
**Note on the case of Mubarak v
Mubarak/The Matter of the IMK
Family Trust – Royal Court of
Jersey**

AUGUST 2009

Fiduciary Legal

**5 North Court, Clevedon Road, London TW1 2HS
Tel: +44(0)7814495366 Email: stuart.pryke@fiduciarylegal.com
Web: www.fiduciarylegal.com**

Introduction

On 15th August 2008 the Royal Court of Jersey reported on the case of Mubarak v Mubarak (otherwise referred to as “The Matter of IMK Family Trust”). The case involved the enforcement of a decision of the Family Division of the High Court in England under section 24(1)(c) of the Matrimonial Causes Act 1973 ordering the variation of trust governed by the law of Jersey, the trustee of which was a Jersey registered company.

The case broke new ground by clearly recognising that the new provisions of the Trusts (Jersey) Law 1984 (the “**Trusts Law**”) are plainly enforceable on their terms. It also highlighted the strength of the trust laws in Jersey, and helped positively position the jurisdiction as favourable for certain types of trust structures.

The order of the Family Division required the trustee to vary the terms of the trust so as to permit payment to and to pay the representor in the Jersey proceedings (Mrs Mubarak) a significant sum of money pursuant to a previous order of the Family Division. By the time of the initial order of the Family Division, Mrs Mubarak had been excluded as a beneficiary of the trust by way of a revocable deed of exclusion executed by Mr Mubarak in whom the power of exclusion was invested.

It is noteworthy that the trustee had not submitted to the jurisdiction of the Family Division.

Royal Court Findings

The Royal Court of Jersey held that:

1. It had no power to enforce the order of the Family Division varying the trust by reason of Article 9(4) of the Trusts Law (which deals with the prohibition of the enforcement of foreign judgments in relation to trusts governed by the law of Jersey).
2. Even if the trustee had submitted to the jurisdiction of the Family Division, the Royal Court would have had no power to enforce the order of the Family Division varying the trust by reason of Article 9(4) of the Trusts Law .
3. Where the order varying the trust does not involve a departure from the terms of the trust itself the position is different to (1) and (2) above. In this situation variations could be effected by the Royal Court (in its discretion) by the exercise of powers already vested in the trustee pursuant to the Court’s jurisdiction to make orders in relation to the administration of the trust under Article 51 of the Trusts Law .
4. On the exceptional facts of the case it was appropriate under Article 47 of the Trusts (Jersey) Law 1984 for the Royal Court to give effect to the order of the Family Division, but only because all the adult beneficiaries had effectively agreed to the variation ordered by the Family Division. In effect the Royal Court was doing no more than evoking the long established doctrine in Saunders v Vautier.

Changes to Jersey law after the Mubarak case

The ruling of the Royal Court clarified three key issues of Jersey trust law:

1. *The law of comity where a foreign trustee had not submitted to the English Court*

Before: It was potentially arguable that an order of the English Court varying the terms of a Jersey law trust could be enforced in Jersey even if it involved a variation of the existing terms of the trust and the trustee had not submitted to the jurisdiction of the English Court (Re Compass Trustees Limited v Mc Barnett [2002] JLR 321 and Re H Trust (unreported) [2007] JRC 187), Re the A Trust [2006] JRC 6th February 2006.

After: It has now been clarified that, unless the Royal Court has the power as a matter of Jersey law to effect the variation, then any judgment of the English Court where the trustee has not submitted to the jurisdiction of the English Court will not be enforceable in Jersey by reason of Article 9(4) of the Trusts Law.

2. *The law of comity where a foreign trustee had submitted to the English Court*

Before: It was certainly arguable that where a trustee submitted to the jurisdiction of the English Court and had full opportunity to place their case before that Court, an order of the English Court varying the terms of a Jersey law trust could be enforced in Jersey even if it involved a variation of the existing terms of the trust (Lane v Lane [1985-86] JLR 48 and Re Fountain Trust [2005] JLR 359).

After: It is now the case that, even where the trustee has submitted to the jurisdiction of the English Court, where the English Court applies English law to vary the terms of a Jersey law trust (which will certainly be the case in most if not all matrimonial proceedings before the English Courts), that Article 9(4) of the Trusts Law prevents the enforcement of the order of the English Court.

3. *The law of Jersey as it relates to the power of the Royal Court to vary the terms of a trust*

Before: It was unclear as to whether the Royal Court had the jurisdiction to vary the terms of a trust which involved a departure from the existing powers of the trust, either pursuant to its inherent jurisdiction or pursuant to Article 51 of the Trusts Law.

After: It is now clear that the Royal Court has no inherent jurisdiction nor does it have any power under Article 51 substantively to vary the terms of the trust. This does not, however, mean that the Royal Court cannot approve such variations where all the beneficiaries who are sui juris consent to such a variation or under the limited circumstances set out in Articles 47 and Articles 47A of the Trusts Law.

Postscript

On the 26th September 2008, the Court of Appeal in Jersey gave its decision on an appeal by Mr Mubarak against the judgment at first instance. The Court of Appeal, however, declined to express an opinion concerning the important legal issues relating to Article 9 of the Trusts Law and, in any event, dismissed the appeal. It is considered, therefore, that the issues raised above are unaffected by the Court of Appeal decision.

A public consultation paper proposing changes to Article 9 and Article 51 of the Trusts Law in order to address perceived 'weaknesses' in these Articles, was issued by the States of Jersey in July 2008. In light of the judgment in Mubarak, whilst there may still be a case for improving the wording of these Articles, the need for reform must now be considerably less urgent than it was before.

Impact Outside Jersey

The laws of both of the Cayman Islands and the British Virgin Islands also have provisions which prevent the enforcement of foreign judgments relating to the variation of trusts governed by the laws of these jurisdictions. Whilst the judgment in the case of Mubarak is not binding in the jurisdictions of the Cayman Islands and the British Virgin Islands, it is likely that the Courts of these jurisdictions would pay due regard to this decision. Accordingly, the laws of the Cayman Islands and the British Virgin Islands which prevent the enforcement of foreign judgments purporting to vary trusts governed by the laws of these jurisdictions can only have been strengthened by the decision in Mubarak.