

WALMSLEY 1982

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On the 14th December, 1981, Sidney Walmsley died domiciled in Jersey. On the 26th November, 1981, Probate of his Last Will and Testament was granted to Advocate Sinel as one of the Executors named in the Will. The Inland Revenue of the United Kingdom has notified the Executor of a claim against the deceased for arrears of United Kingdom Income Tax and Capital Gains Tax in the sum of £45,120.91 with interest accrued to the 1st June, 1982, of £30,345.87, and which interest continues to accrue. The time for appealing against such assessment of tax has expired. I was not told, but I assume that it expired before Mr. Walmsley died. Paragraph 4 of the Will is in the following terms: "I direct that my funeral and testamentary expenses and all debt which I may owe at the time of my decease shall be first discharged by my said Trustees out of the gross of my personal estate." Mr. Sinel has brought this application with the concurrence of the beneficiaries named in the Will, asking the Court to rule whether he is bound or entitled to pay the claim of the Inland Revenue and, if so, whether he should make such a payment out of the gross of the personal estate of the deceased or from the disposable third. The first two points taken by Mr. Birt for the Executor were these. First, does the word "debts" in paragraph 4 mean only those debts which could have been enforced against the deceased during his lifetime. Secondly, even if it does, then a claim of this nature is not enforceable. As to the first submission, I have little doubt that the word "debts" means lawfully enforceable debts. 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 and Morris The Conflict of Laws (10th Edition) at page 89). That is a well accepted fact in the Royal Court and I needn't 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 recognised, 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 these 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. Mr. Birt, however, very helpfully took the argument a little further. He laid before me authorities where the Courts in the United Kingdom have nevertheless sanctioned the payment by Executors of un-enforceable debts. He did this under three headings. (a) If it was not enforceable under Jersey law, nevertheless, can an Executor or Trustee pay an unenforceable debt. (b) If he cannot (of his own volition) when can the Court authorise him to do so and (c) should the Royal Court make an Order in the present case.

On the question of the payment by an Executor or Trustee of a unenforceable debt, counsel admitted that he had been unable to find any Jersey authorities but according to English law, an Executor should not pay an unenforceable debt unless authorised to do so by the Court. There appeared to be an anomalous exception for statute barred debts. I was referred to William and Mortimer on Executors and Administrators and Probate 1970 Edition at pages 944 and 948, Midgley -v- Midgley 3 Ch 1893 at page 282 and Scottish National Orchestra Society Limited -v- Thompson Executors 1969 Scots Law page 725. 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 This is his duty. That general principle is a wholesome principal, 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 the matter of the Marc Bolan Charitable Trust 1981, Jersey Judgments at page 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.

The next matter is to decide the circumstances under which the Court can authorise a payment. In a number of the cases to which I was referred, there was traceable a common element; that was that the deceased left estates in two or more jurisdictions or what have been called the domiciliary estate and the ancillary estate. In the Scottish National case, the executors in Scotland, where the bulk of the deceased's moveable estate was situated at date of death, paid Swedish Inheritance Tax because under Swedish Law the Swedish legatees could not receive their legacies while the Inheritance Tax remained unpaid. Moreover, if the Scottish Executors had paid the Swedish legatees direct without discharging the Swedish Inheritance Tax, the Scottish Court found that the Swedish administrator would have had to take steps to recover the legacies from the Swedish legatees. In this case the position is quite different. There is practically no estate in the United Kingdom although the beneficiaries reside there. 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. As regards the latter, one considers firstly, whether by refusing to pay an unforceable debt such as an Inland Revenue claim, he might not place himself in jeopardy should he enter the United Kingdom and secondly, whether he does so or not and the beneficiaries themselves are proceeded against by the Inland Revenue authorities, or alternatively consider that he has improperly reduced the assets, he might not well face a claim from the beneficiaries themselves. In addition to the Scottish National Orchestra case, I was referred to Jones -v- Bolland 1969 (4) SA 29; Re Reid 1970 17 DLR 3rd 199 and Re Lord Cable 1977 1WLR page 7. They were all considered in the Third Edition of Wheatcroft and Whitmore on Capital Gains Tax at Section 20-50 which is as follows (at page 624) -

"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).

Finally, a trustee or personal representative is entitled to be indemnified out of the assets of the trust or estate (as the case may be) situated in the United Kingdom for any foreign taxes or duty which he has paid under the law of the foreign state in question, provided that the liability to pay that tax or duty could have been enforced against him. Such indemnification does not constitute the enforcement of foreign revenue laws, for whether or not the trustee or personal representative is indemnified does not affect the tax or duty collected by the foreign government, because, as indicated, it could always have enforced its claim (the Reid case and the Lord Cable case)."

A postscript on page 624 reads:

"The propositions set out in the following text are founded on the four cases previously cited, only one of which is an English authority. However, in the authors' opinion, the other authorities cited seem fairly clearly to be consistent with the principles of English law on the topic, so that it is appropriate (although the other cases are only of persuasive authority) to treat them as authoritative in this context."

In the present case as Mr. Birt said, the question of Capital Gains Tax has nothing to do with the Testator's domicile. I was told also that the risk of imprisonment to the Executor was slight but that even if it was, I ought to be prepared to extend the principles of the Lord Cable case. I am satisfied that it would be proper to apply the four principles I have cited to the position of Executors or Trustees in Jersey faced with a claim for an unenforceable debt arising (for example) from a taxing statute in another jurisdiction.

Lastly, I have to ask myself whether I should apply those principles to the present case and make the Order asked for. In this connection I was shown an opinion by English counsel on Mr. Sinel's liability to the Inland Revenue and to the beneficiaries. As regards the latter they did not wish the payment to be made. The only risk according to the opinion was that the Inland Revenue might try to attach Mr. Sinel's assets in the United Kingdom and might try also to claim from the beneficiaries. Mr. Backhurst for the beneficiaries confirmed, as I have said, that as regards any claim against Mr. Sinel for not paying the Inland Revenue unenforceable debt, Mr. Sinel was protected by their support today of the application. Secondly, the risk against his financial assets was confined to some possible future investment in the United Kingdom and perhaps to his R.A.F. pension.

Weighing these matters I have come to the conclusion that it would be right and proper to make the Order asked for and accordingly I order that the Executor is not bound or entitled to pay the claim of the Inland Revenue. As agreed between the parties costs will be paid out of the estate.