

**Judgment 3/2003**

**Kleinwort Benson (Guernsey) Trustees  
Limited et al v Wilson et al  
Royal Court  
(Civil action file 268)  
31st December, 2002**

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**Trusts (Guernsey) Law, 1989 – payment by settlors of UK capital gains tax – whether the trustees are obliged to indemnify the settlors – relevance of rule against enforcement of penal revenue or other public law liabilities of another state.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 31st day of December, 2002 before Sir de Vic Carey, Bailiff; sitting alone.

KLEINWORT BENSON(GUERNSEY)  
TRUSTEES LIMITED, NIGEL CHARLES ROBINS  
and JAMES JOSEPH GILLIGAN

Applicants

v.

FRANK PETER WILSON

First Respondent

and

AUDREY MARY WILSON

Second Respondent

ELIZABETH MARY RISK and OTHERS

Third Respondent

On the application of the above Applicants pursuant to Section 62 of The Trusts (Guernsey) Law, 1989, as amended and/or under inherent jurisdiction of the Court for the following orders:

1. A declaration as to whether or not the Applicants are obliged under the laws of Guernsey to indemnify the First and Second Respondents in respect of tax paid by the First and Second Respondents on 27th July 2001 in the amounts of £85,611 and £137,002.40 respectively, together with interest thereupon, where such right of indemnity arises pursuant to Paragraph 6 (2) of Schedule 5 to the Taxation of Chargeable Gains Act 1992 (UK).

2. The costs of the Applicants, and the First, Second and Third Respondents, be paid for out of the property subject to the trusts of the FP Wilson 1982 Settlement and the AM Wilson 1982 settlement in equal proportion.
3. Such other Order or Orders as the Court shall deem fit.

THE BAILIFF, having on 26th November, 2002 heard Advocates J. E. Roland and N. J. Barnes for the Applicants and the Third Respondents respectively thereon, and in the absence of appearance by the First and Second Respondents, this day ISSUED the attached judgment and

- (1) HELD that the Applicants are obliged to indemnify the First and Second Respondents in the amounts claimed by them respectively; and
- (2) DIRECTED that the fees of Counsel for the Applicants and the Third Respondents be borne by the funds of the settlements.

Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**  
**ORDINARY DIVISION**

**Between**

**KLEINWORT BENSON (GUERNSEY)**  
**TRUSTEES LIMITED, NIGEL CHARLES ROBINS**  
**and JAMES JOSEPH GILLIGAN** **Applicants**  
v.

**FRANK PETER WILSON** **First Respondent**

**and**

**AUDREY MARY WILSON** **Second Respondent**

**ELIZABETH MARY RISK and OTHERS** **Third Respondents**

**JUDGMENT OF THE BAILIFF ON APPLICATION FOR DIRECTIONS IN CONNECTION  
WITH INDEMNITY CLAIM MADE BY THE FIRST AND SECOND RESPONDENTS**

Date of hearing: 26<sup>th</sup> November, 2002  
Date judgment handed down: 31<sup>st</sup> December, 2002

Advocate for the Applicants: J. E. Roland

Advocate for the Third Respondents: N. J. Barnes

The First and Second Respondents were not represented and did not appear.

1. Introduction

The Applicants are asking for a declaration as to whether they are obliged under the Laws of Guernsey to indemnify the First and Second Respondents in respect of tax paid by them under the Taxation of Chargeable Gains Act 1992. The First and Second Respondents claim a statutory right under the Fifth Schedule to that Act to be indemnified by the Applicants.

Understandably but perhaps a little unfortunately Mr. and Mrs. Wilson, the First and Second Respondents who have paid the tax in respect of which they are now claiming an indemnity have not appeared and it has been for Miss Roland as representing the Applicants who are the trustee of the two settlements to argue in support of the obligation of the Applicants to meet these claims. Mr. Barnes who represents the grandchildren of Mr. and Mrs. Wilson who are now the beneficiaries of the settlements has put the alternative argument that the trustees have no obligation or indeed power to make the payments.

## 2. The statutory background

Parliament enacted in 1965 a Law introducing a new tax for persons resident in the U.K. called Capital Gains Tax. One of the features of this tax was that it was to be chargeable only to persons who are resident in the United Kingdom. Therefore if such a person emigrated to another country before incurring the capital gain he was exempt from charge. This freedom for non-residents to make capital gains led to a large number schemes for avoidance of capital gains tax by persons who remained living within the United Kingdom. Indeed servicing this demand for achieving situations where capital gains accrued to non-residents rather than residents nurtured a significant part of the finance industry of this island in its early years. One of the most frequent devices used to avoid tax was the non-resident settlement. This was done either by creating a settlement in an offshore jurisdiction into which the asset the disposal of which was going to attract a chargeable gain would be spirited or as happened in the case of Mr. and Mrs. Wilson the appointment of non-residents of the United Kingdom as trustees of settlements that had already been established by them in that jurisdiction. In 1992 certain changes were made in the law relating to taxation of chargeable gains, but it was not until 1998 that that legislation was expanded to try and recoup the tax that had notionally been "lost" on this type of settlement. This was achieved by imposing liability to pay the capital gains tax on the original settlors Mr. and Mrs. Wilson who still live in England. Hence the Inland Revenue demands, which were not resistible in law, of £85,611 made on the First Respondent, Mr. Wilson and £137,002.40 on the Second Respondent, Mrs. Wilson. Schedule 5 to the Act of 1992 provides at paragraph 6 thereof that the settlor who is required to pay tax in respect of gains of a settlement which are treated as accruing to him shall be entitled to recover the amount of the tax from any person who is a trustee of the settlement. The First and Second Respondents seek to recover what they have paid.

## 3. A slip up

It is unfortunate that when the proposals for amendment of the English legislation were published in 1998 the Applicants sought advice from a firm of solicitors on their behalf and no doubt although it may not have said so in so many words on behalf of the settlors who were old clients of the trustee. That advice was apparently defective because it failed to point out the need for adult children to be excluded as beneficiaries of the trust if the settlors were not to incur the liability they have incurred to capital gains tax on any chargeable gains by the trustees. [The point was that although these expressed as being trusts to benefit grandchildren, adult children of the settlors were still expressed as being to the class of persons who would benefit and this proved fatal to the settlors becoming liable to pay the tax.]

#### 4. The Applicants' case

In her skeleton argument Miss Roland touched on a number of matters and at the outset of the hearing I tried to draw together what I was then seeing as the real issues for the Court. I will put to one side at this stage any question of indemnity under the terms of the settlements themselves, arguments as to the approach the Court should be taking in respect of this application which is brought under section 62 of the Trust (Guernsey) Law, 1989 and questions of moral duties which in any event would be more appropriately considered with jurors. I would just say this that I do not regard this application as sitting squarely within the second category of case identified in a judgment of Robert Walker, J. as he then was in an unnamed case which took place in Chambers in 1995 and is referred to in a judgment of Hart, J. in the case of Public Trustee v. Cooper 20<sup>th</sup> December, 1999. The second category of case that Robert Walker J referred to was the one where the trustees decide to apply to Court for comfort in a case where there is no doubt as to the extent of their powers but the decision is so momentous that they feel it appropriate to have the Court's blessing. I think this is a case where, inevitably, the Trustees, for reasons which do not reflect adversely upon them, might be regarded as unable to fairly reach a conclusion as to how they are to deal with the matter in any event. The reason for this is that they may feel embarrassed at the fact that the lawyers who they chose to advise them in 1998 apparently made a serious error in preparing the opinion they did and that may be regarded as having the direct cause of the liability to tax for which the indemnity is being asked.

Although I am prepared to deal with this as an application under section 62 of the Trusts (Guernsey) Law, 1989, I regard the question that I must decide as being none other than whether as a matter of law the First and Second Respondents could successfully bring proceedings against the Applicants in the Guernsey Court, the Applicants being a company established in Guernsey and two individuals employed by it, holding the assets of the Trust in respect of which the indemnity becomes payable in this jurisdiction. If I am to approve these substantial payments by the Applicants to the First and Second Respondents I must be certain (applying the civil burden of the balance of probabilities) that the First and Second Respondents would succeed in law in proceedings against the Applicants. We will look shortly at the contribution Mr. Barnes has made to the issues as to whether or not the Applicants are liable to pay this money to the First and Second Respondents, but if at the end of the day I am not certain that the First and Second Respondents application will succeed I should reject this application and leave it to the First and Second Respondents to take independent advice and sue the Applicants. My task is not made easier by the fact that Mr. Barnes represents minor beneficiaries and so there is no room for any element of compromise when it comes to protecting their interests. I must look at this in the first instance as a pure question of law.

#### 5. If the Applicants were sued by the First and Second Respondents in the Guernsey Courts would they have a defence?.

There are a number of issues here and I will deal with them separately.

(a) The indirect enforcement issue.

As Miss Roland says the general rule is that the courts of one state decline jurisdiction to entertain an action for the enforcement either directly or indirectly the penal revenue or other public law liability of another state this was clearly recognised by the House of Lords in the old case of Government of India v. Taylor [1955] 1 AC 723. The principles have been recognised in Guernsey by the Court of Appeal in its judgment in the case of Re Tucker 6<sup>th</sup> February, 1989, the ratio of that case relates to orders in aid under bankruptcy legislation and so it does not help us further in consideration of the issue in this case. Further learning on the extent of the ruling in Government of India v. Taylor is to be found in the judgment of Lord Mackay of Clashfern in Williams and Humbert Limited v. W & W Trademarks (Jersey) Limited and Others [1986] AC 368. Reference is made therein to the Irish case of Peter Buchanan Limited v. McVey (note) [1955] AC 156. The mischief which these decisions are tackling is that of the indirect enforcement of a penal or revenue law in another country when a claim under that law remained unsatisfied. In Buchanan there was such a claim whereas in Williams and Humbert there was not.

My reading of these authorities is therefore that proceedings will only fall foul of the Government of India v. Taylor principle where the consequence of their succeeding will be that the foreign revenue will enjoy the fruits of the action. Mr. Barnes claims that there is no authority in support of the view that courts should discharge a liability indirectly by granting the First and Second Respondents an indemnity as requested in this case, but in my view that argument misreads the true situation. It matters not one iota to the Inland Revenue whether the First and Second Respondents succeed in their claim under the indemnity as the Revenue has been paid.

Mr. Barnes goes on to call in aid a passage from Whiteman's Capital Gains Tax. The relevant passage is to be found in paragraph 33-119A which is contained in the Eleventh Cumulative Supplement of the Fourth Edition. I set out the whole of the paragraph in issue

"Hitherto where section 86 has been in point it has been known that it would be in point at the time the settlement was established. Generally therefore the settlor or his children had been within the class of beneficiaries and the trustees have been in the position that, not to honour the settlor's claim to recovery of tax, probably prejudiced the beneficiaries and so generally they have felt able to reimburse the settlor, notwithstanding that the trustees' local law might have protected them, had they chosen to resist the settlor's claim to reimbursement; see Government of India v. Taylor [1955] A.C. 491. However it will now be the case that settlements created prior to 1991, at a time when section 86 was not in contemplation will now be within the charge. In some cases at least the settlor will

not be a beneficiary because the trusts will have been established generally for the benefit of the settlor's children or remoter issue or because the settlor has excluded himself from benefit for whatever reason. When dealing with adult children, their spouses, and possibly their estranged or former spouses, where the settlor is excluded from all benefit under the trust, the trustees may well not be in a position to acquiesce in a claim to reimbursement of tax arising under section 86 without committing a breach of trust. In such circumstances the retrospective extention [*sic*] of the charge may give rise to hardship and will certainly give rise to injustice. This may well involve a breach of the European Convention on Human Rights in a way in which the retrospective provisions of the Finance Act 1978 did not."

What is interesting about this passage is first of all that the author is suggesting that a settlor's claim to reimbursement is resistible under the Government of India v. Taylor. In my judgment this is an over simplification. Secondly, he goes on to suggest that because the settlor is not a beneficiary it would be a breach of trust to acquiesce in a claim to reimbursement. With the greatest of respect to the author of this learned work I think that this commentary misses the point, certainly as far as this particular application is concerned. If the claim does not fail under the Government of India principles and the debt is recoverable the breach of trust point does not arise. It is therefore appropriate to move on to the next point.

(b) Will the Guernsey Court enforce the indemnity?

The first point to note is that the Settlements are governed by English law. English law clearly has decreed that the Trustees of the Settlement, albeit that they could not be sued by the Revenue for capital gains tax direct in Guernsey, if a liability accrued to them, must indemnify U.K. residents who were the original settlors, where they have paid the tax. Parliament decreed that this particular loophole be closed, albeit late in the day, and did this by directing that those left behind in the U.K. must pay the bill in respect of tax that has been notionally lost through the skilful management of settlement's affairs. I cannot see that there is any defence in a Guernsey Court to a claim from the settlors that they be indemnified in this way. It follows therefore that there is no issue of breach of trust or of the Trustees exercising any powers given to them by the Settlements. Likewise there is no requirement to consider difficult issues such as those that were identified in the recent Jersey decision of the T settlement 6<sup>th</sup> February, 2001, and so there are no issues to reserve to the jurats.

6. Conclusion

It follows from this that the Applicants are obliged to indemnify the First and Second Respondents in the amounts claimed by them respectively. Although earlier in this judgment I suggested that it might have been a more appropriate course for proceedings to have been commenced by the First and Second Respondents, I consider that on reflection that no criticism attaches to the way in which this

matter has been presented. Had the matter started by an action the Applicants could properly have come to Court with a Beddows style application asking whether or not they should defend the claim brought by the First and Second Respondents. The upshot of that would have been to bring us precisely into the position we are now in. That has fortified my view that this is indeed a matter which I can properly decide on the basis of a somewhat limited contest as has been presented in this case.

7. A Jersey postscript

Miss Roland towards the end of the hearing helpfully drew my attention to an article by Paul Matthews in the Jersey Law Review 1999 Volume 3 page 56, entitled “When is a Revenue claim not a Revenue claim? ”. Although I had at the hearing reached the tentative view that I have recorded in this judgment I have been greatly assisted by the Article, which not unnaturally covers ground outside the issues before me. The Author’s remarks on Breach of Trust and his conclusions on page 72 coincide with mine, although I would not wish to suggest that there are any public policy considerations for finding as I have.

8. Costs

It is clearly appropriate that the funds of the Settlements should bear the fees of Miss Roland and Mr. Barnes, whose submissions were despite my not having referred to them in detail were of assistance, as of course were Miss Roland’s. I so order. The liability of the First and Second Respondents and the need for this application has stemmed from the apparent failure of the English Solicitors consulted by the Applicants to address the issues on which their opinion was sought. This is a serious matter for the Trustees to consider and obtain advice as to whether they have redress.