Neutral Citation Number: [2016] EWCA Civ 938

Case No: A3/2014/3253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
The Hon Mrs Justice Rose
[2014] EWHC 3010 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/09/2016

Before:

LORD JUSTICE MOORE-BICK
(VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE TOMLINSON
and
LORD JUSTICE KITCHIN

- -

Between:

(1) Peter Routier **(2) Christine Ann Venables (as executors of the late Beryl Coulter)**	**Appellants**
- and -	
The Commissioners for Her Majesty's Revenue & Customs	**Respondents**

- -
- -

Richard Vallat (instructed by Irwin Mitchell LLP) for the Appellants
David Yates (instructed by General Counsel and Solicitor for HM Revenue & Customs) for the Respondents

Hearing date: 14 June 2016

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Judgment Approved

Lord Justice Kitchin:

1. This is an appeal against the order of Mrs Justice Rose made on 18 September 2014 dismissing the appeal of the appellants, the executors of the late Beryl Coulter, against a determination by the respondents, HMRC, that the appellants, as executors, are liable for inheritance tax of about £600,000.

2. The appeal raises two issues. The first is whether the residuary estate of Beryl Coulter was "given to charities" for the purposes of s.23 of the Inheritance Tax Act 1984 ("the IHTA 1984") and is therefore exempt from inheritance tax.

3. The second is raised by amendment to the grounds of appeal for which we gave permission at the hearing of the appeal on 14 June 2016. The appellants assert that s.23, if construed in the manner for which HMRC contend and Rose J accepted, would constitute an unlawful restriction on the free movement of capital between Member States and third countries within the meaning of Article 63 of the Treaty on the Functioning of the European Union ("the TFEU").

The background

4. Mrs Coulter was domiciled in Jersey and died there on 9 October 2007. At the date of her death, her estate included assets in the United Kingdom with a probate value of a little in excess of £1,818,000.

5. By her will ("the Will"), Mrs Coulter left her residuary estate, including the United Kingdom assets, on trust ("the Coulter Trust") for the purpose of constructing homes for elderly residents of the parish of St Ouen in Jersey or, in default, to assist with the capital expenditure required by an organisation called Jersey Hospice Care. Clause 2 of the Will reads, so far as relevant:

> "2. To accumulate the income of the Coulter Trust and to distribute the Coulter Trust together with any accumulated income therefrom UNTO such incorporated body as may be set up by the Parish of St Ouen for the purpose of the provision of homes for the elderly of the Parish …"

Clause 2 then specifies various conditions to which it is subject.

6. Clause 3 of the Will contains the gift in default and reads, so far as relevant:

> "3. In the event that the Parish of St Ouen fails neglects or refuses to set up an incorporated body as set out above within three years of my decease, or fails or refuses to accept any of the conditions of my gift as set out above then in either of these events I DIRECT that my Trustees shall in place of the Incorporated Body, hold the Coulter Trust and distribute the same both as to income as capital UNTO JERSEY HOSPICE CARE to assist with capital expenditure required by Jersey Hospice Care as in their discretion may deem fit, and in the event that the capital expenditure is required for the

> construction of buildings for Jersey Hospice Care then this upon [certain conditions to which clause 2 is also subject].”

7. The Coulter Trust is established under and subject to Jersey law and at all material times the trustees were Jersey trustees.

The statutory framework

8. Under the IHTA 1984, inheritance tax is charged at death on the United Kingdom estate of a person domiciled outside the United Kingdom, subject to various reliefs and exemptions. The tax is charged as if, immediately before death, that person had made a transfer of value and the value of that transfer had been equal to the value of the estate immediately before death. For those persons domiciled outside the United Kingdom, the value of property situated outside the United Kingdom is excluded.

9. Part II of the IHTA 1984 sets out which transfers are exempt. At the relevant time s.23 provided:

> “**23 Gifts to charities**
>
> (1) Transfers of value are exempt to the extent that the values transferred by them are attributable to property which is given to charities.
>
> …
>
> (6) For the purposes of this section property is given to charities if it becomes the property of charities or is held on trust for charitable purposes only, and "donor" shall be construed accordingly.”

10. Accordingly, transfers of value are exempt to the extent that the values transferred by them are attributable to property given to charities, and property is given to charities if either the property becomes the property of charities (the first limb) or the property is held on trust for charitable purposes only (the second limb).

11. Section 272 of the IHTA 1984 (as it stood at the relevant time) provided that:

> “Charity” and “charitable” have the same meanings as in the Income Tax Acts.”

12. Section 989 of the Income Tax Act 2007 (“the ITA 2007”) defined “charity” (but not “charitable purposes”) for the purposes of the Income Tax Acts in these terms:

> ““charity” means a body of persons or trust established for charitable purposes only,”

13. It follows that the two limbs of s.23 can be elaborated in this way:

    i) the first limb exempts a transfer if the property becomes the property of any body of persons or trust established for charitable purposes only; and

ii) the second limb exempts the transfer if the property is held on trust for charitable purposes only.

The first issue

14. There is a considerable amount of common ground. The facts are agreed; it is agreed that the Coulter Trust has only charitable purposes as a matter of English law; and it is agreed that it matters not that those purposes are to be carried out outside the United Kingdom.

15. The appellants also accept that the Coulter Trust is not a "trust established for charitable purposes only" within the meaning of s.989 of the ITA 2007 or the first limb of s.23 of the IHTA 1984. As I shall explain, the reason this is accepted is that the phrase "trust established for charitable purposes only" in the context of s.37 of the Income Tax Act of 1918 ("the ITA 1918") was held by the House of Lords in *Camille and Henry Dreyfus Foundation Inc v IRC* [1956] AC 39 (affirming the decision of the Court of Appeal [1954] 1 Ch 672) to contain an implicit limitation such that it only includes trusts which are governed by the law of some part of the United Kingdom and are subject to the jurisdiction of the courts of the United Kingdom. As I have said, the Coulter Trust is established under and is governed by the law of Jersey. Accordingly, it is not a "charity" within the meaning of s.989 of the ITA 2007. It also follows that the Will did not effect a transfer to "a trust established for charitable purposes only" within the meaning of the first limb of s.23 of the IHTA 1984.

16. The question raised by the first issue on this appeal is whether the phrase "held on trust for charitable purposes only" in the second limb of s.23 is subject to the same implicit limitation, that is to say that the trust must be governed by the law of the United Kingdom and subject to the jurisdiction of the United Kingdom courts. HMRC contended and Rose J accepted that it is. The appellants submit that the judge fell into error in so doing.

17. Consideration of this question must begin with the *Dreyfus* case. This concerned a claim by the Camille and Henry Dreyfus Foundation Inc ("the foundation"), a body constituted under the laws of the State of New York, to an exemption from income tax in respect of its receipt of royalties from an English company. It was accepted that tax was payable on these sums unless relief was obtainable under s.37(1)(b) of the ITA 1918. This provided that an exemption should be granted from tax under the relevant schedules in force in respect of certain payments:

> "… forming part of the income of any body of persons or trust established for charitable purposes only or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only;"

18. It was conceded by the foundation that the phrase "for charitable purposes" meant purposes which were charitable under the law of the United Kingdom but it maintained that its activities, having regard to the terms of its certificate of incorporation, met this requirement. The finding of the Special Commissioners on this point was favourable to the foundation, and this finding was upheld by the Court of

Appeal and not disturbed by the House of Lords. However, the Special Commissioners also decided that, in order to obtain the privilege of exemption under s.37(1)(b) of the ITA 1918, the body of persons claiming the privilege must be one established under and in accordance with the laws of the United Kingdom. The foundation, being a foreign corporation and not subject to the jurisdiction, was debarred from claiming the benefit of the exemption. Upon this issue the Court of Appeal again agreed with the Special Commissioners. Each member of the Court of Appeal gave a full judgment.

19. Sir Raymond Evershed MR considered that the answer to the problem depended upon the true interpretation, according to ordinary principles, of the whole phrase, including the essential word "established", in the context in which it was found. He noted that s.37 was one of a group of sections, all of which were concerned with bodies or corporations constituted and regulated by, and subject to, the laws of the United Kingdom. He also observed that the words "charities" or "charitable institutions" in an ordinary context in an English Act of Parliament must, prima facie at least, mean institutions regulated by, and subject to the jurisdiction of, the laws or the courts of the United Kingdom and constituted for the carrying out of objects or purposes which, in the courts of the United Kingdom, would be held to be charitable. In his judgment these two aspects or characteristics were almost inseparable.

20. In addressing a submission made on behalf of the foundation that there was nothing in the wording of the section which justified any local limitation of the "bodies of persons" named, Sir Raymond Evershed MR explained that it would be awkward and artificial to consider a body of persons established under the law of a foreign country as falling within the scope of the legislation and that, administrative difficulties aside, there was "an inherent incompatibility" in the conception of a corporation regulated according to the laws of a foreign country and carrying on the whole of its activities in that country being able to show that it was "established for charitable purposes only". In this connection, he said (at page 685):

> "I am considering what, as a matter of ordinary language and common sense, is intended (in the absence of a special context) by the phrase, in an English Act of Parliament or other document, "body of persons established for charitable purposes only." In my judgment, applying the test I have formulated, once it is conceded that "for charitable purposes only" means "for purposes which are what the laws of the United Kingdom define as charitable and hold to fall within the special and somewhat artificial significance of that word," then it seems to me, prima facie, that a body cannot be "established" for such purposes unless it is so constituted or regulated as to be subject to the jurisdiction of the courts which can alone define and regulate those purposes."

21. Finally, Sir Raymond Evershed MR came to the context of the section itself, including the use of the word "any" before "body of persons" which was a matter upon which the foundation placed particular reliance. In this regard, he said (at pages 686 to 687):

> "Still more significant to my mind is the circumstance that the formula "any body of persons or trust established for charitable purposes only" is followed by the alternative "or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust or will are applicable to charitable purposes only." It is, in my judgment, reasonably clear that the alternative was added in order to cover those cases in which only a part of the income is, by virtue of the Act of Parliament or other instrument named, applicable to charitable purposes, in contradistinction to those bodies of persons or trusts which are exclusively established for such purposes.
>
> In my view, however, the alternatives are true alternatives; the distinction, that is to say, is between institutions, in other respects alike, whose income is either, on the one hand, wholly applicable to the purposes named, or, on the other hand, is, as to the relevant part only, so applicable. And since, in my judgment, it cannot be in doubt that by "Act of Parliament" is meant an Act of the United Kingdom Parliament, so it follows, in my view, that by "charter, decree, deed of trust or will" is meant an instrument of the kind specified subject to, and taking effect according to, the laws of the United Kingdom. The alternative formula must therefore be regarded as wholly limited by reference to our local law; and, if this is so, then, as it seems to me, the earlier phrase "any body of persons or trust established, etc." must be regarded as equally so limited.
>
> In my judgment, therefore, the bodies of persons mentioned in the paragraph cannot comprehend foreign institutions such as the foundation. I have earlier stated my view that the essential word is "established." In my judgment, whatever might be the true significance of the four words "any body of persons" taken in isolation, those words in the context of paragraph (b) of section 37(1) of the Act of 1918, and particularly when immediately followed by the words "or trust established for charitable purposes only," must be limited to bodies of persons so constituted and regulated as to be (in reference to the income in question) subject to the jurisdiction of the United Kingdom courts."

22. Jenkins LJ considered that any territorial or jurisdictional restriction on the scope of s.37 had to be found in the construction of the section itself and the objects and conditions of the exemption it conferred. In this connection, he attached particular significance to the administrative difficulty which would attend the worldwide application of the exemption. He put it this way (at pages 702 to 703):

> "There is, however, one reason underlying that principle which can, I think, properly be taken into account in reaching any conclusion on the construction of section 37, and that is the great administrative difficulty which must inevitably attend the

> worldwide application of the exemption. If any institution in any part of the world can lay claim to the exemption on the ground that it is established for exclusively charitable purposes, adjudication upon foreign claims for exemption will, as Mr Talbot admits, involve the twofold process of ascertaining the relevant foreign law as to the purposes which the institution concerned is empowered to pursue and then determining whether those purposes, considered, I suppose, in relation to the manners, customs, beliefs and social conditions obtaining in the foreign country concerned, are charitable purposes within the meaning of our law. This would be liable to give rise in many cases to an abstruse and controversial inquiry, hardly to be answered short of litigation in the courts. The present case is relatively simple owing to the affinity of United States law to our own, but that is an accidental circumstance, which does not displace the possibility, or indeed probability, of acute difficulty in many other cases."

23. Jenkins LJ also gave careful consideration to the wording of the exemption. He reasoned (at page 706):

> "Coming last to the material head of exemption (paragraph (b)), I find it extends to any interest etc. "forming part of the income of any body of persons or trust established for charitable purposes only or which" (that is to say, which interest etc.) "according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only." Ex-concessis, "charitable purposes" in paragraph (b), as also in paragraph (a), means purposes which are charitable according to the law of the United Kingdom. "Act of Parliament" clearly means "Act of the United Kingdom Parliament." "Charter" clearly means Royal Charter granted by the Sovereign of the United Kingdom. "Decree" really means "decree of the court of the United Kingdom". As appears from what I have said regarding the references to "trustees" in the other two paragraphs, I think that "trust" and "deed of trust" in this paragraph must be taken as referring to trusts taking effect and enforceable under the law of United Kingdom, and I think that similarly "will" must in this context mean a will so taking effect and enforceable."

24. Hodson LJ focused upon the interpretation of the section in context and against its historical background. He too considered that, in context, the phrase "any body of persons or trust established for charitable purposes only" must be a body of persons constituted under the law of the United Kingdom. He also found support for his conclusions in the practical difficulties involved in the contrary view. He thought the Commissioners would be set a difficult task if they had to apply the law of any part of the world in order to ascertain the purposes for which a particular body of persons

was established before determining whether those purposes were charitable within the meaning of United Kingdom law.

25. On further appeal to the House of Lords, Lord Morton of Henryton (with whom Lord Porter, Lord Normand, Lord Keith and Lord Somervell agreed) noted that the phrase "any body of persons or trust established for charitable purposes only" was not expressly limited to bodies of persons or trusts established in the United Kingdom but that the Court of Appeal had held that it should be construed as being so limited. He agreed with that conclusion and explained that his reasons were, in substance, the same as those given by the Court of Appeal.

26. In expressing his agreement, Lord Normand accepted Jenkins LJ's statement ([1954] Ch 672 at page 706) that ""trust"… must be taken as referring to trusts taking effect and enforceable under the law of the United Kingdom." However, he continued that this statement of the meaning of "trust" depended on the context of s.37, and not upon the connotation of the word "trust" alone.

27. The exemption embodied in s.37 of the ITA 1918 was in material part carried forward into s.360 of the Income and Corporation Taxes Act 1970 ("the ICTA 1970") and for this purpose s.360(3) provided:

> "In this section "charity" means any body of persons or trust established for charitable purposes only."

28. Section 360 of the ICTA 1970 was in force when the IHTA 1984 was enacted. The definition of charity in s.360(3) was then carried forward, via s.506(1) of the Income and Corporation Taxes Act 1988, to s.989 of the ITA 2007.

29. In light of the decision in *Dreyfus* and this legislative history it was, in my judgment, rightly accepted by the appellants before Rose J that the first limb of s.23 of the IHTA 1984 requires the "charity" to be established under the law of some part of the United Kingdom. However, the appellants contended before Rose J that, notwithstanding this requirement in the first limb of s.23, there was no such requirement in the phrase "held on trust for charitable purposes" in the second limb.

30. Rose J rejected this contention and her reasons for doing so reflected the submissions made to her on behalf of HMRC. Those reasons may be summarised as follows. First, there was what she described as an incongruity in requiring a court to ascertain whether the purposes of a body governed by foreign law were charitable purposes as a matter of United Kingdom law. Secondly, the fact that the term "trust" was used elsewhere and in other contexts in the IHTA 1984 to refer to overseas trusts was not sufficient to override the well-established principle (sometimes referred to as the *Barras* principle after the decision of the House of Lords in *Barras v Aberdeen Sea Trawling and Fishing Co Ltd* [1933] AC 402 at page 411) that, where an Act uses a form of words with a previous legal history, this may be relevant to its interpretation; and the question is whether or not Parliament intended to use the words in the sense given by that history. She considered that Parliament must be taken to have been aware of the way the phrase "body of persons or trust established for charitable purposes only" had been interpreted in *Dreyfus* and must have intended that the phrase should have the same meaning in s.23 of the IHTA 1984. Thirdly, the fact that some of the contextual indicators in the second part of s.37(1)(b) of the ITA 1918

relied upon by the Court of Appeal and the House of Lords in *Dreyfus* in support of a United Kingdom link had been omitted from the wording of s.23 did not mean that their reasoning was no longer apposite. Fourthly, the appellants had not put forward any good reason why the second limb of s.23 should be so much broader than the first. Finally, subsection (6) of s.23 was only a definition section; the primary exempting provision was subsection (1) which referred only to "charities" as defined in s.989 of the ITA 2007, and this clearly imported the requirement for a United Kingdom link. If Parliament had intended to extend the scope of the exemption to overseas trusts, it would have made this clear in subsection (1).

31. Upon this appeal Mr Vallat, who appeared on behalf of the appellants, as he did below, submitted that the starting point is that the residuary estate was plainly "held on trust for charitable purposes only" because (a) the Coulter Trust is a trust and (b) the residuary estate can only be applied for purposes which are charitable as a matter of United Kingdom law. He continued that none of the reasons relied upon by Rose J justified the importation into the second limb of s.23 of the IHTA 1984 of a further limitation that the trust must be governed by United Kingdom law.

32. Mr Vallat began with the decision in *Dreyfus.* He submitted that this is of no or limited assistance in ascertaining the meaning of the second limb of s.23 of the IHTA 1984 because the judgments of Sir Raymond Evershed MR and Jenkins LJ make clear that the ultimate conclusion to which they both came was founded both upon the use in s.37(1)(b) of the ITA 1918 of the word "established" and the full context in which that word was used, including, in the second part of paragraph (b), the words "Act of Parliament", "charter" and "decree". What is more, continued Mr Vallat, on further appeal to the House of Lords, Lord Normand emphasised that the term "trust" was not, in general, limited to trusts established under United Kingdom law. Indeed, if anything, submitted Mr Vallat, the differences between the statutory language of s.37 of the ITA 1918 and s.23 of the IHTA 1984 support the interpretation for which the appellants contend because the draftsman of s.23 has avoided all of the terms that were held in *Dreyfus* to denote a United Kingdom link.

33. Turning next to the *Barras* principle, Mr Vallat argued that the proper starting point is that the expression "held on trust" and expressions to like effect are used throughout the IHTA 1984 to refer to all trusts whether or not they are governed by United Kingdom law. In this regard Mr Vallat pointed, by way of example, to the exemption in s.18 for transfers to a spouse or civil partner where property is held on trust for that spouse or civil partner; and to the special treatment elsewhere in the Act for various vulnerable or special groups such as employees, disabled persons and young persons which depends upon identification of the trusts upon which property is held. He submitted that in none of these cases is there a justification for limiting the scope of the relevant provision to trusts established under the law of the United Kingdom and so taxpayers, HMRC and the courts must necessarily address the problem, such as it is, of having to assess the application of the Act to trusts established under foreign laws. Accordingly, he continued, Rose J was wrong to conclude that the term "trust" in s.23(6) of the IHTA 1984 has a narrower meaning than it does elsewhere in the Act, whether under the *Barras* principle or otherwise.

34. That brought Mr Vallat to what he described as the discrimination argument. He recognised that the appellants' approach created a distinction between non-United Kingdom trusts (which can qualify for relief on the appellants' construction) and non-

United Kingdom companies (which cannot, unless they hold their property on non-United Kingdom trusts). But he submitted that this distinction is not objectionable, and that it is certainly no more objectionable than the distinctions created by HMRC's construction pursuant to which, for example, gifts to trusts which are wholly United Kingdom trusts qualify for relief but gifts to largely United Kingdom trusts (with United Kingdom assets, trustees and objects) which happen to have a non-United Kingdom governing law do not.

35. Finally, Mr Vallat addressed the defined term point. He pointed out, correctly, that this aspect of the judge's reasoning is founded upon the speech of Lord Hoffmann in *Macdonald (Inspector of Taxes) v Dextra Accessories* [2005] STC 1111. There, in considering the meaning of the defined term "potential emoluments", Lord Hoffmann said this at [18]:

> "In the ordinary use of language, the whole of the funds were potential emoluments. It is true that, as Charles J pointed out, 'potential emoluments' is a defined expression, and a definition may give the words a different meaning from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."

36. Mr Vallat continued that this reasoning has no application to the point with which this appeal is concerned because the definition in s.23(6) is clear; and further, the definition goes beyond the ordinary meaning of the expression "given to charities" and so one cannot use the expression itself to illuminate the meaning of the definition.

37. Attractively and clearly though these submissions were advanced, I find myself unable to accept them. My reasons are these. First, and as I have explained, the appellants accept (and in my judgment rightly accept in light of the decisions of the Court of Appeal and the House of Lords in *Dreyfus* and the legislative history) that the first limb of s.23 of the IHTA 1984 only applies to bodies or trusts which are governed by the law of some part of the United Kingdom. This is the full extent of the application of the *Barras* principle in the context of this case because Mr Yates, who appeared on behalf of HMRC, as he did below, made clear to us that HMRC do not suggest and have never suggested that the *Barras* principle applies to the second limb of s.23.

38. Secondly, and in light of the foregoing, it seems to me that a number of the points made by Mr Vallat concerning the precise wording of s.37(1)(b) of the ITA 1918 fall away. I recognise and accept that in construing the first limb of this provision, that is to say the phrase "body of persons or trust established for charitable purposes", all members of the Court of Appeal in *Dreyfus* attached weight to the presence in the alternative limb of the words "Act of Parliament", "charter", and "decree", all of which suggested a link to the United Kingdom. This wording is not to be found in s.23 of the IHTA 1984 or s.989 of the ITA 2007. Nevertheless, I accept the submission of Mr Yates that this is nothing to the point, given that the appellants do not suggest that the phrase "body of persons or trust established for charitable purposes" has a different meaning in s.23 of the IHTA 1984 from that which it had in s.37 of the ITA 1918.

39. Thirdly, and focusing now upon the second limb of s.23 of the IHTA 1984, this must be seen in the context of the whole provision, including the first limb which, as we have seen, does require the relevant body of persons or trust to be governed by the law of the United Kingdom. Yet the interpretation for which the appellants contend would result in the second limb having a much broader scope. The first limb applies to bodies or trusts established for charitable purposes only, provided those bodies or trusts are governed by the law of the United Kingdom. By contrast, the second limb would, on the appellants' interpretation, apply to both United Kingdom and foreign trusts provided they hold the property for charitable purposes. Moreover, as Rose J observed, the appellants' interpretation discriminates between foreign law charities which are incorporated (and are excluded unless they hold the property on trust) and those formed under trust (which are not). We were provided with no good reason why Parliament might have chosen to draw such distinctions. Moreover these distinctions are, in my judgment, far more significant than those which arise on HMRC's interpretation and to which Mr Vallat drew our attention.

40. Fourthly, and as Mr Yates also submitted, the practical difficulties inherent in considering whether a foreign law trust holds property on trust for charitable purposes only or is established for charitable purposes only provide a further reason to question whether Parliament intended s.23 of the IHTA 1984 to have the meaning for which the appellants contend. Further support for this submission may be derived from the judgments of Jenkins and Hodson LJJ on appeal to the Court of Appeal in *Dreyfus*. Both expressed concern at the administrative difficulties which would attend the worldwide application of the exemption contained in s.37(1)(b) of the ITA 1918. In my judgment it is no answer to this point to say that, on the facts of this case, concerning as they do a Jersey trust, this does not present any particular difficulty because, as Jenkins LJ explained in the passage of his judgment cited at [23] above, such a broad and open-ended interpretation might in other cases necessitate what he described as an abstruse and controversial enquiry, hardly to be answered short of litigation.

41. Fifthly, I think that Rose J was entitled to attach the weight that she did to the structure of s.23 of the IHTA 1984. As she explained, s.23(1) is the primary exempting provision and concerns transfers of property to charities and, as we have seen, "charities" are defined in s.989 of the ITA 2007 in terms which call for a United Kingdom link. The broader notion of the meaning of the phrase "property which is given to charities" is introduced by the definition in s.23(6). In so far as the terms of s.23(6) are ambiguous then it seems to me that it is permissible to consider whether the phrase so defined sheds light on the meaning of those terms. In my judgment it does. It suggests a United Kingdom link of the kind which the judge identified.

42. Finally, I have given careful consideration to Mr Vallat's submissions concerning the use of the term "trust" and the expression "held on trust" elsewhere in the IHTA 1984. HMRC have never disputed that, when used elsewhere, these words may denote a foreign trust. I am also conscious that Lord Normand expressed the view in his opinion in the *Dreyfus* case that the word "trust" may connote a foreign trust. However, the phrase with which we are concerned is "held on trust for charitable purposes only" and I am satisfied that, in context and for the reasons I have given, this has the meaning for which HMRC contend.

43. For all of these reasons, I believe Rose J came to the right conclusion on the first issue. In my judgment and subject to the second issue, it is a requirement of the phrase "held on trust for charitable purposes only" in the second limb of s.23 of the IHTA 1984 that the trust is governed by United Kingdom law and subject to the jurisdiction of the United Kingdom courts.

The second issue

44. Article 63 TFEU provides, so far as relevant:

> "1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between member States and between Member States and third countries shall be prohibited."

45. In light of the decision of the Court of Justice in Case C-171/96 *Rui Alberto Pereira Roque v Lieutenant Governor of Jersey* [1998] 3 CMLR 143, the appellants accept that relations between Jersey and the United Kingdom cannot be regarded as similar to those between two Member States. However, the appellants contend that, for the purposes of Article 63, Jersey is (or is to be treated as) a "third country". They also assert that s.23, as HMRC contend it should be construed, would constitute an unlawful restriction on the movement of capital.

46. HMRC dispute that Jersey is (or is to be treated as) a "third country" within the meaning of Article 63 and they also contend that any restriction on the movement of capital of the kind in issue in this case can be justified.

47. Unfortunately neither the appellants nor HMRC were in a position to develop these submissions at the hearing of the appeal and accordingly we had no alternative but to direct that we would deal with the appeal in two parts; that we would proceed to hear argument upon and give judgment in relation to the first issue and then, should it be necessary to do so, we would give directions for the disposal of the second issue. In light of the conclusion I have reached on the first issue it is indeed necessary to deal with the second issue and accordingly I would invite the parties to consider together and propose directions for that purpose.

Lord Justice Tomlinson:

48. I agree.

Lord Justice Moore-Bick:

49. I also agree.