The Offshore Tax Planning Review

LETTERS OF WISHES

Paul Matthews[1]

> *'Well, poor soul; she's helpless to hinder that or anything now,' answered Mother Cuxsom. 'And all her shining keys will be took from her, and her cupboards opened, and things a' didn't wish seen, anybody will see; and her little wishes and ways will all be as nothing.'*
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> Thomas Hardy, *The Mayor of Casterbridge*, Ch 18.

Introduction

A common phenomenon in the modern offshore trust world is the letter of wishes. This is a document, usually contemporaneous with the settlement itself, in which the settlor records some of the motives he had in creating the trust, or suggests how discretions conferred on the trustees (or others) under the trust might be exercised. Almost invariably, this document is expressed not to fetter the discretion of the trustees or other appointors at all.

The effect of a letter of wishes is not much discussed in the literature[2], perhaps because it has become common only comparatively recently. Nor are there many cases dealing with the subject. But it is obvious that, depending on these effects, there may be significant consequences for estate and tax planning. Accordingly, the purpose of this short article is briefly to outline various aspects of the operation and effect of a letter of wishes today.

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1 Paul Matthews, Consultant Solicitor, Hopkins & Wood, 2-3 Cursitor Street, London EC4A 1NE Tel: (0171) 404 0475 Fax: (0171) 430 2358; Visiting Professor, King's College, London.

2 Though see Hayton [1992] J Int P 3, 8-9.

Shams

We begin with an obvious point. Some letters of wishes are not intended to be taken seriously. They do not represent the real intentions of the settlor, and are to be ignored in practice. This is merely an aspect of the doctrine of sham[3]. Where a settlor signs a pre-prepared "standard form" letter of wishes which he does not understand and which is never explained to him, and does not intend any consequences to flow from doing so, other than the general one of creating the trust as a whole, the document is a sham. It does not accurately record the intention of the settlor. Any document which does not do so can either be discarded completely or, if the settlor truly had some relevant intention which was misrecorded, rectified[4]. This misrecording need not be as to the substance of the wishes. It could, as Professor Hayton has noted[5], be as to whether it is to be binding on the trustees.

A more subtle form of sham occurs when the settlement is created by a "dummy settlor", i.e., a person who has (according to the trust instrument, at least) settled a nominal sum upon trusts for persons whom he does not know and is not connected with[6]. Subsequently, the "real" settlor decants substantial wealth into the hands of the trustees to hold upon the like trusts. In reality and substance the second settlor *is* the settlor[7]. The first settlor is a settlor (if at all) only in relation to the nominal sum. But what it achieves is that the real settlor's name does not appear in the trust documentation.

If the dummy settlor writes a letter of wishes (as commonly occurs) inviting the trustees to take account of the wishes of the real settlor, is that a sham? Well, it could be. If the dummy settlor has signed the letter (he will not have drafted it) without reading it, perhaps even before the name of the real settlor is inserted, it can hardly be said to represent his real intentions in the matter[8]. The mind does not go with the words in the document. If, on the other hand, the dummy settlor has genuinely focused on the letter, and has some real wishes to express, then the letter is not a sham. It may be without legal effect for other reasons (as to which see below), but not as a sham.

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3 e.g., *Rahman v Chase Bank (CI) Trust Co Ltd* 1991 JLR 103; *Midland Bank plc v Wyatt* [1995] 1 FLR 696.

4 e.g., *Re Butlin's ST* [1976] Ch 251.

5 [1992] J Int P 3,8.

6 As in *West v Lazard Brothers & Co (Jersey) Ltd* 1993 JLR 165, 201-205.

7 cf *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

8 cf *West v Lazard Brothers & Co (Jersey) Ltd*, above.

Inconsistent Wishes

Sometimes the wishes expressed are inconsistent. For example, the letter might begin with the usual assertion that the wishes are not binding and that the trustee is to exercise discretion, but then go on to provide in minute detail what distributions are to be made, when and to whom. Often the explanation is that the settlor has been told by the trustee that a standard form discretionary trust with detailed letter of wishes will be less expensive than — *but to the same effect as* — a tailor-made fixed trust.

In that case the settlor's wishes *are* intended to have effect, and the provision regarding discretion is not. That part is either a sham, or is to be struck out as inconsistent with and repugnant to the remainder of the letter. The trust instrument itself is also (in part) a sham, because this is not intended to be a genuinely discretionary trust, but instead a fixed trust.

On the other hand, if the settlor does really intend to leave final decisions up to the trustee, then the provision in the letter for discretion is to be taken seriously, and it is the detailed exposition of wishes which is suspect, and liable to be struck down or ignored. But normally it does not make sense, in creating a truly discretionary trust, to spell out *in detail* what should happen. Accordingly, in the absence of evidence either way, it is submitted that the former is a more plausible explanation than the latter.

Meaningless Wishes

A letter of wishes written in gibberish cannot be given effect to. It is meaningless. Strictly, we should distinguish this case from that of a letter written in a language which no-one can understand. In that case there are (or at any rate may be) sensible suggestions made, but in practice they cannot be taken account of.

Similarly, a letter that does not express any wishes cannot be a letter of wishes. It is common, for instance, to find letters of wishes that say something like:

> "I would like the trustees to take account of my wishes during my lifetime, and of anything I may say in my will, and subject to that, to take account of the wishes of X."

Of course, the trustees may take account of, indeed implement slavishly, the wishes of the settlor as expressed from time to time, but they could do that anyway. The "letter of wishes" adds nothing. It is like the purported execution

of a wide power of appointment by appointing in terms which parallel the original power but do not narrow it in any way[9].

Indeed, such a letter is not merely useless. It may also be positively dangerous. It might invite speculation that, since if it is to be taken literally it adds nothing, to give it meaning it must be seen as nevertheless legally significant, imposing an obligation of some kind on the trustees. The effect of this is discussed in the next section.

Restrictions on the Trustees

Professor Hayton takes the view that, even if a letter of wishes contains some words denying that it is to fetter the trustees, nonetheless

> "it is intended to be taken into account or it would be a pointless piece of paper"[10].

There is much force in this. If the settlor applies his mind to the letter of wishes, it is because he wants his wishes to be taken seriously. But note that Professor Hayton does not say that the settlor's intention is for his wishes to be slavishly followed to the letter. Plainly, not all settlors self-evidently want to control what happens. Many will be satisfied if the trustees have an obligation to take their wishes into account, even if (after due deliberation) they decide to exercise their discretion differently.

The question is whether there is still room for a letter of wishes which the settlor hopes will be taken into account (not necessarily followed), though he does not wish it to be possible for anyone (whether any beneficiary or himself) to complain if it is not. In my view there is. Clients are often advised by lawyers that the imposition of a legal obligation (even at a minor level such as consultation) may cause more difficulties than benefits will accrue, and that reliance on purely moral pressure may be sufficient as well as simpler[11].

In every case, therefore, it will be a question of examining the letter of wishes, the terms of the trust, and any other admissible evidence to see whether the settlor's intention was to impose a legal obligation on the trustees or others having discretion. It will be for consideration, for example, whether a description of the

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9 e.g., *Re Hay's ST* [1982] 1 WLR 202.

10 [1992] J Int P 3,8.

11 cf the common form provision in wills for the executors (or others) to distribute chattels taking into account the testator's (non-binding) wishes, and the Inheritance Tax Act 1984 s.143, which recognises this.

trustees' discretion in the trust instrument as "absolute" or "uncontrolled" has a bearing on this question[12].

If there is such an intention shown, the next question is, what is the obligation? At the lowest this would be an obligation of consultation with the settlor before the trustees exercise their power. At the highest, it might enable the settlor to control the trust completely, thus potentially giving rise to further arguments of sham trust, infringement of customary laws[13], frauds on creditors and so on, quite apart from unpleasant tax consequences in some fiscal systems.

Now we must be clear that the difference between a requirement to consult and a requirement to obey is enormous. The effect of the latter will be to make the settlor almost an appointor in his own right. A beneficiary whom such a settlor has expressed a wish to benefit probably will have a direct right of action for the benefits concerned. But a "beneficiary" of the settlor's wishes where there is only a requirement to consult will at most have only the right to seek to set aside an appointment made without consultation. And sometimes not even that. If the beneficiary cannot prove that the trustees have failed to take into account considerations which they should have taken into account, and that, had they done so, their decision would have been different, the trustees' decision will not be set aside[14].

Non-Binding Wishes

If the conclusion is reached that the wishes are genuine, but are not intended to bind, or to create any level of obligation, what then? Is it proper for the trustees (or other appointors) to take account of the letter of wishes? On principle, it should seem so. Trustees are not to take into account irrelevant considerations[15]. The settlor having created a trust, his wishes, at least if expressed contemporaneously, and as long as consistent with the general terms of the trust, cannot be said to be an irrelevant consideration. Not everything that is relevant to the exercise of discretion is to be found in the trust instrument itself.

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12 cf *Re Gulbenkian's ST* [1970] AC 508, 518.

13 As in *Rahman v Chase Bank (CI) Trust Co Ltd* 1991 JLR 103 (though Jersey law on this point has been altered for trusts created after 21st July 1989).

14 cf *Re Hastings-Bass* [1975] Ch 25; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587.

15 *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896, 903; *Stannard v Fisons Pensions Trust Ltd* [1992] IRLR 27.

This view is directly supported by recent Commonwealth authorities[16], and indirectly by older authority[17]. But trustees and appointors must not go too far. If they have an independent discretion, unfettered by requirements to consult or follow others' views, then if they do not genuinely exercise that discretion but defer to others, their purported decision will be set aside by the court[18].

Beneficiaries' Rights

What rights do beneficiaries have in relation to a letter of wishes? We have already touched on this question, and concluded that that must depend on the terms of the letter of wishes taken together with the trust instrument, and on whether together they impose obligations on the trustees or other appointors to consult or take others' wishes into account. So what really matters is to be able to know the terms, not only of the trust instrument, but also of the letter of wishes and of any other relevant document or communication.

There is no doubt that beneficiaries have a proprietary right to see "trust documents"[19]. Such documents are part of the trust property and belong in equity to the beneficiaries. The problem lies in identifying what are the trust documents. The leading English case[20] on the point proceeds on the basis of an unhelpful circularity: trust documents are those documents in the hands of the trustees, as trustees, containing information about the trust which the beneficiaries are entitled to know.

It is clear enough that the trust instrument, deeds of appointment thereunder, trust accounts, documents of title to trust assets, counsels' opinions and other legal advice to the trustees for the benefit of the trust, and so on, fall within this category[21]. It is also clear that, in England at least, documents relating to assets of underlying companies owned by the trust are not within the category, at any rate

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16 *Bank of Nova Scotia Trust Co (Bahamas) Ltd v De Barletta* (1985) Bahamas unreported, noted [1994] J Int P 35; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 427-431.

17 E.g., *Fraser v Murdoch* (1881) 6 App Cas 855.

18 *Turner v Turner* [1984] Ch 100.

19 *O'Rourke v Darbishire* [1920] AC 581, 626-7.

20 *Re Londonderry's Settlements* [1965] Ch 918.

21 *Ibid.*

not directly[22]. Nor are documents revealing how trustees have reached their decisions on the exercise of discretion[23].

But much else remains at large and open to debate. In particular, the status of a letter of wishes is unclear. A recent decision of the New South Wales Court of Appeal[24] had to grapple with the question, but unfortunately the three judges split three ways. One judge held that a letter of wishes was a "trust document" which beneficiaries (in that case of a discretionary trust) had a right to see. A second held that it was directed to matters of administration, and was accordingly not a trust document. The third held that it *was* a "trust document", but that, as it had been written on a confidential basis, with the intention that the beneficiaries should not see it, they were not entitled to see it. (The second judge also cited confidentiality as a reason for non-disclosure.) Thus a majority held that the document was in fact a "trust document", but a different majority held that the beneficiaries were not entitled to see it.

This is not a practical basis upon which trustees can act in the future. Nor is it conceptually sound. Whilst it is tolerably clear that a settlor can limit or restrict the information available to beneficiaries[25], there are doubts about how far it is permissible to do so consistently with the existence of the trust itself[26]. We therefore need to be clear about the principles upon which the trust information can be controlled and limited. Some commentators refer to the "irreducible minimum fiduciary obligation of disclosure", but admit that this is not easy to operate[27]. It is submitted that there is a better way.

Confidential information is often valuable, and is protected by law in similar ways to private property[28]. Indeed, for some purposes at least, it is to be regarded as property[29]. Unauthorised use by a fiduciary of trust information is visited with

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22 *Butt v Kelson* [1952] Ch 197.

23 *Re Londonderry's Settlements*, above.

24 *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

25 *Tierney v Wood* [1983] 2 Qd R 580.

26 *Jones v Shipping Federation of British Columbia* (1963) 37 DLR (2d) 273, 274-5; *AG for Ontario v Stavro* (1994) 119 DLR 4th 750.

27 E.g., Lehane [1994] J Int P 133. Cf Hayton [1992] J Int P 3, 5-6, Underhill & Hayton, *Trusts and Trustees*, 15th Ed 1995, 560-562, 663.

28 See, e.g., *Coco v AN Clark (Engineers) Ltd* [1968] FSR 415.

29 *Aas v Benham* [1891] 2 Ch 244.

the same remedial consequences as unauthorised use of trust property[30]. If the settlor confides property — including information — to trustees for the benefit of beneficiaries, those beneficiaries "own" the information in equity. It cannot lawfully be withheld from them, or terms imposed on what they can or cannot do with it[31]. If, however, the information is given to the trustees (a) for their own benefit, or (b) for the benefit of persons other than the trust's beneficiaries, or (c) on resulting trust for the settlor, then the beneficiaries have no proprietary basis for claiming the information.

It may therefore be that the "confidentiality" argument that attracted two of the judges in the recent New South Wales case can best be rationalised as the case of information being given to the trustees either for their own benefit or (less likely) for that of the settlor himself. (The latter construction becomes problematic if the settlor dies and the persons inheriting his residuary estate are or include the beneficiaries of the trust.)

What of the "irreducible minimum", the point beyond which the settlor cannot go in cutting down the beneficiaries' rights to information? This seems to be put on the basis that, without such information, the beneficiaries cannot effectively vindicate the rights that have been given to them[32], and hence the jurisdiction of the court is ousted[33]. Perhaps the best way to see this in property terms is this. What the settlor truly gives in equity to the beneficiaries cannot be separated from the information needed to vindicate those rights, any more than I can give property to you but on terms which purport to fetter your ownership[34].

So it all turns on exactly what the settlor gives, and what he does not give, to the beneficiary. For many — perhaps most — kinds of property, it is not meaningful to attempt to separate the thing from the information about it, so that the settlor could give the thing but keep the information. That would be, in effect, not to give the thing at all. But there are other kinds of property — primary amongst which is the interest of an object of discretion under a trust — where information *about the discretion* can be separated from *the interest given*, without the thing given becoming nugatory. There the settlor has a choice. He can choose not to give the supplementary information to the beneficiaries in equity, but to give it to

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30 *Boardman v Phipps* [1967] 2 AC 46.

31 cf *Morris v Morris* (1993) 9 WAR 150, where proprietary information was released to a beneficiary on terms as if it was given on discovery.

32 See Hayton [1992] J Int P 3, 5-6; Underhill & Hayton, *Trusts and Trustees*, 15th Ed 1995, 560-562, 663.

33 *Jones v Shipping Corporation of British Columbia*, above.

34 cf *Re Lipinski's WT* [1976] Ch 235.

the trustees for themselves, or retain it for himself. But it must belong to someone.

Discovery

In order that it should not be forgotten, a brief mention must be made of the right to discovery of documents and other information during the course of litigation[35]. This is not a right to your own information, but a right to that of your opponent. It is given on the basis that the document or information is relevant to the dispute between you both, and there cannot be a fair resolution of that dispute without that provision. And, if supplied, it is not yours to deal with as you wish. You may not use it for purposes collateral to the proceedings without consent[36]. This is a long way from the beneficiary's claim qua beneficiary. It arises only in litigation, once the issues between the parties have been sufficiently defined by the pleadings, and only relates to information satisfying restrictive conditions. As has often been said, it is not a licence to go fishing in the hope that something will turn up. For present purposes, therefore, nothing further need be said here about discovery.

Conclusion

Properly employed, there is an obvious and beneficial use to be made of the letter of wishes. But it is necessary carefully to separate out the cases of the letter of wishes as smokescreen, of the letter of wishes which expresses no wishes at all, of the letter of wishes which (taken with the trust instrument) does indeed impose some obligation on the trustees, and of the genuine, non-binding letter of wishes. Each of these has different — importantly different — legal effects. It is hoped that this article has come some little way towards assisting in making these distinctions[37].

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35 See, generally, Matthews and Malek, *Discovery*, 1992.

36 cf *Morris v Morris*, note 31 above.

37 I am grateful to Antony Duckworth for helpful comments on an earlier draft, though he must not be taken necessarily to agree with what I have written.