# Best practice when acting for trustees

**Claire Gordon, Farrer & Co**

Divorce creates uncertainty and stress. Whilst we most commonly see that uncertainty and stress falling upon the shoulders of the spouses themselves, the width of the Court's powers on divorce can often result in third parties being drawn into the matrimonial proceedings. Where husbands or wives are the beneficiaries of a trust, the trustees will inevitably be concerned about the impact that the divorce proceedings will have on the trust and on their role as trustees. They will most certainly need careful advice to help them navigate the process. This creates an opportunity for family lawyers. For most of us, our clients are largely made up of divorcing spouses but acting for trustees can be an interesting addition to our practice, and should not be shied away from. As clients, the trustees will have different priorities from our spouse clients and acting for them requires a shift in mindset. Some practical pointers follow.

## Early advice is key

There will be a huge amount to think about, and the earlier that advice is sought, the better.

## Understanding the dynamics

It is important to try to understand the family dynamic from the outset, as this will impact both the advice that is given, and the way that it is given.

Are the trustees professional trustees, or family members? Professional trustees may well have experience of being in this sort of situation before, which can be beneficial but also can bring its own challenges. On the other hand, family members may have their own strong emotional reactions to the circumstances the spouses find themselves in.

How does the trust work in practice? How are decisions made and communicated?

What has the attitude of the trustees been to the beneficiaries in the past? What is their attitude now?

Who is to be your main point of contact and how are your instructions to be given?

Dealing with all of these issues at the outset will ensure that your working relationship is constructive from the off.

## Getting to grips with the trust itself

It is important to consider the trust documents carefully. What is the nature of the beneficiary's interest? Vested or contingent? In possession or remainder? Absolute or limited? Is the trust itself revocable or irrevocable? Fixed or discretionary?

What is the purpose of the trust and therefore what will the trustees priorities be? Are there other beneficiaries and if so, who are they? Is there a letter of wishes? Are the beneficiaries interest in alignment or are there potential conflicts that could arise?

Is it an English or a foreign trust? Where are the trust assets? Where are the trustees based? These are all crucial points when it comes to questions of enforcement (see below).

Getting a handle on these factors is imperative as they are going to form the basis of your advice – you will want the answers as soon as possible.

## What role is the trust likely to play in the outcome?

It will be familiar territory that the court has jurisdiction to vary a 'nuptial settlement'. Careful consideration therefore needs to be given to whether or not the trust is nuptial and so susceptible to variation. Do

consider involving specialist Chancery Counsel where this is in dispute.

It is also important to consider how any order varying a trust could in practice be enforced.

Is it possible that the court will consider the trust assets a resource of one of the parties and therefore make an order 'judiciously encouraging' their involvement? The key question for the court will be, if requested by the beneficiary, would the trustees make a capital payment to him or her? Evidence is likely to be required, and this may impact on decisions about the extent to which the trustees want to play a role in the litigation (see below).

Might allegations be made that the trust is a sham? Has control of the trust property really passed from settlor to trustee? A finding of sham by the court means the assets held by the trust revert to the settlor. Now whether or not this helps the applicant spouse depends on whether the settlor is party to the proceedings, but if you can see this argument may be on the cards, you will certainly want to glean evidence from the trustees about the day to day running of the trust at an early stage.

## What role do the trustees wish to play in the litigation?

It is important for the trustees to decide (with the benefit of advice) what stance they wish to take in the litigation. It is likely that they will have been served with the applicant spouse's Form A, but this is not the same as being joined to the proceedings. The applicant spouse may then apply to join the trustees, and the trustees will need to decide, with your help, whether to resist that application.

From the applicant's perspective, joinder is critical if any order is to be enforced against the trustees (Mostyn J expressed a clear view in *DR v GR and Others (Financial Remedy: Variation of Overseas Trust)* [2013] EWHC 1196 (Fam), [2013] 2 FLR 1534 that it was not necessary for trustees to be joined to the proceedings in order to be bound by any orders, but Moor J disagreed with him in *TM v AH* [2016 ] EWHC 572 (Fam) in which he came to the 'extremely clear conclusion' that trustees must be joined in order to be bound by any order).

The advantages to the trustees of being joined to the proceedings may be that they can then properly represent the trust – they can file submissions and make representations on behalf of the whole beneficial class.

But crucially, even where trustees are joined to the proceedings, offshore trustees will need to consider whether they will submit to the jurisdiction. The two are not the same thing. Simply by being joined to the proceedings, offshore trustees are not bound by any decision of the English court unless they submit to its jurisdiction by participating in the proceedings, or confirming that they will be bound by the court's decision. Importantly, if a trustee instructs an English solicitor to accept service of an application, they have submitted to the jurisdiction, unless again, it is expressly simply to contest jurisdiction, and so there are real traps for the unwary here.

It can be a difficult decision for offshore trustees as they have to balance the interests of the beneficiary getting divorced against their duties to the other beneficiaries. This may become particularly difficult in the context of disclosure. There can be a difficult balance between the provision of helpful information and duties of confidentiality to other beneficiaries. A decision not to disclose trust documents may be construed by the court as unhelpful, but the trustees have a duty of confidentiality which prevents them from providing a non-beneficiary party or their lawyers with detailed disclosure of a trust, its assets or the affairs of the beneficiaries.

## Seeking directions from foreign courts

There is clearly a degree of tension and for this reason foreign trustees will usually want

to seek directions from their local court before taking steps in the English proceedings. They may later bring that judgment to the court's attention to avoid criticism and adverse inferences of deliberate non-disclosure. How the timing of getting such directions fits in to the litigation can therefore be very important.

## Helping to find and fund a solution

Whilst the trustees may well decide on your advice, to resist being a formal part of the English proceedings, on a practical level do think about whether they may be willing to be involved in without prejudice negotiations to help settle matters. They may wish to help the parties reach a pragmatic solution whilst still ensuring that their actions are not making the trust vulnerable down the line.

You can certainly think about agreeing to attend round table meetings or a private FDR, but attending a court based FDR may lead to the suggestion that they have submitted to the jurisdiction, and should often be avoided.

The structure of any financial provision on divorce should be considered carefully. Does outright provision need to be made or could it be made within a sub trust? What are the tax consequences? Will the applicant spouse be receiving maintenance? A clean break may well be desirable to give certainty to both trustees and the other beneficiaries, but will inevitably result in a larger sum being paid out of the trust, and so may need to be balanced against the interests of the other beneficiaries.

As with many things in life, looking at the challenges of divorce from an alternative perspective, that of the trustee, can be both rewarding and provide hugely valuable experience. With the ever increasing use of pre-nuptial agreements, the privately wealthy are already factoring in the risk of divorce to their financial planning. It will surely only be a matter of time before family lawyers advising on trust structures at the point of settlement becomes commonplace