

High Court's landmark decision in "huge money" divorce

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The judgment in the case of Mr and Mrs Charman, handed down by Mr Justice Coleridge to the parties in August 2006 offers guidance on how parties with unusually high wealth including offshore trust assets should be treated on marriage breakdown.

The Court's decision was:

- On the facts, the sizeable trust assets sequestered in a Bermuda trust by the husband should not be excluded from the marital "pot". This is because not only was there no accompanying letter of wishes to suggest "dynastic intent" but even if there had been, the trust is a conventional discretionary trust of which Mr Charman is a potential beneficiary, and the assets it contains should be treated as part of the "pot", whatever the original intention underlying the trust.
- The Court confirmed Mr Charman's claim that his "wholly exceptional" and "remarkable abilities in the insurance world" entitled him to a greater share of the assets than his wife. Ultimately, the Court awarded him approximately 63% of the total assets.
- The Court dismissed what it perceived as Mr Charman's attempts to introduce by the "back door" arguments relating to Mrs Charman's conduct. He had cited her failure to move to Bermuda with him and to support his business endeavours adequately.
- It was argued that were Mr Charman, as CEO and "key man", to sell substantial stock

in his business, the effect would be to depress the value of that stock. This, it was claimed, should be taken into account when valuing the marital finances. The Court rejected this contention and the judge took the view that markets are now accustomed to such situations and will not be influenced by them.

- The suggestion that payment of a large lump sum to his wife would infringe Mr Charman's human right to "peaceful enjoyment of his possessions" was rejected out of hand.

What will this mean for future cases?

- Makers of genuinely extraordinary financial contributions will continue to argue for departures from equality on the division of the marital assets by dint of such contributions.
- Those seeking to put assets beyond the Court's reach will have no success in arguing that "dynastic trusts" are exempt from financial claims on divorce.
- If a departure from equality is appropriate in a "huge money case", the departure should be significant rather than trifling. As the judge put it, "the sharp carving knife rather than the salami slicer is the appropriate tool".
- It is less likely that those with substantial personal shareholdings who might find themselves within the provinces of the divorce Courts will be able to apply a discount to the value of those shares on the basis that their sale would distort the market.

CEOs and majority shareholders might want to give this development some careful thought.

- Experts who give evidence in family cases would be well advised to read this judgment as it enforces the need to have available the necessary information to support their contentions as otherwise they run the risk, as was the case here, of judicial censure.
- Although the judge made no use of it in this decision, he did raise the possibility of tariffs as to appropriate asset divisions being developed to guide negotiations in cases where the assets are very substantial.

Background

Mr and Mrs Charman separated in 2003 after 27 years of marriage. They lived in England and had two children. In January 2003, Mr Charman took up residence in Bermuda. Mrs Charman remained in England and in June 2004 commenced divorce and financial provision proceedings.

In February 2005, Mr Justice Coleridge refused Mr Charman's application for a stay of his wife's petition. Mr Charman had issued divorce proceedings in Bermuda in August 2004.

During the marriage, Mr Charman had made a fortune in the insurance market in the City. He conceded that the assets that fell for division on divorce amounted to £58 million but Mrs Charman alleged that the relevant assets were worth £126 million. The difference between the figures (£68 million) was represented by the assets of Dragon Holdings ("Dragon"), a Bermuda trust created by Mr Charman which, according to his wife, should be included as part of the marital assets.

The trust was in fact established under the law of Jersey in 1987. When Mr Charman relocated to Bermuda in April 2003, he

exercised his power to change the trustee to Codan Trust Company Limited in Bermuda and the proper law of the trust was changed to the law of Bermuda.

A central issue in the financial proceedings was the extent to which the assets contained within Dragon should be included in the "pot" of marital assets. Mrs Charman contended that the trust assets "could be available to [her husband] on demand without being his money". Mr Charman denied this and in any event argued that the intention in creating the trust was to secure wealth for future generations of the family and it should therefore be left out of account entirely.

Additional applications

Before the trial, Mrs Charman made a successful application to the Court for the issue of letters of request to Bermuda in an attempt to obtain further information about the trust. Mr Charman appealed against the grant of these letters of request but his appeal was dismissed by the English Court of Appeal. However, subsequently, the Bermuda Courts declined to oblige the trustees to produce information pursuant to those letters (an action that Coleridge in his judgment labelled "parochial" and "churlish").

Concluding remarks

The award of £48 million in total to Mrs Charman is spectacular in terms of its size. In many ways, however, the judgment is a consolidation rather than a new departure. The existing doctrines relating to extraordinary financial contribution and the treatment of trusts have been clarified and reinforced.

It remains to be seen whether the wife will encounter difficulties if she seeks to enforce this order in the Courts of Bermuda which are generally obdurate in declining to assist the implementation of English court orders.

Following the High Court's judgment, an appeal from the husband was made. Permission to appeal has now been granted and the appeal is likely to be heard in March..

Now more than ever before wealthy clients will require specialist advice in relation to asset protection generally and, in particular, to Living Together Agreements for those who do not marry, and if they do, Pre-Nuptial Agreements, Pre-Registration Agreements for civil partners and Family Protocols. Clients and their advisors need to think carefully about their structures and the way in which letters of wishes, types of trusts and the like can be affected by the failure of relationships. It underlines the need for joined up thinking between advisors.

Contact

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