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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

Civil CAUSE NO. 350 OF 2004

BETWEEN:

(1) EVEN WAHR-HANSEN
(2) ANDERS JAHRE REDERI A/S
(3) BRIDGE TRUST COMPANY LIMITED

Plaintiffs

AND

(1) COMPASS TRUST CO. LIMITED
(2) MADS ERIK MONSEN
(3) AALL GROUP INC.
(4) AALL TRUST & BANKING CORPORATION LTD.
(5) AALL & COMPANY LIMITED INC.
(6) TOVE BROWN
(7) ANTHONY GEORGE MERRIK, BARON TRYON OF DURNFORD
(8) FORRESTER MARITIME LIMITED
(9) FORRESTER HOLDINGS LIMITED (IN VOLUNTARY LIQUIDATION)
(10) CHESTER PORTFOLIO LIMITED
(11) ORNATE LTD.
(12) BANK OF BUTTERFIELD INTERNATIONAL (CAYMAN) LTD.
(13) ANCHOR TRUST CO. LTD.
(14) ROBERT N. SLATTER
(15) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Defendants

LEGAL DEPARTMENT JAN 19 2007 Cayman Islands

Appearances: Mr. Geoffrey Vos Q.C., Ms. Camilla Bingham, Mr. Roger Leese and Ms. Maxine Mossman with Mr. Carlos de Serpa Pimentel and Mr. Chris Easdon of Appleby Spurling Hunter (now Appleby Hunter Bailhache) for the first to thirteenth Defendants

Mr. Stephen Rubin Q.C., Mr. Justin Higgo with Mr. Graham Ritchie Q.C. and Mr. David Collier of Charles Adams, Ritchie & Duckworth for the first to 3rd Plaintiffs

The fourteenth and fifteenth Defendants did not appear

GRAND COURT - CAYMAN ISLANDS

Before: **Hon. Justice Henderson**

Heard: **May 17, 18, 19, 22, 23, 24, 26, 29 & 30, 2006**

JUDGMENT

When and in what circumstances will this court refuse to entertain a claim on the ground that it amounts to an indirect attempt to collect tax on behalf of a foreign revenue authority? The rule that a court will ordinarily decline jurisdiction over such claims is well established. The factors which will lead a court to characterize a claim as an indirect attempt to collect foreign tax are more difficult to discern and can be gleaned only from a review of the authorities.

Background

The Plaintiff Even Wahr-Hansen is the administrator of the estate of Anders Jahre. Jahre died in 1982 in Norway while domiciled there. At the request of his widow, Bess Jahre, his estate was taken under public administration in 1982 by the Probate Court in Sandefjord, Norway. The original administrator, Dr. Per Brunsvig, was replaced by Mr. Wahr-Hansen in 1991. In the following year, letters of administration were granted to Mr. Wahr-Hansen by the High Court of Justice in England and resealed by this court.

The Plaintiff Anders Jahre Rederi A/S is an entity owned by the estate. The Plaintiff Bridge Trust Company Limited is the present trustee of the AALL Foundation ("the AF") in the Cayman Islands and an assignor of certain claims pleaded in the statement of claim.

In the broadest terms, the plaintiffs represent the estate of Anders Jahre. I will refer, as do the pleadings and the arguments on this application, to the estate and the plaintiffs interchangeably.

The estate's case is that Anders Jahre was, on (and prior to) November 9, 1976, the legal and beneficial owner of all of the 10,000 shares of a Panamanian company, Continental Trust Company Inc. ("CTC"). On that date, 8,000 of the10,000 CTC shares were purportedly settled on a trust known as the Continental Foundation ("the CF"). The validity of this settlement was attacked in a previous action in this court, cause 296 of 1994; the decision of the Privy Council on June 26, 2000 declared the settlement to be void. Consequently, the 8,000 CTC shares and the assets and income derived from them were held by the trustees of the CF on resulting trust for Anders Jahre and, after his death in 1982, for the estate. These assets were later transferred to another trust - the AF.

After November 9, 1976, the remaining 2,000 of the 10,000 CTC shares and the assets and income derived from them were, on the plaintiffs' case, beneficially owned by Anders Jahre and held in trust for him by Thorleif Monsen. (Alternative, but roughly equivalent, theories of ownership are advanced by the plaintiffs on the basis of the applicable Norwegian law.)

Essentially, the estate claims a dishonest misappropriation of estate assets by Thorleif Monsen, with the dishonest assistance of other defendants. One group of claims (found

in Part III of the pleading) alleges the estate's entitlement to trace the proceeds of and seek equitable compensation for the misappropriation of the 2,000 CTC shares retained after the 1976 settlement. Another group of claims (in Part IV) relates to the "Contingency Fund", a fund held by CTC in trust for Anders Jahre and/or the second plaintiff and allegedly misappropriated by Thorleif Monsen with the assistance of certain defendants. The Contingency Fund was originally intended to provide for the reimbursement of Jahre and the second plaintiff for expenses incurred by them on CTC's behalf. Part V of the statement of claim again makes allegations of misappropriation of assets – the assets vested in the CF, held by it on resulting trust for the estate, and transferred to the AF. This group of claims consists of allegations of misappropriation, breach of trust, dishonest assistance, breach of fiduciary duty, the right to trace and the right to receive equitable compensation. The final group of claims (described in Part VI) sets out the estate's entitlement to follow assets forming part of the estate of Thorleif Monsen, who died in 1992.

The first Defendant, Compass Trust Co. Limited, is the personal representative of Thorleif Monsen. The second and sixth defendants, Mads Erik Monsen and Tove Brown, are children and heirs of Thorleif Monsen. The other defendants (except the Attorney General) are alleged to have been complicit in some way in breaches of trust and misappropriation of assets.

Issue

One of a number of defences advanced in the amended defence (of the first to thirteenth defendants, at paragraphs 1035 to 1066) is the assertion that the estate's claims are an indirect attempt to enforce a foreign revenue law and therefore unenforceable. In my ruling of September 23rd, 2005, I granted leave to the defendants to set down the following question for preliminary determination:

> "Do the plaintiffs' claims fail as being in substance claims to collect tax by or on behalf of a foreign revenue authority (as per paragraphs 9.2 and 1035 to 1066 of the Defence)?"

Leave was also granted to proceed with a preliminary determination of a second question – one of limitation periods – but the parties have agreed not to proceed with that.

For the purpose of this application, I must assume that the plaintiffs' claims can and will be established at trial.

The first part of the enquiry requires resolution of a pure question of law: the nature, extent, and essential elements of a "tax gathering" defence in English law. Once the essential elements have been identified, questions – which are largely issues of fact – of whether the evidence before me establishes each of the essential elements of the defence on the balance of probabilities must be resolved. To that end, I have received in evidence a number of witness statements and observed two of the most important witnesses (Mr. Wahr-Hansen and Truls Leikvang) under cross-examination.

This court will decline to exercise its jurisdiction if it is asked to enforce a foreign penal or revenue law, directly or indirectly: see *Marada Global Corporation v. Marada Corporation et al 1994-95* CILR 546. The estate accepts the validity of this central proposition (Opening Submissions on Behalf of the Estate, paragraph 27, page 8).

Cases of direct enforcement are not common and present little difficulty. The present claims are said to be an effort at indirect enforcement. There is a dispute about the nature and scope of the prohibition on indirect enforcement and no agreement on the factual prerequisites which must ground such a finding.

The defendants say that a careful examination of the decided cases reveals that there are three, and only three, prerequisites. The court must be satisfied:

1) that there exists an unsatisfied tax claim; and

2) that the proceeds of the litigation will go to the foreign revenue authority; and

3) that the claim is in substance an attempt to collect foreign tax.

The first of these is uncontroversial; the plaintiffs agree that it is a necessary element and admit the existence of the unsatisfied tax claim. They also agree that the second and third prerequisites must be present, but argue that the evidence does not establish either element. While most of the proceeds would go to the Norwegian revenue authority, the plaintiffs say that there are other interested parties. They deny that the proceedings are in substance an attempt to collect foreign tax.

With respect to the third element, the plaintiffs say there are qualifications which prevent the rule from operating in the present case:

1) there must be a "connection" between the current claims and the foreign tax law; and

2) the indirect enforcement rule is not a defence available to anyone other than the taxpayer; and

3) "control" of the estate "by the tax authorities and/or the State of Norway" is a necessary requirement for application of the rule.

The defendants reject each of these supposed limitations, and say there is no support for them in the decided cases. In their submission, all that can be gleaned from the authorities is that a claim which "in substance" is an attempt to enforce indirectly a foreign revenue law must fail.

Facts

In 1941, a ship known as the Janko was seized as a prize in Curacao on the ground that it was suspected of being owned by Anders Jahre, a Norwegian national. The dispute dragged on until 1947. The State of Norway attempted to show Jahre to be the true owner of the Janko while he insisted that Gosta Dalman, a Swedish national, owned the vessel by virtue of his shareholding in Pankos Operating Company S.A., an entity incorporated in Panama. Eventually, the Janko was returned to Dalman because the State of Norway was unable to establish Jahre's ownership of the shares of Pankos (and thus his ownership, indirectly, of the Janko).

In the early 1950s, the State of Norway initiated enquiries into investments which it believed Jahre had placed in Panama, Sweden and elsewhere. Ultimately, there was a compromise involving the repatriation of certain ships to Norway.

In 1972, Jahre offered on behalf of CTC a contribution of forty million Norwegian kroner towards the building of a new town hall in his home town of Sandefjord. The second instalment of this gift was paid from a CTC bank account held in Sweden, a circumstance which triggered investigation by the Bank of Norway. Jahre repeatedly denied owning any beneficial interest in the shares of CTC. He refused to disclose the identity of CTC's shareholders, an act which provoked the Bank into saying it would issue no further currency transfer licences to CTC. In 1975, the Bank wrote to the Norwegian Director of Taxes explaining the circumstances and asking for further investigation.

In 1979, the head of the Vestfold County Tax Office initiated an audit of Jahre's corporate and personal financial affairs. The State of Norway obtained (in 1980) an order freezing a CTC bank account in Sweden, although the order was revoked later that year.

Two months after Jahre's death in 1982, his estate was placed under the public administration of the Sandefjord District Court. Dr. Per Brunsvig was appointed administrator of Jahre's estate at the instance of Jahre's widow and sole heir, Bess Jahre. Dr. Brunsvig had represented Jahre's interests earlier, in relation to the Government's investigations. Anders Jahre A/S and the Norwegian tax authorities were the estate's sole creditors.

On September 14, 1983, the Vestfold County Taxation Board made a retroactive assessment against the estate of Anders Jahre for tax payable in the years 1970 to 1982. This was done on the basis that Jahre was the owner of CTC over that period. The total amount of the assessment, including interest and penalties and as adjusted subsequently in 1990 and again in 1999, amounted to some U.S. $125 million.

In November, 1983, Dr. Brunsvig issued a writ in the Sandefjord City Court seeking to have the tax assessment declared invalid on the ground that Jahre was not the owner of CTC. This writ named Sandefjord Municipality as the Defendant but the State of Norway (acting through the Ministry of Finance) elected to step in and defend the proceedings in place of the Municipality.

In 1984, Dr. Brunsvig filed an appeal to the National Tax Committee.

Bess Jahre was anxious that the estate should not be made the subject of bankruptcy proceedings because of the adverse effect that would have on her husband's reputation. An understanding was reached between Bess Jahre and the State of Norway that the State would not initiate bankruptcy proceedings provided that it was given certain information about Jahre's income and assets.

In November, 1990, the National Tax Committee rejected the estate's appeal and upheld the tax assessment of the Vestfold County Taxation Board. After an attempt to pursue

the action which was commenced in the Sandefjord City Court challenging the assessment, those proceedings were eventually withdrawn in 1993.

Dr. Brunsvig suffered a stroke in February, 1990. In November of that year the Probate Court formally relieved him of his position as administrator of the estate.

Ten days later, the Attorney General of Norway, Bjorn Haug, wrote to the Probate Court. He said he had been requested by the Ministry of Finance to represent the State's interests in relation to the tax assessments. He asked for a meeting of creditors to determine "what steps should hereafter be taken to investigate whether there are any outstanding assets or other capital, in Norway or abroad, that must be assumed to belong to the decedent estate and which may be brought home to cover the claims of the estate." He also noted that it would be necessary to appoint a new administrator and said the appointment of Dr. Brunsvig had been "a mistake" because Dr. Brunsvig had acted "against the tax authorities, who are the real principal partner in the decedent estate and whose interests the estate must defend since the estate must be deemed to be insolvent." He added: "in my opinion, it should under no circumstances be considered to appoint as trustee anyone whose job it is to fight the creditors' claims in the estate." A creditors' meeting was scheduled for the following month.

The Attorney General turned his attention to the need for a new administrator. The Plaintiff, Even Wahr-Hansen, has been practicing law since 1970 and was well known to the Solicitor General. Mr. Wahr-Hansen's speciality is taxation law; he also has

experience in shipping and maritime law. He was involved in the administration of the bankrupt estate of another Norwegian ship owner and found himself engaged in tracing and recovering assets secreted abroad.

When the Attorney General asked Mr. Wahr-Hansen to undertake the administration of the Jahre estate, he accepted. On January 17, 1991, his appointment was approved at a meeting of the heirs and beneficiaries and recorded in the minutes of the Probate Court. His mandate was clear: "I was instructed by the Probate Court at the outset to trace any offshore funds that Jahre had established."

The Probate Court accepted, after the decision of the National Tax Board, that the Norwegian revenue was the principal creditor. Mr. Wahr-Hansen said that his "total focus" after appointment was to locate offshore funds owned beneficially by the estate and take control of them.

The investigation into Jahre's affairs made headline news in Norway on a regular basis. Alf Jacobsen, a journalist with a particular interest in the story, contacted Mr. Wahr-Hansen in January, 1992. He put him in touch with Dr. Hank McKinnell, who was in the midst of an acrimonious divorce from the daughter of Thorleif Monsen. McKinnell was in possession of documents which could assist the estate in proving that the shares of CTC, ostensibly owned by Thorleif Monsen, were beneficially owned by Jahre.

McKinnell asked for 15 to 20 percent of any amount recovered by the estate as his price for co-operation. The estate said that the proposal "presupposed the participation of the Norwegian Government, seeing that the tax claim is the only claim in the estate and that any surplus in the estate will in its entirety benefit the Norwegian tax authorities." (see Ex. D4/1336)

By June 14, 1992, the Attorney General had been briefed on the McKinnell proposal and provided a "positive" initial reaction. Mr. Wahr-Hansen supported the proposed McKinnell agreement fully. By November, 1992, it appeared likely that the Ministry of Finance would approve it. At this point, for the first time, Mr. Wahr-Hansen advised the Probate Court of the possibility of buying McKinnell's co-operation. The timing is significant, and will be examined below.

In January, 1993, the Norwegian Government approved of the McKinnell bargain and Mr. Wahr-Hansen applied to the Probate Court for authority to make the first payment of U.S. $270,000.00 to Dr. McKinnell. This was approved.

By May, 1994, Mr. Wahr-Hansen had had sight of the McKinnell documents for almost a year. He decided to initiate proceedings in England and in Norway against Lazard Brothers and Co. Limited and others. Under Norwegian law, the Probate Judge himself could be made liable for losses caused by the institution of the proceedings and required an indemnification agreement. That was provided by the State of Norway.

Other legal proceedings were under way as well, and financing was needed for this purpose. Mr. Wahr-Hansen asked the Ministry of Justice for funding. The application came before the Standing Committee on Justice and was then debated in Parliament. The application was approved. Funding in the approximate amount of U.S. $16.2 million was provided to the estate. From that point on, Mr. Wahr-Hansen sent quarterly reports to the State of Norway on his progress and the State advanced sums to him from time to time.

By 1996, about one third of the funding had been spent, but with little positive result. Political figures began to doubt the wisdom of continuing to find funding. More funding was provided, however, and further proceedings were launched.

As administrator, Mr. Wahr-Hansen had a duty of loyalty to the estate and to the Probate Court but not to any individual creditor. By November, 1996, the Probate Judge was beginning to question Mr. Wahr-Hansen's degree of independence from the Ministry of Finance. He was concerned about the nature and extent of Mr. Wahr-Hansen's communications with that creditor.

On October 3, 2001, Mr. Wahr-Hansen settled the Norwegian proceedings against Lazards for a payment to the estate of U.S. $41.5 million. It was a condition precedent to the settlement agreement that the State of Norway guarantee it would take no further action against Lazards.

At the subsequent Probate Court hearing for approval of the agreement, Mr. Wahr-Hansen and the State of Norway recommended approval but Bess Jahre and Anders Jahre A/S opposed it (arguing that a global settlement of all claims would be preferable). The Probate Court accepted the submission of the State of Norway and approved the agreement. The Court explained that while, in the case of a solvent estate, the views of the sole heir should prevail, in the present case it was "completely unrealistic that Bess Jahre would receive anything after the creditors have been paid" (see Ex. D8/2937). In those circumstances, it was only fair that the view of the Ministry of Finance should prevail.

The proceeds of the settlement were applied to repay advances to the estate made by the State of Norway. Since early 2002, the estate has been self supporting financially.

On November 19, 2001, Anders Jahre A/S initiated bankruptcy proceedings against the estate. Mr. Wahr-Hansen responded by recommending to the Probate Court that an "intervention payment" be made to Anders Jahre A/S to avert bankruptcy. He expressed the view at that time "that the position of the estate in the legal action in the Cayman Islands will be weakened if bankruptcy proceedings are opened" (see D8/3022). This was a reference to cause 296 of 1994 in this Court, the predecessor action dealing with the assets of the AF. The tax gathering defence was also pleaded in that action.

The opinion quoted mirrors an earlier one, recorded in the minutes of the working meeting of the estate in November, 1997, that administering the estate as an insolvent

estate would "make things simpler abroad." The distinction has to do with the question of control. Under Norwegian law, creditors have very limited powers in the administration of an insolvent estate but their opinions (as distinct from those of the beneficiaries) will dictate the outcome of disputed questions in a bankrupt estate. The expert evidence on Norweigan law establishes that:

> "In bankruptcy, the creditors in practice are in charge of the administration of the estate, while the creditors have very limited powers in an insolvent estate. The ultimate decision making organ of a bankrupt estate is the creditors meeting …basically the weight of each creditor's vote depends on the proportionate size of his claim against the bankruptcy estate."

Bess Jahre supported the bankruptcy petition. However, the Attorney General of Norway, acting on Mr. Wahr-Hansen's advice, offered an intervention payment to Anders Jahre A/S on behalf of the State. The payment was accepted and, on December 18, 2001, the Probate Court ruled that Anders Jahre A/S no longer had standing to proceed with its bankruptcy petition. The estate remained an insolvent estate.

Cause 296 of 1994, the predecessor action to this one, was settled in November, 2003. These proceedings were initiated in July, 2004.

Bess Jahre passed away on June 9, 2006. Before her death, she assigned her interest in the Anders Jahre estate to charity.

Applicable Law

The modern line of authority on the tax gathering defence starts with *Huntington v. Attrill [1893]* AC 150, a case concerned not with taxes but with penal sanctions. Huntington

was a creditor of a New York company of which Attrill was a director. Huntington obtained a judgment for the debt against Attrill personally in New York under a State law imposing personal liability on directors. The judgment went unsatisfied, so Huntington sued Attrill where he resided – in Ontario. Attrill's only defence was his argument that the action should not be entertained at all because it was an attempt to enforce a penalty inflicted by the law of a foreign State.

The Judicial Committee of the Privy Council agreed that "no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country" (at page 156). The court quoted with approval from *Wisconsin v. Pelican Insurance Company* 127 U.S. (20 Davis) 265, an 1888 decision of the U.S. Supreme Court in which the American authorities are reviewed. As an example, their lordships postulated an action by "a member of the public in the character of a common informer" who, although apparently suing in his personal capacity, is regarded as acting in the public interest (page 158).

The importance of the decision lies in its recognition that substance, rather than form, must govern the characterization of the proceedings and in the assertion that an action will offend the rule even where its object "indirectly" aims at enforcement of a penalty. Since the penalty in question could not have been recovered at the instance of the State, Huntington was successful.

Apparently, the first reported instance of a tax gathering defence in England was *Municipal Council of Sydney v. Bull [1909]* 1 KB 7. This was an attempt at direct enforcement. The Municipal Council sued in England to recover a levy imposed by it for street improvements. In a brief judgment, the court said the issue was "not properly cognizable by these courts" (at page 13). The decision was applied in *Re Visser: The Queen of Holland v. Drukker & others [1928]* Ch 877, another case of an attempt at direct enforcement.

One rationale for the rule against tax gathering is set out with particular clarity by Learned Hand, J., in *Moore v. Mitchell (1929)* 30 F. (2d) 600. He said:

> "While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign state, if they run counter to the "settled public policy" of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state. This is not a troublesome or delicate inquiry when the question arises between private persons, but it takes on quite another face when it concerns the relations between the foreign state and its own citizens or even those who may be temporarily within its borders. To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are entrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbour. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper."

The decision in *Commissioner of Taxes, Federation of Rhodesia v. McFarland (1965)* 1 W.L.D. 470 contains a useful discussion of a different public policy foundation of the rule against tax gathering. This was a case of direct enforcement. The discussion starts with the observation that, "one would have thought that it is public policy that persons should pay their taxes and not evade such payment by escaping the country which imposed them" (at page 473). After examining a number of authorities, the court found the rule against tax gathering to be rooted in considerations of sovereignty:

> "In the well-known *Lotus case (1927),* decided in the Permanent Court of International Justice, is to be found the following passage:
>
> > 'The first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another State. In this sense jurisdiction is territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or a convention.'
>
> The imposition of a tax creates a duty that is not to be likened to any other debt. The fiscal power is an attribute of sovereignty. Professor Edgar Allix says in the "*Receuil des Cours*" of the *Academie de Droit International, (1937)* 111 (61) at p. 559:
>
> > 'Le premier droit et le premier devoir de l'Etat est d'assurer son existence et son fonctionnement et, a cet effet, d'exiger de ceux qui vivent sans sa lois les moyens necessaries. Le fondement de l'impot est dans la souverainete de l'Etat laquelle implique l'autorite, dont le pouvoir fiscal est un des attributs.'
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> As *Oppenheim* says:
>
> > 'to enforce revenue laws would in effect mean to assist States in the performance of acts of sovereignty in foreign countries in derogation of their territorial supremacy'. Pp. 329-30.
>
> Just as one State cannot send its police force into another State so also it cannot send its tax-gatherers.
>
> To allow a foreign State, whether directly or indirectly, to obtain a

> judgment for taxes imposed on all those who in its eyes share in the economic or social life of that State, in the courts of another country, would be a judicial intervention in direct derogation of that country's territorial supremacy. As the passage cited from the *Lotus* case indicates, such an inroad can only be justified by custom or by some special agreement. The latter is the function of the Executive power."

An early example of an indirect enforcement case is found in *Banco De Vizcaya v. Don Alfonso de Borbon y Austria [1935]* K.B. 140. The Defendant, the former King of Spain, had provided certain securities to the Plaintiff, a Spanish bank, with instructions that they should be held by the Westminster Bank in London to the order of the Plaintiff as the Defendant's agent. Subsequently, the Spanish Government decreed that all of the ex-King's property should be seized for the benefit of the State and that all Spanish banks should deliver such property to the Spanish Treasury. Both the Spanish bank and the ex-King sought to recover the securities; the Westminster Bank interpleaded.

Lawrence, J. applied *Huntington v. Attrill* and sought to determine the substance of the claim. The Spanish bank claimed to be entitled to the securities by virtue of its own contract with the Westminster Bank; it argued that the ex-King's rights were limited to a right of action against the Spanish bank itself. The court found that:

> "The plaintiffs are not asserting their contractual rights as they originally existed, but as altered by the decrees of the Spanish Republic. Nor are they in substance asserting their own rights at all, but the rights of the Spanish Republic." (at page 144)

The claim by the Spanish bank failed because it was in substance an attempt to enforce indirectly the confiscatory decrees of the Spanish Government. The Spanish bank was not an agent or nominee of the Spanish Government. Its claim against the Westminster Bank was founded upon its own contract with that institution. However, as against the

other claimant (the ex-King), the Spanish bank was compelled to invoke the Spanish confiscatory legislation to establish its pre-eminent claim. Moreover, the Spanish bank's purpose in claiming the securities was to recover them for the benefit of the Republican Government.

The decision in *Peter Buchanan Ltd. & MacHarg v. McVey [1954]* IR 89 is now viewed as a seminal decision on an indirect enforcement claim. Peter Buchanan Ltd. was a company doing business in Scotland as a broker of wine and spirits. James McVey owned all of the shares of the company and was one of its two directors; the other was "for practical purposes the paid servant of" Mr. McVey. He had disposed of his interest in two other companies on very advantageous terms. Before doing so, he was advised by the Scottish Revenue that the transactions would not attract excess profits tax; later, the transactions were made liable to such tax retroactively and a tax assessment was made against McVey.

He determined to resist what he saw as an immoral tax. The company's assets at this time consisted of whisky stocks. McVey arranged to have a bank advance a sum approaching the value of the whisky, secured by whisky warrants and McVey's personal guarantee. The bank was put in the position of being able to sell the whisky for its own account, which it did. McVey caused the funds to be moved to bank accounts in Dublin in his name. He left enough behind in the company to meet the claims of all creditors other than the Revenue.

The Lord Advocate, acting for and on behalf of the Commissioners of Inland Revenue, obtained a default judgment against McVey in Scotland and brought a petition there to wind up the company compulsorily. The Scottish court made an order for winding up and appointed the Plaintiff, Andrew MacHarg, as liquidator. He was "chosen by the Revenue" and "worked in every respect hand in glove with the Revenue authorities in an effort to chase the tax" (page 95).

The action against McVey in Ireland was for an accounting and repayment of the monies taken by him. In effect, this was a claim against a director for breach of fiduciary duty. Although it does not appear from the report of the case, there were a few other creditors for small amounts. At some time in the course of the Irish proceedings, McVey paid off these creditors: *Anton, Private International Law, 1967*, pp. 584-5.

Kingsmill Moore, J. first concluded that the stripping of assets from the company by McVey was both *ultra vires* the company and dishonest. In doing so, he made reference to the principle that a British court "cannot take notice of the revenue laws of a foreign State" (per Abbott, C.J. in *James v. Catherwood* 3 Dow. & Ry. 190). Nevertheless, he gave consideration to the Scottish revenue law for the limited purpose of his conclusions about the nature of the transaction (at page 100).

After a very complete review of the authorities, Kingsmill Moore, J. held:

> "These decisions establish that the Courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority or the representative of such an authority; and that, even if a judgment for a foreign

> penalty or debt be obtained in the country in which it is incurred, it is not possible successfully to sue in this country on such judgment. They do not expressly go further, though some of the dicta suggest that there may be a principle that our Courts will not lend themselves indirectly to the collection of a foreign tax and will not entertain a suit which is brought for that object. Such a wide extension is also suggested by the authorities which establish that our Courts will not entertain an action for the enforcement of a penalty imposed by the laws of a foreign State, a principle which seems to have been the parent of the rule as to not enforcing foreign revenue claims."
>
> ...
>
> "Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaint that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly involve the execution of the revenue law of another State, and serve a revenue demand. There seems to me to be a reasonably close parallel between the position of the Banco de Vizcaya and the present plaintiff. In each case it is sought to enforce a personal right, but as that right is being enforced at the instigation of a foreign authority, and would indirectly serve claims of that foreign authority of such a nature as are not enforceable in the Courts of this country, relief cannot be given."

His Lordship referred to the rationale for the rule provided by Judge Learned Hand in *Moore v. Mitchell* (and quoted above), and then said:

> "Safety lies only in universal rejection. Such a principle appears to me to be fundamental and of supreme importance.
>
> If I am right in attributing such importance to the principle then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinised and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue, it must be rejected. Mr. Wilson has pressed upon me the difficulty of deciding such a question of fact and has relied on "*ratio ruentis acervi.*" For the purpose of this

> case it is sufficient to say that when it appears to the Court that the sole object of the suit is to collect tax for a foreign revenue and that this will be the sole result of a decision in favour of the plaintiff, then a court is entitled to reject the claim by refusing jurisdiction.
>
> If the strict application of the principle were in any way relaxed evasion would be easy and the Court would be faced with all the difficulties which the adoption of the rule was designed to avoid."

In the result, Kingsmill Moore, J. found:

> "I hold as a fact and indeed I understood it to be admitted that the sole object of the liquidation proceedings in Scotland was to collect a revenue debt. There is no evidence that any ordinary creditor would not have been paid in full out of the assets left in Scotland and as far as ordinary creditors are concerned the result of the liquidation proceedings in Scotland would be to deprive them of payment by reason of the priority in Scotland of a Revenue debt. I hold also that the sole object of the present proceedings before me is to collect a Scottish Revenue debt, and that if I were to decide for the plaintiffs the only result of those proceedings would be that every penny recovered, after paying certain costs and liquidator's remuneration could be claimed by the Scottish Revenue. That in my opinion is the substance of the suit - to collect the revenue claim of a foreign State. Being of this opinion, I reject the claim."

On appeal, the judgment was upheld in its entirety. The argument that Kingsmill Moore, J. should have focused solely on the legal effect of the proceedings and not the indirect result of them was rejected. The Court of Appeal said:

> "It is argued that while a company is in liquidation it is still a company and operates in Scotland by its liquidator. A foreign State it is said recognises the title given to a liquidator by the laws of his country. I agree that if the payment of a revenue claim was only incidental and had there been other claims to be met, it would be difficult for our Courts to refuse to lend assistance to bring assets of the Company under the control of the liquidator. But there is no question of that here. The position seems clearly to be as found by the trial Judge that these proceedings were started in Scotland with the purpose of collecting a tax and that apart from costs and the expenses

> of the liquidator any moneys recovered will inevitably pass to the Revenue."

Of particular note is that the Plaintiff liquidator, although nominated by the Lord Advocate on behalf of the Revenue, was appointed and supervised by the court: see remarks of Barrington, J. in *Larkins et al. v. National Union of Mineworkers [1994]* 3 I.R. 111. It seems likely that the litigation in Ireland was itself authorized by the Scottish Court or the Committee of Inspection. Neither the learned trial Judge nor the Court of Appeal saw this as a barrier to the tax gathering defence. The latter was content to rest its decision upon three essential findings (at page 117):

1) The proceedings were started in Scotland for the purpose of collecting tax; and

2) after payment of the costs and expenses of the liquidator, the amount recovered would inevitably be paid to the Revenue; and

3) there were no other creditor claims to be satisfied.

This decision has been cited with approval by many Commonwealth courts.

Any remaining doubts about the existence of a rule against direct enforcement of tax claims were put to rest in *Government of India v. Taylor [1955]* A.C. 491. The Government of India sought to prove in the voluntary liquidation in England of a company which owed income tax in India. The House of Lords held that the claim was rejected correctly. Viscount Simonds referred with approval to *In Re Visser* and *Municipal Council of Sydney v. Bull* and quoted the dictum of Abbott, C.J. in *James v. Catterwood.* These and other decisions amounted to "a formidable array of authority" (at page 505). All of the law lords agreed.

Lord Keith, who wrote separately, alone had had access to the then-unreported judgment in *Buchanan,* a judgment he described as "admirable." Lord Keith quoted the rationale for the rule found in *Moore v. Mitchell* but also provided another, separate explanation:

> "One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."

In *Rossanno v. Manufacturers' Life Insurance Company [1963]* 2 Q.B. 352, the Plaintiff sued on two insurance policies. The Defendant company argued that, as it had been served with two garnishee orders in Egypt resulting from tax owed by the Plaintiff to the Egyptian revenue authorities, it should not have to pay the sums claimed. This defence was rejected on the ground that to give effect to it would be to "recognize or enforce directly or indirectly a foreign revenue law or claim" (at page 376). The judgment quotes *Buchanan* and emphasizes that the claim must be scrutinized to determine its real substance.

In *United States of America v. Harden [1963]* S.C.R. 366, the Commissioner of Internal Revenue first obtained a judgment against the Defendant for back taxes in the United States. This was a consent judgment. An action was then brought on the judgment in British Columbia. The Supreme Court of Canada agreed with the lower courts that the claim remained in substance a claim for taxes, although the cause of action in British

Columbia was based on the earlier judgment and that judgment had been obtained with the agreement of the Defendant.

Re Reid (1970) 17 D.L.R. (3D) 199 was a case where a trustee was liable in England to pay certain estate duty. The trustee had offices in England and in British Columbia and was administering an estate with assets in both jurisdictions. The assets in England were insufficient to pay the duty, so the trustee was forced to make up the difference. He then asked to be reimbursed out of the assets in British Columbia, a proposal which a remainderman under the will resisted on the ground that acquiescence would involve the enforcement, directly or indirectly, of a foreign revenue law. That argument was rejected. Reliance was placed on the fact that the English Treasury would not be affected whether or not the trustee was indemnified; it was required to pay the tax in any event, and it had done so. The action was not in substance an effort to enforce a foreign tax; the foreign State had no interest in the outcome of the proceedings.

In *Ayres v. Evans* 3 ALR 129 the official assignee of an estate in bankruptcy in New Zealand sought to obtain control over property of the bankrupt in Australia. About fifty-six percent of the debts of the estate (see page 130) were due to the New Zealand revenue authorities. One of the grounds advanced in Australia against honouring the letters of request was the rule against indirect enforcement of a foreign revenue claim.

All three judges decided that the request should be honoured and assistance given. Fox, J. referred to the fact that "the farthest the cases have gone" is to deny a claim where the

entire amount sought to be recovered by a liquidator or official assignee in a foreign country will go to the revenue. He held that the rule does not apply where the property claimed will eventually benefit ordinary creditors as well as the foreign revenue authority (at page 131). His Lordship also said this (at page 130):

> "A liquidator, or an official receiver or assignee, does not act to enforce the revenue claim, but to obtain property which is to be dealt with in a due course of administration. In his own country he will doubtless meet revenue claims where these are payable out of the property coming to his hands, but in the foreign country he is simply seeking to get in property under a title recognized in that country. In *Peter Buchanan Ltd. v. McVey* it was obvious that the property in Ireland which was wanted by the Scots liquidator would go only to the Scottish revenue authority and the claim was rejected (see [1955] AC at 530). The court looked behind the representative character of the claimant. It is in some respects an anomalous case, although doubtless sensible in its result."

Northrop, J. agreed that the rule has no application where there are ordinary creditors as well as a debt owing to the Revenue, but his primary reasoning was based on the wording of the statute. McGregor, J. agreed with the result but confined his reasoning to statutory interpretation.

The decision thus stands as persuasive support for the proposition that the rule against indirect enforcement of foreign revenue claims can have no application if the result would be to disadvantage ordinary creditors. Fox, J.'s suggestion that the official capacity of a liquidator, and the nature of his mandate, serves to break the connection between the foreign revenue authority and the impugned proceedings (together with his view that *Peter Buchanan Ltd.* is "in some respects an anomalous case") was not taken up by the other two judges.

The judgment of Fox, J. in *Ayres v. Evans* were quoted with approval and applied by Elloff, J. in *Priestley v. Clegg* [1985] 3 SA 955. There, the trustee of an insolvent estate in England applied for an order in South Africa recognizing his appointment. About six percent of the claims against the insolvent estate were by ordinary creditors, the remainder being a claim by the Commissioner of Inland Revenue in England for taxes. The assertion by Fox, J. that "a liquidator, or an official receiver or assignee, does not act to enforce the revenue claim …" was quoted with approval.

Another case involving more than one creditor is *Re Tucker (Isle of Man) [2000]* BPIR 859. An English trustee in bankruptcy applied for an examination of two witnesses in the Isle of Man. The application was made under section 122 of the Imperial Bankruptcy Act 1914; much of the reasoning in the judgment turns on the court's interpretation of that section. The major creditor in the bankruptcy was the U.K. Inland Revenue; there was one other creditor, for a relatively small amount.

The court was of the view that "where there is any creditor other than a foreign revenue authority" (at page 870 D), the rule against tax gathering will not apply. Moreover, the court was able to find that the request, coming as it did from an English court and invoking in the Isle of Man an Imperial statute, could not amount to an assertion of sovereignty by a foreign government. The bankruptcy proceedings were instigated by ordinary commercial creditors; the U.K. Inland Revenue proved in the bankruptcy at a later date: see page 860 E. The court discussed the decision in *Buchanan* and concluded that it was "decided on its unusual and particular facts"; whether that decision would be

followed in the Manx courts "if the identical facts ever arose for consideration" was left open.

Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. [1986] 1 A.C. 368 was a case involving Spanish confiscatory legislation. The facts (taken from the headnote) were as follows:

> "As a result of Spanish expropriatory decrees passed in 1983, the State of Spain became entitled to control directly the affairs of R.S.A. and the two banks and to control indirectly the affairs of W. & H. Ltd. and, by operation of the arrangements made in 1976, the shares in the Jersey company and with them the benefit of the trade marks became held in trust for M. and his family."

English courts are required to recognize foreign laws involving compulsory acquisition of property and acknowledge the resulting changes in ownership: see, for example, the speech of Lord Templeman (at page 428). The Spanish confiscatory decrees had been passed and put into effect; the change in ownership resulting from that had already taken place. As a consequence, all three levels of court held that the claim could not be described accurately as an attempt to enforce the Spanish Government decrees directly or indirectly; "so far as the decrees are concerned there is nothing left to enforce": per Fox, L.J., in the Court of Appeal (at page 396). That distinguishes the case from *Peter Buchanan Ltd.*

The importance of the decision for present purposes lies in the remarks about *Buchanan* contained in the speech of Lord MacKay (at pages 440 – 1):

> "From the decision in the *Buchanan* case [1955] A.C. 516 counsel for the appellants sought to derive a general principle that even when an action is raised at the instance of a legal person distinct from the foreign

government and even where the cause of action relied upon does not depend to any extent on the foreign law in question nevertheless if the action is brought at the instigation of the foreign government and the proceeds of the action would be applied by the foreign government for the purposes of a penal, revenue or other public law of the foreign State relief cannot be given. It has to be observed that in the *Buchanan* case the action was being pursued by a person whose title as liquidator of the company depended on his having been appointed by a petition to the court in Scotland on behalf of the Inland Revenue and that the ground of action was that the transactions being attacked in the proceedings in Dublin were *ultra vires* and dishonest because there existed at the time that they were effected in Scotland a claim by the Inland Revenue which the transactions were designed to defeat, and that if no such claim existed the defendant would have been entitled to retain the subject matter of the claim. Most important there was an outstanding revenue claim in Scotland against the company which the whole proceeds of the action apart from the expenses of the action and the liquidation would be used to meet. No other interest was involved. That this was regarded as of critical importance appears from what was said in the decision on appeal by Maguire C.J., at p. 533.

Having regard to the questions before this House in *Government of India v. Taylor [1955]* A.C. 491 I consider that it cannot be said that any approval was given by the House to the decision in the *Buchanan* case except to the extent that it held that there is a rule of law which precludes a state from suing in another state for taxes due under the law of the first state. No countenance was given in *Government of India v. Taylor,* in *Rossano's case [1963]* 2 O.B. 352 nor in *Brokaw v. Seatrain U.K. Ltd. [1971]* 2 Q.B. 476 to the suggestion that an action in this country could be properly described as the indirect enforcement of a penal or revenue law in another country when no claim under that law remained unsatisfied. The existence of such unsatisfied claim to the satisfaction of which the proceeds of the action will be applied appears to me to be an essential feature of the principle enunciated in the *Buchanan* case [1955] A.C. 516 for refusing to allow the action to succeed.

In the present case there is no allegation of any unsatisfied claim under the law of the Kingdom of Spain on which counsel for the appellants found. No provision of that law would provide a foundation for making any of the claims in question in the actions with which this appeal is concerned. The decision in the *Buchanan* case gives no basis for the substitution in place of such an unsatisfied claim, of a general desire on the part of the foreign state to secure a particular result, object or purpose from the enactment of the law."

Three of the other law lords agreed with Lord McKay.

Thus, the House of Lords has accepted that a claim of indirect enforcement cannot succeed unless there is an existing claim under the penal or revenue law of the foreign country which remains unsatisfied. An unsatisfied claim is an essential element. Three other salient features of *Buchanan* – the liquidator had been nominated by the Inland Revenue, the transactions were *ultra vires* and dishonest because they were designed to defeat an existing claim by the Inland Revenue, and the Defendant would have been entitled to retain the money but for the Inland Revenue's claim – were singled out as being of interest but not identified as essential elements of the rule.

Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty Ltd. & Anr 78 ALR 449 applied *Buchanan* and *Williams & Humbert* to a claim to enforce in Australia an obligation of confidentiality owed to the United Kingdom Government (with reference to the publication of "Spycatcher" by a former member of the British Security Service). It was argued that the claim was in substance one to enforce the governmental interests of a foreign State and was therefore unenforceable. The majority judgment of the High Court of Australia (6 of 7 judges) said:

> "For the purposes of the principle of unenforceability under consideration the action is to be characterised by reference to the substance of the interest sought to be enforced, rather than the form of the action: cf *Buchanan* (Ir R at 104, 107; AC at 527, 529); *Williams & Humbert Ltd. v. W & H Trade Marks (Jersey) Ltd.* at 439. Thus, to concentrate on the private law character of the causes of action or grounds for relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action."

In *Re State of Norway's Application (Nos. 1 & 2)* [1990] 1 A.C. 723 involved an application under the *Evidence (Proceedings in Other Jurisdictions) Act, 1975* to obtain evidence in England for use in Norway in the action by the Jahre estate in the Sandjeford City Court. Both the State of Norway and the estate itself supported the application; the witnesses in England opposed it. One of the arguments advanced in opposition to the application was the argument that English courts (following *Dicey & Morris, The Conflict of Laws, 11th edition,* 1987, page 100, rule 3) "have no jurisdiction to entertain an action … for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state…".

Lord Goff, with whom the other four law lords agreed, began by saying that the rule does not operate so as to deprive an English court of jurisdiction; rather, the court simply declines to exercise its jurisdiction in such cases (at page 808). In so far as the request for assistance came from the estate itself (for the purpose of opposing the tax assessment), the question presented little difficulty as the estate was not seeking to enforce the foreign revenue law but to prevent its enforcement. With reference to the request by the State of Norway, Lord Goff said:

> "I return to the rule in *Government of India v. Taylor [1955]* A.C. 491. It is of importance to observe that that rule is limited to cases of direct or indirect enforcement in this country of the revenue laws of a foreign state. It is plain that the present case is not concerned with the direct enforcement of the revenue laws of the State of Norway. Is it concerned with their indirect enforcement? I do not think so. It is stated in *Dicey & Morris*, at p. 103, that indirect enforcement occurs (1) where the foreign state (or its nominee) in form seeks a remedy which in substance is designed to give the foreign law extraterritorial effect, or (2)

> where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state. I have been unable to discover any case of indirect enforcement which goes beyond these two propositions. Even so, since there is no authority directly in point to guide me, I have to consider whether a case such as the present should nevertheless be held to fall foul of the rule. For my part, I cannot see that it should. I cannot see any extraterritorial exercise of sovereign authority in seeking the assistance of the courts of this country in obtaining evidence which will be used for the enforcement of the revenue law of Norway in Norway itself."

Clearly, the controlling factor in this decision was the fact that the evidence would be used in Norway itself; its purpose was to assist in the enforcement of the revenue laws of Norway, but only in that country.

Another instance of indirect enforcement is found in *Stringam v. Dubois (1992)* A.C.W.S.J. 669646. Dubois' aunt died while domiciled in Arizona. In her will she left a wheat farm in Alberta to her niece. The probate assets located in the United States were insufficient to pay the estate taxes owing there, so the U.S. executor looked to the equity in the wheat farm to make up the balance. The niece applied for an order requiring the conveyance of the wheat farm to her; this was opposed by the aunt's executor on the ground that the wheat farm should be used to satisfy the American tax debt. After referring to *United States of America v. Harden, Government of India v. Taylor,* and *Peter Buchanan Ltd.,* the Court of Appeal said that "an indirect attempt at enforcement is as offensive as a direct attempt" and that "one must look at the substance of the claim to determine its nature for the purposes of application of the rule" (at paragraph 25). The niece succeeded, because any other result would have amounted to an indirect enforcement of the estate tax laws of Arizona.

The Grand Court has held that the disgorgement provisions in two American statutes, the *Securities Act 1933* and the *Securities Exchange Act 1934*, are penal in nature (applying *Huntington v. Attrill*): *Stutts v. Premier Benefit Capital Trust 1992-93* CILR 605. As a consequence, the Grand Court refused to recognize an American receiver whose mandate included enforcing disgorgement provisions.

That decision was considered but distinguished in *Marada Global Corporation v. Marada Corporation & Others*, *supra* . An action was brought in the Grand Court to recover money had and received. The Plaintiff corporation was under the control of a U.S. receiver, appointed at the instance of the Securities and Exchange Commission on allegations that the Plaintiff company had violated U.S. federal securities legislation. The Defendant argued that the action should be struck because it amounted to an attempt to enforce a penal law, i.e., a disgorgement provision, of a foreign State. In this instance, however, the order of the U.S. District Court sanctioning the action in the Cayman Islands provided expressly that any money recovered was to go to the company's investors and creditors and not to the S.E.C. That was considered "an important distinction "(page 552); in *Stutts v. Premier Benefit Trust,* it was clear that the American receiver was seeking recognition in the Cayman Islands in order to give effect to the disgorgement provisions in the American legislation.

Kalley and others v. Manus and others (1999) CILR 560 is a case where Murphy, J. of this court was asked to characterize a certain action in the Grand Court as an attempt to

enforce the penal laws of a foreign country. The plaintiffs were suing on a judgment obtained in Florida in relation to illegal dealings in securities. The American causes of action were statutory and based upon violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 (as well as various Florida statutes and a claim for damages for common law fraud). The court had little difficulty in dismissing the assertion that this was an attempt to enforce the penal law of a foreign jurisdiction. In coming to that conclusion, the court said:

> "The basic question is whether enforcing the judgment at the suit of a private citizen would amount to the enforcement of a penal law contrary to Cayman public policy. I consider these fairly obvious criteria (based on *US v. Inkley*):
>
> (i) whether the claim sought to be enforced is one which involves the assertion of foreign sovereignty;
>
> (ii) the view of the remedy adopted by the foreign court; and
>
> (iii) the identity of the plaintiff or the person in whose favour the right is created.
>
> On these bases, it is clear that the plaintiff here is not seeking to have this court enforce a foreign penal statute. My view, based on the proceedings on their face, is buttressed by the uncontradicted expert evidence characterizing the nature of the US proceedings here as personal in nature. I regard this defence as vexatious and an abuse of process."

An important element in the court's decision was that the judgment recovered in the U.S. proceedings only benefited the plaintiffs as private individuals.

QRS 1 ApS & others v. Frandsen [1999] 1 WLR 2169 is a recent decision in which the Court of Appeal applied *Peter Buchanan Ltd.* and held that a claim by a liquidator was really an attempt at indirect enforcement of a foreign revenue law. The five plaintiffs were Danish companies in the process of compulsory liquidation. The companies, acting

through their liquidator, brought an action in the United Kingdom against the Defendant (a resident there) claiming damages for negligence or reckless default; reimbursement or compensation arising from an alleged breach of a statutory duty under Danish company law; and, alternatively, damages or compensation for breach of fiduciary duty (see page 2170 H).

The Defendant had owned the companies and controlled their affairs. He caused the companies to dispose of all of their assets for cash and, immediately afterwards, caused them to use the cash to acquire his shares in those companies. This asset stripping scheme provided the companies with a remedy under Danish company law against the perpetrator. Some one and a half years later, the companies were put into liquidation and the liquidator sought to assert that remedy. He had been "appointed" by the Danish revenue authority (see page 2172 E), who was funding the action against the Defendant. The Danish tax authorities had made a claim for back corporate taxes some eight months after the asset stripping; the companies were insolvent and the tax authority was the only creditor. The basis of the restitution claim was a provision in Danish company law prohibiting companies from providing financial assistance for the acquisition of their own shares.

On these facts, the Court of Appeal was unanimous in finding the case "indistinguishable" from the facts in *Peter Buchanan Ltd.* The Court of Appeal said:

> "There can be no distinction between the defendant's sale of the company's assets and his pocketing of the proceeds in the *Buchanan* case [1955] A.C. 516 and the defendant's sale of the companies' assets and use of the proceeds to fund their purchase of his own shares in the present case. It can, therefore,

> equally be said of the plaintiffs' claim here as was said of the liquidator's claim in the *Buchanan* case, "that the whole object of the suit is to collect tax for a foreign revenue, and this will be the sole result of a decision in favour of the plaintiff ..." (per Kingsmill Moore J. [1955] A.C. 516, 529.)"

As in *Buchanan*, the claim was a private law cause of action which existed in the companies irrespective of any claim against the companies for unpaid tax. Unlike *Buchanan*, there was no allegation that the motive for the asset stripping was evasion of Danish income tax. In each case, the liquidator was viewed as working solely on behalf of the revenue authorities; in *Buchanan*, the liquidator was appointed by the court while in *QRS*, he is described as having been "appointed" by the tax authorities. In each case, there was an unpaid tax debt and the whole reason for pursuing the claim was to satisfy that debt.

The reasoning in *Buchanan* and Judge Learned Hands' exposition of the public policy rationale in *Moore v. Mitchell* have been mentioned with approval by the Judicial Committee of the Privy Council recently (albeit in a case bearing little resemblance to the present one): *President of the State of Equitorial Guinea v. Royal Bank of Scotland International et al (Feb. 27, 2006)* Appeal No. 59 of 2005. Other Commonwealth decisions (not already mentioned) in which *Buchanan* has been cited and approved include:

(a) *Byrne v. Conroy 1998* 3 IR 24 (Supreme Court of Eire);

(b) *Lord Advocate (on behalf of the Commissioners of Inland Revenue) v. Tursi 1998* SLT 1035 (Scottish Court of Session);

(c) *Rothwells Ltd (liquidation) v. Connell* 119 ALR 538 (Queensland Court of Appeal);

Analysis

I return to the question of the constituent elements of a tax gathering defence. The defendants say they are three in number. The plaintiffs agree that the three prerequisites proposed by the defendants must be established, but concede only that the first of these is proved. There is an unsatisfied tax claim by the State of Norway. Clearly, most of the proceeds of this litigation will go to satisfy that tax debt but the plaintiffs say that is not sufficient - it must be plain that all of the proceeds will go to that purpose. The plaintiffs argue that there are other creditors whose claims must also be satisfied, and the residual claim of the estate's sole heir must be considered. This issue will be considered below. Finally, the defendants say the proceedings must be "in substance" an attempt to collect foreign tax; the plaintiff's agree that this is a prerequisite, but contend that the evidence does not show it to be the case. This, also, will be considered below.

The plaintiffs argue that there are three additional prerequisites which must be established. The first of these is a "connection" between the present claim and the foreign tax law. They say the common law rule concerns the extra-territorial enforcement of a foreign revenue law, directly or indirectly. The present claims are private law causes of action. They are pleaded, and can be proved, without any reference to the claim by the Norwegian revenue authority. Thus, the pursuit of these private law causes of action does not involve any attempt to give extra territorial effect to the Norwegian revenue law. According to the plaintiffs, in every previous decided case held to be an attempt at indirect enforcement, the private law claim arose "as a result of and

was parasitic upon the existence of liability to the foreign revenue authority and was commensurate with the value of the outstanding tax claim."

The authorities do show a preference for the improper assertion of sovereignty as a rationale for the existence of the rule. Do those authorities also demonstrate that the rule can be invoked only where the court is being asked to apply or consider a foreign revenue law in the local jurisdiction? The passage quoted earlier from Lord Mackay's judgement in *Williams and Humbert* appears (at page 440) to suggest this. The point did not arise there for decision; *Williams and Humbert* turned on the fact that there was no allegation of any unsatisfied claim under the law of Spain.

Such a connection is found in most of the authorities. In *Banco De Vizcaya v. Don Alfonso De Borbon Y Austria*, the Spanish bank found it necessary to refer to the Spanish confiscatory decrees to explain why its claim should be paramount to that of the ex-King, the bank's nominal principal. In *Peter Buchanan Ltd.*, the trial judge needed to take notice of the existence of the Scottish revenue claim in order to reach his conclusion that the stripping of assets from the company by McVey was *ultra vires* the company and dishonest. In *Rossano,* the court was asked to take some notice of the Egyptian tax debt because the two garnishing orders were based upon it. In *Stringam v. Dubois*, some notice had to be taken of the tax apportionment between the American and Canadian assets, which required reference to the American tax legislation.

In *QRS*, the claim advanced in England was twofold: a claim for restitution of the value of the company's assets, based upon a Danish company law provision prohibiting companies from providing financial assistance for the purchase of their own shares; and damages for negligence or reckless default arising from the Defendant (a director) allowing the companies to suffer loss as a result of the asset stripping scheme. Neither cause of action would have required any reference at all to the Danish tax claim, which arose from the disallowance of certain claims for depreciation on containers. The tax claim may have arisen from transactions which were part of the asset stripping scheme, but proving the Defendant's liability for asset stripping does not seem to have required reference to the tax consequences of what he was doing.

The Court of Appeal's view of the facts, and its conclusion, are explained in this passage from the judgment of Simon Brown, L.J. (at p. 2172):

> "The plaintiffs are all Danish companies in compulsory liquidation. The defendant is domiciled (within the meaning of the Convention) and resident in the U.K. Until 1992 he owned the companies either directly or indirectly. In November 1992 the entire assets of the companies were disposed of for cash which the following month was used to acquire the defendant's shares. In July 1994 the companies were put into liquidation on the ground that they had been engaged in asset-stripping. In March 1995 the Danish tax authorities claimed against them corporation taxes of some 30m. Danish kroner together with some 10m. Danish kroner interest, a total tax claim of some 40m. Danish kroner (nearly £4m.). The companies have no assets and the only creditors are the Danish tax authorities. It was those authorities who appointed the liquidator and who are funding this action by the companies against the defendant. Their claim against him is limited to the principal sum, together with interest claimed by the Danish tax authorities against them. The nature of the claim is summarised in the plaintiffs' evidence as follows:

> "The claim against the defendant arises out of his involvement in the stripping of the plaintiffs' assets. In essence, the plaintiffs submit that the purchase price for the defendant's shares in each of them was paid, at the defendant's instance from their own funds or using their assets. The plaintiffs' claims are for, in the first instance, restitution of the value of their assets which were disposed of in order to finance the purchase of the defendant's shares and, in the alternative, damages arising out of the defendant's negligence and/or reckless default in allowing the plaintiffs to suffer loss as a result of the asset-stripping in which he was involved."
>
> The basis of the restitution claim is a provision in Danish company law prohibiting companies from providing financial assistance for the acquisition of their own shares…These facts are in all material respects indistinguishable from those in *Peter Buchanan Ltd.* and *Macharg v. McVey* (Note) [1955] A.C. 516, the leading authority on this aspect of indirect enforcement."

The "core argument" advanced by the unsuccessful plaintiffs was that this is a private law claim not merely in form but in substance (at page 2180B; and see page 2174F). There is not a hint in *QRS* that the Court of Appeal considered it significant that the claims were indeed private law claims and could be advanced without any reference to Danish tax law or the tax debt. The important points, which made *QRS* indistinguishable from *Buchanan*, were: the existence of the tax debt, the lack of any other creditors, the appointment of the liquidator by the Danish tax authorities, the funding of the English action by those same authorities, and the fact that the amount claimed in England was equal to the Danish tax debt. In other words, the Court of Appeal found that the claim

was, in substance, an attempt to enforce the foreign revenue law indirectly. The fact that the claims were wholly private in nature made no difference.

Given that the need for a connection between the claim and the foreign revenue law is not identified as an essential prerequisite in any prior decision, and given its absence in *QRS*, the position advanced here by the plaintiffs is untenable. There is no need to prove any "connection" to the foreign revenue law once it is shown that the proceedings are in substance an attempt to enforce such a law.

The second qualification urged by the plaintiffs is that the indirect enforcement rule is not a defence available to anyone other than the taxpayer. They argue that the defence is not available to third parties and not available where the claim is for the vindication of proprietary rights. The typical case in which the rule arises is a dispute between a taxpayer and the foreign revenue. By contrast, in the present case the dispute is between a taxpayer (the estate) and third parties.

There is no express support in the authorities for the proposition that defence is available only to the taxpayer. The rule has been used by and against third parties. Although *Buchanan* and *QRS* were disputes between a taxpayer and a liquidator acting on behalf of the revenue, *Stringam v. Dubois* was not. In *Stringam v. Dubois*, the rule was invoked by a third party (the niece) in a successful attempt to defeat a claim by the executor of the estate that the farm should be sold to pay the American tax liability. In *Rosanno*, the successful Plaintiff was the taxpayer. He invoked the rule to defeat the defence advanced

by the insurer (a third party) which relied upon the garnishee orders from the Egyptian tax authority.

I am satisfied that the decided cases leave no room for a qualification that the rule can be invoked only in a dispute between a taxpayer and the taxing authority or its nominee.

The plaintiffs also say it is wrong in principle to apply the rule where a proprietary right is being asserted. Some support for this is found in a statement of principle by Denning, M.R. in *Brokaw v. Seatrain [1971]* 2 WLR 791, cited with approval in *Williams and Humbert* (at page 439-440):

> "The United States Government submit that that rule only applies to actions in the courts of law by which a foreign government is seeking to collect taxes, and that it does not apply to this procedure by notice of levy, which does not have recourse to the courts. I cannot accept this submission. If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law."

The plaintiffs put the argument this way. Suppose, they say, Jahre were still alive and had no other assets but owed the Norwegian revenue a sum for taxes equal to the value of the stolen assets. It would be unconscionable to allow the thief to plead the indirect enforcement rule to defeat such a proprietary claim by Jahre. If that is so, the death of Jahre should make no difference. The rule against indirect enforcement is not a rule which requires a court to prevent foreign taxpayers from paying tax in their own countries.

Again, there is little support in the decided cases for this argument. Lord Denning's comment in *Brokaw* was obiter, and the decision in *Williams and Humbert* turned not on the fact that a proprietary claim was being advanced, but on the fact that the Spanish confiscatory decrees were in effect and the resulting change of ownership had already taken place. More fundamentally, a claim by the taxpayer himself, as in the example put in argument, is less likely to be considered a claim which is in substance brought to collect foreign tax.

I am persuaded that the rule can be invoked in favour of a third party or to defeat a proprietary claim. It must be the case, though, that the characterization of the party invoking the defence (taxpayer or third party) and the nature of the claim (proprietary or otherwise) are important elements in the consideration of the defendant's third issue (i.e., are the proceedings in substance an attempt to collect foreign tax?).

The third and final qualification urged by the plaintiffs is that "control" of the estate by the taxing authority is a necessary prerequisite.

The question of control is an important one, but it is subsumed in the third element on the defendants' list – is the claim in substance an attempt to collect foreign tax? In *Buchanan*, the person nominally in control of the litigation was a court-appointed liquidator. In both *Buchanan* and *QRS*, the only existing creditor was the revenue authority itself. It was advancing money to the liquidator to meet his expenses. The liquidator was required to consider only the interests of the revenue authority. Although

each liquidation was proceeding under court supervision, the court would intervene only to decide matters in dispute; since there was just one creditor, disputes were highly unlikely. This is the degree of control which has resulted in a liquidator, notwithstanding court supervision, being described as a "nominee" or a "puppet" of the revenue. (The word "nominee" is used by Lord Keith in *Government of India v. Taylor*, by Lord Justice Simon Brown in *QRS*, and in *Dicey and Morris, 13th edition*, 5-023; the word "puppet" is found in *Ayres v. Evans* and *Re Tucker*.) This degree of control will support a finding that the action is in substance an attempt to collect foreign tax. It is unnecessary to treat control as a separate prerequisite.

Is the Norwegian revenue the sole creditor?

The defendants concede that, for the rule to operate, it must be shown that the proceeds of the litigation will go to the foreign revenue authority. Must it all go there?

Given that the predominant underlying rationale for the rule is that an attempt to advance a foreign revenue claim amounts to an assertion of sovereign authority by one state within the territory of another, the answer must be "yes." If the litigation is initiated for the purpose of satisfying the claims of ordinary creditors (as well as a tax debt), it can no longer be said, in the words of Lord Keith in *Government of India v. Taylor*, that the claim "is but an extension of the sovereign power which imposed the taxes." This was the conclusion reached in both *Ayres v. Evans* and *Priestley v. Clegg*. In the latter, the claims of ordinary creditors amounted to just six percent of the total claims.

I conclude that the defendants carry the burden of showing that the entirety of the proceeds will go to the foreign revenue authority.

The plaintiffs point to three claims on the estate which, they say, are not in substance part of an attempt to enforce a foreign tax debt: the claim of Dr. McKinnell under the agreement with him; the interest of the estate of Bess Jahre; and the amount owing to the Ministry of Justice because of the intervention payment made by it to Anders Jahre A/S.

The agreement with Dr. McKinnell was made solely for the purpose of obtaining evidence to be used in this proceeding and the predecessor action. This is no more than a cost of maintaining the litigation and cannot, for present purposes, be viewed as an ordinary debt to a creditor: see *Williams and Humbert*, page 440G, per Lord Mackay.

During argument, each party submitted a *pro forma* analysis intended to demonstrate that there would or would not be a surplus for the use of the estate of Bess Jahre. I need not engage in a similar exercise, because I am satisfied that the issue is resolved conclusively against the plaintiffs by the findings of the Probate Court and prior statements by Mr. Wahr-Hansen.

On November 13th, 2001, the Probate Court dismissed Bess Jahre's objections to the Lazard settlement and an application to inspect certain documents because it was "completely obvious that Bess Jahre will not receive any inheritance" from the estate and "completely unrealistic" to suppose "that Bess Jahre would receive anything after the

creditors have been paid." On June 19th, 2002, the Probate Court said that the estate was "clearly insolvent" and there is "no prospect of there being any funds in the estate beyond what will go towards covering the creditors' claims." On July 1st, 2002 the Agder Crown Court found the estate to be insolvent and said that "the true economic interest in the administration of the estate lies with the creditors." The Agder High Court, in December 2002, agreed, saying that "Bess Jahre does not herself have any financial interest in the administration of the estate, as the estate is insolvent whether the action in the Cayman Islands continues or not."

Mr. Wahr-Hansen has expressed the same view, albeit in more guarded terms. In a prior affidavit in this proceeding, he said: "I accept that the liabilities of the estate are likely to exceed its assets, with the result that there is likely to be no surplus to distribute to [Bess Jahre]". In a submission to the Agder High Court, Mr. Wahr-Hansen said that this action "is immaterial to Bess Jahre personally" because "her inheritance from the estate will not be affected by whether the estate continues with or withdraws from the action in the Cayman Islands." He also conceded in a witness statement that the estate has always been administered by him "as an insolvent estate."

Thus, those who are charged with the administration of the estate have, in a considered way and on a number of occasions, conceded that Bess Jahre had no prospect of receiving anything. I am satisfied that is the case.

As of November, 2001, Anders Jahre Rederi A/S had a relatively small claim against the estate in the amount of some US $179,000.00. As described above, the company initiated bankruptcy proceedings against the estate and, very shortly thereafter, found that its claim was satisfied by an intervention payment from the Norwegian Ministry of Justice.

The payment was made on the recommendation of Mr. Wahr-Hansen. I am satisfied that his predominant reason for recommending the payment, and the Ministry's predominant reason for making it, was tactical – to preserve a perceived advantage in this and the predecessor proceeding concerning the tax gathering defence. Had the bankruptcy proceeding been allowed to take its course, it would have been impossible for the estate to argue that Bess Jahre was wholly or even partially in control of its affairs; it would have then been plain that the creditors were in the driver's seat. By avoiding bankruptcy, the estate preserved for itself an argument in response to the tax gathering allegation which it perceived as important - the argument that the debt owed to the Ministry, because of its origin, is tantamount to one owed to an ordinary creditor.

At this juncture, I think I must do what many of the authorities do in another context and ask whether, *in substance*, the estate has any creditor other than the Norwegian revenue. The answer must be "no". The debt in question is tiny – a fraction of one percent of the revenue debt itself. It is owed to the Ministry of Justice, a part of the Norwegian Government which itself has worked in tandem with the Ministry of Finance to pursue the tax claim, and has assisted in providing funding to the estate until the Lazard settlement. In substance, the debt to the Ministry is a debt incurred for the purpose of

advancing this litigation and enhancing the prospects of the plaintiff; it is not a debt owed to an ordinary, independent creditor.

I find that there is no independent creditor of the sort identified in *Ayres v. Evans* and *Priestley v. Clegg*; the defendants have established that the proceeds of the litigation will go to the foreign revenue authority.

Is the claim in substance an attempt to collect foreign tax?

The ultimate question is whether the facts and circumstances, taken as a whole, demonstrate that the claim is in substance one for the collection of foreign tax. The burden of proof and persuasion on this issue rests with the defendants.

The administration of the Jahre estate was not, of course, initiated by the Norwegian revenue. It was only after Dr. Brunsvig's illness that the need for a new administrator arose. Like the liquidator in *Buchanan*, Mr. Wahr-Hansen was recruited for the task and proposed for appointment by the revenue authorities. As in *Buchanan*, there were (at the time of appointment) other interests to be considered. Bess Jahre, the heir, asked Mr. Wahr-Hansen for an assurance that the estate would never be placed into bankruptcy. She did not get one, although Mr. Wahr-Hansen did say that he could not see "any sense" in taking such a step. Bess Jahre then gave her approval to the appointment.

Like the liquidator in *Buchanan*, Mr. Wahr-Hansen was appointed by the court. As a matter of Norwegian law, the Probate Judge (Judge Ronning) was entitled to make this

appointment without considering the views of the beneficiary or the interests of the creditors. As administrator, the actions and decisions of Mr. Wahr-Hansen are subject to court administration. That, also, is true of court-appointed liquidators.

There can be no doubt that Mr. Wahr-Hansen's primary mandate has always been to recover foreign assets; he has said that this was his "total focus" after appointment. None the less, the locating of offshore assets has not been the only activity of the estate in recent years. A successful claim was advanced in Norway to the shares of Anders Jahre Rederi A/S, the second plaintiff. That entity owns substantial cash assets, shares and real property. The estate has also advanced claims in Norway against Jorgen Jahre Jr. and Bjorn Bettum. It cannot be said that this proceeding is the estate's only *raison d'etre*.

The mandate to search for assets abroad was given to Mr. Wahr-Hansen by the Probate Court in January, 1991 with the consent of Bess Jahre. It seems surprising that she would give this consent, since she was appealing the Vestfold tax assessment at the time. Later, between June 1993 and October 1995, Mr. Wahr-Hansen initiated proceedings against Bess Jahre to recover the shares in Anders Jahre Rederi A/S (which owned the house in which she was living). Despite these substantial reasons why she might have withheld her consent, the fact that she consented to the search for overseas assets is well documented: see exhibit D4/1296, D4/1323, D4/1345, D4/1428, and D5/1485.

I have been provided with affidavit evidence concerning the Norwegian statutory regime for the administration of estates. The estate is a separate legal entity with the Probate

Judge as its "head." The Probate Court is charged with the responsibility of the administration of the estate, although a Probate Judge may appoint assistants. Mr. Wahr-Hansen is such an assistant; as the administrator, he is a "servant of the court."

All significant decisions must be made ultimately by the Probate Court. It is bound by section 19 of the Probate Act 1930, which requires the court to accept a decision of the heir of the estate unless the judge concludes that this decision is contrary to the interests of the creditors. Even though the estate is insolvent, the creditors have limited formal influence on its administration. For the most part, the creditors have no entitlement to attend meetings of the court. Judge Ronning has, however, considered it appropriate to invite the creditors of this estate to attend Probate Court meetings and to express their views on important decisions. Even though the estate is insolvent, the views of the heir (or the heir's estate) must be considered and acted upon unless they are contrary to the interests of the creditors.

The degree of supervision exercised by the Probate Court has exceeded, to a significant degree, that which would be exercised over the typical court-appointed liquidator, particularly where there is just a single creditor. For example, with respect to the McKinnell agreement, the Deputy Judge accepted the argument of Bess Jahre (over the opposition of the Ministry of Finance) that, should her challenge to the second tax assessment succeed, Dr. McKinnell should not be allowed to look to the assets of the estate under his indemnity. With respect to the estate's claim against Jorgen Jahre, the Probate Judge suggested on his own motion that the estate should seek to negotiate a

settlement (although, in the event, the case proceeded to trial). Later, the creditors wanted Judge Ronning to authorize an appeal by the estate of the judgment in favour of Jorgen Jahre; he rejected the request. After a ruling against the estate in the appeal in Bjorn Bettum's case, the Ministry of Finance asked for a further appeal by the estate; that was rejected. In at least some of these instances, the court's decision was contrary to the recommendation advanced by the administrator.

In 1996, Judge Ronning, on his own initiative, appointed a lawyer to represent the estate with a view to negotiating a global settlement of all the claims. Bess Jahre favoured this approach. The creditors and Mr. Wahr-Hansen were in favour of a narrower approach, hoping to achieving certain specific settlements. On this occasion, the Probate Court adopted a course of action on an issue of central importance which was contrary to the express wish of the Norwegian revenue.

In 2002, the Ministry of Finance wanted the estate to take legal proceedings to determine the validity of a gift of property to Bess Jahre; she, of course, was opposed. The Probate Court decided in favour of Bess Jahre.

Mr. Wahr-Hansen did work closely with the Ministry of Finance and paid a great deal of attention to its wishes and views. The most telling incident has to do with the McKinnell agreement. Since Dr. McKinnell was asking for 15% to 20% of any amount recovered by the estate as the price of his co-operation, the decision to negotiate and conclude the

agreement was a momentous one. (Ultimately, the agreement awarded him 40% but the amount was capped at $50,000,000.00 U.S.)

Mr. Wahr-Hansen was contacted about McKinnell in December 1991. He quickly sought and obtained the agreement of Bess Jahre and the Probate Judge that they would not insist on seeing the "sensitive information" to be provided by McKinnell.

Mr. Wahr-Hansen met McKinnell in New York in February, 1992. By June, 1992, the Norwegian Attorney General was reviewing McKinnell's proposals; the Government's initial response was "positive" and a meeting was arranged for June 23rd, 1992 to discuss the proposal in depth. By that time, Mr. Wahr-Hansen had obtained from the Solicitor General an agreement in principle to the proposal. A first draft of the agreement was provided by McKinnell in August, 1992. By October, the proposal was in the hands of Norwegian Government authorities for their "final consent."

However, it was only on November 12th, 1992 that Mr. Wahr-Hansen raised with the Probate Court the "possibility" of buying information from Dr. McKinnell. Even then, the Probate Court was given only a "restricted and anonymised version of the basic idea of the draft agreement" (see exhibit D4/1439). Finally, in January, 1993, the Norwegian authorities decided to approve the agreement and the Probate Court was then asked to authorize an initial payment of U.S. $270,000.00 to Dr. McKinnell. This narrative, considered in isolation, is entirely consistent with the notion that Mr. Wahr-Hansen was in full control of events and subject only to nominal supervision by the court.

There were repercussions. Judge Ronning became increasingly concerned about what he considered to be Mr. Wahr-Hansen's overly close relationship with the Ministry of Finance and overly independent conduct. On November 12th, 1997 the Probate Court criticized Mr. Wahr-Hansen for having separate meetings with the Ministry of Finance at which he appears to have shared with them facts not made known at the meetings of creditors (see exhibit D7/2556 – 60). Judge Ronning described the situation as consistent with the notion that there were two separate estates – "one administered by the Probate Court, the other by the Trustee". In September, 2002 Judge Ronning felt it necessary to warn Mr. Wahr-Hansen that decisions concerning the estate could not be "made in the shadowy depths of the Ministry of Finance, with instructions issued to the Personal Representative by any unauthorized persons" (see exhibit D9/3320). In January, 2003, the Probate Judge recorded his impression "that the trustee has been more interested in following the Ministry of Finance than the Probate Court" (exhibit D10/3560).

From all of this, I draw two conclusions: first, that Mr. Wahr-Hansen worked very closely (I could say "hand in glove") with and on behalf of the Norwegian authorities; and, second, that the Probate Court exercised a significant degree of control and supervision. In doing so, that Court was exceeding the level of supervision ordinarily exercised over a court-appointed liquidator, particularly where the liquidation estate has only one major creditor.

It is accepted that funding for the estate was provided by the State of Norway between 1994 and 2001; it was extensive. Commercial lenders had been approached but declined to lend assistance. The State's participation included providing a necessary indemnity to the Probate Judge in respect of the English proceedings and providing a guarantee in favour of Lazards and Lord Kindersley to facilitate the Lazards settlement agreement. The Ministry of Justice provided approximately U.S. $28.4 million dollars in funding to the estate.

On the other hand, the estate has been self-funding since the time of the Lazards settlement and remains so today.

Some of my earlier findings are also germane on the question of whether the proceedings are in substance an attempt to collect foreign tax. The defendants here are third parties, the claims advanced are proprietary in nature, and their resolution does not require consideration of any aspect of Norwegian tax law. Unlike the claim in *QRS*, the amount claimed here is not equal to the tax debt. As I have found earlier, the clear purpose of the intervention payment made to Anders Jahre A/S was to avoid having the estate put into bankruptcy and thus to permit the plaintiffs to argue, as they have done, that the administrator and the Probate Court must give primacy to the interests of the heir.

Overall, there are a number of significant distinctions between the present case and the circumstances in *Buchanan* and *QRS*, the two closest parallels. The Probate Court has had a relatively high level of involvement in the administration of the estate and has acted

against the wishes of the Norwegian revenue on several occasions. The defendants here are third parties. The claims are proprietary in nature.

These distinctions are of controlling importance. When I consider them together with all of the other factors militating for and against the proposition that the claim is in substance an attempt to collect foreign tax, I conclude that it is not. A contrary conclusion would amount to a significant extension of the principle. None of the modern authorities provide any support for the notion that the boundaries of the doctrine should be expanded.

For these reasons, my answer to the question for preliminary determination is "no".

Dated this 8th day of January, 2007

Henderson, J.

Henderson, J.
Judge of the Grand Court