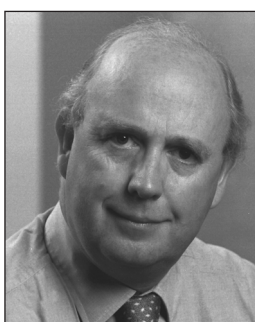


## SETTLEMENTS

# Foreign affairs

*In the second of a series of three articles, Christopher Butler and Susie Barter consider the impact of Charman v Charman, which asked when a court should consider the issuing of letters of request to the authorities of a foreign country*



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**'When giving effect to the overriding objective to deal with cases justly, the court must deal with the case in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of the parties.'**

**C**harman v Charman [2005] caused many headlines billing it as the latest round in a bitter divorce battle between one of the richest men in the City and his wife of 27 years. Charman is by anybody's standard a big-money case. The husband's fortune is estimated by the wife to be £126m. The husband admits to £59m of 'relevant assets'. The difference of £67m represents the assets of the Dragon Holdings Trust, a trust set up as a largely conventional discretionary trust by the husband under the laws of Jersey in 1987. The husband exercised his power to change the trustee to a Bermudian trust company and the proper law of the trust to Bermuda in April 2003, shortly after he had ceased to be resident in the UK and taken up residence in Bermuda.

In the main divorce proceedings the husband claimed that Dragon 'is a dynastic trust for future generations', not a post-nuptial settlement under s24(1)(c) of the Matrimonial Causes Act 1973 capable of being varied by the judge. The wife contends that as principal beneficiary of the trust, the trustees would be bound to have regard to the husband's wishes and would pay a substantial part or the whole of the fund to him if he asked. The wife sought to gather further evidence about the husband's influence on the operation of Dragon from the trustees in Bermuda in support of her arguments that it was not such a dynastic entity.

In October 2005 Coleridge J made orders, on the wife's application, issuing letters of request to the Bermudian court to cause a director of the Codan Trust Company Ltd, which acts as the sole trustee of Dragon, to be examined in the Bermudian court and to produce

documents containing specified matters set out in the letters of request. The husband appealed those orders.

### **Documents to be produced by a person in England and Wales**

Rule 2.62(7) of the Family Proceedings Rules 1991 can require a person to attend an inspection appointment and produce:

... any documents to be specified or described in the order, the inspection of which appears to the court to be necessary for disposing fairly of the application for ancillary relief or for saving costs.

This cannot compel a person to produce a document which they could not be compelled to produce at the substantive hearing. A person cannot be required at an inspection appointment to give oral evidence, although it is becoming common practice to allow any question to be asked that is necessary to enable the inspection to proceed effectively, for example identifying the source of a document or how it relates to another document.

### **Oral evidence to be given by a person in England and Wales**

Normal practice would be to seek authority pursuant to Order 38 r14 of the Rules of the Supreme Court 1965 to issue a writ of subpoena to attend the substantive hearing and give oral evidence. In unusual circumstances a subpoena to attend and give oral evidence returnable prior to the substantive hearing can be made. Alternatively, an order can be made under Order 39 r1 of the Rules of the Supreme Court 1965 (RSC 1965) for a deposition to be taken of a person's oral

testimony before an examiner, with a view to its reception as evidence under Order 38 r9.

### **Documents to be produced by a person abroad**

An appropriate form of order is for the issue, pursuant to Order 39 rr1 and 2 of the RSC 1965, for a letter of request to the relevant judicial authorities to cause a person to be required to produce the documents.

### **Oral evidence to be given by a person abroad**

The appropriate form of order is for the issue, pursuant to the same rules, of a letter of request to cause the person to be required to answer written questions under Order 39 r3(3) and/or oral questions. This is because a person abroad cannot be compelled by subpoena to attend the hearing and give oral evidence in the normal way.

### **The appeal**

The husband appealed the orders made on six grounds set out by Wilson LJ at paragraph 18 of the judgment. Each ground of appeal was considered in turn:

#### **Fishing**

Section 2(4) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, which deals with the production of documents, is mandatory in its operation and is to be construed so as not to permit 'fishing' expeditions. Although difficult to define, 'fishing' can be described as the search for material in the hope of being able to raise allegations of fact rather than in an attempt to elicit evidence to support allegations of fact already made.

The principles relating to oral evidence are slightly different. The concept of fishing does not apply to a request that the witness give oral evidence unless that oral examination relates almost exclusively to the documents that had been requested. Oral evidence should be sought with the intention of gathering evidence for use at trial rather than simply to obtain information. If there was reason to believe that a person had knowledge of matters relevant to issues at trial, the request should not be refused on the ground of fishing.

Wilson LJ found that in this case the wife had made a particularised allegation that, if requested, Codan would make the capital of Dragon available to

the husband. The husband denied that allegation and both parties recognised that this was an issue of the proceedings. The wife's request for documents related to her wish to elicit evidence in support of her allegation for use at the forthcoming hearing. Similarly, the judge found that the request for oral evidence was to obtain evidence for use at trial and as the request was made of a director of the trustee of Dragon, there was clear reason to believe that he had knowledge relevant to this issue.

Wilson LJ distinguished as 'perhaps causing confusion' Dunn J's words in the 1978 case of *B v B (Matrimonial proceedings: discovery)*, in which he had said that the wife is entitled to go 'fishing' in the Family Division within the limits of the law and practice. He said that this case was to be understood to mean that a wife is entitled to ensure that a husband complies with his duty

which, if it does exist, may have a crucial bearing on the outcome of their financial application.

Lloyd LJ noted that although the same principles should be applied to the issue of letters of request in the Family Division as to ordinary civil litigation cases in the Chancery Division, the nature of the issues arising in the Family Division were very different to those arising in ordinary civil proceedings, not least because of the impact of s25. For this reason application of the same principles to an application for a letter of request could produce seemingly different results in the two Divisions.

Potter P went further and referred to FPR r2.51B(1), where it is clearly stated that the overriding objective of the ancillary relief rules is to enable the court to deal with cases justly and, by r2.51B(2)(a), ensure that the parties were

*The Court noted that a claimant spouse will seldom have the knowledge with which to prove the existence of a document which, if it does exist, may have a crucial bearing on the outcome of their financial application.*

to make full and frank disclosure of all his resources, but does not confer upon her the right to go fishing for information from third parties.

#### **Documents not proved to exist**

The authorities also suggested that the Court would need to be satisfied that the documents sought actually existed or had existed rather than might have existed.

The Court found that in matrimonial proceedings the request need not be limited to only those documents which the wife could prove to exist. This departure he justified on the basis of the obligation, under s25(1)-(2) of the Matrimonial Causes Act 1973, to have regard to all the circumstances of the case, including at (2)(a) the financial resources which each of the parties of the marriage has or is likely to have in the foreseeable future. The Court noted that a claimant spouse will seldom have the knowledge with which to prove the existence of a document

on an equal footing. The president noted that it is often said that the aim of the rules is to encourage a 'cards on the table' approach, and when exercising its power and discretion to issue letters of request the court should be astute to assist a wife where, without such assistance, the 'cards of the husband are likely to remain face down and the true extent of his assets undisclosed'.

#### **Necessity**

The complaint that production of the documents was not 'necessary' to dispose fairly of the application in front of the court was dealt with summarily by Wilson LJ. If the wife was already in possession of enough ammunition to deploy in respect of the central issue about Dragon, why was the husband continuing to reject her arguments? Wilson LJ fully endorsed Coleridge J's view on this matter, which was that he did not wish to be reduced to 'conjecture based on inadequate evidence if there is more which could be of real assistance'

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when determining the essential question of whether or not this was a post-nuptial settlement.

### Proportionality

FPR r2.51B(2) provides that when giving effect to the overriding objective to deal with cases justly, the court must deal with the case in a way which is proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of the parties.

whether, as a matter of discretion, the order would be so oppressive upon them as to outweigh the likely value of the material in determination of the case.

Wilson LJ identified several instances where the oppression argument may prevail: for example, where a wife's father is ordered to explain with supporting documentation his testamentary intentions towards his daughter or where a spouse's wealthy cohabitant is ordered to produce evidence not just as

*B v B (Matrimonial proceedings: discovery)*

[1978] Fam 181

*Charman v Charman*

[2005] EWCA Civ 1606

*Panayiotou v Sony Music*

*Entertainment (UK) Ltd*

[1994] Ch 142

that Mr Anderson should impart such knowledge, and produce such documents in his possession, as were relevant to the debate in Court as to the fair outcome of a financial dispute between the settlor (a beneficiary) and his wife (also a beneficiary).

## *The Court needed to be satisfied that the requests sought information which would 'illumine the answer to the central (or indeed subsidiary) question'.*

Wilson LJ unhesitatingly adopted Mr Pointer's submission that 'any question of proportionality is overcome by the magnitude of the trust assets in question'.

### Oppression

Where any civil court is asked to order a non-party to divulge material, whether documentary or oral, it must consider

to the support provided by him or her to the spouse, but also as to his or her overall resources.

In the judge's opinion this could be distinguished quite clearly from orders made against professionals whose personal privacy would not be invaded in any sense by the operation of the orders. Trustees exist for the benefit of the beneficiaries to the trust. It was obvious

### Excessive width

The Court needed to be satisfied that the requests sought information which would 'illumine the answer to the central (or indeed subsidiary) question'.

Subject to one small amendment, the letters of request were issued to the authorities in Bermuda as drafted. However, that takes matters only so far. Of crucial importance in this case is, of course, the enforcement of those orders in Bermuda. We shall consider that issue in the next issue. ■

## Principles to be applied

It was agreed that the same principles should apply when determining whether a person who is not a party to the proceedings should produce documents or give oral evidence regardless of whether that person is in England or abroad.

Wilson LJ went further and accepted Sir Donald Nicholls VC's view in the George Michael case (*Panayiotou v Sony Music Entertainment (UK) Ltd* [1994]) that:

... the principles determinative of an application for an order for the issue of a letter of request in respect of documents or of oral evidence ('an outgoing request') were the same as those determinative of an application for an order giving effect to a letter of request received from a foreign court in respect of documents or of oral evidence ('an incoming request').

He found it would be unconscionable for the English court to make an outgoing request in circumstances in which, had it been incoming, it would not have been given effect to.

The appeal therefore required consideration of the principles by which the English court decides whether to give effect to an incoming request.

These principles are set out in, or at least derived from, the Evidence (Proceedings in Other Jurisdictions) Act 1975. Section 2 provides:

- (1) ... the High Court... shall... have power... by order to make such provision for obtaining evidence... as may appear to the court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made;
- (2) ... an order under this section may, in particular, make provision –
  - a. for the examination of witnesses, either orally or in writing;
  - b. for the production of documents...
- (3) an order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order...
- (4) an order under this section shall not require a person –
  - a. to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
  - b. to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or to be likely to be, in his possession, custody or power.