

In focus

Isle of Man

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This section compares law and practice of various jurisdictions in particular areas. We use the Q & A format familiar to readers of the World Trust Survey, but the In Focus section asks for more detailed answers than in the Survey. We start with two unrelated subjects, topical to readers in all the key trusts law jurisdictions. The subjects are anti-money laundering and trusts and divorce. In this issue we deal with the position in the Isle of Man. Useful practice points are included at the end.

A. ANTI-MONEY LAUNDERING

This section of the survey looks at what is meant by beneficial owner for this purpose and whether in practice beneficiary Know Your Client (KYC) is necessary when forming and administering trusts. The survey also looks at regulation of trust and company service providers.

Legislation

(a) What legislation exists within the jurisdiction for identification and verification of customers and beneficial owners?

The Criminal Justice (Money Laundering) Code 2007 ('the code') came into operation on the

1 September 2007 and was made pursuant to S.17F of the Criminal Justice Act 1990. The Code as amended¹ provides that, in conducting 'relevant business', a person shall not form a business relationship or carry out a one-off transaction with or for another person unless he has various systems and procedures in place. Relevant business means engaging by way of business in one or more of the businesses or transactions specified in schedules of the code [see paragraph (b) below].

(b) What is the scope of the legislation? In particular:

(i) Does the legislation apply to trust and company service providers?

The Fiduciary Services Act 2005 and the Financial Services Act 2008 require trust service providers (TSP's) as well as corporate service providers (CSP's) to hold the relevant class and category of licence. The rules are set out in the financial services handbook 2008. A licence is obtained by application to the Financial Supervision Commission (FSC). A person who holds himself out to be or acts as a 'fiduciary' is guilty of an offence unless he has a licence or is exempt from applying for such licence in or from the island.

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1. By the Criminal Justice (Money Laundering) (Amendment) Code and the Criminal Justice (Money Laundering) Code 2008. The code replaces the Anti-Money Laundering Code 1998 (as amended).

**(ii) Does it apply to other intermediaries?
Which ones are within the scope of the
legislation?**

The legislation applies to banks, building societies, credit unions, estate agents, insurance intermediaries and other businesses. The legislation² provides that an activity is a regulated activity if it is a financial services activity of a specified kind and it is undertaken by way of business.

Regulated activities include but are not limited to:

- Deposit taking (does not include credit unions)
- Investment business
- Any service to a collective investment scheme
- Corporate services
- Trust services
- Any service or activity involving money transmission
- Any other financial service or financial activity of a specified kind that is carried on by a person of a specified description

(iii) What activities of trust and company service providers and other intermediaries are within the scope of the legislation?

Other relevant financial business includes:

- Any activity with the meaning of the Fiduciary Services Act 2005
- Acting as a retirement benefit schemes administrator or trustee
- Businesses that provide audit services in respect of a body corporate
- Activities of the legal and accountancy profession that relate to holding, dealing or managing assets or monies on behalf of clients
- Turf accountants (excluding on-line gaming). A transaction or a series of linked transactions where the aggregate total exceeds £3000 applies

- Activities raising money by a local authority
- Bureaus de change
- Banking services provided by the Post Office
- Money transmissions or cheque encashment facilities
- Transactions involving £15,000 or more or a series of linked transactions where the total exceed £15,000 or more
- Safe custody facilities for cash or liquid securities
- Activity carried out by a casino licence holder under the Casino Act 1986. A transaction or a series of linked transactions where the aggregate total exceeds £3000 applies
- Acting as an insurance manager for or in relation to an insurer within the meaning of the Insurance Act 1986
- Financial leasing, guarantees and commitments
- Lending, credit facilities, debit cards, money orders, bank drafts, electronic monies, mortgages, etc
- Administering or managing money on behalf of other persons

A 'fiduciary' is a 'regulated person' under the code. Regulated persons³ engaging in relevant business⁴ (see (ii) and (iii) above) are obliged to take reasonable measures to identify, verify and retain records of persons with whom they have a business relationship including one-off transactions. Fiduciaries must comply with procedures established by the code for the purpose of due diligence.

Know your client (KYC)

(a) Is beneficiary KYC required? If so, is it required at the following stages:

- (i) creation of the trust?
- (ii) during the course of administration?
- (iii) when distributions are made to beneficiaries?
- (iv) by intermediaries when acting for trustees?

2. The Financial Services Act 2008 and the Financial Services Handbook 2008.

3. S.2 the Code.

4. S.2 the Code.

A relevant person shall establish, maintain and operate procedures⁵ in relation to the production by the applicant for business of satisfactory evidence of his identity or the taking of such measures as will produce satisfactory evidence of his identity.⁶

The procedures should be undertaken before a business relationship develops but in any event as soon as reasonably practicable after contact is first made between the relevant person and the applicant for business.⁷ An 'applicant for business' means a person seeking to form a business relationship or carry out a one-off transaction with a relevant person who is carrying on relevant business in or from the Isle of Man.

The Code provides that evidence of identity shall not be satisfactory unless reasonable measures have been taken by the relevant person to identify the applicant for business or the beneficial owner.⁸

The FSC recognises the difficulty with complex arrangements such as non-simple trusts and in its guidance to licence holders stresses that flexibility and common sense should apply. It also emphasises the need for staff in this area to be competent and experienced.

The Guidance notes state that in the case of all types of trusts, if practical, licence holders should obtain and verify the identity of any principal beneficiaries at the outset. The Commission, however, state in the guidance notes that where for reasonable reasons, for instance, where an unborn child is the beneficiary or a where a beneficiary has not become entitled as yet, then the licence holder should establish and verify the identity of the beneficiary before any payment of trust property is made to that individual.

The FSC expects satisfactory evidence to be obtained of the identity of the settlor, the person providing funds (where not the settlor), the protector and any person who has power to appoint or remove trustees. Evidence as to the source or origin of the assets of the trust is also required.

The Commission sets out in its guidance on Anti-Money Laundering that, once a relationship has been established, the licence holder must have systems and controls in place to monitor the activity of the structure. The requirement for ongoing monitoring of a relationship means that licence holders should carry out further Customer Due Diligence to ensure that any revised risk is fully understood and dealt with.

The draft handbook on AMLN and Countering the Financing of Terrorism 2008 (the 2008 code) states that a licence holder must verify the identity of any persons purporting to act on behalf of the trustees and verify that that person is authorised to do so. A licence holder should therefore obtain an appropriately certified copy of the resolution of the board of the trustee (or other authority) that provides any individuals representing the trustee with the right to act on the trustee's behalf.

The 2008 code states that where an intermediary, acting on behalf of underlying customers is another regulated financial institution, the licence holder can regard the intermediary as its customer. The KYC obligations regarding the underlying principals therefore rest with the intermediary. A licence holder must however satisfy itself that:

- the intermediary is another licence holder supervised by the FSC; or
- the intermediary is a person regulated in another equivalent jurisdiction (as listed in Schedule 2 of the Code) who would be a licence holder if conducting business in the Isle of Man; or
- the intermediary is an advocate, a registered legal practitioner within the meaning of the Legal Practitioners Registration Act 1986 or an accountant, where the rules of the intermediary's professional body cover requirements equivalent to the Code, the Rule book and the Handbook; and
- the intermediary maintains administration and counter-terrorist financing procedures at least

5. S.5 (1) the Code.

6. S.5 (3) the Code.

7. S.5 (2) the Code.

8. S.3 (1) (b) the Code.

in line with the Code, the Rulebook and the handbook and confirmation is obtained from the intermediary that all the necessary KYC checks have been conducted by them on the underlying client base.

(b) What is the definition of beneficial owner for this purpose?

Beneficial owner means the natural person who ultimately owns or controls an applicant for business or on whose behalf a transaction or activity is being conducted, and, in relation to a legal person or legal arrangement, includes but is not restricted to:

- (i) In the case of a legal person other than a company whose securities are listed on a recognized stock exchange, a natural person who ultimately owns or controls (whether through direct or indirect ownership or control, including through bearer share holdings) more than 25% of the shares or voting rights in the legal person; or
- (ii) In the case of any legal person, a natural person who otherwise exercises control over the management of the legal person;
- (iii) In the case of a legal arrangement—
 1. The trustees or other persons controlling the applicant; and
 2. the settlor or other person by whom the arrangement is made.⁹

A 'legal arrangement' means:

- (i) An express trust or
- (ii) any other arrangement which has a similar legal effect,

A 'legal person' includes any body corporate or unincorporated which is capable of establishing a permanent customer relationship with a financial institution or of owning property.

(c) When must beneficiary KYC be carried out?

See 2 (a) above.

(d) Has guidance been issued covering the method of beneficial owner KYC? If so, what does it say?

The guidance notes do not differentiate between the methods of KYC for beneficial owners and other applicants for business.

(e) Are KYC checks risk sensitive?

Yes.

If so, what does the guidance say about risk assessment?

The 2008 handbook recognizes that the money laundering and terrorist threat to a licence holder varies across customers, jurisdictions, products and delivery channels.

Licence holders are permitted to differentiate between customers in a manner that matches risk to a particular business. A licence holder can apply its own approach to procedures, systems, controls and arrangements in particular circumstances. Internal systems require employees to properly consider the risk posed by individual customers and relationships and to react appropriately.

(f) Is there a requirement for ongoing monitoring? What does this require? In particular, does this require monitoring in relation to beneficial owners? Does this increase the risk of intermediaries from constructive trustee liability?

See 2 (a) above. The purpose of monitoring is for licence holders to be vigilant for any significant changes or inconsistencies in the pattern of transactions or client behaviour. Inconsistency is measured against the stated original purpose of the account or client company, trust or other structure.

9. 9.2 (1) Rule Book 2008.

Beneficiaries are defined as those persons who can, from the terms of the trust instrument be identified, as having a reasonable expectation to benefit from the trust capital or income. A licence holder holding property that it knows, or suspects, or has reasonable grounds to suspect does not belong to its customer may be regarded in law as a constructive trustee. The licence holder is deemed to hold the property on a constructive trust for the benefit of the actual owner of the property ('the constructive beneficiary'). A transfer of property by the licence holder may constitute a breach of trust in these circumstances, even where the transfer is made with the consent of the Financial Crimes Unit.

Although each case should be considered on its facts, effective use of CDD information including verification of source of funds and source of wealth where necessary can help licence holders to guard against constructive trust liability arising out of fraudulent misuse or misappropriation of funds as well as against money laundering.

Regulation and supervision of service providers

(a) Are trustee and company service providers required to be regulated and supervised?

TSP's and CSP's are regulated and supervised [see paragraph 1 (b) (i) above].

If so:

(i) by whom:

TSP's and CSP's are regulated and supervised by the FSC. The FSC is empowered to make rules.¹⁰ As well as overseeing licensing, the other matters that are and can be included in the rules are the systems, procedures, policies, record-keeping,

controls and training which must be instituted by the fiduciary in the course of its business. The FSC may suspend, revoke or attach conditions to a fiduciary licence if there are reasonable grounds for so doing.¹¹ Where the FSC suspends a licence it must review the suspension on a regular basis.¹²

Clause 5 of the Rule Book sets out the requirements, duties and responsibilities of auditors. A licence holder must at all times have an auditor who is qualified and not ineligible to act.¹³

(ii) what is the test for whether a TSP and CSP is fit and proper?

A fiduciary licence will only be granted by the FSC if it is satisfied that the applicant is a fit and proper person to carry on business as a fiduciary¹⁴ and that the applicant is managed and controlled in the island.¹⁵ The fitness and propriety criteria apply both in relation to the initial application for a fiduciary licence and thereafter on an ongoing basis. The General Licensing Policy with respect to CSP's and TSP's are set out in Appendices 1 and 2. The commission considers each licence application on its own merits. In assessing the fitness and propriety of a licence applicant's business the FSC examines the key areas of:

- Integrity
- Competence
- Financial Standing
- Structure and Organization of the Applicant

The 'fit and proper' test applies both to the business as a whole and to the individuals responsible for the management and control (including owners) of the business, as well as those who have significant powers and responsibilities in respect of any of its regulated activities.

10. S.18 2008 Act.

11. S.7 2008 Act.

12. S.9 (4) 2008 Act.

14. S.6 (1) (a) 2008 Act.

15. S.6 (1) (a) 2008 Act.

15. S.6 (1) (d) 2008 Act.

B. TRUSTS AND DIVORCE

Protection of Trust Assets

(a) Exercise of power of exclusion to remove a beneficiary considered to be at risk of divorce

(i) Is this appropriate to protect trust assets?

A power of exclusion can be used to protect trust assets in some circumstances but care is required to avoid any challenge (see below).

A power of exclusion would be exercisable at the trustee's discretion. It would therefore be subject to the usual considerations as regards its proper exercise. Caution would be required if the exercise seems likely to be challenged or if it might lead to an allegation of 'sham'.

(ii) Have your Courts recently considered exclusion in these circumstances?

We are not aware of any such cases before the Manx Courts.

(iii) Would exclusion be open to challenge?

In the ordinary course, the Courts will not interfere with the exercise by the trustees of powers or discretions. The Court is free to do so, though, in recognised circumstances. It is open to the trustees to apply to the Court for guidance on the exercise of its powers.

S.61 of the Trustee Act 1961 expressly allows any trustee without the institution of a suit to apply to the Court for a direction on any question with regard to the management or administration of the trust property.

A divorcing spouse may not have the requisite locus standi to commence an action against the trustees but could challenge the validity in their own proceedings.

(iv) Has the Court given its blessing to trustees in exercise of the powers to exclude?

We are not aware of any Manx case in which leave has been sought for the approval, or direction of exclusion.

(b) Pre-and post-nuptial settlements. Can these be effective to protect trust assets?

This depends partly upon whether the divorce is proceeding in the Isle of Man or elsewhere. Assuming that it is proceeding elsewhere, it is difficult to say. It is thought that no automatic enforcement of foreign judgements would be granted on the basis of comity as has happened elsewhere. The lack of any successful claim against Manx trust assets suggests that trusts are effective to a greater or lesser extent.

Even if the settlement remains impervious to foreign orders this might not prevent the foreign Court from making a finding that the trust capital or income is available to one of the parties.

(c) Are any other methods available to protect trust assets in divorce proceedings?

S.4 of the Trusts Act 1995 (the 1995 Act) provides that subject to sub-sections (3) and (4), all questions arising in respect of:

- a trust which is governed by the law of the Isle of Man,
- any disposition of property upon the trusts of such trust,
- any of the matters referred to in Article 8 of the Convention set out in the Schedule of the Recognition of Trust Act 1988 and most other aspects of a trust [listed in S.4 (2)] are to be determined according to Manx law without reference to the laws of any other jurisdiction with which the trust or disposition may be connected.

S.4 (3) provides that sub-section (1) does not affect foreign laws prescribing the formalities for the disposition of property within their own jurisdiction.

Further, the Act provides that no trust governed by Manx law and no disposition of property to be held upon the trusts of such a trust is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned by reason that:-

- (i) The law of any foreign jurisdiction prohibits or does not recognise the concept of a trust or
- (ii) The trust or disposition, avoids or defeats any right, claim or interest conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights or contravenes any rule of foreign law, foreign judicial or administrative order or action intended to recognize, protect, enforce or give effect to such a right, claim or interest.

This legislation suggests that Manx law should resist foreign divorce Court orders against trustees. The experience in other jurisdictions however, suggests that reliance upon it should be tempered by the reality that the Courts do not like to support arrangements designed to defeat what they view as legitimate claims.

If the family division of the English Courts request disclosure having joined the trustees of a Manx Trust to the proceedings, the Manx Court may well direct disclosure in light of the increased international cooperation that has developed in recent years.

If the trustees have not submitted to the jurisdiction of the English Courts and successfully argue that it is a fishing expedition on behalf of a divorcing spouse, the Manx Court is much less likely to support disclosure. Each case will depend on the individual circumstances. Certainly the Manx Courts would look more favourably on the request for information if such request is confined to seeking specific information which is relevant to the divorce proceedings.

Whilst submission to the foreign Court's jurisdiction means that the trustees would be bound by the foreign Court's orders, it might make it more open to the trustees to make submissions to that Court if they

considered that the extent of disclosure contemplated by an application was excessive. Should the trustee decide not to submit to the foreign Court's jurisdiction, disclosure can still be sought by way of the Hague Convention on taking evidence abroad. In addition, it is believed that the Manx Court would follow the approach of the English case of *Norwich Pharmacal Co*¹⁶ which held that discovery to find the identity of a wrongdoer was available against anyone whom the claimant had a cause of action to the same wrong.

Disclosure

The English Family Court has a quasi inquisitorial duty to establish the parties' financial resources, and will use powers to compel parties before it to disclose all documents relevant for this purpose. The sorts of documents and information that were disclosed by Mr Charman are illustrative of what is likely to be relevant. They include the trust instrument, letters of wishes, correspondence between the settlor and his tax adviser involved in the creation of the Dragon trust, to establish its role and purpose. Where offshore trustees have been joined to the English proceedings, the Court may order them to give disclosure. If the trustee is not within the jurisdiction, and has not submitted, disclosure can be sought under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970. This route was invoked (unsuccessfully) in *Charman* and successfully in *Minwalla*. This section of the survey seeks to ascertain whether this Convention has been given effect in various offshore jurisdictions.

(a) Does the general law impose any confidentiality or other obligation on trustees restricting disclosure to beneficiaries or others? If so what is the nature of the sanction for breach?

The Isle of Man is not a 'secrecy' jurisdiction. It applies the normal rules of confidentiality regarding

16. [1973] 3 WLR 164.

commercial or private information, which may be abrogated in appropriate circumstances. Trustees are generally subject to a duty of confidentiality to the beneficial objects of the trust in relation to trust affairs.

(b) To what extent are beneficial objects entitled to disclosure?

In the Manx case *Schmidt v Rosewood Trust Ltd*¹⁷ the key conclusion drawn was that disclosure is the subject of the Courts supervisory role over the administration of trusts and that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Also, there are issues as to personal or commercial confidentiality and the Court may have to balance the competing interests of different beneficiaries, the trustees themselves and third parties. Disclosure may have to be limited and safeguards put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the Court has to perform on the material placed before it. In many cases, the Court may have no difficulty in concluding that an application with no more than a theoretical possibility of benefit ought not to be granted any relief. Thus, even a beneficial object will only be granted such rights of disclosure as are necessary in the circumstances.

If the beneficiary is involved in trust litigation against the trustees, that beneficiary will be in the same position as other litigants in other types of litigation and has the right to disclosure of relevant documents.

There is an overlay of taxation, regulatory and criminal legislation that require or entitle trustees to make disclosure to the appropriate authorities regarding the trust affairs.

(c) How many prosecutions/convictions or other enforcement measures have been taken, giving detail where possible?

We are not aware of any prosecutions or enforcement measures as a result of disclosure constituting any breach of criminal or regulatory laws.

(d) How would the Court approach an application for directions by trustees on whether to give disclosure of trust information and documents to a non-beneficiary?

The Court would be receptive to applications by trustees for directions, including *Beddoe* relief.¹⁸ As a starting point, the Manx Court would expect the trustees to preserve the confidentiality of the trust's affairs and to act in the interest of the beneficial class as a whole (see *A v A St George Trustees Ltd & Ors*¹⁹). The Court will however consider whether non-disclosure is in the interests of the beneficiaries—there may be certain circumstances where it would be desirable to give information to a beneficiary/non-beneficiary (e.g. to the spouse of a beneficiary either directly or to the beneficiary on the understanding that it will be disclosed to the spouse and/or the Court seized of the divorce proceedings). The Isle of Man Court may also consider that disclosure is necessary to correct a misapprehension or misunderstanding on the part of the non-beneficiary spouse or the matrimonial Court. It may, for example, be desirable to give some indication as to the likely assets, pattern of distributions and expectation of future benefit. It may therefore order Manx trustees to submit to the jurisdiction or to intervene in proceedings where to do so would be in the interests of the trust as a whole.

If the trustee does not seek the guidance of the Court in taking some unusual step (for example, disclosure of an otherwise confidential document to a non-beneficiary) it may be exposed to an action to

17. [2004] Part 2 Case 5 [PC].

18. See S.61 of the Trustee Act 1961 in 4 (a) (iii) above.

19. [2007] EWHC 99 (Fam) (Unreported).

restrain it, for damages or for prosecution under the following acts:

- (a) the Prevention of Terrorism Act 1990
- (b) the Criminal Justice Acts 1990 and 1991
- (c) the Drug Trafficking Act 1996
- (d) the Criminal Justice (Money Laundering Offences) Act 1998
- (e) Terrorism (United Nations Measures)(Isle of Man) Order 2001
- (f) the Criminal Justice Act 2001
- (g) the Anti-Money Laundering (Online Gambling) Code 2002
- (h) the Anti-Terrorism and Crime Act 2003
- (i) the Fiduciary Services Acts 2000 and 2005

Similarly, where third parties are involved in litigation against the trustees, their entitlement to disclosure will be based upon the usual rules applicable to disclosure.

In addition,

- (e) **Has the Hague Convention on the taking of evidence abroad in civil or commercial matters been enacted?**

Yes, by virtue of the Evidence (proceedings in other jurisdictions) (Isle of Man) Order 1979 which came into operation on 1 February 1980.

Directions Applications by Trustees

Trustees often seek directions to protect themselves: if they have made full disclosure and act in accordance with the Court's directions, the beneficiaries will thereafter be unable to complain at what was done. Such applications are usually made in a separate action to the Court where the trustees are resident, thus resulting in satellite proceedings being brought before Courts of offshore jurisdictions. Such applications are the focus of this section of the survey.

- (a) **How would your Courts respond to an application by trustees for directions as to whether to participate in the English divorce proceedings and if so, what role would they be directed to take?**

Much would depend on the facts of each particular case and the arguments before the English Court. There have been no cases on the matter in the island to our knowledge. It is broadly expected that they will be directed to submit to the jurisdiction of the English Courts or to seek to intervene only where to do so would be in the interest of the trust as a whole (for example, to ensure that no inappropriate conclusions might otherwise be drawn by an English Court).

- (b) **How would your Courts respond to an application by trustees for directions in relation to the following ancillary relief orders of English Court:**

- **Payment to beneficiary to enable that beneficiary to discharge obligations under an English Court order owed to a non-beneficiary—would this be regarded as a fraud on a power?**

Manx trust law includes the doctrines of fraud on a power and the so called rule in *Hastings-Bass*. The answer must therefore depend upon the circumstances, if it would benefit the beneficiary to make the payment, even though a non-beneficiary may benefit incidentally. It seems unlikely that the payment could be challenged, but where no such benefit could be shown, a payment to a spouse routed through a beneficiary would be open to challenge as a fraud on the power.

In assessing these issues, the value of the proposed distribution against the value of the trust fund as a whole and the extent to which provision for other beneficiaries will be affected will always be material considerations. The Isle of Man Court may permit such distributions in the circumstances seen in *Re X Trust*²⁰ (avoidance of further hostile litigation to the

20. [2002-03] 5 ITELR.

financial detriment of spouse and children) and *Compass Trustees v McBarnett*²¹ (to discharge the beneficiary's legal and/or moral obligation to provide for spouse and children) or, perhaps, to stave off bankruptcy or imprisonment although in this latter case the trustees may well consider that the interests of the class of beneficiaries as a whole preclude such a rescue package.

• **Judicious encouragement in Charman-type situation**

It is suggested that 'Judicious Encouragement' potentially gives rise to allegations, where trustees are compliant of fraud on a power (above), of exceeding their power or of taking into account irrelevant considerations or ignoring relevant ones (see rule in *Hastings-Bass*).

(i) **Would the Court view the English Court's judicious encouragement as undue pressure?**

The English Court's judicious encouragement may, in the context of ancillary relief proceedings be justified and a legitimate attempt to examine the quantity of the marital assets. However, the Manx Court would be concerned with other issues in relation to the administration of a trust such as whether it amounted to a speculative claim on behalf of an overzealous spouse or prejudiced the interests of other persons beneficially interested.

(ii) **Would the Court view a payment of such a large amount of money to Mrs Chairman absolutely to be in her best interests?**

As mentioned above, Manx common law and legislation is very similar to that of England. There is no reason to believe that the Manx Courts would not follow the line of thought in *Charman* in reaching a similar conclusion in a Manx divorce case.

However, in a trust case this seems unlikely to be allowed into consideration unless the award seems outrageous.

(iii) **How would the Court ensure that interests of other beneficiaries are protected?**

The Manx Court would carefully examine any request and would use its discretion as to what is necessary to ensure that the beneficiaries are to be protected. It seems most unlikely that any claim or matter that may prejudice them would be allowed to proceed without their having the opportunity to be given notice of the proceedings and being represented. Further, it is thought that the Manx Courts will ensure that the legitimate interests of the beneficiaries will not be overridden unless the Manx Court thought it was appropriate in the circumstances.

Enforcement

The English Court has the power under its inherent jurisdiction and S37 of the Matrimonial Causes Act 1973 to order a freezing order against one of the divorcing spouses. This would extend to the interests of that spouse under a trust or company, even to interests held out of the jurisdiction. This section of the survey looks at how other jurisdictions would approach this and other such orders.

(a) **Against interests of beneficiary/object in discretionary trust. How have your Courts approached.**

(i) **Freezing orders of English Courts made against a trust beneficiary/object? Is the answer different if English Courts orders joined trustees to English proceedings and**

Applications for freezing order in support of English divorce/ancillary relief proceedings (when trustees not party to English proceedings)?

21. [2002] 1TELR 119.

The Isle of Man may grant, and has granted, free-standing freezing orders in aid of foreign divorce proceedings.

An application to the Isle of Man Court for an order freezing the assets of a Manx trust in support of an order from an English Court (either against a party to the divorce proceedings, or against the trustee directly) may require cogent evidence that the assets of the trust may be regarded as the assets of the respondent, (i.e. that the trust acts as the alter ego). The trustee will be entitled to apply to the Court to discharge any such order on the grounds that the allegations are unfounded, or that the order sought is oppressive, for example, if it would interfere with the business of the trust or with discretionary distributions to other beneficiaries. A trustee in this position would be well advised to seek (a) local advice and appropriate directions from the Isle of Man Court as to how it should respond to any order made in the English proceedings; and (b) advice from English solicitors as to any steps that might be taken to discharge the English Court's order.

(b) When are ancillary relief orders of English Courts capable of recognition/enforcement?

- (i) Periodical Payments/Maintenance Orders—S 5 of the Maintenance Orders (Reciprocal Enforcement) Act, 1995 provides that where the maintenance payer (who will be an individual rather than a trustee) resides on or has assets in the island, an English order can be enforced.
- (ii) The Isle of Man is not a party to any treaties regarding the recognition and enforcement of judgements other than the Judgements (Reciprocal Enforcement) (Isle of Man) Act, 1968. This permits a cash judgement of the

English High Court (which might include an order in ancillary relief proceedings) to be registrable and automatically enforceable in the island.

In other circumstances common law principles apply. In relation to an *in personam* claim, recognition first requires, that the foreign Court must have had jurisdiction to bring the defendant before it, including where he submits to the jurisdiction.

As regards an *in rem* judgement concerning immovables, only the Court of the situs of the property will be recognized as having jurisdiction. In the case of an *in rem* judgement concerning moveables, the Court of situs will be regarded as having jurisdiction but it is unclear as to what extent a foreign judgement in respect of moveables situated outside that jurisdiction will be recognized. In *rem* orders are rarely enforceable in practice outside the jurisdiction of the Court making the order, even if the order is recognized.

It is therefore important to establish whether the order made, is *in rem* or *in personam* in character.²²

It has been held that an order against the trustees concerning trust assets is personal in nature (See for example *Ashurst v Pollard*,²³ *Pattni v Ali and Dinky*²⁴)

(c) Assuming that the English Court order is capable of recognition, how have your Courts approached an application for garnishee orders over interest of beneficiary/object?

An Order of an English Court for payment of a sum is unlikely to be enforced by garnishee order or other form of attachment against a discretionary beneficial interest in an Isle of Man trust.

22. The matter is further complicated by the Manx Case of *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2006] UKPC 26 a New York Court made an order that shares in Navigator vested in the shareholders (the creditors committee) and sought the support of the Manx Courts. Lord Hoffman stated at common law, the Manx Court has a broad discretionary jurisdiction to assist a foreign Court dealing with the bankruptcy of a company over which that Court had jurisdiction. It could and should assist by vesting the Navigator shares in the creditors committee to enable implementation of the plan". Cambridge argued that the order was either *in personam* (requiring the New York Court to have had jurisdiction) or *in rem* (in which case it could not be recognized).

23. [2002] 2 AER 772.

24. [2006] UKPC 51.

Different considerations may apply in the event that the English Court has determined that the trust is a sham, or, perhaps, if the spouse has a fixed interest in trust assets. Careful consideration needs to be given to the trust deed in all cases.

Under Manx law, a debt of the judgement debtor can be 'arrested'. Where the judgement debtor has a bank account the Coroner is entitled to uplift the money from the bank account without the necessity of a garnishee order.²⁵

(d) Are there firewall measures which insulate trustees and trust property from ancillary relief orders of the English Court following divorce? If so, what is the scope of those measures and how have they been applied by the Courts?

The legislation has introduced firewall measures (see 4 (c) and 7(b) above but these have to be tested in the Manx Courts).

(e) Is it your view that the Courts are too cooperative in giving effect to English divorce Court orders following judicious encouragement or otherwise? What is your perception of other jurisdictions?

It is premature to furnish a view as to whether the Manx Courts are 'too cooperative' given that to our knowledge there have been no cases that have reached final judgement. The indications appear to be that they would take a critical but open stance. This is in contrast to the perceived approach in Jersey which is sometimes seen as having gone too far on the basis of 'comity' (e.g. *Minwalla*).

The Isle of Man is a cooperative international jurisdiction. A recent example to be found in *re Impex Services Worldwide Limited*.²⁶ In that case, Deemster²⁷ Doyle held that the Court could recognize the appointment of a liquidator of an English Company by an English Court at common law. That matter

involved insolvency issues, but it is suggested that the general attitude would also be applicable in divorce cases.

Manx Courts might observe that the Court dealing with ancillary relief on divorce is the appropriate forum to determine the issue of the ancillary relief. Manx Courts have, after all, the same powers as English Courts in relation to divorce proceedings before them and would probably follow similar principles in applying them. Would they decide that an order of an English Court should be denied effect?

It is not thought therefore, that Manx Courts would refuse in every case to assist (for example, by compliance with a request for examination under the Hague convention)—the perception of Bermuda in the '*Charman*' case is that it was robust, but it is believed that a Manx Court would consider whether the assistance sought would be appropriate.

The tendency of the Manx Courts (like those of other reputable jurisdictions) will be to cooperate and support the proper exercise by foreign Courts of powers within their jurisdiction. The Courts will nevertheless act carefully, considering the facts and circumstances.

PRACTICE POINTS

1. **Trustees should take care as regards disclosure. They should not breach duties of confidentiality owed to the beneficial objects.**
2. **Trustees should not surrender to Courts of foreign jurisdiction without first obtaining a direction from a Manx Court. Trustees should abide by the duties and obligations imposed upon them and keep within the terms of the trust.**

If unsure, best practice is to seek directions from the Court.

25. *Flintshire Car Hire Co. Ltd v Road Runner Freight Services* 1981-3 MLR 1.

26. [2004] Isle of Man High Court (Unreported).

27. A 'Deemster' is a judge of the High Court in the Isle of Man.

Additional information

The regulatory objectives of the Financial Services Act, 2008 and the Financial Services Rule Book 2008 are:

- (a) securing an appropriate degree of protection for the customers of persons carrying on regulated activity
- (b) the reduction of financial crime

- (c) supporting the island's economy and its development as an international financial centre

S.18 of the 2008 Act permits the FSC to make rules regarding licence holders, regulated activities, corporate governance, record keeping and accounts maintenance, etc.

S.19 of the 2008 Act empowers the FSC to take action against licence holders for breach of the rule book.