

# Foreign orders

In amending its trust law, Jersey included exclusion of foreign law legislation. In the first case since the amendments, the Jersey court complied with a foreign order. Steve Meiklejohn and Sian Le Cocq of Ogier analyse whether this sets a precedent for future judgements

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There has been much discussion of the enforcement of foreign matrimonial orders in offshore courts, particularly Jersey. This article will examine the position in Jersey, particularly in light of a recent judgement of Jersey's court that was critical of a recent change to the island's trust law. The Trusts (Jersey) Law 1984 was recently amended by way of the Trusts (Amendment No 4) (Jersey) Law 2006, which substituted a new Article 9 into the Jersey Trust Law (the Amendment).

## What did the Amendment intend to achieve?

The Amendment was intended to strengthen Article 9 in respect of the protection it affords Jersey trusts against forced heirship claims and to limit the extent to which other types of foreign judgements can be enforced against Jersey trusts.

The Amendment does not provide in absolute terms that foreign judgements will

never be enforceable against a Jersey trust but rather such judgements will be unenforceable only if and to the extent that they are inconsistent with the new Article 9.

Furthermore, it should be borne in mind that if a trust holds assets which are situated in a jurisdiction other than that of the proper law of the trust, the court of that jurisdiction will always be able to enforce an order it has made in respect of those assets without regard either to the trustees of the trust or to the proper law court. In such situations, the Amendment is in practical terms of no consequence.

## In the matter of the B Trust

Since the Amendment came into force, there has only been one judgment in the Royal Court of Jersey, namely in the matter of *The B Trust* [2006]JRC185 (The B Trust), that has considered Article 9 in any detail.

The brief facts of The B Trust were as follows. The B Trust was a discretionary trust, most of the trust property consisted

of land situated in England and the trustee had submitted to the jurisdiction of the Family Division of the High Court of England and Wales (the English Matrimonial Court).

The English Matrimonial Court purported to make an order varying the terms of the trust by *inter alia* creating a sub-trust in which the wife would have a life interest with a power on the part of the trustee to advance capital to her (the English Order). The trustee then made an application to the Jersey Court under Article 51 of the Trust Law for directions in relation to the English Order.

The husband argued that on a proper interpretation of Article 9, the jurisdiction of the Jersey Court to enforce/give effect to a foreign judgment in relation to a Jersey trust on the basis of comity had been removed.

The Jersey Court concluded that: "We are quite clear what they (the words of Article 9) . . . do not exclude the application of the doctrine of comity. It would . . . take very clear and express words to deprive the court of the flexibility to do justice in a wide range of cases on the basis of a principle of almost universal applicability."

But the Jersey Court did not rubber stamp the English Order, citing with approval the following observations made by the court in an earlier case:

"The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interests of the other beneficiaries of any trust involved.

"Conversely . . . this Court's primary consideration is to make or approve decisions in the interests of the beneficiaries.

"It has therefore a very different focus from the Family Division."

Unlike in the proceeding before the English Matrimonial Court, all the other adult beneficiaries were legally represented, as were the interests of the minor and ►►

unborn beneficiaries.

The Jersey Court gave careful consideration to the English Order and did not simply enforce it but rather stated that “in the exercise of our discretion, **we see no reason why**, in the interests of comity, substantial effect should not be given to the judgement” (my emphasis). Having heard submissions from all parties regarding each element of the English Order, the Jersey Court made its own order in such terms as it deemed to be fair and just. While the Jersey Court did give effect to certain terms of the English Order, having determined that it was in the interests of the beneficiaries as a whole to do so, it did not give effect to each and every term of the English Order. For example, it did not direct that a different trustee be appointed to the sub-trust as the English Order had ordered, stating that: “We do not think it is in the interests of either the wife or the beneficiaries as a whole.”

## The effect of the decision in The B Trust

On one interpretation of the Amendment, the Jersey Court could have concluded that it should not give effect to the English Order.

But given that the trustee had submitted to the jurisdiction of the English Matrimonial Court and that much of the trust property consisted of land in England, in our view it was always likely that the Jersey Court would seek to give effect to the English Order. On different facts, the case may have been decided differently.

While a different set of facts may have produced a different result, however, this

does not detract from the fact the Jersey Court has said the Amendment does not, in itself, oust the jurisdiction of the court to give effect to a foreign judgement on the basis of comity.

That said, the Jersey Court also confirmed it will not necessarily give effect to a foreign judgement.

It is clear from case law that the Jersey Court is less likely to give effect to an order of a foreign court if the trustee has not submitted to the jurisdiction of that court.

## Orders of the English Matrimonial Court - a special category

In the matter of *The Rabaiotti 1989 Settlement* (a case where the trustee had not submitted to the jurisdiction of the foreign court), the Jersey Court stated:


“As a general rule, it would be an exorbitant exercise of jurisdiction for a foreign court to purport either to vary the terms of a Jersey settlement or to declare such settlement to be a sham, in the particular circumstances of this case **we do not consider that it is contrary to public policy to recognise and enforce a judgement which seeks to do justice** in matrimonial proceedings where the husband has flouted his legal and moral obligations towards his wife” (my emphasis).

Therefore, it would seem that unless there are public policy reasons militating against it, the Jersey Court will be inclined to give effect to an order of the English Matrimonial Court where this would achieve justice.

In considering cases involving orders

of the English Matrimonial Court, however, it should be kept in mind that matrimonial cases often involve an element of unscrupulous behaviour on the part of one spouse who is attempting to deprive the other spouse of their share of the matrimonial assets. Therefore, to do justice in matrimonial proceedings where one party has “flouted their legal and moral obligations” towards the other, the Jersey Court has been understandably minded to give effect to such judgements.

Unfortunately, the only reported case law we have regarding the Jersey Court being asked to give effect to foreign court orders concerns orders of the English Matrimonial Court. But in our view it is likely that when considering other claims, such as forced heirship claims, the Jersey Court would almost certainly take a different approach. In terms of forced heirship, one must remember that Article 9, as it existed before the Amendment, had been in existence since 1989 and was specifically designed to protect Jersey trusts against forced heirship attacks.

In our view, and notwithstanding *The B Trust* case, we believe the Jersey Court, faced with foreign judgements from respected jurisdictions in respect of matters falling outside of the matrimonial field and where the trustee has played no part in the proceedings, would not give effect to these judgements but, in accordance with Article 9, would consider the matter again under Jersey Law. 

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