Neutral Citation Number: [2014] EWHC 3010 (Ch)

Case No: CH/2013/0499

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2014

Before:

MRS JUSTICE ROSE DBE

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Between:

(1) PETER ROUTIER **(2) CHRISTINE ANN VENABLES**	**Appellants**
- and -	
COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

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

Hearing date: 28 July 2014

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Judgment

MRS JUSTICE ROSE DBE:

1. This appeal raises the question whether the disposition in the will of the late Beryl Coulter is exempt from inheritance tax because it comprises property which is given to charities within the meaning of section 23 of the Inheritance Tax Act 1984 ('the IHTA'). The appeal is brought by the Appellants who are the executors of Mrs Coulter's will. They challenge the notices of determination given by the Respondents ('HMRC') on 29 May 2013 determining that relief under section 23 is not available. I gave permission for the appeal to be brought in the High Court rather than before the First-tier Tribunal by order dated 19 November 2013, pursuant to section 222(3)(b) of the IHTA. The liability to tax if HMRC are correct in their assessment that the disposition is not exempt is for a sum between £591,724 and £633,571 – there is some difficulty in determining this more precisely but that is not relevant to this dispute.

2. Mrs Coulter died on 9 October 2007 and was domiciled in Jersey at the date of her death. Her will is dated 1 October 2004. Probate was granted in the Probate Division of the Royal Court of Jersey on 25 October 2007. In her will Mrs Coulter left a number of legacies to various people (totalling £210,000). As to the residue, the will provides that it is to given to her executors to be held on trusts (referred to as the Coulter Trust):

> '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 (hereinafter known as "the Incorporated Body").'

3. The will set out express conditions to which the trust was subject, including a condition that the money must not be used for buying the land because the provision of the land by the Incorporated Body or the Parish of St Ouen in Jersey ('the Parish') was a precondition to the release of any funds.

4. Clause 3 of the will provided a gift in default:

> '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 identical conditions as those set out in paragraph 2(iii), 2(iv) and 2(v) hereof.'

5. The will set out the powers of the trustees and finally provided by clause 18 that:

> 'The Proper Law appertaining to the Coulter Trust shall be the Law of the Island of Jersey.'

6. It became apparent after Mrs Coulter's death that HMRC did not accept that the gift of the residue to the Coulter Trust was exempt from inheritance tax. On 28 April 2009 the Appellants entered into a Deed of Variation with representatives of the Parish and of Jersey Hospice Care. By the Deed of Variation the parties declared and directed that the will shall take effect with a new provision replacing the gift of the residue. The replacement clause provided for an absolute gift to Jersey Hospice Care of £10,000 and an absolute gift of the residue to the Appellants to use for the purpose of the construction of homes for the elderly of the Parish. The Deed of Variation contained a further clause which said:

> 'AND PROVIDED FURTHER THAT my trustees shall have the power to vary the terms of the Coulter Trust in so far as may be necessary in order to comply with any legal requirement in Jersey or elsewhere in order to ensure that the Coulter Trust shall be operated exclusively so as to be held on trust for charitable purposes only as required by section 23 of the Inheritance Tax Act 1984 (a statute enacted by the Houses of Parliament in the United Kingdom) and that if my Trustees

> make any such variation of the terms of the Coulter Trust such variation shall be deemed to be incorporated into the terms of this my Will with effect from the date of my death.'

7. There was a second deed of variation entered into when the Appellants retired as trustees (but not as executors) and appointed Thomas Eggar Trust Corporation Ltd as the sole trustee on 1 October 2010. That new trustee executed a deed on 12 October 2010 amending clause 18 of the will to replace the reference to Jersey law with a reference to the law of England and Wales ('the Proper Law Variation'). They did this pursuant to the power in the earlier Deed of Variation. The Coulter Trust was registered as a charity by the UK Charity Commission on 14 February 2011.

8. The IHTA provides as follows:

   i) Section 1 provides that inheritance tax shall be charged on the value transferred by a chargeable transfer.

   ii) Section 2(1) provides that a chargeable transfer is a transfer of value which is made by an individual but is not (by virtue of Part II of the IHTA or any other enactment) an exempt transfer.

   iii) Section 4(1) provides that on the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred had been equal to the value of his estate immediately before his death.

9. Part II of the IHTA sets out which transfers are exempt. Section 23 provides:

> '**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. Section 272 of the IHTA provides that 'charity' and 'charitable' have the same meanings as in the Income Tax Acts. In 2007 that meaning could be found in section 989 of the Income Tax Act 2007 which defines a charity as 'any body of persons or trust established for charitable purposes only'.

11. There was no definition of 'charitable purposes' in the IHTA or the Income Tax Acts so the words have their English common law meaning. I will refer to those purposes as 'UK law charitable purposes' though such purposes can be fulfilled by work

carried out entirely overseas. The definitions in the Charities Act 2006 only came into force on 1 April 2008, after Mrs Coulter's death.

12. Subsection (6) of section 23 read in conjunction with section 989 of the Income Tax Act 2007 therefore can be read as having two limbs -

    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;

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

13. So far as variations of dispositions are concerned, section 142 of the IHTA provides:

> '**142 Alteration of dispositions taking effect on death.**
>
> (1) Where within the period of two years after a person's death—
>
> (a) any of the dispositions (whether effected by will, under the law relating to intestacy or otherwise) of the property comprised in his estate immediately before his death are varied, or
>
> (b) the benefit conferred by any of those dispositions is disclaimed,
>
> by an instrument in writing made by the persons or any of the persons who benefit or would benefit under the dispositions, this Act shall apply as if the variation had been effected by the deceased or, as the case may be, the disclaimed benefit had never been conferred.'

14. There are certain matters that are common ground between the parties for the purposes of the proceedings before me.

    i) The objects of the Coulter Trust (both before and after the Deed of Variation) and of Jersey Hospice Care are exclusively UK law charitable purposes.

    ii) No instrument varying the will was made by the Appellants between the date of the Deed of Variation and the Proper Law Variation.

    iii) Section 142 of the IHTA did not apply to give the Proper Law Variation retrospective effect.

    iv) The Coulter Trust was not established in the United Kingdom.

15. The issue between the parties is whether the gift to the Coulter Trust falls within section 23(1) because it falls within the second limb of section 23(6), being a gift which is held on trust for charitable purposes only. The Appellants argue that the plain words of subsection (6) indicate that all that is needed for the exemption to apply is that (i) there is a trust – and there is no doubt that the Coulter Trust is a trust –

and (ii) the trust's purposes are exclusively UK law charitable purposes – and HMRC have accepted that this is the case. HMRC say, however, that there is an implied requirement in both limbs of subsection (6) that the body of persons or trust (in the first limb) or the trust (in the second limb) are governed by the law of some part of the United Kingdom. I shall refer to that as the body of persons or trust needing to have a 'UK link'. HMRC therefore conclude that because the Coulter Trust is governed by Jersey law it does not qualify as a 'trust for charitable purposes only' for the purposes of either limb. The Appellants accept that a UK link is required for the first limb and therefore that the Coulter Trust cannot benefit from the exemption by falling within the first limb. But they say that there is no need for a UK link for the second limb to be satisfied.

16. The source of the requirement of a UK link for the first limb is the decision of the House of Lords in *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1956] AC 39, upholding the decision of the Court of Appeal in *Camille and Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1954] 1 Ch 672 ('*Dreyfus*'). The Dreyfus Foundation was a New York corporation resident outside the United Kingdom. It never conducted any operations here. The Foundation applied to HMRC for exemption from income tax in respect of income earned in the United Kingdom. The relevant exemption was section 37(1)(b) of the Income Tax Act 1918. That provided that exemption was granted from taxation under the various Schedules which at that time applied to different kinds of income. The exemption applied to income:

> '… forming part of the income of any body of persons or trust established for charitable purposes only or which, according to the rule 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; …'

17. In *Dreyfus*, Evershed MR recorded that it had been common ground in that case that the reference to 'charitable purposes' in section 37 meant purposes which are UK law charitable purposes, that is, at that time 'within the scope and intendment of the preamble to 43 Eliz. 1, c. 4'. The Special Commissioners had decided in the Foundation's favour that the Foundation's purposes complied with this requirement. This finding was upheld by all three members of the Court of Appeal and was not disturbed by the House of Lords. However, the Court of Appeal held that because the Foundation was not established under and in accordance with the laws of the United Kingdom, it could not benefit from the exemption. Evershed MR held first that there was no reason to treat the phrase 'body of persons' in section 37 as limited to bodies resident in the United Kingdom. The important question was the proper interpretation of the requirement that the body be 'established'. He noted that section 37 formed part of a group of sections and that other sections within that group clearly dealt with institutions that were UK based such as the British Museum and friendly societies. He noted also that there was a penalty imposed by section 40 of the Act for making a fraudulent claim and that it would be administratively difficult to apply that penalty to non-residents. He referred to the heading of the relevant group of sections as including the word 'charities' which he concluded must refer to charitable 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 are charitable according to that law: (page 683)

> 'In my judgment the two aspects or characteristics are almost inseparable. The law relating to charities or charitable trusts is a peculiar and highly complex part of our legal system. An Act of Parliament which uses the words 'charity' or 'charitable' trust must be intending to refer to that special and characteristic, if not in some respects artificial, part of our law'.

18. Evershed MR considered that it would be 'at least awkward and artificial' to treat the reference to charitable purposes as bearing the meaning given by United Kingdom law and then seek to evaluate the purposes of a body governed by non-United Kingdom law according to that test. This was particularly so given that it was also necessary to show that the income was in fact used for that purpose in order to qualify for the exemption. A contention that Parliament intended that such an exercise be carried out generated what appeared to him to be 'an inherent incompatibility'. He therefore held that as a matter of ordinary language and common sense, the intention of Parliament in referring to a body of persons established for charitable purposes only must mean that the body is constituted or regulated so as to be subject to the jurisdiction of the courts which can alone define and regulate those purposes.

19. He then turned to consider the use of the term in the context of section 37 and found that this supported the conclusion he had reached on the basis of the ordinary meaning of the words. The exemption applied not just to charitable institutions but to hospitals, public schools and almshouses, cathedrals, colleges, churches and chapels. This must, he held, be limited to institutions in the United Kingdom. He then said this: (emphasis added)

> '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 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'*
>
> The reference to Acts of Parliament, charters etc must be to instruments subject to and taking effect according to the laws of the United Kingdom. That alternative clearly therefore was

> limited by reference to our local law and if that was the case then the same must be true of the reference to any body of persons or trust.'

20. Jenkins LJ in *Dreyfus* placed particular emphasis on the administrative difficulty which must inevitably attend the world-wide application of the exemption once it was accepted that the phrase 'charitable purposes' meant United Kingdom law charitable purposes: 'This would be liable to give rise in many cases to an abstruse and controversial inquiry, hardly to be answered short of litigation'. Jenkins LJ also referred to the surrounding sections of the Act as pertaining clearly to UK institutions such as the British Museum and held that the other sources of income referred to in section 37 – land, almshouses, colleges and cathedrals etc – must refer to institutions of descriptions existing and legally recognised in the United Kingdom. He also, significantly, considered whether it was appropriate to split the first branch of the exemption relating to bodies of persons from the second branch which contained the reference to Acts of Parliament and so forth. He held that that was a wrong approach: the phrase must be construed as a whole. Both the body of persons and the trust must be shown to be established for charitable purposes only and that must impose the same requirement for a link for both kinds of entities. The requirement was only satisfied by a body of persons which is under the law of the United Kingdom subject to an obligation enforceable in our courts to apply its funds for purposes which are according to that law exclusively charitable. The Foundation therefore did not benefit from the exemption.

21. In the House of Lords, the main speech was given by Lord Morton of Henryton with whom the other members of the House agreed. He referred to the full and clear judgments in the Court of Appeal and upheld the decision for the reasons given in those judgments.

Discussion

22. In my judgment the reasoning of the Court of Appeal in *Dreyfus* applies to the wording of section 23 of the IHTA. The Coulter Trust does not qualify for exemption under either limb of subsection (6) because it is not governed by United Kingdom law but by Jersey law. Mr Vallat, appearing for the Appellants, argued that the Court of Appeal in the *Dreyfus* decision focused on the requirement that the body of persons or trust must be 'established' for charitable purposes only and held that the word 'established' must mean 'established in the United Kingdom'. Since that word is not incorporated into the second limb of section 23 by the definition of section 989 of the Income Taxes Act there was no justification for requiring the UK link in relation to the second limb.

23. Although Evershed MR stated that the meaning of the word 'established' was an important point, both he and the other members of the Court relied on other indicators when concluding that a UK link was needed. The most significant was the incongruity of requiring a court to ascertain whether the purposes of a body governed by foreign law were UK law charitable purposes. Mr Vallat argued that there is no such difficulty here because it is accepted that the Coulter Trust does have exclusively UK law charitable purposes. That is not, however, an answer to the point. In *Dreyfus* itself, the Court of Appeal upheld the finding of the Special Commissioners that the purposes of the Foundation were exclusively UK law charitable purposes. The fact

that in the instant case it may be relatively easy to form a view as to whether or not the purposes of a foreign trust are UK law charitable purposes does not overcome the problem that if the Appellants are right in their construction of section 23, trusts governed by any non-UK legal system potentially benefit from the exemption.

24. Mr Vallat pointed to other references in the IHTA where the term 'trust' is, he submits, used to cover both UK and overseas trusts, for example in relation to transfers to a spouse or civil partner in section 18. He also showed me provisions where the legislation does require the application of UK law concepts and principles to overseas bodies, for example in the definition of 'settled property' in section 43 of the IHTA. I accept that the word 'trust' may cover overseas trusts in other aspects of inheritance tax law and that there are other contexts in which taxpayers and HMRC have to grapple with the difficulty of applying domestic concepts to overseas bodies. However, the use of a wider meaning in other contexts is not sufficient to override the *Barras* principle that in using these words in section 23, Parliament must be taken to have been aware of the interpretation that had been given to them in this context by the *Dreyfus* decision and to have intended to bring forward that meaning into the present legislation: see Bennion on Statutory Interpretation, fifth edition pages 600 - 604.

25. Mr Vallat also submitted that in *Dreyfus* the Court of Appeal decided that the reference in the second limb of section 37 to Acts of Parliament and charters must refer to acts of the UK Parliament and Royal charters; that the reference to trusts in that list of sources of rules and regulations must also therefore be a reference to UK trusts; that if the reference to trust in the second limb was to UK trusts then that indicated that the 'trust' in the first limb reference to 'body of person or trust' must also be to a trust established in the United Kingdom. He argued that whereas the Court of Appeal thus argued from the second limb meaning to the first limb, here HMRC were trying to argue in the opposite direction to say that because *Dreyfus* decides that the first limb of section 23 requires a UK link, that must mean that the second limb does so as well. I agree that that is HMRC's line of argument but I do not accept that it is illegitimate. The fact that some of the contextual indicators relied on by the Court of Appeal in support of the UK link (such as references to the British Museum, friendly societies, Acts of Parliament etc) have been omitted from the present wording does not mean that the conclusion reached by the Court of Appeal and House of Lords in *Dreyfus* no longer applies.

26. The Appellants have not put forward any good reason why Parliament should have intended that the second limb of section 23 should be so much broader than the first, encompassing trusts governed by foreign law but limited to charitable bodies established under UK law. Another important plank in the reasoning of the Court in *Dreyfus* was that the distinction drawn between the first limb of section 37 (namely income of any body of persons or trust established for charitable purposes) and the second limb of section 37 (namely income which according to the rule established by deed of trust or will are applicable to charitable purposes only) was intended only to distinguish between income held by bodies which are exclusively charitable on the one hand and bodies which are not exclusively charitable but which hold the relevant income for exclusively charitable purposes on the other. It was not intended to be a difference beyond that, allowing a much wider geographic range of bodies to fall within the second limb than could fall within the first. The Appellants' interpretation

of section 23 appears to discriminate between overseas trusts and overseas incorporated charities since the latter would not be able to fall within either limb of section 23 whereas the former would fall within the second limb.

27. I accept the point made by Mr Yates for HMRC that one must bear in mind that subsection (6) of section 23 is only a definition section. The primary exempting provision is subsection (1) which refers only to property given to charities. The word 'charities' as defined in section 989 of the Income Tax Act clearly imports the UK link as it refers to bodies established for charitable purposes. Mr Yates referred me to the well-known passage from the speech of Lord Hoffmann in *Macdonald (Inspector of Taxes) v Dextra Accessories* [2005] STC 1111 where he stated that although a definition may give a word a meaning different from its ordinary meaning, the choice of words by Parliament should not 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': see paragraph 18 of his speech. If Parliament had intended to extend the scope of the exemption to overseas trusts, it would have made this clear in subsection (1) rather than using there a word which imports the requirement for a UK link.

28. Turning now to the Deed of Variation, Mr Vallat submitted that the clause which I have set out in paragraph 6 above should be read not as conferring a power on the trustees to vary the will but as imposing a duty upon them to do whatever is necessary to ensure that the trust meets the requirements for relief under section 23. He further relies on the equitable maxim that 'equity regards as done that which ought to be done' to argue that the will should be treated as having been varied so that it can benefit from the exemption. Ingenious though this argument is, it cannot succeed. The wording of the Deed of Variation is clearly the wording of a power and not of a duty. It does not of itself alter the terms of the will trusts. The Appellants could have taken steps to remedy the problem identified by HMRC but they did not do so. The equitable maxim cannot make good that omission.

29. I therefore dismiss the appeal on the grounds that the expression 'held on trust for charitable purposes' in section 23(6) requires not only that the charitable purposes be UK law charitable purposes but that the relevant trust be subject to the jurisdiction of the United Kingdom courts as well.