IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-005488

UNDER	Part 4 of the High Court Rules, in particular Rules 447(a), (e), (h) and (i) and 448(1)(1), Section 66 of the Trustee Act 1956 and/or the Declaratory Judgments Act
IN THE MATTER OF	an application for directions by the Executors and Trustees of the estate of BASIL HAMBLETT, deceased
BETWEEN	NOLA ELSIE MCGOWAN, JUNE HAMBLETT AND PAUL HAMBLETT Plaintiffs
AND	JUNE HAMBLETT First Defendant
AND	SUSAN ELIZABETH HEPTON, REX HAMBLETT AND PAUL HAMBLETT Second Defendants

Hearing: 8, 9 May 2006

Appearances: R Harrison QC for Plaintiffs
WM Patterson and W Butterworth for First Defendant
GM Illingworth QC for Second Defendants

Judgment: 8 June 2006

JUDGMENT OF ASHER J

This judgment was delivered by me on at am/pm
pursuant to Rule 540(4) of the High Court Rules

……
Registrar/Deputy Registrar

……
Date

Solicitors:
Vlatkovich & McGowan, PO Box 120 Whangaparaoa (N McGowan)
McMahon Butterworth, PO Box 106073 Auckland (W Butterworth)

Table of Contents

Introduction

[1] This is an application for directions by the Trustees and Executors of the estate of Basil Hamblett, who face a dispute between residuary beneficiaries. The first and second defendants, who are entitled to the residue of the estate, argue as to who is entitled to the benefit of the deceased's widow's exemption from United Kingdom inheritance tax. The widow, June Hamblett, claims that she only should have the benefit of that exemption, as it relates to her share of the residue as the deceased's spouse, and that no part of the inheritance tax can be charged against her share of the estate. This will mean that she gets a greater share than the other residuary beneficiaries. The deceased's children of his first marriage, the second defendants, argue that the benefit of the widow's exemption should be shared equally between all residuary beneficiaries, so that all beneficiaries, including the widow, receive equal net shares.

Background facts

[2] The deceased, Basil Hamblett ("Mr Hamblett"), was born and worked in the United Kingdom. In 1987 Mr Hamblett retired to New Zealand with his wife Jean Hamblett ("Mrs Hamblett"). Mrs Hamblett was Mr Hamblett's third wife. She and Mr Hamblett had no children. Mr Hamblett has three children of his previous marriages.

[3] Mr Hamblett died in New Zealand on 5 June 2003. He left a Will dated 28 July 1999 ("the Will"). The Executors and Trustees of the Will were Mrs Hamblett, one of Mr Hamblett's sons, Paul Hamblett, and Mr Hamblett's New Zealand lawyer, Nola McGowan. The Will bequeathed NZ$500,000 and any cars, boats and the contents of Mr Hamblett's principal residence to Mrs Hamblett. That residence had been jointly owned, and passed by survivorship to Mrs Hamblett. The residue of Mr Hamblett's estate was given to the Trustees who, after making various payments, were to hold the balance upon trust to be divided between Mrs Hamblett as to a one-quarter share and Mr Hamblett's three children as to a one-quarter share each.

[4] Mr Hamblett left a considerable estate. In New Zealand there was real estate worth approximately NZ$6 million, together with some cash. In the United Kingdom there were some bank accounts and a half-interest in a property in Rochdale, Manchester, England, which was leased to the Tesco Supermarket chain ("the Tesco property"). The parties accept that the half-interest of the Tesco property was worth, at the time of Mr Hamblett's death, £1,950,000.

[5] Probate of the Will was obtained in the High Court at Auckland on 17 June 2003. Ms McGowan's firm, Vlatkovich & McGowan, acted for the Executors. They took advice from an English solicitor, David Coupe, of Coupe Bradbury Solicitors of Lythan, Lancashire, in relation to the United Kingdom assets. On his advice the Executors re-sealed the grant of probate in the United Kingdom under the Colonial Probates Act 1892 (UK) with the seal of the family division of the High Court of Justice in England and Wales using the District Probate register in Liverpool. The effect of this has been to make the New Zealand Executors and Trustees the Executors in the United Kingdom in relation to United Kingdom assets. The probate has the force and effect of probate granted in the United Kingdom.

[6] On 2 December 2003 Mrs Hamblett before the present issue arose issued proceedings in the Family Court at Auckland under the Property (Relationships) Act 1976. She sought to extend the time within which to exercise her options under s 61 of the Property (Relationships) Act 1976 and sought a declaration as to the status of property. The proceedings were transferred from the Family Court to the High Court at Auckland, and the parties obtained an extension of time to make the election between options. There was also a hearing of an application for interim distribution, and judgment was given on that application: *Hamblett v Hamblett & Ors*, [2004] 2 NZLR 116.

[7] In December 2003 negotiations began between Mr Hamblett's children and Mrs Hamblett aimed at achieving a settlement. These efforts were apparently successful and between 4 and 13 February 2004 the parties, by the execution of counterparts, entered into a Deed of Family Arrangement, which is dated 12 February 2004 ("the Deed of Family Arrangement").

[8] On 7 April 2004 the Auckland firm of McMahon Butterworth acting for Mrs Hamblett, wrote to Coupe Bradbury enquiring whether it was possible to allocate "the surviving spouse exemption of £500,000 … to the benefit of the surviving spouse alone." This led to extensive correspondence between Vlatkovich & McGowan, Coupe Bradbury and McMahon Butterworth, where the issues that arise in these proceedings were clarified and argued.

[9] In September 2005 the parties entered into a "Deed of Consent of Beneficiaries" to pay United Kingdom inheritance tax and transfer the Tesco property to the four beneficiaries as tenants in common in equal shares. The Deed expressly provided that the inheritance tax payments, interim distributions and property transfers referred to in the Deed were "agreed to and made without prejudice to all persons in future disagreements and disputes as between the beneficiaries or any of them in relation to their respective ultimate entitlements as beneficiaries of the Will in the estate of … the deceased." Although there has been some reference to this Deed, ultimately it has been accepted that this was a without prejudice arrangement that should not affect the issues in these proceedings.

[10] These proceedings were commenced on 28 September 2005. Directions were sought under s 66 of the Trustee Act 1956 or, on the alternative, mandatory or declaratory orders as to the lawful and proper approach to be adopted by the Executors to the administration and distribution of the estate, and such further directions or orders as might be appropriate. Directions were also sought as to the effect of the Deed of Family Arrangement on the dispute, and the ultimate distribution of the residuary estate to the beneficiaries.

Jurisdiction

[11] Section 66(1) of the Trustee Act 1956 provides that a Trustee may apply to the Court for directions concerning any property subject to a Trust, or respecting the management or administration of any such property or the exercise of any power of discretion vested in the Trustee. The definition of "Trust" in s 2 of the Trustee Act includes a Trust arising from a Will. The Court has a general power to grant

declaratory relief, and in addition a specific power to grant relief pursuant to s 3 of the Declaratory Judgments Act 1908 in relation to a Will.

The first issue: The impact of UK Inheritance Tax on the distribution of the residuary estate

[12] The provisions of the Inheritance Tax Act 1984 (UK) apply to the transfer of the Tesco property. The inheritance tax amounts to 40% of the value of the asset. Under the tax there is a special total exemption available to a deceased's spouse from such tax. Section 18(1) of the Inheritance Tax Act 1984 (UK) provides:

> **18 Transfers between spouses**
>
> (1) A transfer of value is an exempt transfer to the extent that the value transferred is attributable to property which becomes comprised in the estate of the transferor's spouse or, so far as the value transferred is not so attributable, to the extent that the estate is increased.

[13] Section 41 reads as follows:

> **Section 41 Burden of tax**
>
> Notwithstanding the terms of any disposition –
>
> (a) none of the tax on the value transferred shall fall on any specific gift if or to the extent that the transfer is exempt with respect to the gift, and
>
> (b) none of the tax attributable to the value of the property comprised in residue shall fall on any gift of a share of residue if or to the extent that the transfer is exempt with respect to the gift.

[14] Sections 10 and 11 provide that the tax is treated as part of the general testamentary and administrative expenses of the estate. Mr Patterson argues for Mrs Hamblett that the effect of these provisions is that the whole of the United Kingdom exemption for inheritance tax must be enjoyed solely by her. He asserts that it cannot be enjoyed directly or indirectly by the other residuary legatees. It is submitted on behalf of Mrs Hamblett specifically:

> (a) The payment and incidence of inheritance tax is a function of administration and governed by UK law as the lex fori.
>
> (b) If clause 5 of the Will as construed under NZ law requires the payment of inheritance tax prior to the division of the residue, that

provision is essentially invalid under the law of the situs, which is UK law.

(c) That even if the New Zealand Court concluded that a net division was intended by the deceased, the executors, as UK executors, having declined to take the opinion of the UK Courts, would be under an overriding duty to distribute the UK estate so as to preserve for Mrs Hamblett the benefit of the spousal exemption.

(d) However, if the Will falls to be construed in accordance with New Zealand law and is not materially invalid in respect of the provisions relating to the inheritance tax, a New Zealand Court would reach the conclusion that the words "death duties" used in the Will do not extend to the UK inheritance tax or, alternatively, that a gross division was intended by the deceased.

[15] In response, Mr Illingworth QC on behalf of the children, submits that the construction of the Will, for which the first defendant contends, is inconsistent with established principles of law and with the expressed intentions of the testator. He submits that the Executors are able, lawfully, to pay the inheritance tax from the residue and divide the net residuary estate equally between each of the four beneficiaries. He also contends that Mrs Hamblett is bound by the accord and satisfaction that is contained within the Deed of Family Arrangement, under which she received $600,000 over and above her testamentary entitlement, and which by its words expressly precludes her from claiming anything beyond an equal share of the net residue of the estate.

The evidence as to English law

[16] Foreign law is a question of fact which has to be decided by the Court: Judicature Act 1908, s 19C. The general rule is that foreign law is best proved by an expert witness who will give evidence on oath in the ordinary way.

[17] In this case I have had the benefit of expert evidence as to United Kingdom law from three deponents:

a) Catherine McAleavey, a solicitor of the United Kingdom specialising in Wills, probate and the administration of estates, whose affidavit has been produced by Mrs Hamblett;

b) David Coupe, the English solicitor who has acted for the Executors in the United Kingdom; and

c) Sonia Proudman QC, an English barrister specialising in the law of trusts and estates. Ms Proudman was the leading counsel for the charity defendants in *Re Ratcliffe (Dec'd)*.

[18] Any relevant dispute between them will have to be resolved by an assessment of their evidence and a decision as to which of the expert's views is to be preferred.

The legal background - English authorities

[19] This dispute arose when Mrs Hamblett's advisers became aware of the English law relating to the deceased's spouse exemption. Section 41(b) of the Inheritance Act 1984 (UK) states that none of the tax attributable shall fall on any share of the residue if it is exempt. In terms of this section, Mrs Hamblett should get a quarter share of the residue free from any tax. Mr Patterson submits that this legally precludes the Executors from making any deduction for inheritance tax from her share.

[20] The particular issue of how the surviving spouse's exemption under the Inheritance Tax Act 1984 (UK) should be treated as between exempt and non-exempt beneficiaries has been the subject of some attention in the United Kingdom. It is common ground that there are two cases of importance. The first in time is *Re Benham's Will Trusts* [1995] STC 210. In that case the testatrix bequeathed the residue of her estate after payment of funeral and testamentary expenses and debts on trust "… to pay the same to those beneficiaries who are living at my death and who are List A and List B …". In List A one beneficiary was a charity and in List B there were a number of charities.

[21] It was held that the plain intention of the testatrix was that each beneficiary of the respective Lists, whether charitable or non-charitable, should receive the same amount as other beneficiaries on the same List. This result was consistent with the

express terms of the Will and with the statute of provisions. It was held that s 41 had given rise to three possible options:

a) The first was that the non-charitable beneficiaries would receive their respective shares, subject to inheritance tax, which would mean that they would receive less than the charitable beneficiaries.

b) The second was that non-charitable beneficiaries were entitled to have the respective shares "grossed up" to include the tax payable so the net result was that equality was achieved between charitable and non-charitable beneficiaries.

c) The third was that the Executors should pay the inheritance tax as part of the testamentary expenses under the Will, and distribute the balance equally between the exempt and non-exempt beneficiaries.

[22] It can be observed that in this case Mrs Hamblett is submitting that option one of these three options should apply. Mr Hamblett's children are submitting that option three should apply. The difference between options two and three is that under option two the inheritance tax is funded by the individual shares of the non-charitable beneficiaries being increased or as it is called "grossed up" so that they receive the necessary amount to pay the tax and are then able to receive the net amount intended. The effect is that although they pay the tax out of their shares, they receive the same amount as the exempt beneficiary.

[23] It was concluded in *Benham's Will Trusts* that s 41 of the Inheritance Tax Act 1984 (UK) precluded the possibility of the third option. However, it was not accepted that the "presumed intention" by the testatrix was that option one should apply and only the charitable beneficiaries should have the benefit of their exempt status, with the result that there would be inequality in the amount that the non-charitable beneficiaries and the charitable beneficiaries received. It was held that the main intention of the testatrix was that each beneficiary whether charitable or non-charitable would receive the same as each other. This result was consistent with the express terms of the Will and the relevant statutory provisions. It was held that the

second option of "grossing up" applied. The third option that all beneficiaries receive the same amount, and that the tax is paid from the balance of the residue, was rejected.

[24] This decision was not followed in the subsequent case of *Re Ratcliffe (Dec'd), Holmes v McMullin* [1999] BTC 8,017. It that case there was, as in *Re Benham's Will Trusts*, a Will giving the residue of the estate after payment of funeral and testamentary expenses, as to part to exempt charities, and the other part to non-exempt beneficiaries.

[25] Blackburne J in declining to follow *Re Benham's Will Trusts* accepted the submission that option two as proposed in that case involved some far from easy mathematics, and that it was not what the testatrix had stipulated. The judge then went on to note that the third option would have fallen foul of s 41(1), the inevitable consequence of which was, in his view, that the tax in question would have to be borne by the non-exempt beneficiaries' share. It was held that option one of the three options in *Re Benham's Will Trusts* applied. This meant that the disposal of the residue was divided equally between the exempt and non-exempt beneficiaries, and that therefore the inheritance tax attributable to the non-exempt beneficiaries would be borne by those shares alone. Section 41(b) prohibited the sharing of the exemption.

[26] Mr Patterson relied on *Re Ratcliffe (Dec'd).* He pointed out that it is agreed between all counsel that were the deceased's Will to be interpreted in accordance with English law, following *Re Ratcliffe (Dec'd,* the result would be that the whole of the exemption would be available to Mrs Hamblett, and the tax would be paid from the children's share of the residue. He pointed out that the *lex situs* of the Tesco property is the United Kingdom. This is also agreed between counsel. He then submitted that United Kingdom law governs the distribution of the Tesco property as that property is in the United Kingdom, and that the Executors of Mr Hamblett's Will must follow the *Re Ratcliffe (Dec'd)* approach.

What law applies to the Will?

[27] Clause 2 of the Will reads as follows:

> I declare New Zealand to be my place of domicile and my Will is to be administered according to the laws of New Zealand.

[28] I consider that on any plain reading of these words, the testator is expressing an intention that his Will is to be construed according to the law of New Zealand. While the word used is "administered", the reference to the place of domicile in New Zealand, coupled with the direction as to administration, indicates an intention that New Zealand's law should prevail in all respects. Logic would indicate that it is unlikely that a Will would be administered according to one law, but interpreted according to another. The Will describes the testator as "Basil Hamblett of Auckland, Engineer" and was executed in New Zealand. This is an indication that Mr Hamblett regarded himself as based in New Zealand and subject to its laws. It refers also in clause 7 without comment to a New Zealand statute, the Trustee Act 1956 which indicates an assumption that New Zealand law applies. The overall tenor of the Will cannot be ignored. It is a New Zealand document, to be interpreted according to New Zealand law.

[29] It is stated in Halsbury's Vol. 8(3), para 453:

> Prima facie, a will of immovables must be construed according to the law of the testator's domicile at the date of execution of the will, but this presumption may be rebutted by a sufficient indication that the testator intended to refer to some other law, as where he uses the technical language of the country where the immovables are situated. When construing a will of immovables in accordance with the law of the testator's domicile, the court will construe it so as to enable its dispositions to operate to the fullest extent that they are allowed to do so by the *lex situs*.

[30] It is stated in *Laws of New Zealand*, Conflict of Laws para 222 that New Zealand is likely to follow the English presumptions with regard to the interpretation of Wills, and it is noted in particular that the presumption of *lex situs* will apply with regard to immovables.

[31] Mr Patterson puts the issue as being at least in part one of conflict of laws. He relies on *Dicey & Morris on the Conflict of Laws*, 13th ed, and the proposition

that the administration of a deceased person's estate is governed wholly by the law of the country from which the person or representative derives his authority to collect them (Rule 126 at 26R-103). He also relies on Rule 138 of Dicey to the effect that the material or essential validity of a Will of immovables or of any particular gift of immovables contained therein is governed by the law of the country where the immovables are situated, the *lex situs*.

[32] I do not interpret these propositions as meaning that the interpretation of the Will for the purposes of overseas immovables must be governed by the *lex situs*. Rather, they stand for the obvious proposition that the executors must ensure that the disposition of the immovables takes place in accordance with the *lex situs*. If a bequest of immovables is invalid in the *lex situs*, the bequest is invalid under the Will. Equally, if there is particular privilege attached to the immovables in the *lex situs*, those who are entitled to the land can enjoy those benefits (see the illustrations 1 and 3 at 27-053, *Dicey*, Rule 138).

[33] If a New Zealand person or representative has also obtained a grant in a foreign country, he must administer the foreign assets according to the law of that country: Dicey 26-032. However, it is also observed in Dicey at 26-033:

> Administration within the meaning of this Rule does not include the distribution to beneficiaries of that portion of the assets which remains in the hands of the personal representative after the estate has been cleared. This is characterised as "succession" and governed by a law determined in accordance with the rules laid down [in the chapter on succession].

[34] This approach is supported by the words of s 2(1) of the Colonial Probates Act under which probate was sealed in the United Kingdom. Section 2(1) refers to the sealing being "of like force and effect, and [having] the same operation in the United Kingdom as if granted by [the United Kingdom Court of Probate]." That operation is expressly limited to the United Kingdom.

[35] It is clear in this case that the assets within the United Kingdom must be administered under the authority of the Courts of the United Kingdom. It would be wrong for New Zealand Courts to rule on the propriety of steps taken by overseas administrators or to give directions as to what they should do in the United

Kingdom, and according to its law. This point relates more to international comity than to any fundamental jurisdiction or rule: *Philipson-Stow v Inland Revenue Commissioner* [1961] AC 727 at 745.

[36] However, this rule does not in any way mean that the Will should be construed in a manner contrary to the testator's intention, by applying the laws of a foreign jurisdiction to the Will because it refers in whole or in part to immovables in that foreign jurisdiction. This Will should still be interpreted in accordance with New Zealand law, excepting that the administration of the United Kingdom assets will be governed by the law of the United Kingdom.

[37] The effect of the resealing of the grant of probate of the Will under the Colonial Probates Act 1892 is that English law governs the administration of a deceased's interest in the Tesco property. However, the administration does not include the distribution to the beneficiaries. That issue is more properly characterised as succession: (Authorities at footnote 2 of Proudman *Dicey & Morris The Conflict of Laws* (13th Ed 2000, update 2004) 26R-030 to 26-035, *Halsbury's Laws of England*, 4th Ed Reissue Vol 8(3) para 433). While the material or essential validity of a testamentary gift of immovables is governed by the *lex situs*, a Will that relates to immovables out of the jurisdiction of the testator still falls to be construed in accordance with the law intended by the testator. The incidence of tax will be governed by United Kingdom law, but that is different from the sourcing of the payment, which is a matter for the Executors carrying out their duties as New Zealand Executors under the New Zealand grant of probate.

[38] I conclude therefore that the Will is to be construed according to the law of New Zealand. This decision as to which law applies is itself a decision made according to the law of New Zealand and therefore the evidence of the expert English lawyers is not of relevance to the point.

[39] However, I note that Ms McAleavey's approach was that clause 5 of the Will should be construed in accordance with English law. Ms Proudman, on the other hand, emphasised the distinction between administration and succession. She commented in her affidavit that subject to the overriding principle that the validity of

a testamentary gift of immovables is covered by the *lex situs*, in the United Kingdom a Will of immovables as well as movables must be construed in accordance with the law intended by the testator. She also commented that an English Court would be likely to hold that clause 2 of the Will demonstrated an intention that the law of New Zealand should govern the interpretation of the Will.

[40] Insofar as there is a relevant conflict between the evidence of Ms McAleavey and that of Ms Proudman, I prefer the evidence of Ms Proudman, which is in accord with the reasoning set out earlier in this section of the judgment.

[41] United Kingdom law will govern the administration of the estate as it relates to the Tesco property. The testatrix's personal representatives effectively are wearing different hats in each jurisdiction. The New Zealand jurisdiction may be viewed as the principal jurisdiction and the English jurisdiction as the ancillary jurisdiction: *Halsbury's Laws of England* (4th ed Reissue) Vol. 8(3) para 432, footnote 2. Issues such as the validity and legality of any transfer of the immovables in the United Kingdom, namely the Tesco property, must be governed by United Kingdom law. This, however, will not include the sourcing of the payment of United Kingdom tax or the ultimate distribution to beneficiaries of the deceased's net estate, after the United Kingdom asset has been realised: *Halsbury's Laws of England* (4th ed Reissue) Vol. 8(3) para 433. This will be governed by New Zealand law.

Construction of the Will

[42] It is necessary now to consider what the provisions of the Will mean, applying New Zealand law, recognising that United Kingdom law will apply to the administration of the Tesco Property.

[43] The relevant clause in the Will is clause 5. It reads in part as follows:

> 5. I GIVE the rest of my estate to my Trustees UPON TRUST to pay my debts and funeral expenses my Trustees administration expenses and any other death duties and to hold the balance UPON TRUST to divide as follows:
>
> (a) a one quarter share for my said wife JUNE HAMBLETT;

(b) a one quarter share for my daughter SUSAN ELIZABETH HAMBLETT;

(c) a one quarter share for my son REX HAMBLETT;

(d) a one quarter share for my said son PAUL HAMBLETT …

[44] Clause 5 does not refer to United Kingdom inheritance tax. This is not surprising. There is no suggestion in the evidence that any of the persons involved in drafting the Will knew of the incidence of the tax, or, if they did, gave it any thought. In New Zealand there is no inheritance tax. There were death duties. These were effectively suspended in 1993 and abolished in 1999. There is now no duty or tax that applies to estates in New Zealand.

[45] Inheritance tax would not fall under the rubric of "my debts". That phrase would appear to apply to Mr Hamblett's debts existing at the date of his death.

[46] The natural meaning of "administration expenses" in the Will would include tax to be paid by the administrators. Section 211(1) and (2) of the Inheritance Tax Act states that inheritance tax should be treated as part of the "general testamentary and administration expenses of the estate" subject to any contrary intention shown by the deceased in his Will. Inheritance tax therefore is an administration expense under the Will and should be deducted before the equal division to the beneficiaries.

[47] The phrase "other death duties" may well have been included out of an abundance of caution. On its natural meaning, the word "duty" includes the meaning of "payment to the public revenue", *The New Zealand Oxford Dictionary*, 2005, p 334. This is wide enough to include a tax.

[48] Death duties had only just been abolished at the time of the drafting of the Will. The phrase "other death duties" appears to have been inserted as a catch-all. The intention of the testator appears to be clear. All expenses of any sort including duties (and it can be inferred taxes) are to be paid before division. This is the natural meaning of the words used. The word "other" is presumably inserted in case for some reason the phrase "administration expenses" does not include all duties.

[49] This interpretation is consistent with clause 7 of the Will, which declares that in relation to the whole or any part of the estate, the Trustees have an absolute power to sell, let, lease, mortgage or invest, and to postpone such sale or conversion. This gives the Trustees the power to sell and obtain funds (if they are not readily available) to pay all expenses.

[50] Even if the deceased is to be taken as having been aware of the United Kingdom inheritance tax, the wording with its reference to first paying administration expenses shows an intention that there should be a net equal division between all four beneficiaries, after the payment of all taxes. I consider that this included any United Kingdom tax that might apply in whole or in part to the shares of the particular individual residuary beneficiaries. I can see no basis for inferring a qualification that in the event of a taxation exemption attaching as a matter of law to just one residuary beneficiary's share, that the exempt beneficiary's share should itself be solely exempt from the payment of tax.

[51] Mr Patterson referred to the New Zealand case of *Re Rayner (dec'd), Daniel v Rayner* [1948] NZLR 455 for the proposition that tax had to be treated as a disposal falling upon the assets taken by those liable to pay the tax. I do not, however, consider that the interstices of *Re Rayner* applying as it did to complex and today largely forgotten estate issues, can be properly regarded as part of the relevant background in interpreting the Will. Even if it did, the express words of clause 5 are unambiguous, and require all tax or duty to be paid first out of the general residue.

[52] I was referred to a line of authority which Mr Patterson submitted stood for the proposition that the reference to death duties in New Zealand is a reference to New Zealand duties and not foreign duties. He referred to *Re Norbury* [1939] Ch 528 and *Re Cunliffe- Owen* [1951] Ch 964. However, I do not find these cases to be of any particular assistance. The Wills in question contained different words and there were different background circumstances.

[53] Mr Patterson also argued that the principle of judicial comity should lead to an interpretation which does not aid an illegal act in a foreign country. No doubt as a matter of public policy at least some contracts are avoided which offend the laws of

a foreign state: *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 at 287, *Regazzoni v KC Sethia* (1944) Ltd [1958] AC 301, 319 and 327, *Re Lord Cable* [1977] 1 WLR 7, 24-25. However, for reasons that are set out later in this judgment, I conclude that there will be no illegality committed in the United Kingdom if the provisions of clause 5 of the Will are followed by the Executors. If ultimately the result is that more tax must be paid according to United Kingdom law, then no doubt it will be paid.

[54] I conclude that it was the intention of the testator that all taxes arising from the dispositions in the Will should be paid out of the residue of the estate, and that there is no basis for inferring any qualification that the particular share of an exempt residuary beneficiary escapes that deduction.

Application of the law of the "lex situs"

[55] The crucial question in this case is whether the application of United Kingdom law displaces the natural meaning of clause 5 of the Will, interpreted in accordance with New Zealand law.

[56] If the effect of the United Kingdom law is that it is invalid or illegal to give effect to the obvious intention of the testator, and pay the tax out of the residue first and divide the net balance equally between both exempt and non-exempt beneficiaries, then this Court would be obliged to direct a division of the residue in accordance with that United Kingdom law. This Court must apply the *lex situs*. If, on the other hand, such provision is not invalid or illegal, and does not offend against the laws of the United Kingdom, then the testator's intention can be implemented.

[57] Mr Patterson submits, relying on *Re Ratcliffe (Dec'd)* and the provisions of s 41 of the Inheritance Tax Act 1984 (UK), that the provision in the Will for an equal net division of the residue to the beneficiaries, with all effectively enjoying the benefit of Mrs Hamblett's exemption, is invalid. Mr Illingworth for the children submits that under United Kingdom law such a provision in the Will is not invalid, but rather that in the United Kingdom the Will will not be construed to conflict with

s 41. The issue then is whether s 41 makes option three type bequests invalid, or rather creates a rule of construction.

[58] This is a matter of United Kingdom law, and a matter of fact which I have to determine. The only affidavit of a United Kingdom expert that deals with this issue in particular detail, is that of Ms Proudman. She, like all three of the experts, was not called for cross-examination. Counsel differed as to how her evidence on this point should be interpreted.

[59] Ms Proudman in her affidavit addressed the question of whether there was potentially any material or essential invalidity of the residuary gift in the Will as it affected the Tesco property. She commented that in both *Re Benham's Will Trusts* and *Re Ratcliffe (Dec'd)* the issue was "… simply one of construction as to whether the words used in the Will in each case had achieved an equal net division". She stated:

> … The testator's presumed intention had to be ascertained in the context of relevant surrounding circumstances, one of which was the applicable statutory tax regime. But s 41(b) of the 1984 Act was not in itself *"an impediment to the net division approach"*. Nor in my view is a direction to make a net division a *"disposition [which is not] permitted or recognised by the lex situs and [thus] cannot be given effect.*

[60] The authorities she footnoted for the two statements she quoted were *Re Ratcliffe (Dec'd)* at pg 266 b and the statement of Lord Denning in *Philipson-Stow v IRC* at 761. She stated that it was her firm opinion that there was no material or essential invalidity in the testamentary direction to make an equal net division of the residue of the estate. Whether the Will did so direct, or whether it directed an equal gross division, was a matter of construction governed by New Zealand law. She also commented that if the Will were to be construed according to English domestic law it would be likely that it would be interpreted as effecting an equal gross division. However, if the English Court were deciding a question of construction it would apply New Zealand law, so that the same result would by no means certainly follow.

[61] In this respect, as noted earlier in this judgment, she expressly disagreed with the affidavit of Ms McAleavey. Ms McAleavey had stated that clause 5 of the Will would be construed in accordance with English law. Ms McAleavey had gone on to

state that it was her clear view that the wording used in clause 5 of the Will was insufficient to displace the presumption of gross division strictly in accordance with s 41(b) of the Inheritance Tax Act 1984 (UK). Ms Proudman also disagreed with that proposition. No affidavit from Ms McAleavey was filed in reply to Ms Proudman's affidavit. As I have stated, none of the expert witnesses were cross-examined.

[62] Mr Coupe in his second affidavit also expressly disagreed with Ms McAleavey's views. His evidence was that the ultimate distribution of Mr Hamblett's residuary estate "… was governed by New Zealand law (and his Will) and not by English law". He expressly disagreed with Ms McAleavey's conclusion that the division into shares should take place before inheritance tax with no part of the United Kingdom inheritance tax liability being borne by the share passing to the widow under clause 5(a) of the Will. He did not accept that it was the duty of the Executors on re-sealing the grant of probate in the United Kingdom to distribute the United Kingdom assets in that way.

[63] There is, therefore, conflicting evidence. Mr Patterson sought to persuade me that Ms Proudman's view was that it was "illegal" for the United Kingdom administrators to fail to give effect to s 41. He submitted that the incidence of inheritance tax was one of administration, and could not be a matter of construction. He suggested that Ms Proudman's affidavit supported this. He submitted that Ms Proudman, when she talked about a net division, was speaking about the option two grossed up division adopted in *Re Benham's Will Trusts*, rather than the net division of option three.

[64] Ms Proudman stated at para 10:

> (a) There is no material or essential invalidity in a testamentary direction to make an equal net division of the residuary estate …

She went on at para 13 to say:

> If the New Zealand Court were to hold that under the Will as properly construed the whole of the net residue shorn of testamentary expenses and English inheritance tax should be divided equally between the four residuary beneficiaries, then s 41(b) would fall away for distribution purposes.

She commented that this may mean that more inheritance tax will have to be paid.

[65] I interpret these statements in Ms Proudman's affidavit as providing a clear opinion that option three could apply if the Will was interpreted according to New Zealand law. In this respect she differs from Ms McAleavey. It is necessary to decide which opinion is to be preferred.

[66] In considering and endeavouring to resolve the conflicting views in the affidavits and the different submissions of counsel, it is necessary to go back to the case law put forward by Ms Proudman. As with any expert witness, in the event of conflict I am able, and indeed bound, to consider the sources in order to resolve the conflicting testimony: *Dicey and Morris* p 233, *Re Fuld's Estate (No. 3) Hartley v Fuld* [1968] P 675 p 675 at 700-703.

[67] The starting point is s 41 itself. It is asserted in mandatory language that "Notwithstanding the terms of any disposition …", the tax attributable to a property shall not fall on any exempt share. While not expressly asserting a rule of construction, there is no consequence or penalty referred to.

[68] Both *Re Benham's Will Trusts* and *Re Ratcliffe (Dec'd)* appear to approach the issue raised by this legislative statement as one of construction, as opined by Ms Proudman. The originating summons in *Re Benham's Will Trusts* stated that the issues related to the true construction of the Will, and whether on the true construction of s 41 of the Inheritance Tax Act 1984 (UK) and the Will, the shares of residue were to be taken free of tax by the beneficiaries in equal shares, or, rather, on a grossed up basis. The language of the judgment indicated that the Court was dealing with a construction issue. The judge asked himself, at p 212 line H, what the words of the testatrix's Will meant. He considered s 41, and then considered the provisions of the Will. He relied on a portion of McCutcheon "*Inheritance Tax*" (3rd ed, 1988) para 7-84, pg 263-264, which referred to the issue as being one of construction of the Will. He felt constrained to interpret the terms of the Will in a manner consistent with the statutory provisions, and this lead to his rejection of option three and his adoption of option two.

[69] In *Re Ratcliffe (Dec'd)* the same approach was adopted, although with a different result. The question was stated by Blackburne J early in the judgment as being "which construction [was] correct…" (pg 8,018, line E). He said further (pg 8,019, line F):

> Given then that s 41 need not be an impediment to the net division approach, the question, Mr Warren submitted, is simply one of the true construction of the Will. As to that, he submitted, there can be no doubt …

While not adopting that submission, the judge appeared to approach the matter as one of construction of the Will. He commenced his consideration of the competing submissions of counsel with the statement:

> The question is, of course, one of construing the Will.

His language throughout the judgment focused on construing what the testatrix intended and directed. He noted the difficulty of *Re Benham's Will Trusts*, which was that the judge there had selected option two, the "grossing up" option, when it was by no means clear that option three was not the result the testatrix was intending (pg 8,022, line E).

[70] Mr Patterson relied on the following statement in the judgment (pg 8,022, line G):

> It is only once the true construction of the will has been determined that the impact of the 1984 Act falls to be considered: the terms of the Act do not help in ascertaining what Mrs Ratcliffe intended.

However, the learned judge there was referring to the application of a different section, s 38 of the Inheritance Tax Act 1984 (UK). It was clear, however, from his words earlier in the paragraph, that the issue was still whether s 38 "… might assist with the question of construction".

[71] Ms Proudman's view that the requirement of s 41 creates a rule of construction rather than a rule which governs the validity of a disposition appears to be supported then by the approaches in both *Re Benham's Will Trusts* and *Re Ratcliffe (Dec'd)*.

[72] Mr Patterson relied on the statements of Lord Denning in *Philipson-Stow v IRC* to the effect that although the construction of the Will will normally fall according to the law of the domicile of the testator, this interpretation would itself be subject to the overriding requirement that it must not in any way conflict with the law of the country in which the property is situated. However, once it is accepted that s 41(b) embodies a rule of construction only, the reservation referred to by Lord Denning does not apply. No conflict of laws issue arises. A New Zealand Court is not obliged to incorporate the ingredients of s 41(b) of the Inheritance Tax Act 1984 (UK) if they create only a rule of construction, because the exercise is the interpretation of a New Zealand Will according to New Zealand law. New Zealand law does not include the Inheritance Tax Act (UK).

[73] I accept that the views of Ms Proudman are correct, and I prefer them to the view expressed by Ms McAleavey. Section 41 does not create a restraint or limitation on dispositions. It creates a rule of construction. If the Will had to be construed in accordance with United Kingdom law, this New Zealand Court would be obliged to recognise the rule of construction contained within s 41 and apply it to this Will. If that were the exercise to be carried out, it is clear from Ms Proudman's affidavit, and indeed the affidavit of Ms McAleavey, that it would be appropriate to construe this Will in the way the Will was construed in *Re Ratcliffe (Dec'd)*. Although there is some difference in the wording in the relevant clauses in the Wills, the differences are not sufficiently significant to warrant *Re Ratcliffe (Dec'd)* being distinguished.

[74] However, a New Zealand Court approaching this Will from the perspective of New Zealand law does not have to take into account s 41 of the Inheritance Tax Act 1984 (UK) as part of the factual matrix that led to the drafting of the Will. There is nothing to indicate that those drafting the Will had it in mind, and the plain words of clause 5 of the Will require an equal division of the residue. This can only be achieved by any tax coming out of the whole of the residue.

[75] It is true, as Mr Patterson has emphasised, that there is a distinction between the way in which estate duty applies to the process of division, and the way the inheritance tax is calculated. The incidence of inheritance tax under s 4 of the

Inheritance Tax Act 1984 (UK) is chargeable as if immediately before the testator's death, he or she had made a transfer of value, and the value transferred had been equal to the value of his or her estate immediately before his or her death. In contrast, when there were death duties in New Zealand, pursuant to s 26 of the Administration Act 1969, the whole residue was available to the executor for the payment of all duties and fees payable under the Act.

[76] Thus, under New Zealand law estate duty would have been paid out of the total value of the estate, whereas in the United Kingdom the tax was attributed to the specific asset and treated as a debt notionally payable at the time of the testator's death.

[77] However, the distinction does not affect the construction of the New Zealand Will under New Zealand law. Those drafting the Will would not have known of it. They would have assumed that under New Zealand law clause 5 would be construed as requiring a net division. There is no evidence to indicate that even if they were aware of the difference, the provisions of the Will would have changed. The testator's object was a net equal division.

[78] Mr Patterson placed reliance on the case of *Bath v British and Malayan Trustees Ltd*. It was submitted that this case supported the proposition that the United Kingdom administrators could not have discharged the inheritance tax liability out of any of the assets comprising the residue of the estate. However, *Bath v British and Malayan Trustees Ltd* (1969) GOWN (Pt 1) (NSW) 44 does not appear to contain any such rule. In that case the Court ruled that a beneficiary would be successful in preventing the removal out of New South Wales of assets of the estate, to discharge duties payable in Singapore. The disposition of assets to Singapore that the beneficiaries sought to prevent, would have substantially prejudiced the New South Wales beneficiaries. The question of construction that arises in this case did not arise in *Bath v British and Malayan Trustees Ltd*.

[79] While the United Kingdom administrators are obliged to treat the inheritance tax as part of the testamentary expenses of the estate, the construction of the Will, as Ms Proudman pointed out, is logically a prior issue.

[80] Under New Zealand law s 41(b) does not operate to override the clear intention of the testator. The result the English Court was bound to reach in *Re Ratcliffe (Dec'd)* is not the result that a New Zealand Court is bound to reach, s 41(b) not being part of our law. New Zealand's general rules of construction apply, and all the residuary beneficiaries can share equally in the spouse's exemption. This may, as Mr Patterson has pointed out, give rise to difficulties in the United Kingdom for those who administer the estate there. It may mean that more inheritance tax has to be paid out of the residue, than would have been necessary if the exemption was applied only to Mrs Hamblett's share. No doubt the United Kingdom administrators will deal with that issue in a proper and efficient manner. It does not change the interpretation of the Will. The plain words prevail. All taxes are to be paid before the equal division is made, and if this involves the payment of some extra tax in the United Kingdom that is simply a consequence of meeting the testator's intention.

[81] Some reference was made by both counsel to the later 'without prejudice' settlement, whereby the Tesco property was transferred into the name of the four beneficiaries, and the tax was paid out of funds held as part of the residue. However, both counsel accepted that the 'without prejudice' nature of that settlement meant that it was not relevant to the exercise that this Court has to carry out, and I put that later Deed of Consent to one side.

Conclusion on first issue

[82] I do not accept that clause 5 is invalid under United Kingdom law or that the Executors when distributing the estate are bound to preserve for Mrs Hamblett only the benefit of the spousal exemption. The ultimate division is to be carried out in accordance with the provisions of clause 5 interpreted under New Zealand law, with inheritance tax being paid from the general residue. This will carry the testator's intention into effect. The result is an equal net division between the four beneficiaries.

The second issue: the effect of the Deed of Family Arrangement

[83] The issue that arises is whether the provisions of the Deed of Family Arrangement preclude Mrs Hamblett from now contending for an unequal ultimate distribution of the residuary estate, by asserting that the saving of inheritance tax arising out of the widow's exemption is available only to her personally. Given my findings on the effect of clause 5 it is not strictly necessary to consider this point, but I shall do so in any event in case this proceeding goes further.

Background to the Deed

[84] There was a considerable amount of correspondence which led to the signing of the Deed of Family Arrangement on 12 February 2004. However, this has not been emphasised in submissions, and there does not seem to be much doubt about the background to the Deed. The parties had been in a dispute through 2003 concerning the potential claim of Mrs Hamblett under the Property (Relationships) Act 1976. They had started settlement discussions in December 2003, and these had led to the ultimate settlement. The parties were aware that inheritance tax would apply to the Tesco property, and that there was a widow's exemption. In a memorandum filed on behalf of Mrs Hamblett with the High Court on 18 December 2003 it was stated:

> There is stated (which is accepted) a potential New Zealand tax liability of $400,000. There is also stated to be a liability for United Kingdom death duties. However, these death duties are payable as a charge against the United Kingdom property in respect of which they are incurred. They are payable by the beneficiaries over 10 years at a very modest rate of interest. There was also a substantial discount available to all beneficiaries because of the interests of the applicant as widow of the owner.

[85] Thus it was part of the background that the parties recognised that there was UK inheritance tax, that there was a widow's discount of some type, and that all beneficiaries and not just the widow could benefit from it.

The Deed

[86] The Deed of Family Arrangement contains recitals, which set out the background of Mr Hamblett's death and the provisions of the Will. It is stated at recital C and D:

> C. Because June wished to be free of doubt as to the legal effect of challenging the amount which she would receive under the Will pursuant to her rights under the Property (Relationships) Act 1976 she applied to the High Court at Auckland for, inter alia, a declaration.
>
> D. In order to save the considerable expense of litigation, and for the sake of avoiding unnecessary enmity between the parties who are family members, it has been agreed that an additional lump sum cash payment should be made to June from the Residue in settlement of all claims she might have under the Property (Relationships) Act, or any other enactment, or otherwise in settlement of all claims she might have under the Property (Relationships) Act 1976, under any other statute or at common law or in equity, and whether under the laws of New Zealand or otherwise.

[87] The first three operative clauses of the Deed read as follows:

> 1. June shall receive out of Basil's estate, in addition to her succession to the former matrimonial home and the specific bequests in her favour under clause 4 of the Will, an additional payment of $600,000.00 payable out of the Residue, such additional payment being in full and final settlement of all claims she might have under the Property (Relationships) Act 1976, under any other statute or at common law or in equity, and whether under the law of New Zealand or otherwise.
>
> 2. In all other respects the provisions of the Will shall be executed as written, so that the Residue of Basil's estate after payment of the $600,000.00 additional payment specified in clause 1 shall be divided between June and each of Basil's children, as provided for in clause 5 of the Will.
>
> 3. Basil's children (nor any one of them) will not make a claim against Basil's estate or an application for an amendment of the terms of the Will and each shall accept their entitlement under the Will as written (save only the additional payment to June of $600,000.00) in full and final settlement.

[88] The children of Mr Hamblett assert that these terms in particular, paras 1 and 2 of the Deed, preclude Mrs Hamblett from endeavouring to secure a greater share of the revenue. They submit that the Deed constitutes an accord and satisfaction and that in return for the guarantee of complete finality in relation to all future claims the

children had agreed to the provision of an additional payment to Mrs Hamblett of $600,000. It is submitted that they would not have agreed to this but for the waiver by Mrs Hamblett.

[89] Mrs Hamblett, on the other hand, contends that the Deed was only intended to settle claims under the Property (Relationships) Act, or other possible claims under the Family Protection Act, or other claims that she might have an equity against the estate that were similar to such claims. It is submitted that the reference to "or otherwise" in para 1 was to preclude the possibility of similar proceedings being taken in the United Kingdom under any equivalent legislation or in equity. It is submitted for her that the provisions of the Deed were not intended to deal in any way with, or to settle, the matter of the incidence of inheritance tax, which was not at issue at that stage.

[90] The starting point to construction was clearly expressed by Somers J in *National Bank of New Zealand Ltd v West* [1978] 2 NZLR 451 at 455 where he stated:

> The Court must ascertain the intention of the parties from the totality of the words used by them having regard to the circumstances in which they were used and the object, appearing from those words, which the person using them had in view.

[91] Clause 1 of the Deed must be read with clause 2, which specifically states that in all other respects the provisions of the Will shall be executed "as written" and the residue divided "… between Jean and each of Basil's children, as provided for in clause 5 of the Will."

[92] I have already considered the meaning of clause 5 of the Will. The plain meaning is that the four beneficiaries will get the same net amount after payment of all expenses including taxes. I interpret clause 2 of the Deed as precluding any challenge by any beneficiary to the plain meaning of the Will. That position is further confirmed at para 3, where the other residuary beneficiaries state that they will accept their entitlement under the Will "as written" save for the payment of $600,000. It is again a reference back to the words of the Will. That this can be objectively construed as the intention of the parties is confirmed by the various paragraphs in the agreement including the recitals. The recitals are relevant to

explaining the meaning of an operative part of a Deed. The avowed purpose is to set out the background to the Deed. The intention appears to be to effect a final settlement of all matters including the Will.

[93] The words used in the Deed of Family Arrangement indicate a wish on the part of the parties to finally resolve all matters relating to Mr Hamblett's estate. In para 1 Mrs Hamblett agrees that there is a settlement of "all claims" not only under the Property (Relationships) Act 1976, but also any other statute or at common law or in equity, whether under the law of New Zealand or otherwise. It is arguable that the dispute that has arisen as to the incidence of the tax does not constitute a "claim" by Mrs Hamblett. Despite the fact that she has sought specific relief in her statement of defence, the position is more that she, in common with the other beneficiaries, is seeking a declaration from this Court to resolve a dispute as to the interpretation of the Will. However the intention to be discerned from the words referred to is clear. There is to be an end to ongoing disputes about money arising out of the testator's death.

[94] In seeking these declarations Mrs Hamblett is challenging the Will as written. The Will as written provides that all administration expenses and other death duties (which I have interpreted includes the UK inheritance tax) is to be charged against all the residue including her share. She is therefore precluded from seeking such declarations to the contrary, or indeed from arguing against the declarations sought by the children for a distribution of the whole of the residuary estate of the deceased equally as between the residuary beneficiaries.

[95] The factual background is relevant. In *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 at 81 the Court of Appeal adopted the general principles summarised by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at pp 114 – 115 [1998] 1 WLR 896, 912-913. It was stated:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (*Investors Compensation* pp 114)

It is clear that the knowledge reasonably available to the parties must include matters of law as well as matters of fact: *Bank of Credit and Commerce International SA v Ali & Ors* [2002] 1 AC 251, 281. It is not appropriate to consider the previous negotiations of the parties or their declarations of subjective intent, (a requirement not always observed in this case). The meaning of the words is what the parties using the words against the relevant background could reasonably have been understood to mean (*Investors Compensation* pp 114-115).

[96] I consider that it was an objectively observable part of the relevant background that the parties were proceeding on the basis that there would be a substantial discount on the inheritance tax available to all beneficiaries because of the interests of Mrs Hamblett as the widow of the testator. This is evident in the Court memorandum of 18 December 2003. Further, it was part of the basis on which the parties proceeded that as a result of the administration process in New Zealand and the United Kingdom, there would be a net equal division between the beneficiaries. I construe this not from what the parties assert was their subjective intentions, but rather from the assumption that can be discerned from the memorandum.

[97] This background further confirms that the settlement words used in the Deed were intended to preclude any challenge to an equal net division between residuary beneficiaries under the will. I consider that the Deed constitutes a bar to Mrs Hamblett taking the position she has in these proceedings, even if Mrs Hamblett's submissions as to the application of the *lex situs* and the interpretation of the Will had succeeded. In my view the provisions of the agreement, when read with the Will, and the background relating to the issue of tax, shows a contractual acceptance of an equal net division.

[98] Mr Butterworth (who argued this part of the case for Mrs Hamblett) pointed out that the parties did not understand the detail of the United Kingdom law and how it would attach to a particular asset. He submitted that the issue of the incidence of the inheritance tax and who should bear it was not in dispute at the time because Mrs Hamblett did not then understand the legal effect of s 41 as interpreted in *Re Ratcliffe (Dec'd)*.

[99] I am satisfied that Mrs Hamblett's and her advisers, when they entered into the Deed of Family Arrangement, while they were aware of the incidence of tax and the fact there was a widow's exemption, did not know of the specific provisions of s 41 and the fact that in the United Kingdom the spousal exemption could only be a benefit to Mrs Hamblett. The discovery of this, and the development of this claim, can be seen in the correspondence that followed the signing of the Deed of Family Arrangement.

[100] Mr Butterworth emphasised authorities that show that in the absence of very clear language a Court will be slow to infer that a party intended to surrender rights in claims of which that party was unaware and could not have been aware: *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para [10], *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112, 129-130. The High Court in *Grant v John Grant & Sons Pty Ltd* stated at pp 129-130:

> From the authorities which have already been cited it will be seen that equity proceeded upon the principle that a releasee must not use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of the transaction as ascertained in the nature of the instrument and the surrounding circumstances including state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor.

[101] The legal position was summarised by the Court of Appeal in *Tag Pacific Ltd v The Habitat Group Ltd* (1999) 19 NZTC 15,069 where it was stated:

> The general rule said to govern this case represents no more than a reflection of the inherent probabilities, ie that people are unlikely to intend to release a claim of which they are unaware at the time. But it is always possible for parties to do so, and such an intention will be found if clearly demonstrated by the words used.

[102] In *Ali* the issue was whether a fairly standard settlement entered into by employees when they were made compulsorily redundant by the Bank could be said to preclude those employees from pursuing claims based on the stigma that those employees had since suffered as a consequence of their previous employer, the Bank, having carried out its business in a dishonest and corrupt manner. The employees did not know that the business had been carried on in this way when they entered

into the release. It can be readily seen that in that situation the claim was out of the ambit of that which was understood and agreed.

[103] In *Tag Pacific Ltd* the issue was whether a release discharging all outstanding matters and recording that there would be no further claims, precluded a claim for a tax liability not anticipated at the time of the release. The Court of Appeal approached the matter primarily as one of construction of the words used by the parties. The tax claim was not an "outstanding matter" as the claimant was not aware that it might have the tax liability. The second part of the release relating to there being no further "claims" had to be read with the first part. The settlement claims could only be regarded as relating to matters known as outstanding at the time. In the end, the Court of Appeal emphasised that the ultimate objective is always to ascertain the intention of the parties from the words they have used, interpreted in the light of the objective circumstances known to them at the time (p 15, 075).

[104] In both *Ali* and *Tag Pacific Ltd* the claims made after the signing of the release related to new heads of claim, arising from facts not known to the claimant. In *Ali* the head of claim was entirely new. The cause of action was a cause of action that the parties would not have contemplated at all in their thinking leading up to the agreement. Indeed, the circumstances of the nefarious practices were cleverly concealed from the world. The facts of *Tag Pacific Ltd* are closer to the present, in that the issue there was an unknown tax liability.

[105] The matter at issue here was the settlement of the issues between the children and Mrs Hamblett. The recitals of the agreement recorded that the parties wished to avoid the expense of litigation and unnecessary enmity. The recitals recorded that the agreement was to settle any claims in addition to her claims under the Property (Relationships) Act whether at common law or in equity and whether under the laws of New Zealand or otherwise. Clause 1 of the Deed specifically recorded that it was a full and final settlement of all claims not only under the Property (Relationships) Act but under any other statute or at common law or in equity and whether under the law of New Zealand or otherwise. In that context the provision in clause 2 that after the payment of the $600,000, the residue of the estate shall be divided in accordance

with the provisions of clause 5 of the Will between Mrs Hamblett and the children, can be seen as being intended on its words to preclude claims, or indeed arguments being raised, in proceedings such as these, which effectively challenged the equal division that was contemplated.

[106] It was said in *Tag Pacific Ltd* that the general rule that governed the position in that case was no more than a reflection of the inherent probabilities:

> … ie that people are unlikely to intend to release a claim of which they are unaware at the time. But it is always possible for parties to do so, and such an intention will be found if clearly demonstrated by the words used.

[107] However, in this case the fact of the tax liability, and the fact of the tax exemption, were in general terms known. What was not known was a characteristic of the tax exemption, namely that s 41 required that it be applied to the deceased's spouse's exemption. While this exact provision of the exemption was not specifically in the contemplation of the parties at the time when the Deed was signed, I consider that the words used, the words in the Will and the background all indicate an inherent probability that no later discoveries about the incidence of tax should change the equal net division. The parties can be seen as wanting an absolute finality of division. The Deed of Settlement was just that. It was designed to preclude any claims for an unequal division of the residue, whether on a basis known at the time or unknown. It is often the case that after the event of an agreement, there are legal or factual discoveries made later which were not known at the time, which might have led a party to take a different position if they were known at the time. Such discoveries (absent claims of misrepresentation, mistake or rectification) do not provide any exemption from a release, provided the words of the release can be seen as being intended to relate to the matter at issue.

[108] I consider that the Deed can be seen as excluding the presentation of arguments based on aspects of United Kingdom law that were not fully understood at the time of the execution of the Deed. That was one of the risks of settlement. I consider it was a full and final settlement in every respect so that after the payment of the $600,000 the net residue was to be divided equally. I conclude that Mrs Hamblett is precluded by the words of the Deed from making the claims and seeking the declarations sought in her statement of defence and counterclaim.

[109] I note that in this judgment I interpret the Will as providing for an equal net division after the payment of United Kingdom inheritance tax. If this had not been my decision, and I had concluded that the Will should be interpreted as providing for an unequal division then my conclusion might have been different as to the effect of the Deed when read with clause 5. If Mr Patterson's submissions as to the interpretation of the Will were accepted, the Deed when read with the Will might not preclude a claim because clause 5 would have required that inheritance tax not come out of Mrs Hamblett's share. If, however, Mr Patterson did not succeed on this interpretation argument, but succeeded on some other ground, Mrs Hamblett might well be precluded, depending on the Court's findings.

The Executors' questions

[110] In relation to the dispute as to the administration of the Will, the Executors have provided four questions to the Court which counsel accept encapsulate the issues that must be answered. The questions will now be listed and answered, and constitute the directions sought.

Question 1: *Is the interpretation of the Will governed by New Zealand law? If so, is there on the facts of this case any partial exception to that proposition as regards to the interpretation of clause 5 of the Will, insofar as UK situs immovable property (being the half interest in the Tesco property) forms or has formed part of the residuary estate prior to distribution? If that is the case, what is the ultimate effect on the distribution of the residuary estate?'*

[111] For the reasons I have given, the interpretation of the Will is governed by New Zealand law. There is no exception in relation to the interpretation of clause 5 or United Kingdom situs immovable property.

Question 2: *Is administration of the estate, and in particular the ultimate distribution of the residuary estate, governed by New Zealand law? If so, is there on the facts of this case any partial exemption to that proposition as regards to the operation of clause 5 of the Will, insofar as UK situs immovable property (being the half interest in the Tesco property) forms or has formed part of the residuary estate*

prior to distribution? If that is the case, what is the ultimate effect on the distribution of the residuary estate?

[112] The administration of the estate, and in particular the ultimate distribution of the residuary estate, is governed by New Zealand law, (although the administration of the United Kingdom assets is governed by United Kingdom law). There is no partial exception as regards the operation of clause 5 of the Will relating to the United Kingdom immovable property.

Question 3: *Do New Zealand conflict of laws principles apply to the resolution of either of the two preceding questions, and, if so, to what extent and to what effect?*

[113] New Zealand conflict of law principles apply only to the extent that the Will is to be interpreted in accordance with New Zealand law, although United Kingdom law must be applied to the administration of the United Kingdom assets.

Question 4: Having regard to the answers to the foregoing questions, how should the plaintiffs be directed to distribute the residuary estate as between the four residuary beneficiaries?

[114] The residuary estate should be distributed equally between the residuary beneficiaries after the payment of all administration expenses, including the payment of the United Kingdom inheritance tax.

[115] In relation to the dispute as to the interpretation of the Deed of Family Arrangement, the following two questions are asked:

Question 1: *On a proper interpretation of the Deed of Family Arrangement, and in particular clauses 1 and 2 thereof, is the widow, in the event that she succeeds in respect to the first dispute, thereby precluded from contending for an unequal ultimate distribution of the residuary estate which treats the saving of inheritance tax arising from the widow's exception as available to her?*

[116] It is not possible to answer this question, as the answer could turn on the exact grounds on which the widow succeeded in respect of the first dispute. If the

widow succeeded on a submission that clause 5 on its proper interpretation required an unequal distribution treating the saving of inheritance tax as available to her only, she might not be so precluded. This is because the effect of the Deed when read with clause 5 would be different, and in accord with Mrs Hamblett's position in this proceeding. However, if she succeeded on some ground other than the interpretation of clause 5, she might be precluded.

Question 2: *Having regard to the answer to the foregoing question, how should the plaintiffs be directed to distribute the residuary estate as between the four residuary beneficiaries?*

[117] The plaintiffs should distribute the residuary estate equally between the residuary beneficiaries after payment of expenses including the United Kingdom inheritance tax.

Result

[118] The statement of claim is couched as a general request for directions pursuant to s 66 of the Trustee Act 1956 or, in the alternative, mandatory or declaratory orders as to the lawful and proper approach to be adopted by the plaintiffs to administration and distribution of the estate. The directions given are those contained in the answers to the questions set out in the preceding section of this judgment.

[119] The first defendant's statement of defence seeks, first, a declaration that Mrs Hamblett is not liable to meet any part of the inheritance tax charged in respect to the Tesco property. This point does not appear to be in contention. It is evident that she is not personally liable to the United Kingdom government to meet any part of that inheritance tax, but that her share of the residue is in common with the entire residue, to be available to meet the inheritance tax.

[120] The second declaration sought by the first defendant is a declaration that no part of the inheritance tax charged in respect to the Tesco property is to be charged against her share of the residue of the estate of the deceased. In fact the inheritance

tax will, as a consequence of the directions given, be charged against her share of the residue of the estate of the deceased, together with the other shares of the residue.

[121] Therefore, I decline to make the declarations sought by the first defendant.

[122] The second defendants' in their statement of defence and counterclaim seek a declaration that the plaintiffs are required to distribute the whole of the residuary estate of the deceased equally as between the residuary beneficiaries, namely the first and second defendants. The directions already given in answer to the questions respond affirmatively to this request. The plaintiffs are required to distribute the whole of the residuary estate of the deceased equally as between the residuary beneficiaries, including the first and second defendants.

Costs

[123] I have received some submissions on costs from the parties, but I am by no means certain that I have received all the material that counsel intended would be provided to me on this topic. The first defendant's most recent submissions on costs appear to refer to submissions that I have not seen. To ensure that I have all the relevant materials, counsel should compile a consent memorandum attaching all the relevant submissions. If this is not possible, counsel should seek a telephone conference before me and the appropriate way forward can be decided.

[124] I reserve leave to counsel to raise any additional or consequential issue arising from the directions given.

……

Asher J