

## FINANCIAL PROVISION

# The dragon slain

*In a concluding article on the big-money case of Charman, Clare Robinson outlines the key points and the impact of the long-awaited judgment*



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**'Other jurisdictions, including Jersey, are in the process of revising their existing laws in order to mirror those of Bermuda so as to make it more difficult to enforce English orders in foreign jurisdictions.'**

In the previous article in this series (by Christopher Butler and Susie Barter in issue 58), in anticipation of the judgment in the case of *Charman v Charman* [2006], the Bermuda courts' reaction when faced with an English court order seeking to vary an offshore trust was considered. As we know, enforcement of such orders in the courts of Bermuda can be problematic due to their 'exclusion of foreign law' legislation. In the event, however – and it is always hard to pre-empt a judge's decision – Coleridge J made no specific variation order, although he did include the husband's Bermuda trust, Dragon Holdings, as part of the matrimonial 'pot' when deciding on the division of assets. The husband was ordered to pay his wife (a mere) £48m, and it was left up to him as to how to raise the funds.

In this article, I shall take you through the long-awaited judgment and consider the wider implications it may have for future cases of this nature.

### The facts

Mr and Mrs Charman had been married for 27 years when Mrs Charman received a telephone call from her husband in November 2003 informing her that he regarded the marriage as over. They had lived in England with their two children up until Mr Charman decided to take up residence in Bermuda in January 2003. Mrs Charman and the children did not join him. In June 2004 Mrs Charman commenced divorce and financial provision proceedings and in February 2005 Coleridge J refused Mr Charman's application for a stay of his wife's petition, Mr Charman having issued divorce proceedings in Bermuda in August 2004.

With regard to other interlocutory hearings, such as Mrs Charman's application for letters of request, I invite you

to read the second article in this series in the June 2006 issue (*FLJ* 57).

Having entered into the marriage with no substantial assets, the husband was very successful in the insurance world and accumulated wealth, according to the wife, to the tune of £126m (excluding assets of between £26m and £37m placed in a trust for their two children). The husband's advisers, however, argued that the assets of Dragon (approximately £68m) should not be included as part of the matrimonial 'pot' and that the court should only take into consideration the assets in his sole name (around £56m) to divide between him and his wife. As can be seen by the figures involved, Coleridge J aptly asserted that to describe it as a 'big-money case' was 'something of an understatement'.

Dragon was in fact established under the law of Jersey in November 1987. When Mr Charman relocated to Bermuda in January 2003 he exercised his power to change the trustee to Codan Trust Company Ltd in Bermuda and the proper law of the trust was changed to the law of Bermuda.

Mrs Charman's lawyers asserted that the trust assets 'could be available to [her husband] on demand without being his money', which, so they argued, implied that such assets should be regarded as a 'resource' of her husband's in accordance with s25(1)(a) of the Matrimonial Causes Act 1973. However, Mr Charman's advisers contended that Dragon was a 'dynastic trust' set up with the intention of providing for future generations of the family and that its assets should therefore be ringfenced from consideration by the court.

### The decision

Coleridge J concluded that Mr Charman's arguments regarding the

exclusion of the trust from the matrimonial pot fell both on the facts and as a matter of principle.

On the facts, Coleridge J found that the lack of any reference whatsoever, in any of the letters of wishes drafted since Dragon was established in November 1987, to such dynastic intent by the husband only served to undermine his argument as to why the trust should be excluded from the matrimonial pot. Such omissions can lead to regrettable results. Not one of the letters of wishes made reference to such a significant factor and, as Coleridge J was quick to remark, had Mr Charman:

... harboured this as a settled and real intention from the outset, the lack of a single piece of supporting documentary evidence from any quarter [was] truly remarkable.

Coleridge J also made the point that since Dragon was set up, it had been run by paid professional offshore trustees who would have surely advised Mr Charman to confirm in writing his intentions regarding the trust had he made

such a significant matter known to them. Furthermore, the judge was satisfied that Mrs Charman knew nothing of this plan. Coleridge J concluded by saying that the assets were:

... no more 'dynastic' than any other part of [his] immense fortune, which [would] inevitably be handed on for many generations to come after he [had] shuffled off this mortal coil.

was a potential beneficiary and this factor alone was sufficient for Coleridge J to decide to include the trust in the matrimonial pot, whatever the original intention underlying it.

Coleridge J doubted whether Mr Charman would be entitled to exclude from consideration by the court, by dint of, say, a letter of wishes (which had not even materialised), half of the assets built up during the marriage without

### *Mr Charman's arguments regarding the exclusion of the trust from the matrimonial pot fell both on the facts and as a matter of principle.*

Even if the intention as to the purpose behind the trust had been well-documented, however, the judge stated that he would not have been convinced, as a matter of principle, that this trust should be left out of account when determining the division of assets. The assets were held in a conventional discretionary trust, of which Mr Charman

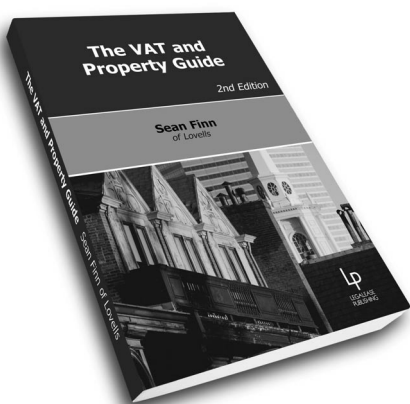
his wife's consent. For Mrs Charman not to be able to reap the benefits of such an informal arrangement, entered into at a time when the marriage was going well, after a near 30-year marriage would be profoundly unjust. Coleridge J stated that Mrs Charman must, in the circumstances, surely be able to say:

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## FINANCIAL PROVISION

...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.

In the final analysis, even if there had been an agreement between the parties, during the marriage, as to how and to whom these trust assets were to be distributed in the future, the position had now changed in that they were going their separate ways. Mrs Charman therefore remained entitled to receive a share of the trust fund in order that she might be able to distribute the capital as she wished following the divorce.

### *Trust lawyers will be concerned that their carefully structured offshore trusts might be vulnerable to attack by the financially weaker party on divorce.*

Turning to other matters raised by Mr Charman, his argument that the share price of Axis, the insurance company (incorporated in Bermuda) of which he was CEO and 'key man', would fall if he were to sell stock in the business following divorce was rejected. Also dismissed were his contentions that his wife's conduct, in failing to support him in his business endeavours and refusing to move to Bermuda with him to avoid tax at the end of the marriage, should be taken into account, and that a lump sum order to his wife would breach his human right to 'peaceful enjoyment of his possessions'. However, Coleridge J did accept that Mr Charman had made an exceptional contribution to the welfare of the family insofar as his 'remarkable abilities in the insurance world' were concerned and that this factor justified a departure from equality in this case.

Coleridge J therefore ordered that the husband pay his wife a lump sum of £40m (in addition to her present assets). She left the marriage with a total of about £48m, which, in percentage terms, is just under 37% of the total assets.

#### **Wider implications**

Documentary evidence is a powerful tool and we can be sure that, as a result of this decision, a strong message has been sent out to trust advisers about the

need for their clients to record fully the purpose for which a trust is established. In the same way that testators are advised to clarify their intentions as to how they wish their estate to be distributed on their death, so too should settlors record their intentions as to the purpose of the trust. It will then be up to the judge to decide whether the evidence is credible or not but, surely, any reference, no matter how vague, to the underlying intention behind a trust is better than none.

However, even if the settlor's intentions are recorded fully, any argument regarding a 'dynastic trust' would be likely to fail on principle anyway. In the simplest of terms, this decision vindicates those parties who change their minds about such things. In doing so, of

course, the decision also preserves the court's precious ability to consider the full range of assets. Mr Charman was always going to face an obstacle in that he was essentially asking the court to fetter its own discretion. That obstacle, in the High Court at least, has proved insurmountable.

Nevertheless, even if a variation order is made by the judge (which did not happen in this case), the spouse in whose favour the order was made might still face difficulties in enforcing that order in foreign jurisdictions, such as Bermuda, due to their 'exclusion of foreign law' legislation as touched upon above. This has, in fact, happened previously in this case. Letters of request had been issued to the Bermuda courts, despite an appeal against them by Mr Charman, in an attempt to obtain further information about the trust. However, the Bermuda judge, 'somewhat churlishly' in the view of Coleridge J, declined to assist the English court in the face of opposition by the trustees and would not therefore order/permit the production of documents by them. If you wish to review this in further detail, please see the third article in this series in the July/August 2006 edition (*FLJ* 58). Other jurisdictions, including Jersey, are in the process of revising their existing laws in order to mirror those of Bermuda so as to make it

*Charman v Charman*  
[2005] EWCA Civ 1606;  
[2006] EWHC 1879 (Fam)

more difficult to enforce English orders in foreign jurisdictions. Those comfortable with flouting English court orders may well pay more heed to the pronouncements of the local court than to the findings of the English court.

With regard to the *Charman* case, Coleridge J was silent as to how the lump sum of £48m should be raised. Even without seeking to enforce against the trust, Mrs Charman might face problems since most of her husband's non-trust assets are also situated in Bermuda. However, before she takes steps to enforce this order, it is highly likely that Mr Charman will be making an appeal, and therefore any enforcement action will be put on hold until it is heard.

#### **Conclusion**

In the light of this case, trust lawyers will be concerned to learn that their carefully structured offshore trusts might be vulnerable to attack by the financially weaker party on divorce, as they may be brought into the financial proceedings as marital assets. The family courts are entitled to use their discretionary powers to vary or set aside such trusts, no matter where they are established, and will do so as and when appropriate. They will also, where necessary, make 'judicious encouragement' orders premised not on a variation of the trust but on the basis that the trust's assets will be made available to the paying party. However, the thorny issue of enforcement will clearly need to be dealt with if such orders are to be effective.

Now more than ever before, wealthy clients will require specialist advice in relation to asset protection generally and, in particular, to prenuptial agreements for those intending to marry, mid-nuptial agreements for those already married, pre-registration agreements for civil partners-to-be, 'living together agreements' for those who choose not to marry and, where a party's wealth is derived from their family, family protocol arrangements. Clients and their advisers 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 breakdown of relationships, and not be reluctant to be proactive in addressing the issues confronting them. ■