The Richard Colin Douglas 1990 Settlement; and an Application under Article 43 of the Trusts (Jersey) Law 1984, as amended

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2000] JRC 56

Royal Court

(Samedi Division)

Before:

M. C. St. J. Birt, Esq., Deputy Bailiff and Jurats Rumfitt and Le Breton.

In The Matter of the Richard Colin Douglas 1990 Settlement
And In The Matter of An Application under Article 43 of the Trusts (Jersey) Law 1984, as amended
and
Matthew John Higham

Advocate R.G.S. Fielding **for the Representor**

Advocate C.G.P. Lakeman **for the trustees and the unborn beneficiaries**

Advocate S.J. Young **for the adult beneficiaries**.

Authorities

Taxation of Chargeable Gains Act 1992: Schedule 5: paragraph 6(1).

In Re Osias Settlement (1987–88) JLR 389 .

In re N . (1999) JLR 86.

In re Seale's Marriage Settlement (1961) 3 All ER 136 .

In re Whitehead's Will Trusts (1971) 1 WLRm833 .

Application by the Settlor, Richard Colin Douglas, under Article 43 of the Trusts (Jersey) Law 1984, as amended.

Bailiff

THE DEPUTY

1 This is an application by Richard Colin Douglas ("the Settlor") under Article 43 of the Trusts (Jersey) Law 1984. The Settlor established a settlement ("the 1990 Settlement") on 19th March 1990. The settlement is governed by Jersey law and Jersey is the forum for its administration. The trustees have at all times been resident in Jersey and the present trustee is Jasmine Trustees Limited.

2 The material provisions of the settlement can be summarized as follows. The Settlor has a life interest which may be enlarged into an absolute interest by the trustees. The Settlor has power to appoint a life interest to his surviving spouse and may confer upon the trustees a similar power to enlarge that life interest into an absolute interest. The Settlor also has a power of appointment amongst the Beneficiaries (who are defined as any widow of the Settlor and any children or remoter issue of the Settlor in existence at the date of the settlement or born or adopted during the trust period). Subject to the foregoing, the capital and income is held on trust for such of the Settlor's children as are then living in equal shares and there is a final long-stop provision for the last surviving child of the Settlor. The Settlor has by revocable deed of appointment dated 10th February 1998 exercised the power of appointment referred to above, and has conferred a life interest on his widow following his death (with power to enlarge it to an absolute interest) with remainder (subject to a power of appointment on the part of the trustees) upon certain trusts for his two sons

and their children.

3 The Settlor is married to Jennifer Ann Douglas and they have two sons, Gavin Fairlie Douglas, (born 16th April 1972) and Niall William Douglas, (born 9th November 1974) neither of whom is yet married. There are no grandchildren. The Settlor, his wife and children are and have at all times been domiciled and ordinarily resident in England.

4 As is well known, the United Kingdom tax regime applicable to offshore trusts settled by United Kingdom domiciled and resident settlors was changed substantially in 1998. As a result, any gains realized by the 1990 Settlement after 17th March 1998 are chargeable upon the Settlor regardless of whether or not he receives any capital from the settlement. Gains realized by the trustees after 17th March 1998 up to the tax year ended 5th April 1999 total some £242,000. A further £344,000 of gains have been realized in the current tax year. There are also some £700,000 of unrealized gains since 17th March 1998. The effect of the legislation in the circumstances of this settlement is that the Settlor will face a capital gains tax charge in January 2001 of some £234,000. In due course, further tax will be due from him as and when the unrealized gains are realized, giving rise to a further charge (on present estimates) of some £280,000. There is therefore a potential capital gains tax liability on the Settlor of some £500,000 altogether.

5 Paragraph 6(1) of schedule 5 of the Taxation of Chargeable Gains Act 1992 of the United Kingdom confers upon the Settlor a statutory right of reimbursement from the trustees after he has paid the capital gains tax. It is an open question as to whether the Royal Court would enforce that statutory right of reimbursement against Jersey trustees but the Court does not have to address that issue in this case. The trustees have indicated that they would be minded to exercise their power to appoint capital to the Settlor in order to reimburse him for any capital gains tax paid by him. The 1990 Settlement therefore stands to be depleted by some £500,000 if nothing is done. If the trustees were to refuse to exercise their power to appoint capital to the Settlor to reimburse him, the family would become embroiled in hostile litigation over whether the Settlor was entitled to reimbursement out of the assets of the 1990 Settlement pursuant to the statutory right.

6 The trustees and the Settlor have taken advice as to whether there is any way of avoiding the imminent charge to capital gains tax upon the Settlor. The following proposal has been put forward:–

(i) The trustees will undertake certain investment transactions as advised by Messrs. Pricewaterhouse Cooper.

(ii) The trustees of the 1990 Settlement will appoint the majority of its assets to a new settlement to be created by the Settlor with UK resident trustees and governed by English law. This will be known as the 2000 Douglas Life Interest Trust (“the 2000 Settlement”). The Settlor will revoke the revocable Deed of Appointment dated 10th February 1990.

(iii) The trustees will then revoke the Settlor's life interest in the 1990 Settlement and appoint a life interest in favour of the Settlor's brother.

(iv) The trustees will then exclude all persons from benefit under the 1990 Settlement who are “defined persons” for the purposes of section 86 of the Taxation of Chargeable Gains Act 1992.

7 The powers conferred on the trustees by the 1990 Settlement are not wide enough to enable the above proposal to be carried out. An appointment of the trust assets to the Settlor (so as to enable him to resettle on the new settlement) would apparently trigger a claim to capital gains tax on the pre-1998 capital gains which total some £4,000,000. Accordingly, application is made to vary the terms of the 1990 Settlement by:–

(i) conferring a power to add to the class of Beneficiaries;

(ii) inserting new clauses 4A and 4B containing an overriding power of appointment on the trustees for the benefit of all or any of the Settlor and the Beneficiaries; and

(iii) making some technical variations to the provisions of clause 4 of the Settlement in relation to the children of the Settlor.

8 The Settlor, the Settlor's wife and the two children (being all the Beneficiaries of the 1990 Settlement in existence at present) all consent to this variation. The Court's approval is sought under Article 43 of the Trusts (Jersey) Law 1984 on behalf of the unborn children and remoter issue of the Settlor who could benefit under the 1990 Settlement. Advocate Lakeman has been appointed to represent their interests and the Court has been assisted by his observations, supported as they are by an opinion from English Chancery counsel. The Court has also been assisted by Mr. Fielding and the written opinion of Ms Emma Chamberlain of counsel.

9 Article 43(2) of the 1984 Law provides that the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof appears to be for the benefit of that person. Accordingly, the Court must consider whether the proposed variation of the 1990 Settlement is for the benefit of any unborn children and remoter issue of the Settlor (“the unborn beneficiaries”).

10 It has been put to the Court that the benefit is clear. If nothing is done, the charge to capital gains tax on the Settlor will arise. If the trustees were to make a capital distribution to the Settlor to reimburse him for the capital gains tax paid (as they have indicated that they would do) the 1990 Settlement would be depleted by some £500,000 in due course. This sum would therefore not be available for the possible future benefit of the unborn beneficiaries. If the proposal is carried out, there should be no charge to capital gains tax levied on the Settlor.

11 In *In re Osias Settlement* (1987–88) JLR 389, the Court expressly left open the question of whether it would approve an arrangement which would assist in the avoidance of tax, although it did give its consent in that particular case on the grounds that …" ***In this case there is no question of avoiding US taxation, the object being to minimize the penal provisions of US tax law.*** The Court was asked to approve a variation which would result in the 'proper' taxes being paid."

12 However, in *In re N* (1999) JLR 86 the Court gave its approval to a variation designed to avoid a charge to capital gains tax arising. We note that in *In re Osias* the Court referred at page 410 to *In re Seale's Marriage Settlement* (1961) 3All ER 136 where Lord Denning MR said at 245:–

> ***"Two propositions are clear: (i) In exercising its discretion, the function of the Court is to protect those who cannot protect themselves.*** It must do what is truly for their benefit. (ii) It can give its consent to a scheme to avoid death duties or other taxes. Nearly every variation that has come before the Court has tax avoidance for its principal object: and no one has ever suggested that this is undesirable or contrary to public policy" .

The Court also referred to the judgment of Pennycuick VC in *In re Whitehead's Will Trusts* (1971) 1 WLR 833 where he said at 839:–

> ***"I should, perhaps, add that one of the purposes of this appointment is unquestionably to escape the burden of certain United Kingdom fiscal liabilities.*** It has, however, long been established that that is no reason why the Court should not lend its assistance in connection with a particular transaction …." .

13 The Court sees no reason to adopt a different approach in Jersey to that of the English Court in relation to the equivalent legislation in the United Kingdom. Accordingly, despite any implied reservation in *In re Osias*, the Court is quite satisfied that the avoidance, minimisation or deferral of taxation is capable of being a benefit and that, as in the English courts, the fact that such avoidance, minimisation or deferral is the principal object of the variation is not a reason for the Court to refuse to give its consent if satisfied that the arrangement is for the benefit of the persons concerned.

14 So what are the possible disadvantages to the unborn beneficiaries in this case which could be set against the benefit referred to above? They can be summarized as follows:–

> (i) The 2000 Settlement will be in broadly similar terms to the 1990 Settlement in that it will confer a life interest upon the Settlor with power to for it to be enlarged to an absolute interest; a subsequent life interest to the widow with power for it to be enlarged to an absolute interest; and thereafter the fund will be held for the children of the Settlor then living in equal shares. However there is an overriding power of appointment vested in the trustees which may be exercised in favour of any one or

more of the beneficiaries of the 2000 Settlement. The beneficiaries are defined as the Settlor, any spouse or widow of the Settlor, the children and remoter issue of the Settlor, spouses, former spouses, widows, widowers, co-habitees (of at least two years standing) and stepchildren of such children or remoter issue. It follows that the assets could be appointed to persons who could not benefit under the 1990 Settlement. That is why the proposed new Clause 4A of the 1990 Settlement provides at paragraph (c) that the trustees may appoint assets to a settlement which includes as beneficiaries persons who are not Beneficiaries under the 1990 Settlement. However, having had the benefit of two opinions from English tax counsel it is clear that, far from being a disadvantage, the wider class of beneficiaries will provide flexibility and increase the prospects in the future for sensible tax planning (e.g. by the use of the spouse exemptions in relation to inheritance tax or annual capital gains tax exemptions and lower rate tax bands in relation to capital gains tax).

(ii) The proposed variations to the 1990 Settlement to enable the trustees to add Beneficiaries, and to exercise an overriding power of appointment could be said to be prejudicial to the unborn beneficiaries as the provisions would enable the trust fund to be diverted from the unborn beneficiaries. Similarly, the restriction proposed to the terms of the 1990 Settlement by the new clause 4(c) — which limits the default beneficiaries to the two present children of the Settlor rather than, as at present, to any children then living of the Settlor — may be said not to be for the benefit of future unborn children. However, the Court is satisfied that this matter must be looked at in the context of the overall proposal which is to maximise the value of the trust fund available for the family. Given therefore that it is the intention that the 1990 Settlement will be left with negligible assets and that the success of the overall re-arrangement will depend upon the Beneficiaries of that Settlement being restricted, the Court is satisfied that no disadvantage will ensue to the unborn beneficiaries from the proposed variation to the 1990 Settlement.

15 Having regard to all the circumstances, the Court is satisfied that the arrangement is for the benefit of the unborn beneficiaries in two respects. First, it offers the prospect of preventing a depletion of the trust assets in the approximate sum of £500,000 by avoiding the charge to capital gains tax arising on the Settlor in respect of the post 17th March 1998 capital gains. Secondly, by increasing the class of beneficiaries in the 2000 Settlement, it gives much greater scope for effective tax planning, both in relation to capital gains tax on the pre and post 17th March 1998 capital gains and in relation to inheritance tax.

Accordingly, the Court approves the proposed variation to the 1990 Settlement as set out in the representation, subject to inserting the words “or income” after “capital” on line 3 of the proposed new clause 4A(c).