**ENFORCEMENT OF ENGLISH DIVORCE JUDGMENTS AGAINST OFFSHORE TRUSTS IN BERMUDA, CAYMAN AND BVI**

**Paul Smith – March 2009**

**Introduction**
Recent big money divorce cases in England where matrimonial assets are held in offshore trusts have raised the question whether, and to what extent, an English divorce judgment will be enforced in the offshore world. In particular, can an English divorce judgment against a spouse who is the discretionary beneficiary of an offshore trust be enforced against the trustees?

**Registration of English judgment as a local judgment**
Bermuda, Cayman and BVI are all British dependent territories and have broadly similar legislation for the recognition and enforcement of English money judgments as local judgments. The relevant legislation is:

- Bermuda: Foreign Judgments (Reciprocal Enforcement) Act 1958;
- BVI: Reciprocal Enforcement of Judgments Act 1922; and

This legislation provides for the registration as local judgments of final judgments by English Courts for monetary sums – such as lump sum orders in ancillary relief proceedings – given against a Defendant who participated in the English litigation. This legislation is not confined to divorce judgments but applies to all judgments of English Courts for monetary sums. It is only possible to enforce an English judgment for a monetary sum under this legislation and the legislation does not apply to orders providing any other form of relief.

There are various preconditions to registration of the English judgment under this legislation, the most important of which are that:

- the English judgment is final;
- the Defendant was subject to the jurisdiction of the English Court in the international sense; i.e. he submitted to the jurisdiction of the English Court by appearing in the English litigation or by agreement to submit, or was resident within England and Wales and validly served there;
- the Defendant was given proper notice of the English proceedings and that the English proceedings were not contrary to natural justice;
- the English judgment was not obtained by fraud;
- various technical requirements set out in the relevant local legislation have been satisfied.
Enforcement of local judgment against the trust

Once the English judgment has been registered as a local judgment in Bermuda, Cayman or BVI it will be enforceable as a local judgment and all the normal methods of enforcement are available. Whilst such methods can readily be used against the judgment debtor/beneficiary, they are likely to prove of little use against the offshore trustee. For, under the trust law of Bermuda, Cayman and BVI, the discretionary beneficiary of a trust has no equitable interest capable of attachment or execution, unless and until the discretion of the trustees to make a distribution is exercised in his favour. The difficulty experienced in enforcing a lump sum order against the beneficiary of a discretionary trust is exemplified by the case of *BTC v Ellefsen* [1995] Bda LR 61 (Supreme Court of Bermuda). Here the wife obtained a lump sum order in matrimonial proceedings in New Hampshire. She successfully converted this lump sum order into a Bermuda judgment against the husband by suing on the US judgment at common law (there being no reciprocal enforcement treaty between the US and Bermuda). The husband was the discretionary beneficiary of a Bermuda trust and did not pay the judgment. The wife attempted to enforce her judgment against the trust assets and was unable to do so quickly and speedily. The husband died before any enforcement against the trust assets. The recent *Mubarak* decision of the Deputy Bailiff in Jersey illustrates the creative steps one offshore jurisdiction has taken to enforce against a discretionary beneficiary.

In the absence of persuasive evidence to the contrary, Courts in England will likely assume in general terms that offshore trustees will come to the assistance of a beneficiary where a reasonable request for a distribution is made to fund payment of an order made in English ancillary relief proceedings: see *Charman v Charman* (No. 4) [2007] 1 FLR 1246. Hence, the practice has developed of English courts applying judicial and judicial encouragement to offshore trustees to fund ancillary relief orders by treating trust assets as available resources of a discretionary beneficiary.

The local methods of enforcement of a judgment in Bermuda, BVI and Cayman include the making of bankruptcy orders against the Judgment Debtor. Bankruptcy, or a threat of bankruptcy against a Judgment Debtor who is a beneficiary of an offshore trust is an enforcement mechanism which may in practice result in a speedy distribution of funds by trustees to their beneficiary/Judgment Debtor and enable the Judgment Debt to be satisfied. Trustees would be rightly concerned had a bankruptcy order, or a threat of a bankruptcy order, been made against their discretionary beneficiary and can properly make distributions in the exercise of their discretion to enable a discretionary beneficiary to comply with an ancillary relief order: see e.g. *Re the X Trust* [2002] 5 ITLR 119. A trustee would require strong nerves to decline a request by a beneficiary for assistance with payment of a lump sum order made in English matrimonial proceedings in face of a bankruptcy threat which was believed to be real and credible. A trustee finding himself in this position would be well advised to seek directions from his local court before deciding whether or not to accede to a request for a distribution.

Offshore trustees will face a difficult decision if attempts are made to join them to English divorce proceedings. Should they participate and submit to the jurisdiction of the English Court or not? It is impossible to give definitive guidance on this question, but much will depend upon the location of the trust assets. If substantial trust assets are situated within the United Kingdom or other jurisdictions in which English Judgments can readily be enforced, it may be essential for the trustees to participate in and defend English proceedings in order to protect the trust assets. If there are no trust assets situated within the United Kingdom, then there is much to be said in favour of the offshore trustees avoiding submission to the jurisdiction of the English Court so as to enable them to resist enforcement in their home jurisdiction. There are clearly risks involved in taking such a course, not the least of which is that the English divorce Judge will not hear evidence from the trustee and may conclude that the trust assets are an available resource of the discretionary beneficiary spouse. This occurred in the *Charman* case and resulted in the £47m award against the husband. If attempts are made to join the offshore trustees to the ancillary relief proceedings in England, the trustee should seek directions from his local court about whether or not to appear in the English proceedings.
Enforcement of Non-Monetary Judgment Against the Trust

There are no statutory mechanisms in Bermuda, Cayman or BVI or the enforcement of English Judgments in ancillary relief proceedings which purport to vary offshore trusts or to reorganize beneficial interests under them. These jurisdictions possibly in consequence of their distance from England, have not adopted any form of “comity” route to enforcement of English Judgments in ancillary relief. The reaction of the Bermuda court in refusing to give effect to the letter of request for production of documents issued by the English Court of Appeal in Charman shows that the courts in the offshore jurisdictions on the Western side of the Atlantic have a healthy scepticism to orders of the English Court.

Indeed, Bermuda, Cayman and BVI all have legislation specifically designed to prevent the enforcement of English judgments in matrimonial proceedings varying offshore trusts. The relevant legislation is:

- BVI: section 83a of the Trustee Ordinance as amended by the Trustee (Amendment) Act 2003; and

The legislation in these three jurisdictions is substantially similar and provides that a foreign Judgment shall not be recognized, enforced or give rise to any estoppel insofar as it purports to vary or set aside a trust validly created under the local law or deprive the trustee or any beneficiary of any rights, where that Judgment arises out of a personal relationship. A “personal relationship” includes marriage. It should be noted that the legislation is not confined to Judgments arising in divorce proceedings but also extends to Judgments arising out of forced heirship and insolvency.

This legislation has been subject matter of only two judicial decisions: (1) the decision of the Chief Justice of Bermuda in Garner v BTC and Schindler [1992] BDA LR 34 and BTC v Ellefsen [1995] Bda LR 61. In the Schindler case, the question arose whether the then current version of section 11 of the Trusts (Special Purposes) Act applied to prevent a forced heirship gift which was contrary to a Bermuda trust. The Court decided that the Act did not apply (because the trust was constituted prior to the Act coming into force and the Act was not retroactive). However, the Court held that the Act was simply declaratory of the Common Law of Bermuda which applied to uphold the trust and bar the forced heirship gift made under foreign law. An appeal against this Judgment was subsequently dismissed by the Court of Appeal for Bermuda at [1992] BDA LR 11. In the Ellefsen case, the court relied upon section 11 of the Act as setting out the public policy of Bermuda.

It is thus reasonably clear that doctrines of comity as developed in the offshore world will not permit the enforcement of English Orders in ancillary relief proceedings purporting to vary Bermuda, BVI or Cayman trusts or to alter their beneficial interests.

Paul Smith, Conyers Dill & Pearman

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors
Conyers Dill & Pearman has pioneered the field of offshore law since its establishment in 1928. It is the first law firm to have established an office outside of its home jurisdiction, setting up shop in Guernsey in 1982 as a base for servicing European clients (superseded by the London office in 1998). It is also the first to have expanded into Asia, with the opening of its Hong Kong office in 1985, and the first to establish a presence in Singapore in 2001. The firm continued in this vein in 2008, becoming the first offshore law firm to have a Russian presence with the launch of its Moscow office in March, and the first offshore law firm to have a physical presence in Brazil with the establishment of its São Paulo office.
With a current complement in excess of 550 staff, with over 150 lawyers, Conyers Dill & Pearman advises on the laws of Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Mauritius from those islands and from Dubai, Hong Kong, London, Moscow, and Singapore. The firm has earned clients' trust, loyalty and respect by consistently providing responsive, timely and thorough advice on all aspects of offshore corporate, company and commercial law, commercial litigation and private client matters.

Affiliated companies (Codan) provide registered agent, registered office, corporate director and secretarial services, as well as specialised company management services. An affiliated global network of licensed trust companies undertakes a broad range of trust establishment and administration services. These services range from the administration of family trusts for private clients to the structuring of highly complex and innovative corporate ventures including special purpose trusts for ownership of securitization structures.

For further information please contact:
Naomi J. Little
Tel: +1 441 298 7828
Fax: +1 441 299 4987
e-mail: naomi.little@conyersdillandpearman.com
web: www.conyersdillandpearman.com