The Representation of Viberts Executors Ltd and Ross Badger

Jurisdiction:	Jersey
Judge:	M. J. Thompson, Jurats Cornish, Berry
Judgment Date:	07 March 2024
Neutral Citation:	[2024] JRC 55
Court:	Royal Court

Text

In the Matter of the Representation of Viberts Executors Limited and Ross Badger
And in the Matter of the Estate of the Late “A” (Wife of B)
And in the Matter of the Estate of B
And in the Matter of Article 2 of the Probate (Jersey) Law 1998 and the Inherent Jurisdiction of the Court

[2024]JRC055

Before:

M. J. Thompson, Esq., Commissioner, and Jurats Cornish and Berry

ROYAL COURT

(Probate)

Estate

Authorities

Government of India Ministry of Finance v Taylor [1955] A.C. 491.

Re S Settlement [2001] JLR Note 37.

Mark Bolan Charitable Trust [1981] J.J.117.

Trusts (Jersey) Law 1984.

The Estate of Walmsley (Deceased) [1983] J.J.35.

Whiteman & Wheatcroft Capital Gains Tax

X Settlement and Y Settlement Unreported Judgment 1994/110.

Re Tucker [1987–88] JLR 473.

Re Williams [2009] JRC 054.

Mitchell v Mousir 18 May 1907 (77 Exs308)

Advocate C. J. Scholefield **for the Representors**.

Advocate K. O. Dixon **for M and the US executors of A**

THE COMMISSIONER:

Introduction

1 This judgment contains the Court's reasons for approving an application for a blessing by the personal representatives of the Jersey estates of A and B to enter into a Memorandum of Understanding committing them to pay a contribution to the Executors of A's United States estate in relation to the worldwide taxes payable on the entirety of A's estate as a matter of US law. This liability arose because A, throughout her life, was a US citizen, although she may have acquired a domicile of choice in Jersey. B was a UK citizen and also contended that he had acquired a domicile of choice in Jersey. A and B were married and at the time of their death had lived in Jersey for a number of years with Jersey being their home. A died in summer of 2021, with B dying a few weeks later.

2 This judgment also deals with whether the contribution to US taxes should be borne by B's movable estate and those entitled to share in it, or whether the contribution should be apportioned between the movable estate and immovable estates of B.

Background

3 We set out the following by way of background, largely based on the affidavits filed by Mr Ross Badger. Mr Badger is a chartered accountant of many years standing and was

appointed by B as Executor of his movable estate situated outside the United States of America. A Grant of Probate was issued in May 2022 to Viberts Executors Limited as the specially appointed attorney of Mr Badger in relation to B's movable estate.

4 Viberts Executors Limited also act as administrator of the personal estate of A who died intestate in respect of all of her personal property outside the United States.

5 The present application has come to Court because A was very successful in her professional career in the US and then the UK. As a result of this, she earned significant sums and became very wealthy. B was a successful academic. As Mr Badger described it, he earned " *a decent living*" but his income bore no comparison to that of A.

6 A and B effectively retired to Jersey in 2008 as high value residents. They acquired a substantial home in the island. They had no children.

7 According to Mr Badger's first affidavit, the tax strategy of A and B was driven by the following factors:

> (i) A proceeded on the basis she would probably pre-decease B because she had suffered and ultimately passed away from a serious illness;
>
> (ii) She wanted B to be provided for as generously as possible;
>
> (iii) They considered themselves to be good citizens who would pay their duties without engaging in tax avoidance schemes, A's major concern was solely to defer if possible the payment of US tax whilst B was still alive.

8 Mr Badger therefore deposed that:

> *"4.1.6 It is therefore my firm opinion, my very firm opinion, that had B lived long enough to do so he would have proceeded to make sure all of A's US estate taxes were paid in full and on time.* Of this I am very confident indeed. He clearly had the means to do so and he was very much the sort of person who would have wanted to do so. He would have hated there to be any doubt over this issue."

9 Mr Badger further explained that A understood the worldwide tax implications of her US citizenship, but A did not want to give up that citizenship and, had she survived B, A would almost certainly have gone back to live in the United States.

A's estate

10 In relation to A's estate, firstly she left a Will relating to all her real and personal property located in the United States.

11 Article 4 of her Will left to B A's half interest in any community property, together with the benefit of any policies of life insurance, employee benefit plan or other retirement plan.

12 Article 5 then appointed the residue of A's US estate to a trust established on 8 January 1988 as amended and restated on 14 th December 2007.

13 Article 6 included the following:

> *"I direct that all estate, death or other succession taxes that may by reason of my death be attributable to my probate estate or any portion of it shall be paid by the Trustee under the above-described [A] TRUST AGREEMENT, as specified therein."*

14 The persons she nominated to act as executor of her US estate were B and failing B, Fidelity Personal Trust Company FSB ("Fidelity").

15 As B died shortly after A, he did not take any steps to be appointed as executor of A's US estate and Fidelity declined to act.

16 The terms of the US trust, referred to in Article 6 of A's US Will ("the US trust"), are complex. However, in summary, the jewellery and personal effects of A were left to B if he survived A. The residue was then split into two trusts, B and M. The M Trust was intended to operate as a qualified domestic trust ("QDT") for B's benefit during his lifetime. This, in summary, allowed B to defer any US estate duties payable on assets held by the M Trust until B's death.

17 The B Trust was also to provide for B's benefit during his lifetime.

18 Upon the death of B, the B Trust terminated and its assets and assets of the M Trust were to be distributed as follows:

(i) 30% to M, a cousin of A;

(ii) 30% to D, the spouse of M; and

(iii) 40% for general charitable purposes.

19 D, however, pre-deceased M and therefore his share also passed to M under the terms of

the US Trust.

20 The deed establishing the US Trust also contained the following provisions in relation to payment of tax.

21 Firstly, in Clause 2, the deed stated:

> *"In addition, the Trustee shall pay out of the trust fund any estate, death or other succession taxes payable upon the Trustor's death with respect to assets held in the trust fund."*

22 Clause 3.5 contained the following:

> *"3.5 Upon the death of the Trustor's spouse, the Trustee shall pay from the trust fund any estate, death or any succession taxes attributable to assets held in the Marital Trust and arising by reason of the Trustor's spouse's death."*

23 In relation to A's movable estate outside the United States, after her death a draft Will was found which left everything to B as long as he did not pre-decease her ("the draft Jersey Will"). However, no executed version of A's draft Jersey Will was ever traced. As B would inherit in any event on an intestacy, letters of administration were sought by Viberts Executors Limited on the basis of an intestacy. We assume this was on the basis that trying to prove that A executed the draft Jersey Will made no difference to whom was entitled her non-US movable estate. Whether there was a valid will based on the draft or an intestacy, in either case, B inherited.

24 A's draft Jersey Will contained the following:

> *"I order and direct that my testamentary expenses and any debts which I may owe outside The United States of America be paid as soon as conveniently may be after my decease."*

25 In relation to her immovable estate outside the United States, A executed a will on 14 December 2012 which left her Jersey immovable estate to B. The only property A owned in Jersey was the matrimonial home where A and B resided. A's will of immovable property did not contain any provisions about payment of taxes.

B's Estate

26 In relation to B, his estate in its own right was worth a very significant sum before he inherited anything from A. His will of his estate outside the United States left everything to A but as A pre-deceased B, his will left 30% to a UK charitable foundation with the balance being split between eighteen different individuals, including a share to M. All bar two of

these individuals have been traced and contacted by the Representors. There is however a partial intestacy of B's movable estate as D pre-deceased B. Those entitled to inherit under B's Will of his non-US assets have been described by the Representors as “the group of 19”. They can be divided into four broad categories as follows:

(i) A and B's family members (37%);

(ii) A's ex-work colleagues (27.1%);

(iii) The UK charity (30%); and

(iv) Various friends and acquaintances (5.9%).

27 In relation to B's immovable estate, no Will has been found, and therefore the Representors have proceeded on the assumption that B died intestate. Ownership of the matrimonial home in Jersey inherited by B from A therefore passed to his sole brother, X, under Jersey intestacy rules. X has subsequently renounced his entitlement to B's immovable estate in favour of his two adult children, Y and Z. This was recorded in an Act of Court dated 19 August 2022. The property has since been sold. X Y and Z are also three of the members of the Group of 19 with Y and Z being named as two of the individuals entitled to share in B's estate and X inheriting due to a partial intestacy as D the deceased partner of M was one of the persons to whom B sought to leave part of his estate.

28 We are not aware of any will of B dealing with any assets he owned in the United States. However, from the material we have seen he did not own any assets in the United States.

A's estate in the US and the payment of US taxes

29 As noted above, A was a US citizen. The effect of this was that her worldwide estate was subject to US Federal estate taxation at the rate of 40% after the first US$11,700,000. This tax is calculated on the value of and claimed against all of A's assets whether or not they were located in the United States at the time of her death.

30 The duty to pay this tax falls on the personal representative of A's US estate and if there is no personal representative appointed on the person or persons in possession of A's property.

31 In relation to A's affairs, the estate of A was obliged to file a personal estate tax return and to pay the taxes due nine months after her death. The amount due primarily related to estate taxes on her assets that were not included in the US trust. The return is known as Form 706. A's estate was also obliged to file an estate tax return in relation to the US trust by filing Form 706 QDT. This return had to be made nine months after the death of B.

32 M, as the primary beneficiary of A's US estate and of the US trust, was only informed shortly before the due date for the filing of A's personal estate tax return in the United States that there was no personal representative of her US estate because the proposed successor executor to B, Fidelity, had declined to act.

33 While M filed for an automatic extension to file Form 706 on the due date, he did not have access to any funds to pay the estate taxes that were then due. This was because any estate taxes due were primarily based on the value of assets outside the United States as the US assets were almost all in the US trust and not subject to estate taxes until a few weeks later.

34 On 22 June 2022, Brown Brothers Harriman Trust Company N.A. (“BBHTC”) were appointed as the trustee of the US trust and on 17 November 2022, as the Person Representative (the US term for executor) of A's US will (in such respective capacities “BBHTC”).

35 The terms of the US trust only authorised BBHTC to pay taxes attributed to the assets held by the US trust (see paragraphs 20 and 21 (of this judgment). Nevertheless, because BBHTC was concerned to avoid penalties for late payment and interest charges it paid the estimated taxes due to the Internal Revenue Service (“IRS”) in settlement of the whole of the US estate duty on A's US and non-US estates.

36 It was also not disputed that the administration of A's US estate was governed by the law of the Commonwealth of Massachusetts. By reference to a legal opinion of US Attorney Scott E Squillace, provided in an affidavit sworn on 12 October 2023 on behalf of BBHTC and confirmed by Thomas P Jalkut (also a US attorney) for the Representors, the law of Massachusetts declares that it is a contribution state. This means that the personal representatives of a deceased are required to seek to apportion liability for estate taxes pro-rata amongst all the estate beneficiaries wherever they reside.

37 In addition, under US Federal law, if estate taxes are paid by any party other than the personal representative of the estate in its capacity as personal representative, the payer of the taxes is entitled to seek reimbursement for any amounts paid that were attributed to property not owned by the payer.

38 The agreed evidence is therefore that by reference both to US Federal law and the law of Massachusetts, BBHTC is entitled to seek reimbursement from the executors of the estate of B of the estate duty BBHTC has paid in respect of non-US assets.

39 Mr Squillace also deposed that the terms of A's US Will only authorised BBHTC to pay taxes due on US property. He therefore deposed that there was no provision in either A's US Will or the US trust for the payment of estate taxes attributed to A's non-US assets.

40 Mr Squillace further deposed that under the law of Massachusetts, for a will to agree to carry the entire US estate tax burden, a specific intent must be imposed (see paragraph 16 of his affidavit). The terms of the US Will, even if it could have been interpreted as directing the trustee of the US estate to pay all estate taxes, did not indicate such an intent and so did not prevent a claim based on apportionment.

41 Mr Squillace then deposed that BBHTC had a right to recover the estate taxes paid as discussed at paragraphs 20 to 24 of his affidavit. In particular, he deposed that if the Representors did not agree to make a contribution in respect of A's non-US assets, BBHTC would be obliged to commence proceedings to seek a judgment for such an allocation. Mr Squillace therefore deposed at paragraph 24:

> *"We believe there is a strong legal basis for such action and believe BBHTC would likely prevail.* As part of such proceedings BBHTC would seek to immediately encumber the US situs investments included within A's non-US estate."

42 In other words, BBHTC would be likely to prevail at trial and also be likely to be able to obtain an injunction or freezing order over assets in the United States belonging to B.

43 At this stage it is appropriate to set out there are significant assets in the United States which are capable of being made the subject of an injunction or freezing order. This is because A had made significant investments through a Jersey company in assets in the United States. As these investments were made through a Jersey company, although the investments were located in the United States, they are not US situs assets. However because significant assets are located in the United States, BBHTC can obtain injunctive relief over these assets and can take them in satisfaction of any judgment in its favour after a trial.

44 Mr Jalkut, in his affidavit, reached the same conclusions and observed that any attempts to resist an application brought for a contribution would be " *highly unlikely to succeed*". He also added that he would " *also expect unsuccessful efforts to oppose such an application to lead to an award of legal fees and costs in favour of A's estate and against the losing party*".

The Representors' decision

45 It is because of the conclusions reached by the expert advice on US law and the likely outcome of any claim by BBHTC that the Representors seek the Court's blessing to enter into a Memorandum of Understanding with BBHTC and, to make a payment to BBHTC out of B's estate reflecting the US estate taxes arising on the non-US assets of A. Under the terms of the Memorandum of Understanding the Representors would be obliged to make the payment of an initial sum upon signing based on the estimated amount to the paid. The

Representors would also undertake to pay a second further payment if necessary which would be capped to a fixed maximum amount as and when the final US estate tax liability was calculated as evidence by the filing of an amended estate tax return with the US IRS.

46 This situation gave rise to the issue of whether entering into the Memorandum of Understanding and making payment of a contribution falls foul of the principle referred to in the case of *Government of India Ministry of Finance v Taylor* [1955] A.C. 491, that claims on behalf of a foreign state to recover taxes due under its law are unenforceable in the English Courts. This principle, as is set out below, is also part of the law of Jersey. It is therefore necessary to discuss how far this principle applies in Jersey, what the exceptions to it currently are, and whether the situation the Representors face either fall within existing exemptions or give rise to a development of the exceptions to the basic principle.

47 In their Skeleton Argument, the Representors firstly contended that the steps they wished to take would not be a direct enforcement of a foreign revenue claim. This is because the claimant in the matter was not the IRS, but BBHTC seeking to recoup part of a payment it had already made to the IRS. However, the Representors rightly accepted that because the sole basis for BBHTC's claim was because of the US estate tax it had already paid, BBHTC's claim thus represented an attempt indirectly to enforce a foreign revenue claim. This was the reason why the Representor's sought the Court's blessing of their decision.

The Jersey law position

48 We start by reference to the approach the Court should take in deciding whether or not to approve the Executor's decision. The Representors contend, and we agree, that the approach the Court should take in relation to the blessing of a momentous decision for executors should be the same as that required for trustees as set out in *Re S Settlement* [2001] JLR Note 37, namely:

> (i) Has the Representor's decision been taken in good faith?
>
> (ii) Their decision is one which a reasonable executor properly informed could have reached; and
>
> (iii) Their decision is not vitiated by any actual or potential conflict of interest.

49 In the present case, the principle at the heart of the application is whether the decision of the Representors is one which a reasonable executor properly instructed could have reached. As the claim by BBHTC represents an indirect attempt to enforce a foreign revenue claim, the Representors must bring themselves within an existing exemption or persuade the Court to makea further exception to the basic principle that the Court will not enforce a foreign revenue claim. We therefore turn to consider the current Jersey authorities on the principle and the exceptions to it.

50 The first decision is in the matter of the *Mark Bolan Charitable Trust* [1981] J.J.117. The only oblique reference to the rule appears in the final paragraph of the judgment where Crill, Bailiff, stated:

> ***"I think that the difficult constitutional matters which might otherwise have raised their heads have been avoided for the time being."***

51 This is because the representors in that case were trustees who were seeking Court approval to settle a claim with the Inland Revenue. The Court accepted that the proposed settlement was in the interest of the beneficiaries and therefore approved the settlement. The Court appeared to conclude that it possessed jurisdiction to approve the settlement in the exercise of its general equitable powers because there was no power in the trust deed to make a compromise in respect of claims. It should be noted that this case pre-dated the introduction of the Trusts (Jersey) Law 1984 and the significant jurisprudence that has developed in relation to applications for directions by trustees either to ask the Royal Court to bless a trustee's decision or to make a decision where a trustee does not have the power to do so or is in a position of conflict should it do so. Nevertheless, the decision in *Mark Bolan*, looked at from today's perspective, is entirely understandable. The compromise was in the interests of the beneficiaries because otherwise there was a risk that the trustees might face a much larger tax assessment. The Court also noted, although this did not appear to be the basis for its decision, that a number of the beneficiaries had ties with or resided in the United Kingdom. The Court was also alive to the possibility of the trustees facing difficulties during future visits to the United Kingdom.

52 The next decision is in the matter of *The Estate of Walmsley (Deceased)* [1983] J.J.35. The Court noted the submissions made for the executor including the following:

> ***"As to the second submission, it is said, quite rightly, that in private international law, countries do not enforce the fiscal or tax legislation of other countries (see Dicey & Morris, 1 The Conflict of Laws, 10th ed., at 89 (1980)).*** That is a well-accepted fact in the Royal Court and I need not enlarge on it. I ***should, however, say this.*** That convention applies between States who are, properly speaking, Sovereign States. This Island, of course, is a dependency of the Crown and cannot rank as a Sovereign Independent State. Nevertheless, it has its own independent judicial system and the convention of private international law to which I have referred was recognized, implicitly, when the Judgments (Reciprocal Enforcement) (Jersey) Law, 1960, was enacted and sanctioned by the Privy Council. Under that Law the Royal Court can register judgments obtained in the United Kingdom unless those judgments are in respect of taxes. I am quite satisfied, therefore, that the Royal Court has no power to enforce in Jersey a claim by the Inland Revenue for taxes in respect of United Kingdom legislation."

53 The Royal Court therefore clearly recognised the general principle that foreign revenue claims would not be enforced in another state as applying in Jersey. While the focus of the

discussion was in relation to enforcement of taxes by the United Kingdom Inland Revenue, Crill, Bailiff, in *Walmsley* also recognised that the principle applied between Jersey and any other foreign state.

54 Re *Walmsley* then explored whether an executor or trustee could pay an unenforceable debt and, if the executor or trustee was not willing to make payment when the Court might authorise an executor or trustee to do so. This led the Court in *Walmsley* to state the following:

> ***"The principle underlying English law was well expressed in*** *Midgley v. Midgley* ***by Lindley L.J. at page 299:-***
>
> ***"The general principle is, that it is the executor's duty to protect the estate against demands which by law cannot be enforced against it.*** This is his duty. That general principle is a wholesome principle, not to be cut away or narrowed … On general principle I take it to be clear that it was distinctly wrong for the executor to pay a debt which had been judicially decided not to be recoverable out of the estate which it is its duty to protect."
>
> ***That principle was recognised in*** (*In re Mark Bolan Charitable Trust* 1981 J.J. 117), ***namely, that unauthorised payments to the Inland Revenue authorities in the United Kingdom by a Jersey trustee, might lay him open to a breach of trust by some of the beneficiaries.*** Mr. Birt invited me to extend the principles of English law I have adumbrated to Jersey. I see no reason why I should not; they seem to me to be sound common sense. Accordingly, I am of the opinion that an executor or trustee under a Jersey will or settlement should not pay unenforceable debts without an order of the Royal Court." [Emphasis added]

55 In *Walmsley*, there was practically no estate in the United Kingdom although beneficiaries resided there. The Court stated " ***The matter has to be approached from two points of view.*** First the interest of the beneficiaries has to be considered and, secondly, that of the executor". The Court therefore noted the possibility of an executor being in jeopardy should he enter the United Kingdom and secondly the trustee facing a claim for breach of trust because beneficiaries were pursued directly by Inland Revenue authorities. Crill, Bailiff, then relied in the position set out in Whiteman & Wheatcroft Capital Gains Tax citing the following:

> ***""The authorities discussed above established four principal propositions as a matter of English and international law.*** First, if a foreign government were to bring an action in an English court, even against one of its own citizens, for the explicit purpose of enforcing payment of its claims for taxes or duty, an English court could not, and would not, entertain it. To do otherwise would be to assist a claim for the enforcement of a revenue law of another sovereign state contrary to international law (the Lord Cable case). Secondly, that accordingly an English court would not give leave to trustees or personal representatives to

> remit assets situated in the United Kingdom to overseas trustees or personal representatives if the only purpose of such remittance was to meet the revenue claim of a foreign government where such claim could not be enforced against the trustees or personal representatives in the United Kingdom (the *Scottish National Orchestra* ***case and*** *Jones v. Borland*). ***Thirdly, however, the principle just mentioned is subject to the qualification that an English court may be prepared to give leave to remit assets situated in the United Kingdom to a trustee or personal representative resident in another country for the explicit purpose of paying tax or duty chargeable in accordance with the laws of that country in circumstances where the trustee or personal representative would otherwise commit or be a party to breaches of the law of that country or be exposed to penalties if that foreign tax or duty was not paid.*** In such a situation, the court would regard the personal protection of the trustees as affording sufficient justification for permitting a remittance to a foreign country, although it may be that a court would only so act where the proper law governing the trusts of the settlement or the estate of the deceased is that of the foreign country seeking to enforce its revenue laws (the Lord Cable case)."

56 The Royal Court therefore recognised an exception to the general principle, namely the personal protection of the trustees or personal representative where they would otherwise commit or be party to breaches of the law of that country or be exposed to penalties if that foreign tax or duty was not paid.

57 On the facts of *Walmsley*, however, the Court concluded that the risk to the executor was limited and accordingly the Court ordered that the executor was not bound or entitled to pay the claim of the Inland Revenue.

58 The third authority drawn to my attention by the Representors was in the matter of *X Settlement and Y Settlement* Unreported Judgment 1994/110 dated 1 June 1994.

59 In this case, the trustees applied for Court permission to settle Federal estate taxes payable in the United States. The executor was a US citizen and resident.

60 At page 4 of the judgment, the Court noted that as far as the Court was aware this was the first occasion upon which the Court had been asked to authorise a payment where there were powers given to the trustees to pay unenforceable taxes. This appears to be a reference to the *Mark Bolan* decision where, while the Court authorised the proposed tax payment, the trust deed did not have power to compromise claims and therefore pay the relevant taxes.

61 The Court also referred to its previous decision in *Walmsley*. However, it distinguished *Walmsley* because of the residence of the executor in the United States who was therefore

" *amenable to the revenue laws of the foreign country*". In particular, the Court appears to have accepted that if taxes were not paid the executor was in peril.

62 The Court however also accepted that payment of estate tax that the trustees believed to be due was in the interest of all of the beneficiaries because it helped put the estate in the most advantageous position possible to conduct future negotiations with the IRS. The Court's conclusion was summarised at page 9 where it stated as follows:

> ***"The point really here is that no one can really benefit from any of the Settlements, 1, 2, or 3, until the tax issues that the Court has very briefly touched upon are properly resolved and the trustees have themselves been released from liability to the United States tax authorities."***

63 The general principle was also recognised in the bankruptcy cases in *Re Tucker* [1987/88 JLR 473] and in *Re Williams* [2009] JRC 054. It is not however necessary to explore the decisions in these cases further and the differences between them because they relate to how far the Courts of Jersey will grant assistance to foreign liquidators where a revenue authority is the sole or main creditor. We observe however that the *Tucker* decision may be limited to the situation where a foreign tax authority is the sole creditor and otherwise the Royal Court will give assistance where there are other creditors.

64 In relation to these authorities, the Representors' position was as follows:

> (i) Under A's US Will, the power to pay death taxes was limited to assets in the US Trust;
>
> (ii) As A had died intestate in respect of her movable estate outside the US, there was no power vested in Viberts Executors Limited to pay unenforceable claims;
>
> (iii) In relation to A's draft Will, the power to pay debts was limited to debts outside the United States and therefore, even if the draft Jersey Will had been executed, it did not provide authority to Viberts Executors Limited to pay debts due in the United States;
>
> (iv) In relation to B's Will, while this referred to the Executor having power to pay any debts which he may owe, including any taxes which may be due in the United States, this will related to his assets outside of the United States. The Representors were therefore of the view that the power to pay tax in the United States could only relate to taxes arising in relation to his movable estate outside the United States.
>
> (v) In relation to A's Will of immovable estate, the power in Clause 4 of that Will was to " *pay all charges as may be due thereon at the time of my decease*". The Representors contend, and we agree, that it is not readily apparent that the ambit of this clause extends to a power to pay taxes to a foreign state which have nothing to do with the Jersey real estate of A.

65 Accordingly, we reached our decision on the assumption that the Representors have no express power to pay the claim by BBHTC. This is therefore a case that is analogous to the *Mark Bolan* case where the guiding principle was whether the proposed settlement was in the interests of the beneficiaries.

66 In the present case, why the action of the Representors is in the interests of the beneficiaries is because ultimately the claims of BBHTC will succeed. By settling at this stage, the Representors avoid incurring costs in relation to litigation where the Representors are unlikely or highly unlikely to prevail. We accept that the Representors, by entering into a settlement to resolve a claim to pay a share of estate taxes payable which claim would on the undisputed evidence succeed and which could be enforced against assets in the country where the claim is to be brought, is a situation where this Court is able to approve such a settlement as being in the interests of beneficiaries.

67 We wish to make it clear that our decision is limited to the situation where the assets of the estate are in the same country where a claim to enforce a foreign tax might be made (whether direct or indirect). If the assets of the estate were in a different country, another Court on a different date might reach a different conclusion. In respect of a claim made under the law of country A to recover assets held in country B held in the name of a trust or estate governed by Jersey law, further analysis would be required about how far the courts of country B would permit enforcement of a judgment of the courts of country A against assets belonging to a Jersey trust or estate, where the judgment of country A was enforcement of a revenue claim.

68 We also add to the sake of completeness that had all the assets of the estate been in Jersey, we would have refused to approve the Representors entering into the compromise unless some other form of peril to either the personal representatives or the beneficiaries could be established. The Representors, in their application, have not sought to argue that either they or any beneficiaries would face some form of jeopardy if the claim of BBHTC was not compromised. The reason for approving the decision of the Representors is therefore based on the undisputed evidence that BBHTC's claim would succeed, including the obtaining of injunctive relief and therefore to dispute BBHTC's claim would simply lead to assets of the estate being expended on unsuccessful litigation.

69 We therefore approved the Representors entering into the Memorandum of Understanding and approved the decision of the Representors in principle to pay from B's estate to BBHTC that part of the US Federal estate tax levied on A's worldwide estate as was attributable to the value of A's non-US estate.

70 This approval was subject to one qualification in that we required the Memorandum of Understanding to make it clear that there could be no recourse against individual beneficiaries, in addition to no recourse against the Representors. While we have concluded that the evidence before us does not show any peril to individual beneficiaries entitled to share in B's estate, we wanted the position clear so that no other claims could be

made by BBHTC to try and recover estate taxes already paid beyond the contribution we have authorised the Representors to pay.

71 Finally, we should record that in giving our approval to the Representors, we were provided with detailed calculations of the effect of the proposed compromise. Although the effect of those calculations showed that a proportion of the taxes payable would fall on the non-Jersey estate, compared to the US estate of A paying the entire burden of US estate taxes, this did not alter our conclusion. Rather it was the inevitable consequence of our decision.

Payment of the agreed contribution out of the movable or immovable estate of B

72 The second part of the Representors' application concerned whether payment of any contribution approved by the Court should be made out of the movable or immovable estate of B. Three possible scenarios were advanced by the Representors:

(i) By reference to the case of (*18 May 1907 Mitchell v Mousir* 77 Exs308) that debts of a deceased person should first be paid out of that person's movable estate and only once that is exhausted should they be funded from that person's immovable estate;

(ii) The intention of A and B to pay all estate taxes due meant that they expected B, if he survived A, to inherit the Jersey property free of any taxes and therefore he was free to leave it to anyone free of US tax; and

(iii) Those entitled under the movable estate had agreed to bear the US tax payable.

73 We deal with each of these in turn.

74 In relation to the principle in *Mitchell v Mousir*, Catherine Mitchell and Maria Killiard, in 1897, lent the sum of £500 to George Moussire. This debt was registered in the Royal Court in 1898. The principal heir of George Mousir (Cecil Mousir) contended that the agreement was made under English law as all parties had been domiciled in England when it was concluded. He further contended that George Mousir had died domiciled in England leaving a will of movables where his wife was nominated executrix. The hypothec created in 1898 only guaranteed payment, but it did not alter the nature of the claim which was for repayment of a movable debt secured on immovable property. It was therefore for the movable estate to discharge debts and only if there was a shortfall could a claim be made under the hypothec created in 1898. The Court accepted these submissions and contended that the lenders did not have any right of recourse against the immovable property of the deceased (George Mousir) until after his movable estate had been exhausted.

75 In relation to this principle, we were not persuaded that it was authority for the proposition

contended for. At the time the case was decided, a person's capacity to leave property by will depended on whether or not they had children and how they had come to acquire the property. Since 1926 however any person is free to leave their immovable estate to whom they wish subject to rights of dower or *viduité*. The context for the case of *Mitchell v Mousir* is therefore very different and we would want to be addressed extensively before ruling that that principle applied today, or whether it still reflects the current state of Jersey law in light of the current rules on disposition of immovable property.

76 In addition, the decision concerns a contractual debt secured on an immovable property. Such a situation is not necessarily the same as an obligation to pay estate taxes applicable to both movable and immovable property and which part of the estate should bear such taxes.

77 In relation to the second ground, we accept that A and B's intention was to pay any estate taxes due on the estate of B. However, we were not persuaded that this general intention extended to what assets might be used to pay such taxes and whether this would have the benefit of meaning that the Jersey immovable property was to be inherited free of any estate taxes payable on A's estate. To be fair to Mr Badger, in his first affidavit, he recognised this in paragraph 7.11.6.3 on page 10, where he stated:

> *"The observation I feel moved to make regarding the presumed intention approach is that [A and B] intended [the Jersey home] to be inherited by [B] and the question of any US tax arising upon it was not addressed."* and
>
> *"The remoter contingency of [Y and Z] inheriting [the Jersey home] and the source of the funds needed to settle any tax arising on it was not considered."*

78 We agree and wish to add that in the few weeks between A's death and B's passing, we do not consider that B addressed his mind to this question. We consider his sole focus was likely to have been the loss of A.

79 In relation to the third argument, this was based on a series of communications between Viberts and the 17 members of the Group of 19 who had been contacted and traced.

80 These communications started in an email dated 28 July, followed by an updated email dated 1 August 2023 and then an email dated 21 September 2023. This email explored the possibility of a pro rata split between the movable and immovable estates of B and stated:

> *"You might think that a pro-rated contribution payment would be the obvious approach to take.* Thus if beneficiary X inherits, say, 15% of [B's] assets then they should contribute (by deduction from the next payment to be made to them) 15% of the tax bill. There are however three complicating factors, or reasons why an alternative approach has been advanced.
>
> *They all relate to whether [Y] and [Z], who via their father [X] have received the*

proceeds of sale of Ville au Bas, should pay the 40% tax attributable to it.

Firstly, there is a Jersey court case [*Mitchell v Mousir of 1907*] *which establishes the rule that when there are debts to be paid on an estate these should first be settled from the movable estate.* Only if that estate is not worth enough to repay all the debts should resort be had to the immovable estate. In the circumstances of this case [A]'s movable estate is easily worth enough to pay this claim upon it, so there is no need to have resort to her immovable property, [the Jersey home]. Its recipients [Y] and [Z] can therefore assert that the 40% death duties due on its deemed value at the time of [A]'s death of £x must be funded by the movable estate.

Secondly, Ross has some knowledge of how [A] and [B] thought and behaved. He feels sure that, had [B] lived long enough, he would have paid the US death duties that became due when he inherited [the Jersey home]. This would have allowed him to leave it to his family with no taxes due upon it and Ross feels sure that was his overall intention. (next sentence omitted).

Thirdly, mindful of the rule established by that Jersey court case, and mindful of what Ross thinks [B] would normally have done, [Y] and [Z] do indeed assert that they should receive [the Jersey home] clear of any US taxes due upon it. They contend that these taxes must instead be met out of the movable estate, and thus out of the assets to be distributed to the members of the Group of 19, to which they too belong.

Interestingly [A]'s cousin [M], also a member of the Group of 19, is willing to accept [Y] and [Z]'s position on this matter. His Jersey lawyer Adv Dixon has filed papers in preparation for the eventual hearing in which this is stated."

81 The email also contained the following:

"As set out above at the forthcoming court hearing the court will be asked to approve not only firstly, the principle of paying the US taxes but also secondly, what sort of amount should be paid, (subject to a stated maximum sum) and thirdly, how the burden of the sum paid should be allocated among the Group of 19. Owing to that case of *Mitchell v Mousir*, *Ross Badger and Viberts Executors Ltd feel that it is correct in law to ask the court to approve the payment proposal set out in the third column and that is what we therefore mean to do.* It is also the case that Ross feels this approach was what [B] would have intended. It would not be right for me to fail to underline that, for most members of the Group of 19, this proposal operates to their disadvantage. Some may therefore wish to challenge it. Anyone considering so doing is invited to contact me so that I can explain what sort of steps would be involved."

82 The third column referred to in the above paragraph set out the effect of the contribution apportioned between the Group of 19 as those entitled to share in B's movable estate based on no contribution to the tax to be paid coming from the recipients of the immovable

estate. Each individual therefore was able to see the effect on their share of no contribution being made from the immovable estate. No one objected to the approach the Representors suggested they were going to take.

83 A further update was provided on 17 November 2023 informing the Group of 19 of the final date of the proposed hearing.

84 In relation to this approach, we were not satisfied that the parties had necessarily consented to the approach the Representors wished to take. This was for the following reasons:

(i) We are doubtful about the applicability of *Mitchell v Mousir*;

(ii) We also expressed our reservations about the lack of evidence of B's intention in relation to where the liability of A's US estate taxes might fall as distinct from a general desire to pay those taxes.

85 Nevertheless, no one has expressly objected to the proposal. We are also satisfied that 17 of the 19 legatees had been made aware of the proposal and had not filed any objection. This is notwithstanding the fact that they were provided with detailed calculations explaining the effect of the proposal upon them. We have seen those calculations and they do make the position clear.

86 In light of the fact that no member of the group of 19 had objected, as long as those with whom the Representors have contacted agreed, we concluded that the Representors could then make the appropriate payment. In other words, we required the Representors to contact the 17 beneficiaries of B' estate with whom to they were in communication to obtain the express agreement of each of them to payment of the US taxes being made out of the movable estate of B. We were not prepared to proceed on the assumption that silence amounted to acquiescence.

87 In the absence of agreement from any member of group of 19, the Representors were to come back to Court.

88 In relation to the two beneficiaries who could not be contacted, the Representors were directed to continue to take all reasonable steps to try and find those individuals. However, because the amounts they were due to receive were relatively small and the effect of the payment of US tax out of their share was not significant, the fact they may not be traced should not, in our view, prevent payment of the US taxes and the release of the remaining funds to the other beneficiaries as long as they all agreed that this should occur. The payment of US taxes out of A's non-US movable estate was therefore approved on this basis.