. [2008] EWHC 2380 (Fam).

what is, in effect, their inheritance to meet the wife's claims? It is not the responsibility of the children to look after their step-mother or to provide for her ancillary relief. That is the responsibility of the husband, and the husband alone.

However, a slight note of caution is needed in taking *Ben Hashem* as authority on this point. There, the 'innocent third parties' were not children of the marriage. They were the step-children of the wife. Therefore, it was easy for the Court to treat them as third parties whose interests should not be harmed by the wife's ancillary relief application.

Moreover, in *BJ v MJ*,⁶⁰ Mostyn J set out and considered the *Ben Hashem* principles and commented on the suggestion that innocent third parties should not be deprived of their interests without a corresponding benefit (see [10] in particular). He stated that the suggestion in *Ben Hashem* about innocent third parties:

must surely be read in the light of the new distributive regime mandated by the House of Lords in *White* [2001] 1 AC 596 and *Miller and Macfarlane* [2006] 2 AC 618. If the court has decided that the assets of a nuptial settlement amounted to matrimonial property which falls to be shared then that sharing may very well be in the form of outright provision which deprives a contingent or discretionary benefit down the line of the chance of benefit...

He referred to *Charman* and said:

It was argued on behalf of Mr Charman that had she in fact been forced to apply for a variation of the settlement she would not have been awarded more than a life interest in part of Dragon, so as not to disturb the rights of other beneficiaries, and that therefore her sharing right to the assets of the trust should be limited to the capitalised value of such a life

interest. This was firmly rejected, Sir Mark Potter P stating at para 56(b):

Fifth, we see no reason to accept that, just because after the breakdown of the marriage Codan formally assigned to the husband a life interest in Dragon, the result of an application to vary it would have been provision of the wife only of a life interest, albeit presumably subject to a power in her trustees to advance capital to her; our instinct, on the contrary, is that on the facts of this case outright provision would have been more likely.

He then ([11]) accepted that if the trust was set up during the marriage as a result of agreement *between the spouses* this would be important in deciding the extent to which the separate legal structure set up for the benefit of not only the spouses but also their children and remoter issue should be respected on a variation application.

What are we to make of this? One way of reading the two together is that *BJ* is principally directed at a different sort of case to that in *Ben Hashem*, because Mostyn J is saying that the interests of *contingent* or *discretionary* beneficiaries who might be expected to benefit *at some stage in the future* might be overridden where there is a settlement *for one or both of their parents and* them. One can see this. This is different from a case where (as in *Ben Hashem*) the children are meant to have the main interest in the settlement or a particular part of it, and therefore one should be reluctant to override this.

Nevertheless, *BJ* does not sit particularly easily with the analysis in *Ben Hashem*, and neither case will be the last word on the subject.

The role of interested parties other than the spouses

Tied to taking into account the interest of third parties is the question of the appropriate role of

60. [2011] EWHC 2708 (Fam).

interested parties other than the spouses, and whether they should ever become involved in a variation of nuptial settlement application.

Given that the offshore trustee will normally not intervene in England (assuming that the level of trust assets in England do not make it necessary for it to do so), the question arises of who will put to the English Court the arguments that it is in the interests of the trust beneficiaries to take.

The ordinary answer is the husband, but he may well not be best placed to do so, and the Court may well take from the husband's stance in so doing that the trust assets are really the husband's property, which may well not be an accurate picture of the practical reality.

Accordingly, it is worth considering whether anyone else should become involved in the application.

Adults:

In *BJ*, Mostyn J said (at [12]) that the role of other beneficiaries of the trust had often been overlooked, and that it was incumbent upon the applicant to vary the trust to draw the claim to the attention of any significant beneficiaries explaining that they are at liberty to apply to intervene or otherwise make representations. This is what happened in that case.

This may often be worth considering in the case of an adult beneficiary:

- a. This may avoid the Court getting the wrong impression that the trust assets are the husband's property (when in fact he may not even be a beneficiary of the trust in question);
- b. In best position to explain how variation might affect you personally.

However, care is needed:

- a. One needs to ask in each case whether this intervention will impact on the ability of the applicant to enforce overseas and therefore undercut the decision that the trustee has taken in the interests

of the trust not to intervene? May well not do so if judgment still not enforceable abroad, but need to consider;

- b. One also needs to consider cost of doing so and whether may get drawn into disclosure and other issues. So making representations might be one thing, formal joinder quite another.

Minor children:

Under Family Procedure Rules 2010 Rule 9.11(1), the Court has the following duty:

Where an application for a financial remedy includes an application for an order for a variation of settlement, the court must, unless it is satisfied that the proposed variation does not adversely affect the rights or interests of any child concerned, direct that the child be separately represented on the application.

Therefore, Court consideration of the position might lead it to have separate representation for minors if no adult beneficiary is there to make the case, so that the Court has the benefit of this perspective.

Trustee

As a final point, Mostyn J also commented in *BJ* that

I find it hard to see why participation by the trustees in a helpful or meaningful way in this court's inquiry *qua witness* could be construed as submission to the jurisdiction ([21])

but it seems unlikely that trustees will necessarily be sufficiently comforted by this to be willing to give evidence to the English Court. Nevertheless, his words are a very useful reminder of the attitude that the Family Division is likely to take to trustees who are not even willing to provide evidence in the proceedings.

Treating trust assets as a 'resource'

When will this approach be relevant?

In some ancillary relief proceedings involving trust assets, it may not be possible (or desirable) to apply for a variation order under Section 24(1)(c) of the 1973 Act. For example, the trust may not be 'nuptial' or, if the trust is situated outside of the jurisdiction, any variation order may be unlikely to be enforced.

In such cases, an applicant spouse might instead seek to gain the benefit of the trust assets through a less direct route by arguing that the assets are in fact a 'resource' of the respondent spouse and therefore should be included in the computation of the marital wealth.

The ultimate legal source for this approach is Section 25(2)(a) of the 1973 Act which specifically provides that, in exercising its powers under Sections 23–24, the Court should have regard to (inter alia):

the income, earning capacity, property and *other financial resources* which each of the parties to the marriage *has or is likely to have in the foreseeable future...* (emphasis added)

As explained in the section above, there are both conceptual and practical differences between running a 'resource' argument and seeking an order varying a nuptial settlement. From a conceptual point of view, the treatment of trust assets as a resource is part of the first step in an ancillary relief application of calculating the parties' total wealth. Once that wealth has been calculated and the Court has then determined how it should be divided, an order varying a nuptial settlement is essentially the form in which that determination is sought to be given effect.

Whilst the overall goal of both a 'resource' argument and an application for the variation of a nuptial settlement is ultimately to gain for the applicant spouse some benefit from the trust assets in question, the practical consequences of either approach succeeding differs. An order varying a nuptial settlement directly gives the applicant spouse an interest in the trust. It is an order made against the trustees and will

need to be enforced against them or against the trust assets wherever they are located.

In contrast, the usual consequence of the Court accepting that certain trust assets are a resource of one or both of the spouses is that the financial provision (often a lump sum) which the respondent spouse is ordered to pay will increase. This will normally be a money judgment which the applicant can enforce directly against the respondent and his or her assets. It will not involve enforcement action against the trustees (who will not usually be parties to the ancillary relief proceedings) or the trust assets. This will often be a significant advantage.

For example, in the *Charman* case (considered in more detail below), the wife could have sought an order varying the trust as a nuptial settlement. However, this would have necessitated enforcement of that order against the trustee in Bermuda which would have been far from straightforward not least because of the local protective statute (the Trusts (Special Provisions) Act 1989). However, by succeeding in her argument based on the trust being a resource of the husband, the wife received a money judgment in her favour which could be enforced against the husband in a more straightforward manner.

In cases in which a spouse seeking to have trust assets taken into account has both the 'resource' argument and the variation of nuptial settlement routes open to him or her, which route is more advantageous will usually depend upon the level of assets which the other spouse holds personally. If that other spouse has assets which will be sufficient to satisfy the award which the Court is asked to make, then the resource approach will usually be simpler and more effective. On the other hand, if that spouse holds few assets personally then it will usually be more advantageous to apply directly against the trust for a variation order.

When will trust assets be treated as a 'resource' of a spouse?

Charman—the central question

The leading modern authority for taking into account trust assets as a resource of a spouse is the *Charman*

litigation. At the time, the amount awarded to the wife was believed to be the highest award ever made on determination of a contested application for ancillary relief in divorce proceedings in England and Wales.

In *Charman*, the husband was the settlor of a discretionary trust (called the Dragon Holdings Trust, or 'Dragon') which was originally created under the law of Jersey but subsequently changed to become governed by the law of Bermuda. The governing provisions of Dragon were in largely conventional terms. Its beneficiaries included the husband, wife, their two children and any remoter issue of the husband and a Bermudian company was the sole trustee. The husband retained the power to replace the trustee.

As one might expect, the trustee had the power to distribute capital as well as income to any beneficiary. The trust deed also expressly empowered the trustee to benefit one beneficiary at the expense of the others and provided that, in exercising its powers in favour of one beneficiary, the trustee could '*ignore entirely the interests or expectations*' of any other beneficiary.

At the time of Dragon's creation, the husband wrote a letter of wishes to the trustee in which he stated that he wished:

to have the fullest possible access to the capital and income of the settlement including the possibility of investing the entire fund in business ventures undertaken by [him].

The husband subsequently sent a further letter of wishes in which he stated that during his lifetime he wanted the trustee to treat him as '*the primary beneficiary*'.

In ancillary relief proceedings, the wife claimed that Dragon, the assets of which were approximately £68 million, was a financial resource of the husband for the purposes of Section 25(2)(a) of the 1973 Act and therefore should be included in the computation of the parties' assets. The husband said that Dragon was

established for the benefit of future generations of his family (a 'dynastic' trust) and should not be taken into account.

In considering this issue, the most relevant statement of law was encapsulated by Wilson LJ in *Charman (No 1)*⁶¹ in which he set out a straightforward test for whether trust assets should be treated as a resource of a spouse:

In my view, when properly focused, that central question is simply whether, if the husband were to request it to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so...and then (at [13])

...In principle, however, in the light of s.25(2)(a) of the Act of 1973, the question is surely whether the trustee would be likely to advance the capital immediately or in the foreseeable future.

This test clearly involves a question of fact which will depend upon the circumstances of each case. On the facts of *Charman*, the trial judge (Coleridge J) answered the central question in the affirmative—the trust assets were a resource of the husband. The Court of Appeal upheld his decision.

The legal test formulated in *Charman* has been routinely followed in subsequent cases. For example, in the recent Court of Appeal decision of *Whaley v Whaley*,⁶² Lewison J summarized the position as follows:

As I have said, a discretionary beneficiary has no proprietary interest in the fund. But under section 25 the court looks at resources; not just at ownership. Thus whether a beneficiary under a discretionary trust has a proprietary interest is not relevant. The resource must be one that is 'likely' to be available. This is the origin of the 'likelihood' test. No judge can make a positive finding about the future: the best that can be done is to assess likelihood. What is relevant is the likelihood of the trust fund or part of it being made available to

61. [2006] 2 FLR 422 (at [12]).

62. [2011] EWCA Civ 617.

him, either by income or capital distribution. If the husband were to ask the trustees to advance him capital, would the trustees be likely to do so: *Charman v Charman* [2006] 1 WLR 1053; *A v A* [2007] 2 FLR 467, 499. The question is not one of control of resources: it is one of access to them.

It is easy to state the legal test and also easy to advise that the answer to it must be considered on a case by case basis. However, that advice alone does not provide a client with much help.

Whilst one must be careful not to apply in a mechanistic fashion past decisions to any future cases, both *Charman* and other authorities have given some more useful guidance as to the types of factors which may lead a Court to find that trust assets are likely to be advanced to a spouse and thus should be treated as his or her resource.

Relevant factors

In order to put some flesh onto the bones of the central question identified by Wilson LJ, we consider below some of the common factors which the Courts have relied upon in determining whether or not trust assets should be considered as a resource of a spouse. However, as we explain, no individual factor is likely to be determinative in a given case. Furthermore, the same factor will not always be given the same weight (or even point in the same direction) in different cases. It is, therefore, important always to consider the overall circumstances of the case and how each potentially relevant factor interacts with others.

As to the general approach which the Courts should take in carrying out this exercise, Potter P explained:

it is essential for the court to bring to it a judicious mixture of worldly realism and of respect for the legal

effects of trusts, the legal duties of trustees and, in the case of off-shore trusts, the jurisdictions of off-shore courts.⁶³

Source of assets

In *Charman*, it was considered to support the likelihood of the trust assets being made available to the husband that he was the settlor of Dragon and that its wealth represented the fruits of his work.⁶⁴ Presumably, this was because a request by him could be expected to be favourably viewed by the trustee given the contribution that he had made to the trust assets and that he would therefore be looked upon as deserving.

However, this factor will clearly not be determinative. In *SR v CR*,⁶⁵ the relevant trusts had been settled by the husband's father. The husband himself had made no contribution to the trust assets. Singer J held that this made no difference. On the evidence in that case, the trust assets were a resource of the husband.

Letters of wishes

Letters of wishes will be very important in determining whether it is likely that a spouse will receive trust assets in the foreseeable future and also the likely level of assets he or she may receive.

Letters written before the onset of the divorce proceedings are likely to be given significant weight. However, letters written after the marriage has broken down will often be seen as self-serving.

Thus, in *Charman*, the fact that the husband had written multiple letters of wishes reiterating the access that he hoped to have to the trust assets was a significant pointer towards the trust assets being considered as a resource of his. It was also

63. *Charman (No 4)* [2007] 1 FLR 1246 at [57].

64. *Charman (No 4)* at [52].

65. [2009] 2 FLR 1083.

inconsistent with the husband's case that the trust was 'dynastic'.⁶⁶

History of past distributions

Evidence of past conduct on the trustees' part is often taken as a good indication of their likely future approach.⁶⁷ Thus, if distributions have been made to a spouse in the past, then, other things being equal, it may be expected (even if the spouse has no absolute entitlement to the distributions) that these will continue.

In contrast, an absence of past distributions to the spouse will be a pointer towards the trust assets not being a resource of that spouse.⁶⁸ However, it will not always be one of great weight if the absence can be explained. For example, in *Charman*, the husband had received very few (and no recent) distributions from the trust. This was considered to be because the husband had not had the need for distributions and because of the potentially negative tax consequences that his receipt of distributions might cause.⁶⁹ Accordingly, this factor did not undermine the conclusion that the trust assets were likely to be made available to the husband were he to request them.

Where loans have been made to the divorcing beneficiary rather than outright advances, the Courts will scrutinize carefully the reason why they have been made. If it is only because a loan structure was tax efficient, then a history of un-repaid loans is likely to support a finding that the trust assets are available to the spouse.⁷⁰

Compliance with past requests of the spouse

A similar factor which the Courts will take into account is the trustees' past attitude towards requests

made by the divorcing beneficiary. Where there is a history of the trustees acceding to requests made by the divorcing beneficiary, then this will support a conclusion that the trustees will be likely in the future to accede to further requests.⁷¹

However, there are two other points to note about the trustees' past conduct towards requests made by the divorcing spouse.

First, the absence of a history of compliance with requests will not necessarily point towards a finding that the trust assets will not be made available to the divorcing spouse. If there has been no reason for the spouse to make requests of the trustees, then this factor is likely to be neutral. Only, if there is a history of the trustee positively *refusing* to accede to requests made by the divorcing spouse is this likely to be a factor which counts against a finding that the trust assets will be made available to the spouse.

Second, it should not be thought that there is a need to allege that there was something wrong with a trustee complying with a request made by a beneficiary or that a history of doing so gives rise to a suggestion of sham or breach of trust on the part of the trustee. As the Royal Court of Jersey stated in *Re the Esteem Settlement*:⁷²

In our judgment many decisions of this nature are likely to arise because of a request by a beneficiary rather than because of an independent originating action on the part of a trustee. The approach that a trustee should adopt to a request will depend upon the nature of the request, the interests of other beneficiaries and all the surrounding circumstances. Certainly, if he is to be exercising his fiduciary powers in good faith, the trustee must be willing to reject a request if he thinks that this is the right course. But when a trustee concludes that the request is reasonable

66. In *Whaley*, Black LJ explained (at [54]) that there was no difference in principle as to how the Court should approach a so-called 'dynastic trust' compared with a 'settlor-beneficiary' trust. In both cases, the ultimate question was the same—whether the trustee would be likely to advance capital to the husband immediately or in the foreseeable future. However, plainly the Court would then have regard to the circumstances of the particular trust in answering that question.

67. *SR v CR* at [36].

68. See *A v A* [2007] 2 FLR 467 at [96].

69. At [47].

70. See *Whaley* at [44].

71. See *Browne v Browne* [1989] 1 FLR 291 at 293 *Whaley* at [37] and [116].

72. [2004] WTLR 1 at [165] to [166].

having regard to all the circumstances of the case and is in the interests of the beneficiary concerned, he should certainly not refuse the request simply in order to assert or prove his independence. His duty remains at all times to act in good faith in the interests of his beneficiaries, not to act against those interests for improper reasons.

In our judgment, where the requests made of trustees are reasonable in the context of all the circumstances, it would be the exception rather than the rule for trustees to refuse such requests.

More generally, it is important to appreciate that a party running a 'resource' argument does not need to (and usually will be best advised not to) allege that that trust is a sham. As both Wilson LJ and Lloyd LJ said in *Charman (No 1)*,⁷³ echoing the comments of the Jersey Court in *Esteem*, a trustee will usually be acting perfectly properly if, after careful consideration of all relevant circumstances, he resolves in good faith to accede to a request of a spouse to advance capital.⁷⁴

Power to replace trustees

In some cases (such as *Charman*), the divorcing beneficiary will have the power to replace the trustees. Is this a factor which might be used to support an argument that the trust assets are likely to be made available to that beneficiary because he could replace a trustee who declined to accede to a request for advancement with one who would accede to it?

On the one hand, relying on cases such as *Re Skeats' Settlement*,⁷⁵ it could be said that the power to replace trustees is fiduciary and could not lawfully be exercised by a spouse by way of response to a refusal by a trustee to accede to his request for advancement but could instead only be used in the interests of the beneficiaries as a whole.

However, it might be too simplistic to conclude that, just because it is fiduciary, the power is irrelevant to the likelihood of advancement. Realistically, a divorcing beneficiary with a power to replace trustees will be unlikely to allow a point to be reached at which his exercise of that power would become unlawful as being in breach of his duty to act in good faith. A lack of harmony between a beneficiary and a trustee can be a lawful ground for the latter's replacement.⁷⁶ A beneficiary with a power to replace trustees may ask himself from time to time, and well in advance of any actual request for advancements, whether, in light of his continuing dealings with the trustee, he is or remains comfortable with the trustee. If the two of them do not see eye to eye, then it is likely to be in the interests of the beneficiaries of the trust, and therefore to be lawful, for him to replace the trustee.

The competing arguments described above were raised in *Charman (No 4)* but ultimately not decided by the Court of Appeal because of the wealth of other evidence supporting the conclusion that the trust assets were a resource of the husband.⁷⁷ However, the sentiment of the Court of Appeal's judgment is that the existence of such a power (whilst not of great weight) will provide some support to the argument in favour of treating the trust assets as a resource.

Nature of the trust assets

If the trust assets are illiquid or there is no reasonable prospect of them being liquidated, then this is likely to be relevant to deciding whether the trust assets should be treated as available to the divorcing beneficiary.⁷⁸ For example, a long established family business may be held by a trust of which the divorcing beneficiary is one of many discretionary objects within the family. Although the trust asset may be

73. At [12] and [60].

74. In *Charman*, the Court of Appeal commented that the wife was correct to withdraw an earlier suggestion that there was a 'unity of interest' between the husband and the trustee.

75. (1889) 42 Ch 522.

76. *Letterstedt v Broers* (1884) 9 App Cas 371 at 386.

77. See [55] (Potter P).

78. *B v B (financial provision)* [1982] 3 FLR 298 at 303–304.

highly valuable, if there is no likelihood of it being sold so as to provide assets which may be distributed to the divorcing beneficiary, it should not normally count as a resource.

In contrast, if a specific fund within the trust assets has been earmarked for the divorcing beneficiary, then this will usually support a conclusion that the value of the specific fund should be counted as a resource of the divorcing beneficiary.⁷⁹

Needs of other beneficiaries

It determining whether or not a trustee is likely to advance trust assets to the divorcing beneficiary, the Court will have in mind the needs and interests of the other beneficiaries of the trust. Thus, in *B v B (Ancillary Relief)*, Moylan J stated:⁸⁰

The specific question . . . is whether, on the balance of probability, the evidence shows that if the trustees exercised their discretion to release capital or income to the husband, the interests of the trusts or of other beneficiaries would not be appreciably damaged. If I so conclude, I am entitled to assume that a genuine request for the exercise of such discretion would probably be met by a favourable response. I have come to the clear conclusion that if the trustees were to advance capital and/or pay income to the husband (a) to enable him to meet an award in the wife's favour even to the extent postulated by Mr Cayford, and (b) to enable him to meet his own needs at a level at least similar to that which I will be providing for the wife, the interests of the trusts and the other beneficiaries would not be appreciably damaged.

However, a purely abstract appeal to the possible future needs of other beneficiaries (eg that they might *one day* need to call on the trust assets themselves) in an attempt to prevent the trust assets being counted

as a resource of the divorcing beneficiary is unlikely to have much weight. If there is no evidence of an actual need on the part of the other beneficiaries (eg because they are already well provided for), then it is unlikely that this consideration will prevent the Court finding that the trust assets should be treated as available to the divorcing beneficiary.

In some trust deeds (as was the case in *Charman and Whaley*), the trustees are expressly authorized in exercising their powers in favour of one beneficiary to ignore the interests of other beneficiaries. Where such provisions do exist, they are usually treated as neutralizing any argument (which is often made) that the trustees would be acting in breach of trust to advance the trust assets to the divorcing beneficiary.

Evidence of the trustee

Evidence from the trustee is clearly likely to be relevant to the Court's conclusion as to whether or not trust assets are likely to be made available to a divorcing beneficiary. In recent times, the Courts have increasingly urged trustees to give evidence in divorce proceedings lest the Courts approach matters on a mistaken basis which may not be in the interests of the trust or its beneficiaries.⁸¹

Importantly though, the Courts will not simply accept at face value the evidence of the trustees as to what provision they will or will not make for a divorcing beneficiary.⁸²

In *Whaley*, the Court was very critical of the responses that it had received from the trustee. It found that the trustee was prepared '*to do the husband's bidding*' and would follow his wishes (at [34]). This, unsurprisingly, strongly supported the conclusion that the trust assets should be counted as a resource of the husband.

The failure of a trustee to give evidence or provide the Court with answers without good justification may well lead to an inference that the trustee would

79. *Whaley* at [54].

80. [2010] 2 FLR 887, at [89].

81. See, eg, Moylan J in *B v B (Ancillary Relief)* [2010] 2 FLR 887 at [77].

82. See, for example, the comments of Singer J in *SR v CR* [2009] 2 FLR 1083 at [60].

be likely to make assets available (especially where the Court concludes that the divorcing beneficiary has encouraged the trustee not to give evidence). In *Charman*, the Court was influenced by the fact that the husband had conducted a ‘*herculean struggle*’ (in opposing the issue of letters of request) to prevent the trustee from giving evidence in circumstances in which, had Dragon been dynastic, it would be likely to have been able to produce evidence from its files to that effect.

In *BJ v MJ*, Mostyn J similarly commented (at [18]): ‘[i]f the trustees have refused to participate meaningfully or helpfully in the inquiry then neither they nor their beneficiary can complain if the court draws robust conclusions as to the likelihood of future benefit’.

The spouse as beneficiary

In most cases, the spouse to whom it is claimed the trust assets are available will be a beneficiary of the relevant trust. If the spouse is irrevocably excluded from benefiting from the trust, then it is hard to see how it can be argued that the assets are available to him or her.

However, just because the spouse is not presently included within the class of beneficiaries, this will not prevent the Court from concluding that those assets are available to the spouse if he or she may later be added as a beneficiary.

This approach was taken in *Whaley*. In that case, the Court included within the husband’s resources the assets not only of a trust of which he was a beneficiary but also of a second trust of which he was not a beneficiary. It was prepared to do this because:

- i. the second trust was created out of the first trust (of which the husband was a beneficiary);
- ii. the husband could at any time be added as a beneficiary of the second trust; and
- iii. the second trust had only been established (with the husband not as a beneficiary) given anxieties

over his tax position and it was expected that he would be included as a beneficiary when those anxieties had passed (which was the case by the time of trial).

As Lewison J appreciated, this meant that the steps which would be needed before the assets of the second trust could be made available to the husband were slightly more complicated. He spelled out those steps as follows:⁸³

- i. the trustee must decide to add the husband to the class of beneficiaries of the second trust;
- ii. the protector must agree to that addition;
- iii. the trustee must resolve to distribute the capital to the husband; and
- iv. the protector must agree to that distribution.

Despite this added layer of complexity, the facts were sufficiently strong for the Court in *Whaley* to find that these steps were likely to be taken.

A lingering concern about the central question

Although the ultimate test (as encapsulated by Wilson LJ in *Charman* and applied in subsequent cases) for whether trust assets should be treated as the resource of a spouse is easy to state and, in some cases, easy to apply, it does raise some further questions the answers to which remain unclear.

The main issue that we shall consider is the context in which the central question—namely ‘whether the trustee would be likely to advance the capital immediately or in the foreseeable future’ should be posed. More specifically, is it sufficient that the trustee would be likely to advance trust assets to the spouse *in order to meet an ancillary relief award* made against him or her but would not otherwise be likely to do so?

This issue arises because a request to a trustee for a distribution of trust capital is not likely to be made in

83. At [115].

the abstract. Normally speaking, before considering whether to advance capital to a beneficiary pursuant to a request, the trustee might want to know from the beneficiary what the intended purpose for the advance was. In some cases, it may be easy to conclude that the trustees would comply with a request by a divorcing beneficiary for capital whatever the reason for the request may be. However, in other cases, the purpose of the request will be important.

For example, where a spouse is one of several discretionary beneficiaries, it may be the case that the trustees would be likely (indeed very likely) to advance some or all of the capital to the spouse were he or she to require expensive life-saving medical treatment. However, if the purpose was instead to put the capital towards fast living or a high risk business venture, then the trustees might not be prepared to advance some or all of the capital. The context (or purpose) is likely to be very relevant.

Accordingly, when asking the central question which the authorities have highlighted, what context or purpose is supposed to apply? Is it sufficient that the trustees would be likely to advance capital to the spouse in some specific circumstances (even if those circumstances themselves are unlikely)? Or does it have to be shown that the trustees would advance capital to the spouse no matter what the ultimate purpose for the request was? Or, as indicated above, is the question to be posed on the basis that the trustees know that the spouse requires the money to satisfy an ancillary relief award?

Many of the authorities have not squarely addressed this issue. However, it was addressed by the Court of Appeal in *Charman* (No 4), in which Potter P said the following (at [53]):

Mr Boyle even concedes that, if disaster struck the husband's business and he fell into real financial difficulty, Codan could properly make available to him a large sum of capital. But, so Mr Boyle contends, such a hypothesis is inapt because the husband has had no

'need' for any capital out of Dragon. Our reaction to that contention is two-fold. First, it is in law a perfectly adequate foundation for the aggregation of trust assets with a party's personal assets for the purposes of s.25(2)(a) of the Act that they should be likely to be advanced to him or her in the event only of 'need'. Second, the contention is inconsistent with another area of the husband's argument, which is to the effect that, although his personal assets computed by the judge at £55 million exceed the lump sum award of £40 million, the judge must have expected him to have recourse, directly or indirectly, to the assets of Dragon, particularly its cash and investments other than in Axis, for the purposes of satisfying the order and that indeed the order can only reasonably be satisfied in that way. If so, why then does the husband not have a 'need' for capital out of Dragon in order to assist him to discharge his legal obligations? Mr Boyle is driven to respond with the suggestion that, because the moment at which the judge considered whether to attribute the assets of Dragon to him was prior to the making of any order against the husband, the husband had had no need for them at that critical moment. This is chop-logic of the most specious kind, as all those who have discharged their liabilities to ex-spouses without court orders will readily understand.

The above passage appears to provide the answer that trust assets will be treated as a resource of a spouse even if:

- a. those assets would only be made available to the spouse in the event of 'need'; and
- b. that 'need' only arises as a result of the ancillary relief award which the Court anticipates making against the spouse.

Although none of the other authorities deal with this question in the same head on manner as *Charman*, they do appear to confirm this approach.⁸⁴

84. *Thomas v Thomas* [1995] 2 FLR 668 (Glidewell LJ) at 678; *TL v ML* [2006] 1 FLR 1263 at [88]; *A v A* [2007] 2 FLR at [100]; *B v B (Ancillary Relief)* [2010] 2 FLR 887 at [88].

However, on one view at least, this approach does appear slightly curious. It would mean that the Court itself essentially has the power to make a trust asset into a 'resource' of a spouse. This is because, in a given case, it may be that absent the divorce proceedings trust capital would not be likely to be made available to the relevant spouse at all. However, were a judgment actually made against that spouse, then the trustees would make capital available so as to help the spouse satisfy the award (perhaps only to save the spouse from bankruptcy). Accordingly, the Court, by making its order, essentially converts a trust asset into a financial resource of the spouse when it would not otherwise be so.

It is also not wholly clear how this approach sits with the general acknowledgement in the cases that whilst the Court may 'judiciously encourage' trustees to make assets available to a spouse to satisfy an award, it should not put 'improper pressure' on the trustees to do so. That restraint should be shown by the Courts was emphasized by the Court of Appeal in the case of *Howard v Howard*.⁸⁵ In *Howard*, Lord Greene MR stated (at 4):

[Counsel] informed the court that seemingly the basis of the learned judge's decision was that he took the view that if he made an order of this kind the effect would be to bring pressure on the trustees to make to the husband an allowance out of the settlement income. If that was the object of this order, it was, in my opinion, entirely wrong in principle. Trustees who have a discretion are bound to exercise it, and if they do so nobody can interfere with it. In my opinion there is no jurisdiction in the Divorce Court to make an order which will leave the husband in a state of starvation (to use rather picturesque language) with a view to putting pressure on trustees to exercise their discretion in a way which they would not have exercised it but for that pressure... What has to be looked at is the means of husband, and by 'means' is meant what he is in fact getting or can fairly be

assumed to be likely to get. I must not be misunderstood. It is, of course, legitimate (as was done in this case) to treat a voluntary allowance as something which the court can, in proper circumstances, infer will be likely to continue and make an order on that basis.

In *Thomas v Thomas*,⁸⁶ Waite LJ explained the relationship between 'judicious encouragement' and 'improper pressure':

... where a spouse enjoys access to wealth but no absolute entitlement to it (as in the case, for example, of a beneficiary under a discretionary trust or someone who is dependent on the generosity of a relative), the court will not act in direct invasion of the rights of, or usurp the discretion exercisable by, a third party. Nor will it put upon a third party undue pressure to act in a way which will enhance the means of the maintaining spouse. This does not, however, mean that the court acts in total disregard of the potential availability of wealth from sources owned or administered by others. There will be occasions when it becomes permissible for a judge deliberately to frame his orders in a form which affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice of the case. There are bound to be instances where the boundary between improper pressure and judicious encouragement proves a fine one, and it will require attention to the particular circumstances of each case to see whether it has been crossed.

In *Thomas v Thomas*, Glidewell LJ also laid down the following principles:⁸⁷

- a. Where a husband can only raise further capital, or additional income, as the result of a decision made at the discretion of trustees, the court should not put improper pressure on the trustees

85. [1945] P 1.

86. [1995] 2 FLR 668 at 670.

87. At 677–78.

- to exercise that discretion for the benefit of the wife.
- b. The court should not, however, be ‘misled by appearances’; it should ‘look at the reality of the situation’.
 - c. 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.

The relationship between the central question posed by Wilson LJ in *Charman* and the need to strike a balance between judicious encouragement and improper pressure is not apparent from the existing authorities. It might be thought that the two issues should be considered separately: the central question is concerned with the preliminary issue of identifying the spouses’ overall resources whereas judicious encouragement (or improper pressure) concerns the framing of an order to give effect to the Court’s decision as to how those resources should be divided. For example, in *TL v ML*, the Court appeared to suggest that the issues were wholly distinct when it stated (at [94]) that

[i]t can therefore be seen that this was not, in reality, a case of judicious encouragement at all, but rather a case of determining the true extent of the wife’s resources.⁸⁸

However, if (as *Charman* and the subsequent cases suggest) the Court can properly take into account its own ancillary relief order as the basis for finding it likely that the trustees will distribute trust assets to the divorcing beneficiary, then these two issues clearly appear to be interlinked. Why should it be sufficient to satisfy the central question—that assets are likely to be made available to the beneficiary spouse—if they are only likely to be made available as a result of improper pressure applied to the trustees by virtue of the Court’s own order?

In many cases the precise detail of the legal test will not matter. It will be apparent that the trustees would accede to any reasonable request made by the divorcing beneficiary and thus an order which treated the trust assets as his or her resource could not be considered as placing improper pressure on the trustees. The order would in essence merely be a trigger for the beneficiary’s receipt of what he or she would be likely to receive in due course even without the order.

However, if the evidence is that the trust assets would not in the ordinary course (without the Court’s order) be made available to the divorcing beneficiary in the foreseeable future, then it does seem to amount to improper pressure to engineer that likelihood purely by making the ancillary relief award. In that case, the Court’s order would not merely be a trigger or ‘encouragement’ but rather an attempt to force the trustees to do that which they would not otherwise anticipate doing.

An inherent limitation of the ‘resource’ approach

If, having determined the level of the marital resources and how they should be divided, there are sufficient assets outside of the trust for the Court to make its full award out of the non-trust assets, things should be relatively straightforward for the applicant. In such a case, often the majority of the non-trust assets will go

88. In *Whaley*, the Court of Appeal appeared at first to treat the issues separately but then merge them into one (see [47] to [55]).

to the non-beneficiary spouse, leaving the beneficiary spouse to collect the benefit from the trustees which the Court has judged he or she is likely to receive.

For example:

- i. in *Charman*, 87 per cent of the non-trust assets were awarded to the wife;
- ii. in *SR v CR*, 80 per cent of the non-trust assets were awarded; and
- iii. in *Whaley*, the Court awarded 94 per cent of the non-trust assets to the wife.

In these cases, the Court is not judiciously encouraging the trustees to make money available to the non-beneficiary spouse but rather it is by its award indirectly encouraging the trustees to provide for its own beneficiary.

However, the situation is more problematic (for an applicant spouse) where there are no or few assets outside of the trust. In such a case, the Court might discover that its findings as to the likelihood of advancement are frustrated by a refusal by the trustees to do what the Court expects them to do. This is an inherent limitation in the 'resources' approach (which does not exist in an application to vary a nuptial settlement). As Munby J explained in *A v A*:

... although the court can 'encourage' it cannot compel... although the court can encourage a third party to transfer an asset to a party to the marriage, if that third party disregards the court's encouragement, the court has no power under [the resource approach] to compel the transfer...⁸⁹

Andrew Mold is a member of Wilberforce Chambers and has a broad practice covering general commercial and traditional chancery work. Within these fields, he has particularly strong interests in trusts (both offshore and onshore), pensions, fraud and breach of fiduciary duties, professional liability, company and partnership disputes as well as property-related work. E-mail: amold@wilberforce.co.uk

Jonathan Hilliard is a member of Wilberforce Chambers and has a broad trusts and commercial practice. Much of his time is spent on private, pension and other commercial trust disputes and fraud disputes, both on and offshore. His litigation often takes him into other areas of law, and he has significant experience of cases with regulatory, insolvency, family and public law elements. E-mail: jhilliard@wilberforce.co.uk

89. At [95].