Representation of Peter Hynd

Jurisdiction:	Jersey
Judge:	Sir Peter Crill, K.B.E., Jurats Myles, Bullen
Judgment Date:	03 April 2001
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Text

[2001] JRC 081

ROYAL COURT

(SAMEDI DIVISION))

Before:

Sir Peter Crill, K.B.E., Commissioner and Jurats Myles and Bullen

In the matter of the Peter Hynd “H” Settlement

and

In the matter of an application under Article 43 of the Trusts (Jersey) Law, 1984, as amended

Representation of Peter Hynd, applying for leave to vary the terms of the Settlement, under Article 43 of the Trusts (Jersey) Law, 1984, as amended

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

Advocate N.F. Journeaux **for the minor and unborn beneficiaries of the Settlement and for the Trustee;**

Advocate M.H.D. Taylor **for the adult beneficiaries**.

Authorities

Trusts (Jersey) Law 1984, as amended: Articles: 5, 6, 32, 43, 47(3).

In re Osias 1980 Settlements (1987–88) JLR 389 .

In re Douglas Settlement (2000) JLR 73 .

THE COMMISSIONER:

1 This is an application under Article 43 of the Trusts (Jersey) Law, 1984 to vary the terms of the Peter Hynd “H” Settlement which was originally an Isle of Man Settlement, dated 11th March, 1989, but which has now been changed to a Jersey Settlement with Jersey Trustees.

2 At the beginning of the case I had some thoughts, which I did not express until the end of the argument, as to whether it was appropriate for this Court to approve any such variation of the Settlement, the effect of which might be to enable the Settlement's Trustees to avoid taxation — properly levied one assumes — within the English jurisdiction.

3 However, what counsel are in fact asking us to do is to enable the Trustees to have a more flexible form of settlement to allow them to plan how best legitimately to avoid taxation in the United Kingdom. The effect of the variation would not be automatically to avoid that taxation but merely to enable the Trustees, in consultation with English counsel who specialise in such matters, to plan the future for the benefit of the Settlor and his wife and their children and grandchildren. That cannot, therefore, be said to be an infringement of such undertaking as the Government of this Island has given in the past to HM Government regarding taxation. Any scheme in the United Kingdom to avoid taxation as a result of changes in legislation in the United Kingdom would be challangeable by the Inland Revenue in the English Courts and not here.

4 Although I have looked at the authorities and had some concerns to begin with when I read the proposals, I am satisfied that what I have just said was probably in the mind of the learned Deputy Bailiff when he referred to the matters I have touched upon in *In the Settlement of Douglas* (2000) JLR 73. I think it right, since I expressed some doubts at the beginning of this judgment, to read in extenso what the learned Deputy Bailiff said:

> ***"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 minimise the penal provisions of US tax law.*** The Court was asked to approve a variation which would result in the 'proper' taxes being paid."
>
> ***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:–***
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> > ***"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 ….".

I interrupt this quotation from the *Douglas* judgment to say that there is, of course, a difference between the English Court giving its consent to a variation, the purposes of which would be to assist in the avoidance of English taxation in that jurisdiction, and this Court doing the same in respect of a different jurisdiction. A true analogy would be between this Court doing the same in this jurisdiction in relation to its own internal taxation. I go on:–

> ***"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."***

Accordingly I do not propose to go down that road any further in relation to whether it would be proper for this Court to make the order and variations sought.

5 We have had the benefit of reading the detailed and most helpful advice of both learned counsel and indeed of listening to all arguments this morning and have no doubt that it would be appropriate to grant the application in accordance with the powers vested in us under Island Law and we therefore approve the variations. The principle effect will be to give the Trustees a great deal more flexibility and ability to assist in forward planning on the question of taxation.

6 We note, in passing, that under the present arrangement and following the legislation of the 90's and particularly that of 1998 in the United Kingdom, the Settlor and the beneficiaries are really in an almost impossible position with regard to the assets of this Trust. These are, in fact, a loan which is due to be repaid shortly by another Trust which, however it was arranged, would inevitably draw upon it taxation varying from 40% to 64%. We think that the Trustees are quite right to come to this Court to seek to increase their powers so that they may plan accordingly. However, I repeat that they will have to do so in accordance with advice received from English counsel in relation to what they propose to do *viz. a viz.* English tax legislation. Accordingly we approve the draft which has been submitted to us to the Settlement and we so order. Costs will be on the standard basis.