EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 12
P423/23

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Petition

of

CHARLES HAROLD ALEXANDER BUTTER AND OTHERS

as Trustees of the Pitlochry Estate Trust

Petitioners

for

Approval of an arrangement under section 1 of the Trusts (Scotland) Act 1961

Respondent

Petitioners: Welsh; Turcan Connell
Minuter (adult beneficiaries): Colquhoun; Turcan Connell
Minuter (curator *ad litem* to child beneficiaries): Watt; Turcan Connell
Minuter (curator *ad litem* to child beneficiaries): MacLeod; Turcan Connell

10 May 2024

Introduction

[1] In this application under section 1(1) of the Trusts (Scotland) Act 1961, the petitioners seek the approval by the court, on behalf of minor and unborn beneficiaries, of an

arrangement varying trust purposes by postponing the date of vesting and by extending the class of potential beneficiaries to include the widow of the current liferenter, restricted to an interest in income only. Minutes were lodged on behalf of the adult beneficiaries, stating that they consented to the arrangement, and by the curators *ad litem* to two classes of child beneficiaries with differing interests, stating that they considered that the arrangement would not be prejudicial to their respective wards.

The trust provisions

[2] The trust was created by a deed of trust granted by the late Sir David Henry Butter dated 28 April 1966 and registered in the Books of Council and Session on 14 November 1966. The deed of trust provided for the trust fund to be held for behoof of such members of a wide category of family beneficiaries, and in such proportions, as the trustees might in their sole discretion select. The trustees were empowered to exclude any persons from the category of beneficiaries. They were obliged to exercise their power of selection in respect of the whole trust fund not later than 1 January 2030, the trust capital vesting immediately upon selection unless the minute of selection provided otherwise. In the event of any part of the trust fund not having vested in one or more of the discretionary beneficiaries on or before 1 January 2030, it would vest on 2 January 2030 equally among children and remoter issue of the truster *per stirpes*. In the meantime, prior to the acquisition of vested rights in capital, the trustees were empowered to pay the trust income to any one or more of the discretionary beneficiaries in such proportions as they might determine.

[3] The trustees have exercised the powers conferred on them as follows:

- A liferent (for tax purposes, an interest in possession) of the trust estate was conferred on the first petitioner with effect from his attainment of age 21 in 1981.

- A revocable minute of selection was executed in 2022, providing that the capital shall, subject to the first petitioner's liferent, vest on 1 January 2030 in the first petitioner, if he is alive at that date, which failing his son B, if he is alive, which failing his daughter A, if she is alive.
- An irrevocable deed of exclusion was executed in 2023, excluding from any benefit under the trust all of the discretionary beneficiaries except (i) the first petitioner and his children and remoter issue, and (ii) another beneficiary named Charles Morrison and his children and remoter issue.

The purpose of the proposed arrangement

[4] The first petitioner is presently aged 64. His wife is aged 48. The first petitioner's daughter A is aged 17 and his son B is aged 15. Notwithstanding the terms of the revocable minute of selection, it is not the intention of the trustees that the trust capital will vest in the first petitioner. The intention is that the capital will vest in due course in B. The trustees, including the first petitioner, wish this to happen as soon as is practicable, but with due regard firstly to B's young age, secondly to the impact of distribution of some trust assets on the financial support available for other such assets, and thirdly to the mitigation of liabilities to inheritance tax and capital gains tax.

[5] The first petitioner's liferent is a qualifying, ie pre-2006, interest in possession. As matters stand, a charge to inheritance tax will occur on the termination of his interest in possession, whether by his death or by the vesting of capital on or before 1 January 2030 in someone other than himself. Subject to availability of reliefs, charges to capital gains tax will occur as and when assets are distributed from the trust, and when the remainder of the capital in the trust fund vests. In the event of the death of the first petitioner prior to

distribution of the whole fund, assets remaining in trust would obtain a tax-free uplift in base cost for CGT purposes.

[6] The trustees wish to increase the flexibility available to them in the distribution of capital to B. In order to achieve this, they seek to vary the terms of the trust (i) by postponing the vesting date from 1 January 2030 until 1 January 2090; and (ii) by introducing a life interest in favour of the first petitioner's wife in the event of the death of the first petitioner. Postponement of vesting is considered to be in B's interests because it will allow distribution of capital in a tax-efficient manner and thereby significantly increase the funds eventually received by him. The prospect of a very substantial CGT charge occurring on or before 1 January 2030 would be avoided or at least mitigated. The trustees envisage that a period of around 10-15 years will be required to effect the transfer of the trust estate into B's hands.

[7] The purpose of creation of the life interest in favour of the first petitioner's wife is said to be to mitigate the tax consequences were the first petitioner to die, survived by her, before the distributions of capital from the trust had been completed. Her interest would qualify as a "transitional serial interest" for inheritance tax purposes so that no IHT charge would occur on the death of the first petitioner. There would also be a tax-free uplift for CGT purposes. It is not the trustees' intention that the creation of the life interest would delay or postpone the distribution of capital to B.

Submission for the petitioners

[8] On behalf of the petitioners it was submitted that the present application was identical to the arrangement approved by the court in *Trustees of Aboyne Castle Estate Trust, Petitioners* [2022] CSIH 31. Whilst an additional life interest was being inserted between the

first petitioner and his children, the interest of that beneficiary was expressly limited. Given that the decision to distribute capital remained with the trustees and not the liferenter, there was little or no risk to B's eventual receipt of the trust fund. The avoidance of significant capital taxation was a real, tangible, and immediate increase in the value of the children's ultimate interest in the funds. Currently, no minor or unborn beneficiary had a vested entitlement. It could not reasonably be said that, as a result of the proposed restructuring, the minor beneficiaries were placed in any worse position than that in which they already found themselves. Their interest would be in a fund with a significantly increased value and the proposed variation was to their benefit.

[9] As regards Charles Morrison's children, their interest remained no more than a hope of benefiting from the trust assets. They had no vested interest in the income or capital of the trust as matters stood.

Decision

[10] We are satisfied that the postponement of the vesting date from 1 January 2030 until 1 January 2090 is not prejudicial to any of the minor beneficiaries upon whose behalf the court is asked to approve the arrangement. The prospect of their obtaining a vested interest in capital is rendered more rather than less likely by the removal of a deadline which will occur when B will be only 20 years old.

[11] The creation of the successive liferent in favour of the first petitioner's wife – in effect, in favour of his widow – has however caused us some concern. The facts of the present case are not entirely on all fours with those of the *Aboyne Castle* petition. In that case the liferenter was aged 48 and there was no material disparity of age between the spouses. The purpose of introducing the widow's life interest was simply to address the risk of the

liferenter's untimely death, and it was critical to the court's decision that the variation was unlikely to make any difference to the time at which the capital beneficiaries acquired their entitlements. In the present application there is a significant disparity in ages – 16 years – and the first petitioner is aged 64. It must be recognised that there is therefore a greater prospect of the successive liferent taking effect. Looked at from the point of view of tax mitigation, that eventuality would have the substantial tax benefit of an uplift in CGT base value, without triggering any charge to IHT. We acknowledge that that would be a benefit accruing to the capital beneficiaries upon whose behalf the court is asked to approve the arrangement. Our concern is that the prospect of such a tax benefit might encourage the trustees to delay the distribution of capital. That, of course, would increase the risk that B might unfortunately fail to survive until he obtained a vested interest, so that far from receiving an estate enhanced by tax saving, he would have received nothing.

[12] In these circumstances the court considered it necessary, before deciding whether or not to approve the arrangement, to seek an indication of when the trustees propose to begin to advance capital to the beneficiaries, the sums likely to be advanced each year, and the period of years over which it is anticipated that advances of capital will be made, together with a written assurance that it was not the trustees' intention that the insertion of the widow as a potential liferentrix would delay or postpone distribution of capital other than in the event of the first petitioner's untimely death. The trustees provided a written response in which it was confirmed that their intention was to distribute assets to B as early as was prudent and practicable, having regard to his age and to the desirability of mitigating CGT by making staggered distributions. Because the CGT consequences of distributions would have to be assessed from year to year, it was not possible for the trustees to commit themselves to distributing a specific proportion of trust assets each year, but the intention

was to make them as quickly and efficiently as possible. The trustees further confirmed that it was not their intention that the proposed liferent in favour of the first petitioners' widow would delay or postpone the distribution of capital to B. The sole purpose of creating the new transitional serial interest was to protect against the risk of Charles' premature death prior to the completion of the distribution of capital.

[13] As the court observed in *Aboyne Castle Trust*, a proposal of this kind involves weighing the potential disadvantages of postponement of vesting against the economic benefits of facilitating the distribution of the trust estate in a tax-efficient manner. We emphasise that every such case has to be considered on its own facts, and that it is not within the power of the court to approve a scheme driven by tax mitigation, however appealing, if the potential financial benefit is outweighed by the risk that a beneficiary's interest may be defeated altogether. In the present case, having received the above assurances as to the trustees' intentions, we are satisfied that when the whole circumstances of the trust are considered, the proposed arrangement is not prejudicial to the interests of any of the existing children of the first petitioner or of Charles Morrison, and that it is one that the court can properly approve on their behalf and on behalf of their issue of whatever degree of the who may be born after the date of approval. We accordingly grant the prayer of the petition.