

BRIEFING NOTE

Charman v Charman: The Offshore Trust as a Financial Resource

London's billing as the divorce capital of the world was further enhanced in the Court of Appeal decision in *Charman v Charman* [2007] EWCA Civ 503. The Court of Appeal had little difficulty in upholding the highest award ever made on a contested application for ancillary relief in English divorce proceedings. Nor did the Court find any impediment to including within the "pot" of marital assets the assets of a Bermudian trust, the Dragon Holdings Trust ("Dragon"), as a financial resource available to Mr Charman.

The case turned on two principal issues. Firstly, whether the likelihood of advancement of the assets to Mr Charman by the trustees of Dragon enabled the Court to look through Dragon and regard its assets as the husband's. Second, whether Mr Charman's exceptional contribution to the creation of wealth during the marriage justified an even greater departure from equality of division such that Mrs Charman should receive less than the 37% granted by the High Court. This briefing will focus on the first of these issues which will be of particular interest to settlors, beneficiaries and industry practitioners.

The increasing exposure of trusts (whether on or offshore) to divorce litigation can be attributed in very large measure to the case of *White v White* [2000] UKHL 54. With *White v White*, the more conservative concept of "reasonable needs" was swept away in big money divorce cases in favour of the "yardstick of equality". As the Court of Appeal noted in *Charman*: "Prior to the decision in *White*, the elaborate enquiry ... as to the attributability of the assets in a trust to a party as part of his or her resources would probably have been unnecessary". After *White v White*, that "elaborate enquiry" has become almost a compulsory aspect of the exercise of discretion by the English matrimonial Court. Indeed, the Court of Appeal in *Charman* went so far as to declare that in the circumstances of that case it would have been "a shameful emasculation of the court's duty to be fair" if Dragon's assets had not been attributed to Mr Charman.

The issue of whether Dragon was a financial resource was divided into sub-issues, of which the first was the husband's contention that due to its alleged "dynastic nature", having been set up to provide for the future generations of Mr Charman's family, Dragon should not be counted into the marital "pot". This contention did not get beyond first base. The Court of Appeal held that the High Court's rejection of the dynastic argument was inevitable for a plethora of reasons, including the fundamentally fiscal purpose behind Dragon, the husband's inclusion as the primary beneficiary, the terms of the letters of wishes and the absence of any documentary evidence to support Mr Charman's contentions. Mr Charman himself appeared to recognise the weakness of this argument, in that the primary ground of appeal he advanced was the secondary issue of the likelihood of advancement.

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Indeed, Mr Charman's appeal was significantly hampered by an alarming tendency on the part of his team to shoot themselves spectacularly in the foot. When Mrs Charman commenced her action in the English High Court, Mr Charman applied for a stay of the English suit so that the divorce might proceed in Bermuda. In his submissions in respect of the stay, Mr Charman conceded that Dragon was a post-nuptial settlement, in relation to which the wife would doubtless seek a variation order, but there were "grave doubts" that any English order would be enforced in Bermuda. Understandably, these earlier submissions made the task of arguing that Dragon was a dynastic trust nigh on impossible. Further, in a settlement proposal formulated the day after the filing of the Bermudian petition, the husband's own advisers included a "Schedule of Matrimonial Assets". Dragon was included.

Interestingly, on the key issue of whether the trustees of Dragon would be likely, on request, to advance all of the assets of Dragon to Mr Charman, the Court of Appeal placed considerable reliance on a passage from the decision of the Deputy Bailiff in *Re Esteem* [2004] WTLR1 as containing a very helpful descriptive analysis of a standard discretionary trust:-

"... one would expect to find that in the majority of trusts, there has not been a refusal by the trustees of a request by a settlor. This would no doubt be because, in the majority of cases, a settlor would be acting reasonably in the interests of himself and his family. This would particularly be so where there was a small close-knit family and where the settlor could be expected to be fully aware of what was in the interests of the family"

The above passage appears to have been deployed somewhat out of context. In *Esteem* it was aimed at the question of whether the trust was a sham; the mere fact that the trustee always followed the settlor's wishes did not mean, without more, that it was (see Dickinson Gleeson briefing on sham trusts). In the context of *Charman*, where no sham argument was raised by the wife, the Deputy Bailiff's analysis was utilised in support of the finding that the assets in Dragon could be made available to the husband on demand and so were a "financial resource".

But there were other more fact-specific reasons why the Court reached this finding. Key among them was the fact that the husband was the settlor; Dragon's assets represented the fruit of his talents; until the breakdown of the marriage, the letter of wishes provided that Mr Charman should have "the fullest possible access to the capital and income" of Dragon; even after the marital breakdown, he remained the primary beneficiary under the new letter of wishes; and he retained the power to remove the trustee. Thus, should the trustee prove recalcitrant in the face of his demands, Mr Charman could legitimately have removed the trustee and installed a more pliant alternative.

The Court of Appeal distinguished this case from the recent Jersey cases of *In re Fountain Trust* [2005] JLR 359 and *In the Matter of the B Trust* [2006] JRC 185. In *Fountain*, the wife had successfully attacked the trust as a sham but no such allegations were being made here. Thus, the question of whether it would be an "exorbitant exercise of jurisdiction" by the English Court to declare a foreign trust a sham did not arise. As to *B Trust*, in that case the wife had sought a variation order. No such order for variation was sought here. In the trust-busting arsenal available to aspiring wives, Mrs Charman had in fact been conservative, seeking only an order that Dragon be recognised as a financial resource on

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which the husband could draw as and when it pleased him, not varied or declared a sham. The Court of Appeal concluded that the evidence fully supported that analysis.

Ultimately, the Court expressed itself to be pleased "for reasons of policy" to be able to uphold the High Court's attribution to the husband of all the assets in Dragon. Although the case was fact specific, it is of some concern to find the Court of Appeal in an English matrimonial case adopting a definition of the workings of a standard discretionary trust derived from *Esteem* to assist that Court in looking through the trust structure. The case re-emphasises the need for settlors, beneficiaries, trustees and their advisers to consider very carefully the impact of divorce on trusts. However, on a more positive note the judgment appeared to lend its weight to reform of the existing family law, including the prospect of limited statutory recognition of pre-nuptial agreements.

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