COMMENT

Sir Charles Clore and the Mareva injunction

Most of us must by now have lost count of the number of court cases arising from the estate of the late Sir Charles Clore. The four which are most important for IHT purposes have been reported by the Inland Revenue in their series of CTT leaflets. CTTL 14 and 15 are entitled *Stype Investments (Jersey) Ltd* v *CIR* and are concerned with the decision of Goulding J, also reported at [1981] 2 All ER 394, and its reversal by the Court of Appeal, also reported at [1982] 3 WLR 228 and [1982] STC 625 (and see *CTT News & Reports*, Vol 3, pp 159 and 163–174, and Vol 4, pp 15–38). These cases are sometimes known as *Re Clore (No 1).* They deal with the Jersey company's claim to immunity from tax, with the locality of Sir Charles's interest in the Guys estate, and with the company's liability as executor *de son tort*.

Re Clore (No 2) [1984] STC 609 (and *CTT News & Reports*, Vol 6, Rep 7) is the decision of Nourse J that Sir Charles remained domiciled in England at his death. It has not been reported in the CTT leaflets.

Re Clore (No 3), *IRC* v *Stype Trustees (Jersey) Ltd* [1985] 1 WLR 1290, [1985] STC 394 (and *CTT News & Reports*, Vol 6, Rep 8) is the decision of Walton J that the trustees of Sir Charles's settlement were liable to deliver accounts even though resident outside the United Kingdom. It is also reported in CTTL 27.

The fourth case, which was decided on 15 November 1983 but was not immediately reported, is *CIR* v *Stype Investments (Jersey) Ltd*, CTTL 26. This was an application by the defendant company ('Stype Investments') to vary a Mareva injunction freezing its assets in the United Kingdom. The company wished to use its assets to discharge a judgment debt in favour of the Official Solicitor, who was administrator *ad colligenda bona* of the estate of Sir Charles. The Inland Revenue opposed the application, on the ground that the company's UK assets were insufficient to meet the claims for CTT, so that the company ought to pay the Official Solicitor out of its other assets. The case is primarily concerned with enforcement procedure, an arcane subject well outside the main stream of CTT law; but it contains some interesting points, particularly with reference to the Inland Revenue charge under IHTA 1984, s 237. In the following paragraphs, references to that Act have been substituted for references to the earlier legislation.

In the first place, Stype Investments contended that its liability as executor *de son tort* was limited by IHTA 1984, s 204(1)(*a*), to an amount equal to the proceeds of sale of the Guys estate plus interest under s 233. The Inland Revenue submitted that the ceiling should also include the income derived by the company from the proceeds of sale. Vinelott J was 'far from persuaded' that this construction was correct, and said that if it were correct the consequences would be astonishing. Section 204(1)(*a*), he thought, was capable of a more limited construction which avoided injustice to personal representatives. The phrase 'the assets . . . which he has received' could be construed as referring to assets which are part of the corpus of the estate but excluding income earned by those assets while in the hands of the personal representatives. But he did not need to express any concluded opinion on this point and thought it would be wrong to do so.

The Inland Revenue had a charge under s 237(1) on the company's shares which Sir Charles had settled on himself for life, and under s 237(2) on 'any property directly or indirectly representing' those shares. They argued that s 237(2) must be read as extending the charge to the underlying assets of the company. Vinelott J was not persuaded that this was a tenable construction. In his judgment subs (2) was not intended and was not apt to create a double charge in such circumstances. The word 'indirectly' was used in subs (2) to make it clear that the charge extends not only to the proceeds of sale of property subject to the charge and to property purchased with those proceeds (which may be said to represent that property 'directly') but also to any property into which the property subject to the charge or the proceeds of sale can be traced.

The settled property also included a debt of more than £50 million owed by Stype Investments to the trustees. The Inland Revenue were entitled to a charge on that debt. They could not of course enforce the charge in Jersey where the debt was payable, but they claimed to be able to recover the debt up to the amount of the charge against assets of the company within the jurisdiction of the British courts. The charge, they said, operates in the same way as a charge created by a transaction between private persons, that is, as an assignment to the chargee by way of security. Stype Investments submitted that though the charge prevented payment of the debt out of assets in the United Kingdom it did not prevent payment out of assets abroad. Vinelott J said that some support for this proposition was to be found in *Dymond's Death Duties* (15th Edn) dealing with FA 1894, s 9(1). The editors of *Dymond* observed that 'the Commissioners have none of the powers of an ordinary mortgagee in connection with the charge', but they cited no authority for this proposition. Section 8(13) of the 1894 Act, which is cited in the same paragraph, provides that the court can appoint a receiver of the rents and profits of any property liable to estate duty and can order a sale of the property. The learned judge said that s 8(13) is of general application and is not specified as the only means of enforcing the charge created by s 9(1). Although there may be no obstacle in Jersey law

to the repayment of the debt out of Jersey assets, *prima facie* the repayment would not under English law discharge the liability of Stype Investments, which could not in this jurisdiction repay the debt except to the Revenue as chargees or with their consent.

Consequently the application had to be approached on the footing that the potential liability of Stype Investments to CTT enforceable against its assets in the UK amounted to a sum far in excess of the value of those assets. As the remedies of a judgment creditor by way of charging order or garnishee proceedings were discretionary, and taking account of other proceedings against Stype Investments, Vinelott J decided not to give the company leave to pay the debt.

Note

The passage in *Dymond's Death Duties* which the company read as supporting its argument can be found at p 949 of the 15th edition and has been carried forward from several earlier editions. It seems most probable that 'the powers of an ordinary mortgagee' mean those listed in s 101(1) of the Law of Property Act 1925, ie, to sell the property, to insure it, to appoint a receiver of the income, and to cut timber. Section 101 applies only where the mortgage is made by deed.

For estate duty purposes the Inland Revenue certainly took the view that their charge operated 'in the same way as a charge created by a transaction between private persons, that is, as an assignment to the chargee by way of security'. The doctrine of equity is that a debtor who has received notice of the charge must withhold all further payments to the creditor unless he makes them with the chargee's consent. If the debtor pays without consent he must pay again to the chargee. See *Rodick* v *Gandell* (1852), 1 De G M & G 763 at p 777; *Durham Bros* v *Robertson* [1898] 1 QB 765; and *Walter & Sullivan Ltd* v *J Murphy & Sons Ltd* [1955] 2 QB 584. This was evidently the view of Vinelott J.

Associated operations: *Macpherson v IRC*

The decision of Goulding J which we reported in Vol 6 at pp 242–244 and Rep 8 pp 79–84 has been reversed by the Court of Appeal. The judgments appear in the Report which will accompany the next issue of *Capital Taxes News & Reports*. Though the case related primarily to the construction of FA 1975, Sched 5, para 6(3), which was repealed in 1982, it is important also in relation to IHTA 1984, ss 10, 52(3) and 65(6), and to the repealed provisions of FA 1975, s 20(4) and Sched 5, para 4(9).

The 'para 6(3)' anomaly

The Court of Appeal found an answer to the an that had troubled Goulding J at first instance trustees argued that, if the Revenue were righ exception at the end of para 6(3) could never app voluntary settlement made after 27 March because the settlor's original disposition would a be an associated operation in relation to the action. Slade LJ thought that this did not nece follow, because taxpayers might be able to sho the series of transactions and associated operatio which the relevant disposition was made di include the original settlement. Ralph Gibson L that the mere fact that a voluntary settlement pre a transaction which is *prima facie* within para coupled with the fact that the voluntary settleme subsequent transaction were made with referer the same property and capable of satisfyin definition in FA 1975, s 44 (now IHTA 1984, s does not mean that the subsequent transactio therefore 'made in' a series of transactions or a ated operations consisting of the voluntary settl and the subsequent transaction.

Accordingly, it seems that the supposed anomal not exist. Though the Court of Appeal did not exp say so, one may hope that the original settleme always be disregarded if it was not made f purpose of facilitating the subsequent transactio

The statutory hypothesis

The main point at issue related to the 'sta hypothesis' in para 6(3), which requires us to su that the trustees were beneficially entitled to the s property. Counsel for the trustees argued t applying this hypothesis we should postulate tional scenario in which the trustees entered in 1977 agreement with Mr Robarts as absolute ov and that that was the only transaction which co introduced into the scenario. It was not legitima said, to introduce the appointment which in re followed on the next day and was a separate action.

Sir Roger Ormrod in his dissenting judgment acc this argument. To take account of the appointme his opinion, would confuse the hypothetical wi actual, a schizophrenic state of mind which Parli could not have intended.

Slade LJ said that on reading para 6(3) togethe s 20(4) he could see no sufficient grounds for ex ing the closing words of s 20(4) when taking ac of the provisions of that subsection in the cou applying the statutory hypothesis to the 1977 a ment. In his judgment it was an inevitable c quence of the hypothesis that the agreement fell regarded as constituting one of a number of asso operations intended to confer a gratuitous bene