



# Court of Appeal's Decision in "Huge Money" Divorce Case

*Christopher Butler & Deborah Sevitt*  
Speechly Bircham



*In the wake of Mr Charman's recent failed attempt to appeal to the House of Lords, the decision of the Court of Appeal which was announced on 24 May 2007<sup>1</sup> provides useful guidance as to how each spouse's share of the matrimonial assets should be calculated in big money divorce cases. The Court of Appeal upheld the decision of Mr Justice Coleridge in awarding the wife, Mrs Charman, a total of 36.5% of the global assets of the marriage, which equated to £48 million. The case affords a valuable analysis of issues such as the correct treatment of "special contributions" of a main breadwinner to the welfare of the family and the approach to be taken where assets are held in offshore trust structures*

By 2004 the marriage had irretrievably broken down and divorce proceedings were commenced. By the time of the trial before Coleridge J in the High Court, the Dragon Trust's assets were valued at £68 million and the total matrimonial property at £131 million, £48 million of which was awarded to the wife. The husband appealed Coleridge J's decision.

## The Decision on Appeal – The Main Points

- The Court of Appeal held that, in big money cases, equality of division can be taken as a starting point as part of the principle of 'sharing' following the case of Miller and McFarlane [2006] UKHL 24. The husband contended that such a "top down" approach would be wrong and that each factor under Section 25 of the Matrimonial Causes Act should be considered in turn, including carrying out a full assessment of the both parties' needs. However, the Court of Appeal confirmed that equality should be the starting point and the Court should then assess whether it is appropriate to depart from it.
- The Court of Appeal provided further guidance in relation to different types of property. In short marriages, non-matrimonial property could include inherited assets and those obtained through the work of one of the parties in a business in which the other party had not been involved and perhaps where assets have been deliberately kept separate if both parties have pursued separate careers during the marriage. Such "unilateral assets" might not be treated as "family assets" to which the sharing principle might apply. However, in long marriages such an approach would be discriminatory.

## Background

The husband and wife married in 1976. The husband had started out as a junior clerk in an underwriting agency at Lloyd's of London and his career had quickly flourished, enabling him to purchase his own underwriting agency in 1986.

In 1987 the husband settled various assets into an offshore discretionary trust known as the Dragon Trust. Both the husband and wife were named as potential beneficiaries. The trust assets were invested in the husband's extremely successful business ventures and the wealth of the Trust grew rapidly.

In 2001 the husband set up Axis, an international insurance business based in Bermuda. He replaced the Jersey trustees of the Dragon Trust with Bermudian trustees and relocated to Bermuda soon after leaving the wife behind in England.



- Further guidance was given on establishing a “special contribution”. Usually some exceptional individual quality in the generator of the wealth is required in order to argue that there has been a special contribution to the marriage but the amount of the wealth alone could sometimes provide a basis for establishing a special contribution. However, this would not be applicable in cases where there has been some kind of windfall. Where a special contribution is established in that it would be inequitable for the Court to disregard one spouse’s exceptional contribution, this could give grounds to depart from a 50/50 division. The percentages for division would be likely to start at a departure of 55% to the special contributor to no more than 66.6% as a maximum limit.
- The factual history of the Dragon Trust was such that it was regarded as a resource of the husband. Some of the relevant factors which influenced the Court in reaching this conclusion were that:
  - The Trust was a key component in the husband’s financial planning;
  - The husband was a named beneficiary of the Trust;
  - The husband had retained power to replace the trustees;
  - The husband had a high level of influence on the decisions of the trustees regarding investments;
  - The husband had entered into discussions about “collapsing” the Trust thus indicating a high level of control;
  - The Letters of Wishes stated that the husband should have maximum access to the trust’s capital and income.

These factors persuaded the Appeal Judges that, if requested to do so, the trustees of Dragon would be likely to advance trust assets to the husband. It was also concluded that the trial Judge had borne this issue in mind at first instance.

- The Court decided that, despite the husband’s arguments to the contrary, it would have been wrong to deduce that the husband’s interest was confined to the

capitalised value of his life interest in the Dragon Trust. Instead the Appeal Judges agreed that, in quantifying a party’s total assets, the correct approach to be taken in cases of this nature where a trust is identified as a “resource” of that party is to aggregate the full extent of the trust’s assets with his personal assets.

- The husband argued that the wife should have made an application to vary the Dragon Trust instead of the application which she made for a lump sum. The husband argued that the trial Judge’s award of 37% unfairly gave the wife more than she would have received if she had applied for a variation and that her approach denied the opportunity to the trustees to be heard. However, the Court of Appeal held that this argument was put forward too late and had not been argued at first instance. Furthermore, it was felt that the husband contradicted himself as he had previously argued against Letters of Request being sent to the trustees and had made “Herculean” efforts to prevent the trustees from giving any evidence. It was decided that in the circumstances he should not criticise the wife for not applying for a variation or attempt to argue that the trial Judge had not considered what the trustees would have done.

## Conclusion

The starting point for the division of matrimonial property upon divorce remains 50/50. The main question which the Court must then ask itself is whether there are any reasons justifying a departure from equality.

Arguments regarding a special contribution of one of the parties as a reason for departing from equal division might become more frequent, particularly with increasing numbers of successful business people with connections to the English jurisdiction.

In its postscript to the judgment, the President of the Family Division referred to London as the “divorce capital of the world” in recognition that the jurisdiction of England and Wales is now the most expensive in the world if you are the paying party. He warned of the obvious anticipated increase in parties entering into



“forum shopping” in order to try to secure the most advantageous jurisdiction for their divorce cases.

The Appeal Court strongly criticised the lack of legislative reform and suggested that there should be more certainty in this area. It strongly endorsed the possibility of pre-nuptial agreements becoming binding in this jurisdiction in future.

It is clear that trust assets are at risk on divorce if trust structures are not fully thought through in terms of whether property is truly alienated from the settlor. Therefore, individuals who are settling assets into trust are well advised to pay careful attention to the drafting of the trust instruments, the Letters of Wishes, the administration of trust files, the powers to be retained by the settlor, the powers to be given to the trustees, choice of jurisdiction and the like.

The very wealthy will need to keep their structures under

constant review and to pay particular attention to the location of their wealth and its liquidity. They should consider the importance of pre-nuptial agreements for those intending to marry, pre-registration agreements for same sex partners entering into civil partnership and living together agreements for those who intend to cohabit. As our colleague James Freeman said about prenuptial agreements: “Even though at this point they are influential rather than binding, it is increasingly obvious that no wealthy, engaged and sane individual should be without one.”

Where wealthy individuals are thinking of relocating to the English and Welsh jurisdiction, they should take professional advice in relation to their financial arrangements and any existing pre-nuptial agreements, particularly when these have been drafted and signed in another jurisdiction.

Footnotes:

1. *Charman v Charman* [2007] EWCA Civ 503.

