IN RE HAMPDEN SETTLEMENT TRUSTS

[1977] T.R. 177

JUDGMENT

MR. JUSTICE WALTON: The originating summons in this matter raises a short but difficult question. It is that it may be determined whether upon the true construction of two settlements and in the events which happened the Deed dated March 25th, 1976 is either wholly valid according to its terms or alternatively not effective as to all or any of the provisions thereof.

The Deed in question was executed in pursuance of powers conferred by a settlement on January 25th, 1961. There is another settlement of April 25th, 1962 (referred to in the title of the originating summons) made between the same parties, which merely adds additional property to that comprised in the first settlement, and therefore for present purposes may be disregarded.

The settlement in question was made on January 25th, 1961 between the Right Honourable John Hampden, the Eighth Earl of Buckinghamshire of the one part, and the Plaintiffs, John Cole and Roger Parker-Jervis as Trustees of the other part. The Earl himself had no direct descendants and the title passed to a cousin. Accordingly, the beneficiaries thereunder are in fact the descendants of the Eighth Earl's father, the Seventh Earl.

The settlement, so far as material, first of all defines various expressions as follows. First of all 'the Income Beneficiaries' is defined as meaning the descendants of any degree of the Seventh Earl (other than the Eighth Earl) together with the spouses widows and widowers of any of the said descendants (other than the Eighth Earl).

'The Capital Beneficiaries' means the same descendants (other than the Eighth Earl). I need not read 'the Trust Property', which consist partly of investments, partly of chattels and partly from moneys arising from the sale of freehold property.

'The Closing Date' means the day falling twenty years after the death of the last survivor of such of the descendants of his Late Majesty King George the Fifth as are living at the date of the Deed.

Under clause 4 until the closing date the trustees were to hold the trust property upon trust to pay or apply the income thereof to or for the benefit of all or such one or more exclusive of the other or others of the income beneficiaries for the time being living as the trustees should in their absolute discretion think fit.

Clause 5 provided that at and after the closing date the trustees should hold the Trust property upon trust absolutely for such one or more exclusive of the other or others of the capital beneficiaries as the trustees should by deed or deeds executed on or before the closing date appoint and in default of and subject to any such appointment upon trust for the two named charities in equal shares absolutely.

Then one comes to clause 6:

'Notwithstanding the trusts and powers hereinbefore contained the Trustees (not being less than two in number) shall have power from time to time and at any time before the closing date to pay transfer or apply the whole or any part or parts of the capital of the Trust property to or for the benefit of all or such one or more exclusive of the other or others of the capital beneficiaries for the time being living as the Trustees shall in their absolute discretion think fit and without prejudice to the generality of the foregoing it is hereby declared that the Trustees may apply capital for the benefit of any one or more of the capital beneficiaries for the time being living and whether an infant or not by revocably or

irrevocably allocating or appropriating to him or her such sum or sums out of or investments or property forming part of the capital of the Trust property as the Trustees shall think fit either absolutely or contingently upon the happening of a specified event and so that the provisions of section 31 of the Trustee Act 1925 (modified as later provided) and the powers of the Trustees in clauses 8 to 13 (inclusive) hereof contained shall apply in respect of any money investments or property so allocated or appropriated'.

It is this clause which raises the present question.

Basically the settlement conveyed one half of the Hampden estate to the trustees to form the bulk of the trust property. The bulk of this estate had descended without a sale since the time of John Hampden of ship money fame, although not in the male line. It has been in the settlor's immediate family since 1824. The settlor was anxious that the estate should be preserved as an entity as long as possible and he regarded as his heir for this purpose Mr. Ian Hampden Hope-Morley, a great grandson of the Seventh Earl, to whom he in fact devised the other half of the estate which he retained in hand.

Mr. Ian Hope-Morley was born on October 23rd, 1946 and married on April 29th, 1972. He has one child only, the first defendant, born on June 13th, 1974. In the circumstances it is obviously likely that he will have more children.

He is (and this is a very important point) himself amply provided for, with a free estate in excess of 500,000 and a substantial unearned income in addition to an earned income of some 8,000 per annum.

The introduction of capital transfer tax by the Finance Act of 1975 raised considerable problems for the plaintiffs as trustees of this settlement, which it would be convenient to refer to as 'the Hampden Settlement'. This is what Mr. Cole, one of the trustees, says in paragraph 9 of his affidavit:

'... we were advised that the Hampden Settlement was prospectively liable to the periodical charge (Capital Transfer Tax) under the Finance Act 1975, Schedule 5, paragraph 12, and that the first charge would arise in January, 1981 and be followed by similar ten yearly charges thereafter. In addition if and when distribution was made or interests in possession created a further charge would be incurred on the capital value of the settled property. Taking the value of the settled property in 1981 quite arbitrarily at 500,000, the periodical charge at present rates of tax would be 67,162 and the charge on a complete distribution would be 223,875, but periodical charges paid during the 20 years preceding that distribution would give relief against the charge on the latter. On the other hand transitional relief was available under Finance Act, 1975 Schedule 5, paragraph 14 if either the Hampden Settlement was brought within paragraph 15 of Schedule 5 to that Act, which provides for special treatment for

accumulation and maintenance settlements in favour persons under the age of 25 years, or if an interest in possession was created in favour of one or other of the capital beneficiaries. My co-Plaintiff and I came to the conclusion that the prospective fiscal burden on a settlement as large as the Hampden Settlement if it remained one under which there was no interest in possession and which was not within paragraph 15 of the 5th Schedule to the Finance Act 1975, was so great that the trusts should be altered so as to avoid this burden. This was reinforced by the consideration that a liability for substantial sums in estate duty had been incurred on the death of the Settlor in 1963. Save for the postponed liability on the timber estates this has now been discharged.'

So the trustees considered what course they should take, and the results are set out subsequently in Mr. Cole's affidavit.

'My co-Plaintiff and I consulted with Mr. Ian Hope-Morley on the question what exercise of our powers under clause 6 of the Hampden Settlement would in the circumstances be the most prudent. We were advised that the terms of clause 6 restricted us to payments or applications of trust property for the benefit of capital beneficiaries for the time being living and so far as Mr. Ian Hope-Morley's immediate family was concerned that limited the field to Mr. Ian Hope-Morley and his daughter Juliette. Careful consideration was given to the question whether the application of the property subject to the Hampden Settlement on trusts for the benefit of all Mr. Ian Hope-Morley's children would be for the

benefit of Mr. Ian Hope-Morley as well of course as being for the benefit of Juliette. Mr. Ian Hope-Morley was of the opinion that it would be beneficial to him if such an application was made and my co-Plaintiff and I agreed with him.

'The following factors were taken into consideration in reaching this conclusion:-

(a) Mr. Ian Hope-Morley himself was already well provided for materially and by the same token he or his heirs had a prospective heavy liability to capital transfer tax to bear in respect of his present free estate. A distribution in favour of Mr. Ian Hope-Morley or the creation of an interest in possession in his favour would exacerbate this difficulty.

(b) In view of Mr. Ian Hope-Morley's age there must be a strong possibility of his having further children.

(c) If Mr. Ian Hope-Morley has a child or children other than Juliette he will wish to provide for such child or children and in any event he would not wish his eldest daughter if he has a son or sons to have a substantially larger estate and particularly a larger share in the Hampden estate than such son or sons.

(d) If Mr Ian Hope-Morley does have a further child or children it will be a substantial financial advantage to him for there to be funds available for their maintenance during minority and for their endowment when they grow up. A particular fiscal consideration is that income applied for their maintenance arising from property of which Mr. Ian Hope-Morley was not the Settlor would not fall to be treated as his for tax purposes whereas if he is the Settlor any income from the property settled by him which is applied for their maintenance whilst they are minors would be treated as Mr. Ian Hope-Morley's for tax purposes under Income and Corporation Taxes Act, 1970, section 437.

(e) As is implicit in what has already been said, my co-Plaintiff and I in the light of our consultations with Mr. Ian Hope-Morley would not have been prepared to exercise our powers so as to allocate the fund to Mr. Ian Hope-Morley for any interest in possession (whether an absolute or lesser interest). Nor would we have been prepared at this stage to allocate more than a fraction (say one-fifth or one-quarter) of the fund to Juliette to the exclusion of after born children.'

It is quite clear that, as is reported in that affidavit, Mr. Ian Hope-Morley himself agreed with the views of the trustees. So in spite of the realisation that to some extent they were defeating the desires of the settlor that the estate should be kept together as an entity, at any rate if (as expected) Ian has more children, and in spite of some qualms as to whether the deed was valid or not, the trustees executed the deed of March 25th, 1976, whose validity is

now in question. The operative part of that deed is in the following terms:

'Now therefore the Trustees in exercise of the above recited power conferred upon them by or by reference to clause 6 of the Hampden Settlement and of all other (if any) powers them hereunto enabling' - and pausing there for one moment no-one has suggested that there are any other such relevant powers apart from those in clause 6 - 'hereby declare as follows: -

1. The Trust property shall henceforth be held upon trust for such of Juliette and the children hereafter to be born to Ian Hope-Morley as shall be living on the closing date or earlier attain the age of 25 years and if more than one in equal shares absolutely.

2. The class of children entitled under the last preceding clause shall not close upon the attainment by one member of a vested interest but shall remain open until whichever is the earlier of the closing date and the death of Ian Hope-Morley.'

There are various subsidiary provisions which I need not read.

It is, I think, slightly unfortunate that recital (F) should be in these terms,

'The trustees have consulted with Ian Hope-Morley and in the light of such consultation and with the approval of Ian Hope-Morley have concluded that it would be for the benefit of Juliette and Ian Hope-Morley for the Trust Property to be applied by being made subject to the trusts powers and provisions hereinafter declared and contained',

because the whole case which has been put forward by Mr. Browne-Wilkinson on behalf of. the first defendant is that the justification for the whole exercise is that it is basically for the benefit of Mr. Ian Hope-Morley, by relieving him from liabilities which he might otherwise have to incur so far as his children are concerned. But I suppose that the trustees had in mind that as Juliette is a member of the class it is right to say that the resettlement is for the benefit of Juliette. But in any event, however that may be, it is perfectly clear from the affidavit of Mr. Cole that the trustees have in fact throughout been motivated solely by the desire to benefit Mr. Ian Hope-Morley himself, and therefore I do not think that I need give any considerable weight to that recital.

The crucial question therefore is on the true construction of clause 6 of the Hampden Settlement was it proper for the Trustees to decide to benefit Mr. Ian Hope-Morley by resettling the trust property on his children, including unborn children, in the manner indicated in the deed of March 25th, 1976. For the first defendant,

obviously benefiting from the exercise of the trustees' powers if valid, Mr. Browne-Wilkinson submitted four propositions of law.

(1) That the power in clause 6 to apply capital for the benefit of somebody is the widest possible formulation of such power.

(2) That under such a power the trustees can deal with capital in any way which, viewed objectively, can fairly be regarded as being to the benefit of the object of the power, and subjectively they believe to be so.

(3) Such benefit need not consist of a direct financial advantage to the person who is being benefited. It may be that he is benefited by benefiting a near relation or by relieving him of moral responsibilities.

(4) In the present case the application of capital is designed to relieve the object of the power, Mr. Ian Hope-Morley, from the legal obligation to maintain his children, or alternatively relieve him from the moral obligation to do the same, and is therefore to his benefit.

In support of these propositions he cited the well known cases of *In Re Pilkington* (1); *Re Kershaw's Trust* (2); *Re Clore's Settlement* (3); *Re C.L.* (4). There is no necessity to discuss the nuances of any of these propositions, because they have all been

broadly accepted as correct by Mr. Price for the second defendant, one of the income and capital beneficiaries who will be excluded from all further interest in the Hampden Settlement if the trustees have indeed exercised their powers validly. It is of course of the essence of Mr. Browne-Wilkinson's argument that the capital beneficiary for whose benefit the capital of the trust property is being so paid, transferred or applied is Mr.]an Hope-Morley. He it is who is being benefited by provisions made for his children. The whole range of his children come in and they come in as persons to whom he would otherwise owe a considerable obligation in respect of making provision for their future.

I should I think add, principally because the point was so clear that neither counsel adverted to it, but one which might not be so clear to anybody barely reading the report in this case, that the figures are such that it is quite possible to regard this provision for the children, although generous, as being for the benefit of Mr. Ian Hope-Morley. By way of a *reductio ad absurdum* if Mr. Ian Hope-Morley had himself no resources whatever then I do not think it would be possible objectively to regard the making of a provision of half a million pounds or thereabouts for his children as realistically conferring a benefit upon him. But here he is himself, as I have already observed, very well provided for, and that makes all the difference. In every case the question must be one of degree, but there are no such difficulties in the present case.

Mr. Price for the second defendant really takes a very simple and fundamental point. He says that the terms of clause 6 of the

Hampden Settlement are such that it is not possible to benefit unborn persons in any way whatsoever. He emphasised this in answer to a question by me by inferring that it would not have been possible for the trustees to have exercised their powers so as to resettle any part of the trust property upon Mr. Ian Hope-Morley for life with the remainder for all his children at 18 or something similar. I should perhaps in passing note one other submission of Mr. Price's, which was to the effect that the words 'pay transfer or apply' which are to be found in clause 6 do not justify a simple resettlement in the manner contained in the deed of March 25th, 1976. 1 do not think that there is anything in this point. It really cannot be the law that if the trustees had themselves set up a settlement in precisely the same terms as the deed of March 25th, 1976 and thereby settled 50 they would have been in order in transferring to the trustees of that settlement the whole of the trust property, but that they cannot possibly reach the same result by the short cut they have in fact taken.

Mr. Price's main point, however, is an attractive one. It is what may be shortly described as the 'living hand' theory. Clause 6 he suggests is dealing with living hands to take, in much the same manner as clause 4 is dealing with living hands to take income. The Hampden Settlement is, he suggests, a rather unsophisticated one, and the living hand theory fits in well to such a settlement. He further submits the second half of clause 6, commencing with the words "without prejudice" in effect indicate very clearly what the draftsman had in mind, which was a simple payment or allocation of some nature to one single person.

Attractive as Mr. Price's submissions are I do not think at the end of the day that they represent the correct construction of that clause. I am more than willing to believe that the draftsman thereof may well never have contemplated the kind of resettlement which is here in question, but I see no escape from the conclusion that it is well warranted by the precise words which he has used. First who may be benefited thereunder? The answer is all or such one or more exclusive of the other or others of the capital beneficiaries for the time being living as the trustees shall in their absolute discretion think fit. Ergo, since Mr. Ian Hope-Morley is one of the capital beneficiaries, and is fortunately still with us, it is permissible for the trustees to benefit him.

How may the fund be exercised in his favour? The answer is by paying, transferring or applying the whole or any part or parts of the capital of the trust property to or for his benefit.

Is it for his benefit to apply the capital of the trust property by settling it all on his children, present and future? The answer is, as the cases show clearly as summarised in Mr. Browne-Wilkinson's propositions, that it is, or perhaps more accurately, that it may be; and on the facts as to the relative financial position of Mr. Ian Hope-Morley and the capital of the trust fund proposed to be resettled, that it is.

I trust that in reaching this conclusion I have not ignored Mr. Price's injunction to give as much weight to the words 'for the time being living' as I have given to the words 'for his benefit'. But in my judgment those words point only to the primary beneficiary, the person who primarily benefits from the whole exercise being undertaken, who is in this case Mr. Ian Hope-Morley and none other.

I shall accordingly answer Question 1 of the originating summons in sense (a).

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