

Richard & Others v. The Hon AB Mackay & Others

Trust Law International, vol. 11 (1997)

Judgment

MILLETT J: This is a summons taken out by the trustees of a settlement made on 2nd April 1965 by Lord Tanlaw. The trustees seek a direction that they may be at liberty, if in the exercise of their discretion they think fit, to exercise a power vested in them by a deed of re-appointment made on 31st March 1981 by applying assets not exceeding 1 million in value, being or part of the capital of a share of the first defendant, and assets of a similar value, part of the capital of a share of the second defendant, for the benefit of those defendants by transferring the sums raised to the trustees of a new settlement which it is proposed should be made by Lord Tanlaw in Bermuda.

The settlor, Lord Tanlaw, is the third son of the second Earl of Inchcape. The second Earl married twice. By his second marriage he married Leonora Margaret Brooke, the oldest of three daughters of the last Rajah of Sarawak. The settlor himself also married twice, and by his second marriage he married a Malaysian lady by whom he has two children aged six and five, the first and second defendants.

The trusts of the deed of re-appointment are essentially accumulation and maintenance trusts for the defendants, future children of the settlor and their issue, contingently on attaining twenty-five. There are remoter beneficiaries in the event of all principal beneficiaries dying under twenty-five. The settlement has a worldwide power of investment. There is a wide

power of advancement which extends to the whole of the trust funds, which could be advanced in favour of any single beneficiary for his benefit. The trust fund is presently worth some 7 million. It is invested widely throughout the world: there are holdings in the United States, Germany, Switzerland and Australia as well as the United Kingdom.

The proposal is to raise a total of 2 million, of which half would be raised now, out of a holding of American dollars and, I think, some shares in a German bank. The balance may be raised if some woodlands in the United Kingdom are sold. They are expected to fetch some 2 million, and it is the present intention to raise half of that sum and transfer that as a second tranche to the trusts of the proposed Bermudan settlement.

The evidence of the trustees sets out the history of the family. It discloses significant connections with the Far East. The family remain substantial shareholders of the Inchcape group of companies. Lord Tanlaw himself has been a director of Inchcape plc since 1967, and was managing director from 1967 to 1971. The family have very substantial overseas connections, particularly in the Far East. Lord Tanlaw himself established a Sarawak foundation. Lord and Lady Tanlaw visit the Far East frequently, often with their children. They maintain their links with Lady Tanlaw's family and with Sarawak. Lord Tanlaw was president of the Sarawak Association from 1972 to 1975; he is a member of the Oriental Club in London; he has extensive business interests overseas, including interests in Singapore, the United States and Australia, and he and Lady Tanlaw jointly own a farm in Australia. The Trustees have deposed to their opinion that it is clearly possible, and indeed likely, that, in view of their overseas connections, family, historic and commercial, the defendants will spend considerable periods overseas, and there is a real possibility that at some stage one or both of them may decide to settle abroad. There is also a considerable possibility that, in the event of the early death of Lord Tanlaw, Lady Tanlaw would decide to live in the Far East with her children, the first two defendants.

In those circumstances the trustees have deposed that they consider it would be advantageous, particularly to the principal direct beneficiaries, if a proportion of the trust fund were to be transferred to a new overseas settlement, and to that end they have caused a draft of the proposed new settlement to be prepared. The settlement reproduces, with only minor alterations, the main beneficial and administrative provisions of the existing settlement and the 1981 reappointment. There is no immediate tax liability which it is desired to avoid. The main object of the proposal is not to gain a tax advantage but to obtain greater flexibility and diversification with the concomitant additional protection to the trust estate which would result from spreading the risks by hiving off up to 25 per cent of the trust fund and -causing it to be subject to an overseas settlement.

The trustees have pointed out that, although they can now freely send funds to the Far East, to do so has only been possible since the abolition of exchange control and might

no longer be feasible if there were a change in economic conditions that required the introduction of exchange control or if, for any other reason, the export of funds became impossible. They have chosen Bermuda as the sea