



## SPEECHLY BIRCHAM

### Case Note: **James Freeman**

#### *Charman v Charman*: Dynastic Trusts and Changed Minds

<sup>LT</sup> Ancillary relief; Divorce; Exceptional contributions; Jurisdiction; Letters of request; Offshore trusts

*The award made to Beverley Charman, £48 million, was the largest ever made in the divorce courts of England and Wales. The rationale of the judgment is relevant not only to the extremely wealthy and to divorce lawyers, but also to all those involved in planning and creating trust vehicles.*

This was a 27-year marriage and it produced two children, both of whom were fully grown by the time that Beverley Charman's claim was heard.<sup>1</sup> She played a traditional homemaker's role throughout the marriage, at the outset of which neither she nor John Charman had any assets of note. The parties lived in England together until January 2003, at which time Mr Charman moved to Bermuda. Mrs Charman did not join him in that move, and this effectively ended their marriage. In June 2004, Mrs Charman issued a petition for divorce and applied for financial relief in the English courts. Mr Charman responded by petitioning for divorce in Bermuda two months later, but it was the English petition which proceeded, Mr Justice Coleridge refusing Mr Charman's application to stay it in February 2005.

Over the course of the marriage Mr Charman operated in the insurance markets with extraordinary success. He amassed assets totalling in the region of £126 million, excluding an amount of between £26 million and £37 million which had been placed into trust for the two children. His move to Bermuda was prompted

<sup>1</sup> *Charman v Charman* [2006] EWHC 1879 (Fam).

by the prospect of a massive tax bill were he to have remained in the United Kingdom. Rather than pay this bill, he chose to change his residence.

During the marriage, Mr Charman had placed approximately £68 million worth of assets into a Jersey trust called Dragon Holdings. When he moved to Bermuda, Dragon moved there with him, changing its governing law to that of Bermuda and being placed under the control of a Bermuda trustee company, Codan.

### **The husband's contentions**

Mr Charman deployed a wide range of arguments in his attempt to defend the wealth that he had built up from his wife's financial claims.

First, he argued that the financial contribution which he had made to the marriage was "special". In the vast majority of divorces, the homemaker's domestic contribution will be deemed the equal of the breadwinner's financial one, on the basis that marriage is a partnership of equals and differentiation between their roles would be tantamount to gender discrimination and not to be tolerated. There is, however, a very small category of cases where the breadwinner's contribution has been of such an order that it is considered more than laudable, more than simply that of a hard-working and able earner, and instead an effort containing a true spark of genius. The hurdle is very high, but there is authority that such an exceptional contribution can merit a departure from equality in the division of capital assets on divorce. Sir Martin Sorrell, the advertising mogul, was held to be one example of such an exceptional financial contributor.<sup>2</sup>

Secondly, Mr Charman contended that the value of his business interests, which ran to many millions of pounds, should be subject to a substantial discount on the basis that he was the "key man" in the business and were he to sell his stocks, the confidence of the market would be undermined by the very act of it and the share price would drop.

Thirdly, Mr Charman alleged that his wife's conduct was relevant, most pertinently in that she had failed to move to Bermuda with him, thus leaving him to avoid the tax bill that caused his emigration without her support.

Fourthly, an argument was made that a capital award of the order sought by Mrs Charman would breach her husband's human right to peaceful enjoyment of his possessions.

Perhaps most critically, however, Mr Charman argued that the assets contained in Dragon Holdings should be entirely exempt from Mrs Charman's financial claim as Dragon was a "dynastic trust" and as such its assets had been set aside

<sup>2</sup> [2005] EWHC 1717 (Fam).

during the marriage, with the implicit consent of his wife, for future generations of the family. It should be noted that this would not include the parties' two sons, as they were already more than amply catered for, being the beneficiaries of the children's settlement referred to above. The contention therefore was that this was a dynastic trust in the truest sense, its purpose being to preserve wealth for generations of Charmans as yet unborn.

Before considering what the judge made of these contentions, and particularly the dynastic trust argument, it is worth considering the approach of the Family Division to trust assets in general and also taking note of the attempts made in this case to obtain more information concerning Dragon Holdings.

### Trusts and divorce

Section 24(1)(c) of the Matrimonial Causes Act 1973 permits the court to make an order varying any ante-nuptial or post-nuptial settlement made on the parties to a marriage. The statute does not define an ante-nuptial or post-nuptial settlement. That has been left to case law, in which a very wide definition has always been adopted. While there is a general requirement that a settlement be made "upon the husband in the character of the husband or the wife in the character of the wife" (*Prinsep v Prinsep*<sup>3</sup>) or indeed upon both in the characters of husband and wife respectively, (and that "broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to the marriage with or without provision for their children"—*Brooks v Brooks*<sup>4</sup>), there are no precise limitations, and indeed even a pension fund has been held to be a nuptial settlement.

Where the court does have power to vary the terms of the trust, that power is not excluded because the trust is offshore. Indeed, a specific foreign law clause in the trust document will not oust the court's power to vary. The power arises from the statute, and not from the terms of any particular trust.

Where a non-nuptial trust is involved, or where the court considers that a variation order is not necessary, the court will attempt as best it can to value a party's interest in the trust. Where it is self-settled, the likelihood is that the trust assets will be considered as available to that party. In other cases, the court will look at letters of wishes if they are instructive, or otherwise at the historic operation of the trust and benefits received by a party from it in order to get an idea of the true value of that party's interest in it.

The courts of the Family Division are more concerned with doing justice between the parties than with the niceties of ownership structures. Their approach,

<sup>3</sup> [1929] P. 225.

<sup>4</sup> [1996] A.C. 375.

sometimes to the horror of Chancery practitioners, is generally purposive rather than technical.

### **The letters of request**

It was part of Mr Charman's claim of a dynastic intent underlying Dragon that he received no ongoing benefit from it and the trust was therefore not variable as a post-nuptial settlement. The wife disagreed with this contention, claiming that as Mr Charman was the principal beneficiary of Dragon, the trustees would take heed of his wishes and would make trust assets available to him on his request. She sought to gather more information in this regard from Dragon's trustees in Bermuda by the issue to that jurisdiction of letters of request. The Court of Appeal ordered that these letters should issue to the courts of Bermuda, being appropriate in their scope and concerning what was clearly a very relevant issue in the case.<sup>5</sup>

However, the Bermudan courts took a different view and declined to oblige Dragon's trustee to provide the information sought, on the basis that the letters of request were too widely drawn and amounted to a fishing expedition. It should be noted that the exclusion of foreign law provision enshrined in Bermuda's trust law means that all such incoming requests must be subject to substantive review in the Bermuda courts. That review process proved fatal to Mrs Charman's attempts to discover more about the operation of Dragon.

### **The judgment**

When the case came before Mr Justice Coleridge, therefore, only limited information about Dragon was available to him. However, it was clear that this was a discretionary trust, and that Mr Charman was a potential beneficiary albeit he had never actually received any benefit. Although no actual order for the variation of the trust was made, the value of its assets was included amongst the general "pot" which was subject to division between the parties.

The court held that Mr Charman failed on the evidence to show any dynastic intent to Dragon Holdings. Most tellingly, no such intent was recorded in any of the letters of wishes relating to Dragon, the judge commenting that this would be remarkable if such intent had existed. This being the case, Dragon was a self-settled discretionary trust of which Mr Charman was a potential beneficiary and, as such, its assets would be treated for these purposes as his.

Further, the judge considered that even if a dynastic intent had clearly been demonstrated, the Dragon assets would still be regarded by the court as a resource of the parties. Mr Charman should not be permitted "at the stroke of

<sup>5</sup> [2005] EWCA Civ 1606.

a letter of wishes” to put Dragon’s assets beyond the reach of the court when considering what order should be made. Rather, Mrs Charman should be able to say:

“Whatever may have been your/our intentions then, now that the marriage is over I have changed my mind and these assets must be on the table for consideration like all the others. I will decide following receipt of my portion what I want to do with them and whom I want to benefit now and in the future”.

On the point of principle, therefore, it would appear that the most careful attempts at asset protection by use of trust vehicles may be undone by the changing of a mind. From the point of view of the family lawyer, this is no great revelation: the divorce courts are very jealous of their powers to consider the entire asset position, and were never likely to conclude that their jurisdiction to do so may be partially ousted by the use of “dynastic” structures. It is appreciated that the trust adviser may view this aspect of Mr Justice Coleridge’s judgment in a different light.

### **Other issues**

All but one of the principal arguments raised on Mr Charman’s behalf were rejected. He was not entitled to a discount of the value of his business assets, not least because when he had announced to the market the prospect of his retirement from the business the stock price had actually risen slightly. Nor would Mrs Charman’s conduct be taken into account in any way as it was not sufficiently gross that it would be inequitable for the court to disregard it. The human rights argument was dismissed out of hand.

However, Mr Charman was held to be that rarest of breeds, the special financial contributor. Furthermore, as such, there should be not a marginal but a clear move away from equality in the division of the capital assets. Of the available £126 million, Mrs Charman therefore received £48 million, being 37 per cent of those assets.

### **Conclusions**

Mr Charman has already evinced an intention to appeal this judgment. To a considerable extent, therefore, the conclusions that one draws from it must be provisional. That said, certain points are clear.

First, if a trust is created with a specific intention, it should be clearly and visibly recorded, most probably in letters of wishes. In the absence of such documents, any claim that a trust was created for a particular purpose is likely to be met by the courts of the Family Division with incredulity.

However, those advising on trusts must be aware that even if a “dynastic” intention was crystal clear in the documents and letters of wishes, the court is unlikely to fetter its own discretion by considering those intentions to be binding on it. In preserving the right of a spouse to change his/her mind, the court preserves its own right to consider the full asset position and exercise its powers accordingly.

For those who wish to engage in wealth protection, therefore, the effects of divorce need to be taken into account from the very beginning. Tax is not the only issue. Indeed, given recent case law it is increasingly tempting to view divorce in the courts of England and Wales as a swingeing 50 per cent rate of tax on the unfortunate. As such, where there is a genuine intention to treat wealth in a certain way, it may be very beneficial to make use of Pre-Nuptial Agreements for those intending to marry, Mid-Nuptial Agreements if they are already married, Pre-Registration Agreements for those contemplating a civil partnership and, where the wealth of an individual is derived from the wealth of his family, Family Protocols. While not specifically enforceable in the way of a contract, such agreements, if their terms are appropriate and if they are accompanied by the necessary formalities such as independent specialist legal advice and adequate financial disclosure, may have a greater influence on the courts of the Family Division than any other form of evidence.

The other crucial issue is that of jurisdiction. Careful thought must be given to the jurisdiction in which assets, particularly trust assets, are to be situated, as some are certainly more accommodating than others when it comes to the implementation of orders made in the context of foreign divorces. Further, where there is considerable wealth and the parties have had an international lifestyle, it may well be possible that more than one jurisdiction is available for the divorce itself. Where this is a possibility, early advice must be taken from specialists in both jurisdictions and swift action taken to secure that which would be most beneficial. Following this decision, men such as Mr Charman are unlikely to conclude that this will be England and Wales.