MISCELLANY

The Royal Court and taxing matters

1 It is a long time since Lord Clyde famously stated—

> "No man in the country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or property as to enable the Inland Revenue to put the largest possible shovel in his stores. The Inland Revenue is not slow, and quite rightly, to take every advantage which is open to it under the Taxing Statutes for the purposes of depleting the taxpayer's pocket. And the taxpayer is in like manner entitled to be astute to prevent, *so far as he honestly can*, the depletion of his means by the Inland Revenue." [Emphasis added.][1]

Those were the days when the distinction between tax evasion and tax avoidance was clear. The former was dishonest and unlawful (and probably criminal); the latter was not. Now the two terms are sometimes elided. Tax avoidance is often preceded in popular parlance by the epithets "immoral" or "egregious", or even "unlawful" although the UK, after initial hesitation, consciously used the word "abuse" rather than "avoidance" when it came to enact a General Anti-Abuse Rule (GAAR) in the Finance Act 2013.[2] If an avoidance scheme is abusive within the meaning of the Rule, it is ineffective. If it is not abusive, it is legitimate.

2 Lord Clyde's *dictum* found an echo in *In re S Trust*[3] where the Royal Court of Jersey stated—

> "The second aspect of the *Pitt v Holt* test that troubles us[4] is the weight given to the interests of the tax authority. We entirely accept that it is open to the courts of any country to lay down

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[1] *Ayrshire Pullman Motor Services v Inland Revenue* [1929] 14 Tax Cases 754, at 763–764.

[2] See Dixon, "The United Kingdom's general anti-abuse rule in tax" (2013) 17 Jersey & Guernsey Law Review 316. Jersey's own anti-avoidance rule is found in art 134A of the Income Tax (Jersey) Law 1961 (as amended).

[3] 2011 JLR 375.

[4] As the test was articulated by the English Court of Appeal ([2011] 3 WLR 19; [2011] 2 All ER 450; [2011] EWCA Civ 197). The Supreme Court took a different view.

> their own judicial policy in relation to the exercise of an equitable jurisdiction. The preference accorded to the interests of the tax authority in the United Kingdom is not one, however, with which we are sympathetic. In our view Leviathan can look after itself. We should not be taken as indicating any sympathy for tax evasion, which we regard as fraudulent and as entirely undeserving of any favourable discretionary treatment. But in Jersey it is still open to citizens so to arrange their affairs, so long as the arrangement is transparent and within the law, as to involve the lowest possible payment to the tax authority."[5]

3 A scheme which constitutes evasion will clearly be regarded without sympathy when it comes to the exercise of a judicial discretion. But what of a scheme which is designed to avoid or minimise tax? The issue arises from time to time, and did so recently in *A v Helm Trust Co Ltd.*[6] The settlor of a Jersey trust had been badly advised by the trustee in relation to the implications of a gift into a discretionary trust. He was advised that a letter of wishes could be contractually enforced. That was wrong. He also asserted that he had been given bad advice in relation to emigration and the inheritance tax implications. He had not taken advice from a lawyer or accountant, but had relied upon the trust company. He claimed to be an unsophisticated investor. His actions would have led to a tax charge of 25% of the value of the trust fund. He applied to have the gift into trust set aside on the ground of mistake. The court found that he had made a mistake and that he would not have settled the funds but for the mistake; the requirements of art 47E(3)(a) and (b) of the Trusts (Jersey) Law 1984 were accordingly satisfied. The court then considered whether the mistake was so serious as to render it just to set the gift aside.

4 The settlor conceded that his sole reason for putting the money into trust was "tax efficiency". He accepted that he did not take professional advice. He was willing to obscure the identities of the beneficiaries of the trust, and thus to be less than frank with Her Majesty's Revenue and Customs. On the other hand the court accepted that he had spent most of his working life outside the UK, did not fully understand the issue of domicile, nor the relevant legal and tax issues.

5 The court was clearly anxious. It asked itself whether it should exercise its discretion—

> "to help a transferor who does not get advice which should put him on notice but ignores it; is associated with a trust which

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[5] *Ibid*, at 393.
[6] [2019] JRC 035.

> deliberately hides his identity and his status as a beneficiary; and indeed who arguably demonstrated . . . once he had realised there was a tax problem, a willingness to be less than frank with HMRC."

It found, however, that he had acted foolishly rather than dishonestly and, "although it is a matter of fine margins", exercised its discretion to make a declaration setting aside the trust.

6 Counsel for the settlor had argued that the court should not make moral judgments on tax issues, and that it would have to be "egregious tax misconduct" to go to the exercise of discretion. That seems to be open to question, but where exactly the line is to be drawn is not entirely clear.

Respecting constitutions

7 The breakdown of normative party politics in the House of Commons is a consequence of Brexit, an issue which cuts across party lines. A political revolution of sorts has occurred where, at least for now, the legislature controls the executive. While Her Majesty's Government understands and accepts the rule or convention that the Westminster parliament does not legislate for the Channel Islands on a domestic matter without their consent, the Rt Hon Dame Margaret Hodge MP and the Rt Hon Andrew Mitchell MP do not. They, and others, wish to see the Channel Islands have public registers of the beneficial ownership of companies, and seek to enforce that wish by UK legislation.

8 The Islands already have registers in place which are of a much higher standard than the United Kingdom register, being independently validated and regulated. They are accessible to those who have a legitimate reason for access, namely, national fiscal and law enforcement agencies, as opposed to the media and the world at large. The Islands have set out their position firmly, and are willing to adopt public registers as and when and if they become the global norm, but not before.

9 The UK Government has announced that it intends to press to make such registers the global standard. It remains to be seen whether it will succeed. Public registers of trusts have come to grief in France as being (at least in the form before the *Conseil Constitutionnel* in 2016)[1] unconstitutional, given the absence of limitations as to the persons

[1] Décision 2016/591 QPC Conseil Constitutionnel: https://www.conseil-constitutionnel.fr/decision/2016/2016591QPC.htm

allowed to consult the register, and the lack of consideration for privacy. The Netherlands has announced that it will introduce only a semi-public register.[2] Switzerland currently has no register of publicly available beneficial ownership of companies.

10 None of this seems to deter MPs holding the views of Dame Margaret and Mr Mitchell. Their method is to seek an amendment to s 51 of the Sanctions and Anti-Money Laundering Act 2018 to require an Order in Council to be prepared which in turn would require the governments of the Crown Dependencies to introduce publicly accessible registers of the beneficial ownership of companies no later than 31 December 2020. Their first attempt, when the 2018 Act was making its passage through parliament, failed after references to the Crown Dependencies were dropped.[3] The Overseas Territories did not fare so well and are now in dispute with London, albeit the UK government seems content to play a long game, giving the Territories until 2023 to comply, by which time they hope that the new global standard will have been established.

11 What if, though, Dame Margaret and Mr Mitchell succeed in what remains of the life of this UK parliament in securing the passage of their amendment? The governments of Jersey and Guernsey have rarely spoken so forcefully and in complete harmony in their profound opposition to any attempt to legislate for them without their consent in an area which is their exclusive, domestic concern. Hodge and Mitchell rely on Part XI of the Report of the Royal Commission on the Constitution, otherwise known as "the Kilbrandon report", for their contention that Parliament has the power to legislate for the Crown Dependencies.[4] But the report is now half a century old, and shows the weight of those years. It was written in a different age, and has been the subject of much criticism in the pages of this *Review*.[5] But even Kilbrandon accepted—

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[2] https://www.step.org/news/netherlands-beneficial-ownership-register-sight

[3] See Miscellany "A challenge to the legislative autonomy of the Channel Islands" (2018) 22 *Jersey & Guernsey Law Review* 116

[4] Part XI of Vol I of the *Report of the Royal Commission on the Constitution,1969-73*, (London HMSO) ISBN 0 11 340428 X

[5] See, *e.g*. Jowell, "The UK's power over Jersey's domestic affairs" in Bailhache (ed) *A Celebration of Autonomy: 800 years of Channel Islands Law* (Jersey Law Review 2005) at 249, where Professor Jowell stated—

> "[the Kilbrandon report] is woefully short on authority, devoid of analytical rigour, packed with speculation, and imbued with colonial assumptions which have always been irrelevant to Jersey's status and are out of tune with the present times."

> "It has, however, been the practice not to legislate for the Islands without their consent on matters which are of purely domestic concern to them. *There has been strict adherence to the practice over a very long period*, and it is in this sense that it can be said that a constitutional convention has been established whereby Parliament does not legislate for the Islands without their consent on domestic matters". [6] [Emphasis added.]

12 Matters have moved on, and only in favour of enhanced Channel Island autonomy. It is strongly arguable that what was a constitutional convention has become a rule of law. Kilbrandon wrote long before the incorporation of the European Convention on Human Rights into the domestic law of the UK and the Crown Dependencies and the requirements of Protocol 1, art 3 in the right to free expression of the opinion of the people in the choice of legislature.[7] The foundation for Kilbrandon is the doctrine of parliamentary sovereignty, but if one accepts that parliamentary sovereignty rests upon democratic principles, then the foundation crumbles in its application to the Channel Islands.[8] In any event, even applying the Kilbrandon criteria for direct legislation, none is in point. The reliance by Hodge and Mitchell upon national security is inapt. National security agencies already have access to Channel Island registers in appropriate circumstances, and swiftly.

13 Article 31 of the States of Jersey Law 2005 requires the referral of UK legislation purporting to apply directly to Jersey to the States Assembly so that they may signify their views. Similar legislation extending also to Orders in Council purporting to be made pursuant to prerogative powers is about to be made by the Guernsey assembly. Other active steps are likely to be taken to protect the Islands' constitutional position. Channel Island governments regard the Hodge/Mitchell proposals as overstepping a line. In Jersey it is likely that any attempt to trespass beyond that constitutional line would be met with a refusal by the States Assembly to comply. A constitutional clash would follow. But that is hardly the point. Constitutions and constitutional relationships should be respected by all responsible parliaments. If the House of Commons does not understand that fundamental democratic mandate, then we would echo the words

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[6] *Ibid*, para 1469.

[7] https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9

[8] See Birt, "The power of the UK to legislate for the Crown Dependencies without consent – fact or fiction?" (2017) 21 *Jersey & Guernsey Law Review* 152 and Dixon, "Jersey's relationship with the UK parliament revisited", (2017) 21 *Jersey & Guernsey Law Review* 43.

attributed to Cromwell in 1653 when addressing the Rump Parliament—

> "You have sat too long for any good you have been doing lately . . . Depart, I say, and let us have done with you. In the name of God, go!"[9]

Sark land reform

14 What is taken for granted elsewhere in the Western world does not always pertain to Sark. A good example is the right to subdivide and charge immovable property. When Sark was granted to Helier de Carteret by Letters Patent in 1565 it was on condition that the Island should be continually inhabited by—

> "forty men at least, our subjects, or such as shall oblige themselves by oath to Our Captain of Our Island of Jersey or Guernsey that they will be faithfully true or obedient to Us, the Queen . . ."[10]

Sark had for a long time past lain "void, waste, uninhabited and not cultivated, manured or occupied by any of our subjects".[11] It had become a base for the enemy during wartime and pirates during peacetime.

15 The terms of the Letters Patent were designed to bring an end to this state of affairs and succeeded. Helier de Carteret divided the bulk of the Island into 40 tenements, each to be held by one of the 40 men and their households. However, some tenements were subdivided, creating "Sark freeholds". This was perceived as likely to undermine the fabric of Sark society leading to a ban imposed by Letters Patent of 1611 forbidding the (further) subdivision of tenements and the charging of Sark land. That ban has remained in force until today.

16 On 1 May 2019, Sark's legislative assembly, the Chief Pleas, passed the Land Reform (Sark) Law 2019. The key provision permits, notwithstanding the terms of the 1611 Letters Patent, the division of Sark tenements and freeholds and the disposal of such portions by transactions *inter vivos* or by will (subject to the remaining limitations on testamentary disposition imposed by the Real Property (Succession) (Sark) Law 1999). The Law gives wide ordinance making powers to Chief Pleas to put flesh on these bones. At the same time the Law

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[9] https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/rump-dissolved/

[10] https://en.wikisource.org/wiki/Sark_Letters_Patent_of_1565

[11] *Ibid*, Preamble.

permits the charging of tenements, freeholds and the newly created portions. Provision is made also to import and amend Guernsey's *saisie* procedure, the equivalent of a mortgage possession action in England. It is highly likely that provision will be made for any surplus on enforcement to be returned to the dispossessed borrower rather than the lender keeping all, as in Guernsey (if not always in practice).

17 The legislation now goes for Royal Sanction and can be expected to be in force before the end of the year. It can be seen as the single most important legislative change in Sark since the Reform (Sark) Law 2008 removing the tenants from Chief Pleas and replacing them with elected representatives. 1 May 2019 was an important day in Sark history.