

# A one-sided argument

*Beth Mason and Georgia Day examine a case involving a large amount of assets, but also issues relevant to cases concerned with lesser sums*



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**'If a solicitor becomes a client's "man of business", advising the client on investment matters, finance policy and other business matters, then the advice may lack the relevant legal context for the purpose of legal professional privilege.'**

The decision in *AAZ v BBZ* [2016] caused a stir in large part due to the level of award granted to the wife. A settlement of £453m is, by any standards, a very high-net-worth case. However the size of the award is, of course, governed largely by the amount of the parties' assets, and what is of greater interest to family practitioners is the analysis by Haddon-Cave J and the issues arising after the final hearing. The case was heard in December 2016, but the judgments were published several months later.

## Background

The husband was born in the Caucasus and was aged 61 at the time of the final hearing. The wife was born in Eastern Europe, grew up in Russia, and was aged 44. The parties met in 1989 in Moscow and married in 1993 when the wife was pregnant with their elder son. They moved to the UK, first to London and then to Surrey in 1996 when their younger child was born.

The husband worked in London in oil and gas and travelled a lot. He pursued various successful business interests in Russia and sold his shares in his Russian company for US\$1.38bn in November 2012. The wife was a 'hands-on' mother throughout the marriage. She brought the children up in Surrey without the assistance of a nanny and cared for the husband's child from a previous relationship, who moved to England to go to school.

At the time of trial the wife still lived in the former matrimonial home in Surrey, which had been

transferred into her sole name by the husband in 2013. The wife issued her divorce petition on 24 October 2013. The husband initially sought to stay those proceedings on *forum non conveniens* grounds but eventually submitted to the jurisdiction in June 2015.

There were three respondents in the financial remedy proceedings, namely the husband, C Ltd (a Cypriot registered company and trustee of a Bermudian discretionary trust, of which the husband was the sole director) and P Ltd (a Panamanian company that the husband contended was within the trust).

None of the three respondents attended, or were represented at, the trial. The husband's long-standing solicitors came off the record shortly before trial and neither C Ltd nor P Ltd ever acknowledged or participated in proceedings.

## Issues

The wife contended that the entirety of the net wealth (some £1bn) was matrimonial, and thus subject to the sharing principle. Due to the non-attendance of the husband and respondent companies at the final hearing, the court had to rely in part on the wife's legal team to identify the points that the respondents would likely have raised. Five principal contentions were identified in defence of the wife's claim and are discussed below.

Haddon-Cave J's consideration of the relevant law does not provide anything new to those familiar with financial remedies work, but it is worth noting as a useful summary of the court's discretionary powers under the Matrimonial Causes Act

1973 (MCA 1973), and issues such as computation, distribution, special contributions, flexible needs and inferences from silence (see paras 21-35). Of greater interest are the conclusions reached on each of the issues below.

**Pre-marital wealth**

The husband asserted in various pleadings prior to the final hearing that he was wealthy prior to the marriage. Haddon-Cave J found however that this assertion had not been supported by any independent evidence, or even a schedule of assets. The husband’s only attempt to quantify those assets was his claim that he paid £700,000 for the first matrimonial home in London. The judge found that, even if that had

been the case, the matrimonial home occupied a unique position within a family’s assets.

Haddon-Cave J was clear that it is for the party making an argument

**Date of separation**

The wife’s case was that the marriage lasted 20 years, from 1993 until 2013 when she issued her divorce petition. Furthermore she claimed there had

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as to pre-marital wealth to prove that assertion by clear documentary evidence and the husband had failed to do so.

been a failed reconciliation in the summer of 2014 and that the marriage finally ended in late 2014. The husband stated that the marriage

**Legal professional privilege**

This case also provided interesting satellite litigation, the first of which dealt with the issue of legal professional privilege in a separate judgment, and should serve as a cautionary tale to solicitors that conversations with clients will not automatically be subject to legal professional privilege. The judgment of Haddon-Cave J provides a useful summary of the key principles that apply to legal professional privilege.

During the final hearing in 2016, the wife gave evidence in relation to the husband’s solicitor, who had been acting for him prior to the final hearing. The husband’s solicitor was referred to as ‘S’. The wife’s evidence detailed the role that S played in relation to the husband’s finances, including arranging insurance for the modern art collection. After the final hearing, Haddon-Cave J granted a witness summons for S to give evidence. During the cross-examination, questions were asked about S’s involvement in the husband’s financial affairs. S’s counsel argued that these should not be answered as such questions invaded legal professional privilege. Haddon-Cave J found that this information was not covered by legal professional privilege, and during the course of the hearing it was uncovered that the husband had moved £600m from P Ltd to a new trust structure and that, just before the trial started, he had also moved the modern art collection to a new repository.

Haddon-Cave J found in favour of the arguments made by counsel for the wife that the husband had taken deliberate steps shortly before the trial to make the prospect of enforcement of any monetary award on the wife’s behalf very difficult.

The law relating to legal professional privilege is well established by authorities, notably *Three Rivers District Council v Governor and Company of the Bank of England* [2004], *Ventouris v Mountain* [1991], *USA v Philip Morris Inc* [2004], *Balabel v Air India* [1988] and *Barclays Bank plc v Eustice* [1995].

Legal professional privilege attaches to communications between solicitor and client for the purpose of obtaining legal advice. Legal advice is not restricted to telling the client the law but includes ‘advice as to what should prudently and sensibly be done in a relevant legal context’. If a solicitor becomes a client’s ‘man of business’, advising the client on investment matters, finance policy and other business matters, then the advice may lack the relevant legal context for the purposes of legal professional privilege (para 13).

Haddon-Cave J found that arranging the insurance for the modern art collection, and the communications regarding P Ltd’s assets, were something that a ‘man of business’ would do; they were routine matters that would not generally involve legal advice (paras 15-17).

In any event Haddon-Cave J found that there was, in this instance, an exception for fraud. As per *Barclays Bank*, where legal advice is sought or given for the purpose of effecting fraud or iniquity, it is not privileged. For the fraud exception to apply, the fraud committed does not need to be criminal in nature or defined by the narrow civil fraud definition but can be given a wider interpretation. There needs to be dishonesty that is not ‘merely disreputable’, or a ‘failure to maintain good ethical standards’ (para 14).

While each case turns on its own facts, Haddon-Cave J found, from looking at his judgment in the main trial, that the fraud exception applied and that the husband’s conduct had been ‘seriously iniquitous’ (para 20). The husband’s attempt to hide the modern art collection and £600m of P Ltd’s assets was inequitable behaviour that made it clear that legal professional privilege should not apply regardless.

actually ended in 1999, or at the latest 2004.

Haddon-Cave J considered the evidence and found it distinctly lacking on the husband's part. The wife had admitted to an affair in 1999 and issued a divorce petition in 2003 but the parties later

The husband argued that between 1999-2004 and 2013 the parties only spent time together for the sake of their children but were in reality separated. He produced no evidence of that and of course did not attend the hearing to be cross-examined. The wife, on the

Express, Knight Frank etc) in which he referred to her as his wife.

Haddon-Cave J took the view that it was not for the court to assess the quality of the marriage. He was satisfied that the marriage continued, notwithstanding a temporary hiatus around 1999, for 20 years as asserted by the wife and that, crucially, the parties were married in 2012 when the husband's Russian shares were sold.

*The wife specifically sought a declaration (to assist with enforcement) that P Ltd was the husband's nominee and that the assets held in that company belonged to the husband on a bare trust.*

### Special contributions

The husband made what appeared to have been a somewhat half-hearted attempt to argue that the difficulties of doing business in Russia, and the legal problems encountered with a large multinational company, amounted to a stellar contribution. As he did not attend the final hearing he was unable to elaborate. Haddon-Cave J found that although the husband had worked hard, and been resourceful, the evidence he had given fell short of the necessary exceptionality. This judgment pre-dates the Court of Appeal decision in *Work v Gray*

reconciled. In July 2006 the husband's then solicitors signed a consent application to withdraw the wife's petition on the basis of a reconciliation. Throughout the later proceedings the husband failed to provide any explanation for the contradiction between that consent application and his assertion that the marriage had ended in 2004.

other hand, produced photographs of the couple socialising and holidaying together, emails demonstrating her involvement with the renovation of the parties' holiday property in France and the planning of a new property in the Caucasus, and emails from the husband to various third parties (his solicitors, Sotheby's, American

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[2017], a notable decision on special contribution arguments.

#### Value of the available assets

The wife provided a schedule of assets and, as the husband failed to produce any evidence to counter it, Haddon-Cave J felt able to rely on it. He noted that the husband, having failed to provide up-to-date figures in breach of a disclosure order, was in no position to complain if the wife's figures were out of date.

#### Trust assets

Possibly the biggest complexity stemmed from the husband's assertion that the bulk of the wealth was held in the discretionary trust structure. Within that trust structure there were (on the husband's case) Panamanian, Cypriot and Isle of Man companies which held a majority share in a Moscow property, a yacht, a plane, a helicopter, a £90m art collection and substantial cash funds and investments.

Haddon-Cave J found that regardless of any 'trust' nature, the assets were resources that the husband had available to him. The yacht, plane and helicopter had been purchased in the husband's name and later assigned to three separate offshore companies. In March 2015, while in the midst of the proceedings, the husband assigned his entire interest in those companies to the trust.

The deeds of the trust, settled in October 2013, named the husband as the settlor, principal beneficiary and protector. The trustee was C Ltd, of which the husband was the sole director. It was, in short, a 'dear me' trust for the husband for his lifetime.

The husband made no secret of the fact that he had free and unrestricted access to the trust funds. His financial statement in Form E openly stated that all his income and capital needs were met by the trust.

The wife specifically sought a declaration (to assist with enforcement) that P Ltd was the husband's nominee and that the assets held in that company belonged to the husband on a bare trust. Haddon-Cave J's judgment contains a useful summary of the law on bare trusts (at paras 85-88). He found that, after receiving \$1.38bn

for his Russian company shares, the husband had transferred the money to P Ltd, seemingly for no consideration. That gave rise to a presumption of resulting trust that the husband had failed to rebut. P Ltd funded the husband's lifestyle like an 'open cheque book' and, despite the husband's assertions,

should be set aside and therefore vest in the husband.

#### Conclusion

This case highlights the need for solicitors to be attuned to the fact that communications with clients are not automatically privileged. In particular, practitioners must be aware of that

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there was no evidence that P Ltd existed within the overall trust structure. Indeed it seemed to have been specifically excluded from the companies assigned to the trust by the husband in March 2015.

The judge ruled that the March 2015 transfers should be set aside under s37, MCA 1973 as the husband had failed to rebut the presumption that the transfers were intended to defeat or impede the wife's claim.

Haddon-Cave J concluded that the entire wealth was matrimonial in character, and there was no reason to depart from an equal division. He awarded the wife her open offer at trial of £350m plus £2.5m in chattels, a car and the art collection.

#### Set aside

In the legal professional privilege litigation (see box on p3) it was revealed that the husband had transferred £600m from P Ltd to a bank called 'L Bank', and the modern art collection to a financial institution called 'O1'. Haddon-Cave J found that these transactions were deliberate transactions by the husband in an attempt to hide assets and make the enforcement of any monetary award to the wife very difficult.

It was evident that the transfer of the £600m was at an under value or a nil value and Haddon-Cave J found (in a separate judgment) that the financial institutions were simply the 'alter-ego' of the husband (para 6). He found that all dispositions of the modern art collection and P Ltd's assets in or around November 2016

fraudulent behaviour will waive such privilege, and this is not simply restricted to the civil or criminal definitions of fraud: it encompasses behaviour with an element of dishonesty that goes beyond merely disreputable behaviour.

It also highlights that sharing means sharing. Unless there is a good reason to depart from equality the pot should be split equally. £453m is a huge amount of money when looked at as an 'award' from the husband to the wife, but not when looked at as the wife's fair share of the £1bn matrimonial assets. It seems unlikely that the husband would have succeeded in arguing a departure from equality even if he had attended the final hearing, but failing to do so certainly left the wife with the benefit of any doubt in relation to pre-acquired assets, length of marriage, special contributions, valuations and the realities of the trusts. ■

*AAZ v BBZ & ors*

[2016] EWHC 3234 (Fam);

[2016] EWHC 3349 (Fam);

[2016] EWHC 3361 (Fam)

*Balabel v Air India*

[1988] 1 Ch 317

*Barclays Bank plc & ors v Eustice & ors*

[1995] EWCA Civ 29

*Three Rivers District Council & ors v Governor and Company of the Bank of England*

[2004] UKHL 48

*USA v Philip Morris Inc & ors*

[2004] EWCA Civ 330

*Ventouris v Mountain*

[1991] 1 WLR 607

*Work v Gray*

[2017] EWCA Civ 270