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UT (Tax & Chancery) Case Number: UT/2023/000060

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: On paper

Heard on: 11 March 2024
Judgment date: 19 March 2024

Protective costs order – Approach in Drummond v HM Revenue & Customs [2016] UKUT 221 (TCC) followed – application refused

Before

Judge Jonathan Cannan

Between

(1) THE EXECUTORS OF THE ESTATE OF PETER JOHN LININGTON
(2) THE TRUSTEES OF THE KENT TRUST

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation: The Appellants and the Respondents both made written submissions and the application for a protective costs order was dealt with on paper.

DECISION

Introduction

1. The Appellants have applied by way of application dated 9 January 2024 for a protective costs order ("PCO") in relation to their appeals. They are represented by Mrs Bridget Pearce who is one of the executors of the First Appellant and one of the trustees of the Second Appellant. HMRC objected to the application by way of written submissions sent to the Tribunal on 30 January 2024. The Appellants replied to that objection on 8 February 2024.

2. The Appellants have permission to appeal a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 30 January 2023 ("the Decision"). The FTT granted permission to appeal on one ground but refused permission to appeal on various other grounds in a decision notice released on 16 May 2023. The appellants renewed their application to this tribunal and permission was granted on a second ground, but refused on other grounds. An oral application for permission to appeal on those other grounds was also refused.

3. The Decision concerns arrangements entered into by Mr Peter Linington ("PL") in 2010 to reduce the amount of inheritance tax that would be payable on his death. He received professional advice in relation to the arrangements which involved the acquisition of various interests in an Isle of Man discretionary trust ("the Marshall Trust") in February 2010. The trust assets comprised £1m in cash and were held on discretionary trust to accumulate and capitalise so much of the income as the trustees should think fit in their absolute discretion. Any income not accumulated and capitalised was payable to the income beneficiary. Subject thereto, the reversionary beneficiary would become entitled to the trust assets at the expiry of 150 years from the date of settlement.

4. The various transactions entered into may be summarised with some simplification as follows:

(1) PL was nominated as the reversionary beneficiary of the Marshall Trust.

(2) PL was granted an option to purchase the income interest in the Marshall Trust. The consideration for the grant of the option was £1,083,750. The option was exercisable on payment of a sum of £100.

(3) PL assigned his reversionary interest to the Kent Trust, a UK resident family trust set up for the purpose. The Kent Trust is the Second Appellant in these proceedings.

(4) PL exercised the option and was designated as the income beneficiary of the Marshall Trust.

5. HMRC issued notices of determination on the basis that PL made a transfer of value when he assigned his reversionary interest to the Kent Trust. The notices of determination were made on the basis that IHT was due either by PL's estate or by the Kent Trust. The Appellants contended that there was no transfer of value on the basis that:

(1) The reversionary interest was excluded property, because it was not acquired by PL for a consideration in money or money's worth.

(2) Even if the reversionary interest was not excluded property, there was no transfer of value by PL.

6. The Appellants' case before the FTT was that when PL was nominated as the reversionary beneficiary, no consideration was paid for that nomination. Indeed, the reversionary interest had no value in itself at that time. HMRC contended that the reversionary interest had been purchased for

consideration in money or money's worth as part of the arrangements as a whole. HMRC relied on a decision of the FTT in *Salinger v HMRC* [2016] UKFTT 677 (TC) where the FTT had held, in relation to similar arrangements set up by the same professional advisers, that the reversionary interest had been acquired for consideration and was not excluded property.

7. As to whether there was a transfer of value, the Appellants' case was that there was no transfer of value by PL because there was no diminution in the value of PL's estate by virtue of the transfer. PL's estate before and after the transfer included the value of the trust assets by virtue of his entitlement to the income interest. On this issue it was the Appellants relying on the decision of the FTT in *Salinger*, where the FTT had held that there was no transfer of value.

8. HMRC relied on the evidence of Mr Brian Watson, who had given evidence as a joint expert. His evidence was that separately, the income and reversionary interests each had no value. It was only when the income interest and the reversionary interest were combined in the same hands that they would be valued at approximately the same value as the trust assets. The FTT accepted that evidence and made findings of fact accordingly.

9. HMRC contended that immediately before PL's transfer of the reversionary interest, he held that interest together with the option to purchase the income interest. By exercising the option, he could call for the trustees to transfer all the trust assets to himself. Once he had disposed of the reversionary interest he was no longer in a position to do that. He only held the option, and according to Mr Watson the income interest had no value in itself. PL's estate had therefore diminished in value by reference to the value of the trust assets as a result of the transfer of the reversionary interest.

10. The FTT accepted HMRC's arguments and held that:

(1) The reversionary interest was not excluded property, and

(2) The transfer of the reversionary interest was a transfer of value.

11. I understand that the amount of IHT in dispute together with interest is approximately £500,000. That sum was paid by the executors on 21 March 2019, without prejudice to their case that there was no liability to IHT.

12. The executors are three members of the Linington family, namely Mrs Pearce, Mr D Linington who is Mrs Pearce's brother and Mr J Linington who is PL's cousin. The Trustees are Mrs Pearce and Mr Sutton, who was PL's accountant. As I understand it, the value of PL's assets passed either through his estate to the beneficiaries under the will, or through the Marshall Trust. The beneficiaries under the will were principally Mrs Pearce, her brother and their remoter issue pursuant to a residuary will trust. No assets passed through the Kent Trust, which was simply a vehicle to split the income and reversionary interests of the Marshall Trust.

13. I am told that Mrs Pearce and her brother were gifted a sum of money and loaned a further sum from a family trust in order to pay £500,000 to HMRC. Those sums will be repaid if the appeal is successful.

Permission to appeal

14. The FTT granted permission to appeal on one ground which I shall call Ground 1. It was drafted by Mrs Pearce as follows:

> Ground 1 - The points at issue have potentially wider implication. There are now two inconsistent FTT Decisions – *Salinger* [2016] UKFTT 677 (TC), [2017] SFTD 316 in

> which the circumstances were essentially identical to the current case, and this one. There are also other cases behind ours which we believe are heading towards FTT. A further ruling would be of benefit to those cases.

15. In granting permission to appeal on Ground 1, the FTT limited it to a challenge to the legal approach the FTT had adopted.

16. I granted permission to appeal on what I shall call Ground 2:

> Ground 2 - The FTT erred in law in finding that the reversionary interest was acquired for consideration. This was not supported by the evidence or was a conclusion which no reasonable tribunal could have reached.

17. Nothing in this decision should be taken as indicating any view on the merits of these grounds, save that I approach the application on the basis that both grounds of appeal are arguable.

18. At the oral hearing of the application for permission to appeal, I invited the Appellants to consider their position on costs in the event that the appeal was unsuccessful. The Appellants have considered their position and have made the present application.

Protective costs orders

19. The Appellants have applied for a PCO whereby they would not be liable for HMRC's costs of defending the appeals if the Appellants' appeals are dismissed.

20. The jurisdiction of the Upper Tribunal to make a PCO has been considered in *Drummond v HM Revenue & Customs* [2016] UKUT 221 (TCC) and *HM Revenue & Customs v TGH (Commercial) Limited* [2016] UKUT 0519 (TCC). It is clear that the Upper Tribunal has jurisdiction to make the orders sought by the Appellants. Judge Sinfield described the principles to be applied in *Drummond* at [27] – [31], drawing on principles applied by the courts in judicial review cases:

> 27. The CPR do not contain any rules in relation to PCO's. PCOs have been recognised in English public law since R v Lord Chancellor ex parte CPAG [1999] 1 WLR 347 where Dyson J set out some guidelines but refused to make a PCO on the facts of that case. The leading authority on the power to make PCOs and the procedure to be adopted is Corner House. In that case, Lord Phillips of Worth Matravers MR, who gave the decision of the court, said at [72]:
>
> > 72. … Dyson J said [in CPAG] the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances. We agree with this statement, but of itself it does not assist us in identifying those circumstances.
>
> 28. At [74], Lord Phillips set out the following guidance:
>
> > 74. We would therefore restate the governing principles in these terms:
> >
> > > (1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
> > >
> > > > (i) the issues raised are of general public importance;
> > > >
> > > > (ii) the public interest requires that those issues should be resolved;
> > > >
> > > > (iii) the applicant has no private interest in the outcome of the case;

(iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and

(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

29. Having set out some examples of types of PCOs, which included an order capping the unsuccessful claimants' liability for costs if they lost, Lord Phillips observed, at [76], that there is "room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise."

30. The governing principles set out in Corner House have been considered and refined by the Court of Appeal in subsequent cases. It is now clear that the principles in Corner House are guidelines which are not to be read as statutory provisions but are to be interpreted and applied flexibly (see R (Compton) v Wiltshire Primary Care Trust [2008] EWCA Civ 749, [2009] 1 WLR 1436 ('Compton') at [23] and Morgan & Anor v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107 ('Hinton Organics') at [40]). Exceptionality is not an additional criterion to be satisfied but a prediction as to the effect of applying the principles set out in [74] of Corner House (see Compton at [24] and [83]). The general public importance and public interest requirements are a matter of evaluation for the judge but a case that will clarify the true construction of a statutory provision which applies to and potentially affects the whole population raises issues of general public importance (see Compton at [75] – [77]). Although private interest is a factor to be taken into consideration, it is not a bar to a PCO (see Hinton Organics at [37] - [39]). I understood HMRC to agree with the following approach to the issue of private interest, derived from Ames. It is inevitable that all tax appeals will have an element of private interest but it is the extent of the general public importance of the issue which must be taken into account, alongside other factors relevant to the fairness and justice of making such an order in appeal proceedings.

31. I can see no reason, as a matter of principle or policy, why the governing principles set out in Corner House should not be applied in the case of applications for PCOs in appeals to the UT. It seems to me to be obvious that consistency and good administration require the UT, when considering whether to make a PCO, to apply the Corner House principles, as modified by subsequent cases and bearing in mind the overriding objective in rule 2 of the UT Rules which is not the same as the overriding objective in the CPR.

21. In the event, Judge Sinfield refused the application in *Drummond*, but of course each case must be determined on its own facts. In *HM Revenue & Customs v TGH (Commercial) Limited* [2016] UKUT 0519 (TCC), Judge Sinfield rejected a submission of HMRC that the existence of a private interest in the outcome of an appeal means that no PCO can be made. He concluded at [30]:

30. … although private interest is a factor to be taken into consideration, it is not a bar to a PCO and a flexible approach should be applied to all aspects of the Corner House guidelines.

22. It has not been suggested that I should apply any different principles in determining the Appellants' application. I also bear in mind that Judge Sinfield in *Drummond* accepted that the Upper Tribunal has jurisdiction to make a costs capping order ("CCO") or an appeal costs order ("ACO"). That jurisdiction is analogous to the jurisdiction in the civil procedure rules ("CPR"), under CPR 3.19 and 52.19 respectively.

23. CPR 3.19 provides as follows in relation to CCOs:

> (5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if—
>
> (a) it is in the interests of justice to do so;
>
> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
>
> (c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by—
>
> (i) case management directions or orders made under this Part; and
>
> (ii) detailed assessment of costs.

24. I can say at this stage that a CCO is not appropriate because there is no suggestion that HMRC will disproportionately incur costs without a CCO.

25. CPR 52.19 (previously CPR 52.9A) provides as follows in relation to ACOs:

> (1) Subject to rule 52.19A, in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
>
> (2) In making such an order the court will have regard to—
>
> (a) the means of both parties;
>
> (b) all the circumstances of the case; and
>
> (c) the need to facilitate access to justice.
>
> (3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
>
> (4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.

26. Judge Sinfield considered the jurisdiction in relation to ACOs in *Drummond*. He cited *Manchester College v Hazel* [2013] EWCA Civ 281 where Jackson LJ described the introduction of ACOs:

> 29. In *R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 and a subsequent line of cases the Court of Appeal developed rules for protective costs orders in the context of judicial review. Such orders were made both at first instance and on appeal. In *Eweida v British Airways PLC* [2009] EWCA Civ 1025, the claimant, who was appealing from the EAT to the Court of Appeal, applied for costs protection on the basis that she was moving from a "no costs" jurisdiction to a costs shifting jurisdiction. The Court of Appeal dismissed her application, on the grounds that it did not have power to make a protective costs order or a costs capping order.
>
> 30. The outcome of *Eweida*, although correct on the law as it stood, was unsatisfactory for a number of reasons. Many individuals of modest means who litigate in "no costs" jurisdictions are often without legal representation. Indeed, the claimants in this case litigated before the Ashford Employment Tribunal without representation. It is usually unjust to subject such litigants to a risk of adverse costs when they

proceed to a higher level. This is particularly so if they win at first instance and are dragged unwillingly into an appeal. It may also be unjust to impose a costs risk if the litigant loses at first instance, but has proper grounds for bringing an appeal. This was the case with Mrs Eweida.

31. Of course it is not always desirable to suspend costs shifting rules when a case comes up from a "no costs" jurisdiction. A classic example is an appeal from the EAT where one party is a well resourced employer and the other party is an employee or a group of employees backed by their union. Such a case may well involve issues of principle or practice on which substantial sums turn. Obviously, in cases like that, there is no reason to disapply the normal costs shifting rules.

32. It is against this background that the Rule Committee has recently promulgated the new rule 52.9A. This rule will come into force on 1 April 2013. It provides as follows…

…

33. This new rule is intended to address the mischief which has emerged in cases such as ***Eweida***. Where justice so requires, the court can exclude or limit costs recovery when a case passes from a "no costs" or "low costs" jurisdiction to a court with full costs shifting powers. The new rule will not only apply to appeals from the EAT to the Court of Appeal. The enactment of this rule constitutes implementation of recommendation 71 in the *Review of Civil Litigation Costs Final Report* (published in January 2010).

27. Judge Sinfield then described the jurisdiction of the Upper Tribunal as follows:

37. I agree that an ACO is simply a species of PCO. As such, I consider that the UT has the power to make such an order under the TCEA 2007 and the UT Rules for the same reasons as I have stated at [18] – [23] above… [T]he UT has the benefit of the guidance provided by CPR 52.9A when deciding how to exercise its power to make orders in relation to costs. Like the ET and EAT, the FTT is a no costs jurisdiction except in a case that has been categorised under rule 23 of the FTT Rules as a Complex case and the appellant has not asked for it to be excluded from potential liability for costs under rule 10. The injustice identified by Jackson LJ in *Manchester College* at [30] has the same potential to arise in the UT as in the High Court and Court of Appeal. In my view, the UT would not be giving effect to the overriding objective in the UT Rules if, having the power to make a costs order to mitigate the potential injustice, it refused to do so where such an order would be appropriate under CPR 52.9A.

28. When Judge Sinfield came to apply these provisions in *Drummond v HM Revenue & Customs* [2016] UKUT 0369 (TCC), he considered the criteria in *Corner House*. He did not separately consider the specific requirements of CPR 52.19. Clearly there is an overlap between the *Corner House* criteria for a PCO and the requirements of CPR 52.19 for an ACO. In refusing any form of order, Judge Sinfield placed particular weight on the fact that Mr Drummond would be able to finance HMRC's reasonable costs of an appeal if required to do so. He concluded:

15. Taking all the criteria together and bearing in mind the overriding objective, as set out in rule 2(1) of the UT Rules, of dealing with cases fairly and justly, I consider that Mr Drummond's application for a PCO or similar order should be refused. Mr Drummond has chosen to appeal to the UT and such an appeal carries with it the risk of an order that the unsuccessful party pays the successful party's costs. Such a costs shifting regime is not inconsistent with the overriding objective which requires fairness and justice for both parties. There is nothing unfair or unjust in this case about refusing to protect Mr Drummond from being exposed to the risk of costs when, as I have found, he is able to pay them.

29. Against this background, and with the principles stated above in mind, I shall consider the Appellants' application for a PCO or similar order.

Discussion

30. I start by considering the *Corner House* criteria for granting a PCO.

(i) General public importance

31. The issues in the present appeal arise in the context of PL seeking to use specific arrangements to reduce the liability to IHT on his death. It is common ground that following the enactment of Finance Act 2012, such arrangements would no longer be effective. I am told by Mrs Pearce, and have no reason to doubt, that she understands there are around 30 other cases following behind this appeal. Mrs Pearce submits that a decision of the Upper Tribunal would avoid the need for multiple hearings before the FTT with the associated stress on the individuals involved.

32. HMRC do not accept that there are 30 cases following behind this appeal. However, they do not say how many cases there are, citing taxpayer confidentiality. I can see that taxpayer confidentiality would prevent HMRC from identifying the taxpayers in similar cases, but it is unfortunate that HMRC have not said how many similar cases are in the pipeline.

33. The grounds for which permission to appeal has been granted arise in relation to the two issues identified above. Whether on the facts as found the reversionary interest in the Marshall Trust was excluded property and whether there was a transfer of value. Those issues arise in the context of whether the arrangements were effective to achieve the intended IHT saving. Given that the arrangements could not be effective after 2012, I do not consider that the present appeal can be said to raise issues which are of general public importance.

34. The FTT did say at [197] that if the approach in *Salinger* was correct then there could be significant consequences for the IHT treatment of discretionary trusts:

> 197. As regards HMRC's submission that *Salinger* produces a very odd result which has the potential to strike at the heart of the basis on which IHT is charged on discretionary interests. It certainly appears to be that the natural consequence of the judgment must be that if Mr Salinger did not effect a transfer of value associated with the arrangements he entered the income interest he held at death must have represented property for the purposes of s272 at his death and which would have then been assessable to IHT at that point. That was not something directly relevant to the determination required by the Tribunal in that case and was not apparently put and thereby addressed by the Tribunal. It does not arise on the basis of my conclusion and accordingly I do not need to determine whether it is or is not a consequence.

35. That point was not addressed by the FTT in the present case because it made findings of fact based on the expert evidence as to the separate valuation of the income interest and the reversionary interest. Nor was the point addressed in *Salinger*. It has not been suggested that the decision in Salinger has caused any great debate about the general application of IHT to property held on discretionary trusts which has been well-established for many years. In the circumstances, I am not satisfied that any wider point of general public importance arises from Ground 1.

(ii) Public interest

36. In the light of my finding that there is no issue of general public importance, it follows that there is no such issue which the public interest requires to be resolved. I accept more generally that there is a public interest in how taxing statutes should be construed and applied in particular circumstances. There is also a public interest in what is known as the "venerable principle", that taxpayers should pay the right amount of tax. In that sense, the public interest requires the issues in the appeal to be resolved. Having said that, most if not all appeals on tax to the Upper Tribunal involve that public interest.

(iii) Private interest

37. The Decision records that ultimately the funds in the Marshall Trust were appointed to Mrs Pearce and her brother. In 2015 the executors and trustees came to believe from communications with HMRC, mistakenly it seems, that HMRC were not seeking to charge IHT in relation to the arrangements. They also received professional advice that no IHT was due. Mrs Pearce received 75% of the fund value and her brother received 25%. I do not know what values were involved but the initial funds in the Marshall Trust were approximately £1m. That is effectively the value which PL sought to transfer free of IHT prior to his death.

38. Clearly, the Appellants have a substantial private interest in the outcome of the appeal. They have no real interest apart from that private interest. In reality, it is of no concern to the Appellants that the issues being determined might assist in giving clarity to other taxpayers who entered into similar arrangements to save IHT. The interests of the Appellants are effectively the interests of the beneficiaries under the residuary will trust of PL. Namely, Mrs Pearce, her brother and the remoter issue of PL. I understand that those interests can be quantified at approximately £500,000 which is the amount of IHT and interest in dispute. That sum would be repayable to the executors in the event that the appeal is successful.

39. Whilst the Appellants have a substantial private interest in the outcome of the appeal, that is not a bar to a PCO.

(iv) Financial resources

40. I must have regard to the financial resources of the Appellants and to the amount of costs that are likely to be involved.

41. Mrs Pearce says that the Appellants, who are executors and trustees respectively, fully support the decision to appeal, but have refused to sanction any liability for costs. Mrs Pearce herself is acting in person as an executor and trustee and would be expected to meet any liability for costs herself. She has incurred little by way of costs.

42. The evidence as to Mrs Pearce's resources or potential sources of funds is limited. It appears and I am prepared to accept that she is of relatively modest means. Mrs Pearce has offered further information about her own financial status if necessary, but not information about the position of the executors and trustees. She contends that the financial position of the individual executors and trustees, apart from herself, is irrelevant because they do not benefit from the outcome of the appeal and it would be unreasonable to expect them to suffer a personal financial loss. I can see that might be the case in relation to PL's cousin and Mr Sutton. It is not the case however in relation to Mrs Pearce's brother who is an executor, a beneficiary of the residuary will trust and benefitted from the Marshall Trust.

43. I do not know what value was attributed to PL's residuary estate, or what the present position is in relation to the residuary will trust. The executors may have a right, or at least an expectation, that they would recover any costs liability they might incur from the residuary beneficiaries who have been paid out.

44. The circumstances in which the executors funded the IHT liability are also relevant in my view. I am told by Mrs Pearce that she and her brother were gifted a sum and also loaned an amount from a family trust to make that payment. They will be required to repay those sums if the appeal is successful. I am not told the source of the gift or anything about the nature of the family trust. It may be that it is the residuary will trust, but I will not speculate. Questions remain about the ability of Mrs Pearce and her brother to fund the appeal. In my view however, it is not necessary or proportionate

to make a wider enquiry into their financial circumstances. For the reasons which follow that would not affect my overall conclusion.

45. I also take into account that Mrs Pearce is making enquiries to see if counsel might represent the executors and trustees pro bono.

(v) Discontinuance of the proceedings

46. Mrs Pearce says that if no PCO is in place, then she will have no alternative but to discontinue the appeals. She could not afford the risk of becoming liable for HMRC's costs. The potential for an adverse costs order would fetter the Appellants' access to justice.

47. Mrs Pearce stated that HMRC's costs of defending the appeal in the Upper Tribunal were likely to be very substantial. In fact, HMRC have estimated that their costs are likely to be in the region of £20,000 plus VAT. Mrs Pearce does not accept that figure, and compares it to what she understands was HMRC's estimate of costs in their appeal to the Upper Tribunal in *Salinger*. In the event, the appeal in *Salinger* did not proceed. Mrs Pearce understands that HMRC had estimated costs running into hundreds of thousands of pounds.

48. I have no reason to doubt HMRC's estimate of their likely costs and in my experience it seems a reasonable estimate considering the issues involved in the present appeal. If their estimate turned out to be inaccurate and the Appellants were unsuccessful, the Tribunal hearing the appeal could take that into account in any costs order that might ultimately be made.

49. Mrs Pearce has not said that the appeal would have to be discontinued if the potential liability for costs was £20,000 plus VAT. However, I assume for present purposes that that is the case.

(v) Overall

50. I take all these factors into account, and the circumstances generally, in considering whether it is fair and just to make a PCO. It seems to me that the most significant factors are the absence of any issues of general public importance, the significant personal interest of Mrs Pearce and her brother, and the context in which the issues arise. I have described these factors above.

51. I also bear in mind that this is not a case where HMRC are seeking to appeal a decision of the FTT in order to establish a point of principle, thereby exposing the taxpayer to a liability for costs.

52. I agree with HMRC that the general body of taxpayers should not be exposed to irrecoverable costs in defending the Appellants' appeal if it were unsuccessful. There are many cases where taxpayers decide not to pursue an appeal because of the potential liability for costs in an unsuccessful appeal. In my view, the general body of taxpayers would baulk at the suggestion that the Appellants should be immune from a costs order where they are seeking to challenge a decision that the tax planning arrangements entered into by PL to avoid IHT were ineffective.

53. Even if I assume that Mrs Pearce could not herself fund the likely costs of £20,000 plus VAT and the appeal would then have to be withdrawn, I consider that the balance falls against granting a PCO.

Other possible orders

54. I should also consider whether it is appropriate to make an ACO, possibly capping the recoverable costs by reference to HMRC's estimate of £20,000 plus VAT.

55. I have not had any submissions specifically directed to how the jurisdiction pursuant to CPR 52.19 might apply by analogy in the circumstances of this application. However, I am not satisfied that it is

appropriate to make any form of ACO. I take into account the means of the Appellants in the same way that I have taken them into account in relation to a PCO. I must also take into account all the circumstances of the case and the need to facilitate access to justice. CPR 52.19(3) specifically identifies that if substantial sums turn on the outcome of the appeal, it may not be appropriate to make an ACO.

56. Whilst I accept that Mrs Pearce is of modest means, the fact remains that a substantial sum was transferred by PL to the Marshall Trust. The IHT liability in this case is significant because PL sought to remove £1m from his estate prior to his death. In my view there is nothing unfair in the Appellants being exposed to liability for the costs of appealing a decision of the FTT that the scheme was ineffective.

Conclusion

57. For all the reasons given above I refuse the application for a protective costs order.

JONATHAN CANNAN
DEPUTY UPPER TRIBUNAL JUDGE

Release date: 19 March 2024