

## Undue influence affecting settlors in exercising powers of revocation

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### Representation of Jasmine Trustees [2018]JRC210

In a recent decision, arising out of a long running family dispute concerning two trusts (the trusts), the Royal Court made a number of notable findings regarding the scope and effect of undue influence in a trusts context.

#### Background

The Trusts, which were established principally for the benefit of the family of a wealthy businessman, have been the subject of long running litigation owing to a breakdown in relationship between the father and daughter.

The most recent decision arose out of an attempt, by the settlors of the trusts, to exercise their power to revoke the trusts by serving notices of revocation on the trustees of each trust (the revocation notices). The trustee was concerned about these actions and so petitioned the Royal Court for directions.

In this context, the validity of each of the revocation notices was challenged by the daughter on the following grounds:

- a. that in issuing the revocation notices, each of the settlors had been unduly influenced by the father;
- b. alternatively, that in issuing the revocation notices, each of the settlors had been operating under a mistake as to the nature of the tax consequences which would follow from revoking the trusts; and
- c. further in the alternative, that in issuing the revocation notices, each of the settlors had been operating under a mistake as to whether they were acting as nominees for the father.

## **The argument on undue influence**

The daughter argued that, as a result of conversations which she had had with the settlors, considerable pressure had been placed on the settlors by her father to revoke the trusts. The daughter contended that the father's behaviour towards the settlor amounted to undue influence with the result that the revocation notices should be set aside as null and void.

Counsel for the father argued that the only person who could apply to set a transaction aside on the grounds of undue influence was the victim of the undue influence – i.e. the person who has entered into the transaction as a result of the influence. In this case, the father submitted that this would be the settlors and them alone.

The Royal Court held that the father's arguments were incorrect. It held that undue influence enables the party who is disadvantaged by the transaction to have that transaction set aside. In the case of the revocation of a trust, it was held that the disadvantage rests with the beneficiaries as they will have lost the ability potentially to benefit from the trust fund.

The Royal Court also gave the following reasons in support of its finding in favour of the daughter:

- a. if a beneficiary cannot challenge a revocation, this will likely mean that a revocation will go unchallenged, even if carried out as a result of undue influence; and
- b. as a matter of principle, there is no reason for refusing to allow a beneficiary to challenge a revocation where it is said that the revocation resulted from undue influence or duress on the part of another.

## **The argument on mistake**

In the alternative to the challenge on the grounds of undue influence, the daughter argued that, in issuing the revocation notices, the settlors were operating under mistake as to either:

- a. the tax consequences in Italy which would flow from revoking the trusts (the tax mistake); or
- b. in the alternative, as to the nature of their role as settlors of the trusts (the nominee mistake)

In relation to the tax mistake, the daughter contended that the settlors were unaware that by revoking the trusts, they would be exposing themselves to potentially considerable tax liabilities.

Alternatively, in relation to the nominee mistake, the daughter argued that the settlors considered themselves to be acting as nominees of the father, with the result that they considered they were bound by his instructions that the Trusts should be revoked. In support of this argument, the daughter was able to point to affidavits, albeit in draft and therefore

unsworn, prepared for the settlors in which they stated that they thought they were nominees for the father.

On the basis that the revocation notices were null and void as a result of undue influence, the Royal Court considered that it was strictly unnecessary to decide the question of mistake. Accordingly, the Royal Court only gave brief conclusions.

In respect of the tax mistake, the Royal Court found that there was insufficient evidence to establish that the settlors were operating under such a mistake. Additionally, the Royal Court also opined that even if the opposite conclusion had been reached, it was ultimately a matter for the settlors as to whether they would wish to revoke the trusts notwithstanding the adverse consequences for them personally.

The Royal Court held that the case in relation to the nominee mistake was made out, and that the settlors had been operating under a mistaken understanding of their position in issuing the revocation notices. In support of this conclusion, the Royal Court pointed to the following factors:

- a. the assertion by the settlors that they were the father's nominee was entirely inconsistent with their statements, made at the time the trusts were executed, that the assets being transferred to the trusts were legally and beneficially theirs;
- b. there was no evidence that the father had ever considered the settlors to be his nominees; and
- c. similarly, until the production of the draft affidavits on behalf of the settlors, there was no evidence to suggest that the settlors considered themselves to be bound to follow the father's instructions. In fact, it was reluctance by the settlors to do so which resulted in the father threatening the settlors in respect of the revocation.

### **An interesting postscript to the decision**

In a postscript to the decision, the Royal Court noted that Article 40(3) and (5) of the Trusts (Jersey) Law 1984 provide that, upon revocation, the assets of a trust are held absolutely for the person who settled them.

The Royal Court noted that it did not consider that this required an expensive and complex tracing exercise to be undertaken with the goal of identifying which parts of the trust fund originated from whom. Instead, the Royal Court stated that the appropriate approach would be to return the trust fund to each source in the proportions initially contributed by them. So for example, if A contributed 10% in value of the original trust fund, B contributed 40% and C contributed 50%, then upon revocation of the trust, A would receive 10% in value of the current trust fund, B would receive 40%, and C would receive 50%.

## Lessons to take away from the decision

So what lessons can trustees take away from the decision in this case?

- Trustees and other fiduciaries should be careful to avoid putting themselves in the position where prominent figures in a family structure might be said to be exerting undue influence, and be alive to situations where there is a risk it may arise;
- In exercising powers, such as a power of revocation, trustees should be aware that the beneficiaries of a trust may be able to challenge that exercise if they have reason to believe that it was procured by undue influence;
- Trustees should be aware of how a trust fund might be distributed upon the revocation of a trust. Trustees should review their terms and conditions of business to ensure that they are protected against any potential adverse consequences in these circumstances; and
- Trustees should feel empowered and able to seek the assistance and direction of the Royal Court if issues such as this arise.

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