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Taking back control: undue influence and trust revocations

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Introduction

Undue influence was the issue at stake in a judgment of the Royal Court of Jersey this month. In *Representation of Jasmine Trustees re Piedmont Trust and Riviera Trust*,¹ the court held that revocation notices issued by two settlors had been vitiated by the undue influence of the family patriarch, and should therefore be set aside.

Background

This judgment involved two Jersey-law revocable discretionary trusts: the Piedmont Trust and the Riviera Trust. The trustees were two Jersey trust companies, Jasmine Trustees Limited and Lutea Trustees Limited. The beneficiaries of the two trusts included the family patriarch, his three children (a daughter and two sons) and their respective issue.

The settlor of the two trusts was not the patriarch himself but rather two of his relatives. However, it was clear from papers submitted to the court that the trusts had been established by them at his instigation. Perhaps unsurprisingly, therefore, when the patriarch's relationship with his daughter deteriorated significantly, this was reflected in the two settlors' letters of wishes: although all three children were beneficiaries of the trusts, the letters indicated that, after the patriarch's death, the trusts' assets should be earmarked only for the two sons' branches of the family.

Acrimonious litigation then followed, both in Jersey and in the United States. This included, in 2014, an attempt by the patriarch to remove Jasmine and Lutea as trustees and to appoint a New Zealand trust company in their place. He also sought to appoint his sons as protectors of the trusts in his place. These appointments were all declared invalid by the court, so that Jasmine and Lutea continued to be the trustees, albeit the retirement of the patriarch as protector was held to be valid even though his sons' appointments were not, meaning that the trusts no longer had protectors at all.²

In 2017, however, matters took a new turn when the two settlors sent signed revocation notices to the trustees. This caused the trustees various difficulties, not least of which was the fact that the bank with which the underlying companies' accounts were held refused to comply with the trustees' instructions for payment of certain fees. The trustees therefore brought representations seeking directions as to whether the revocation notices were valid. This was the matter to be determined by the present judgment.

¹ [2018] JRC 210

² *Jasmine Trustees Limited and Lutea Trustees Limited v L and Others* [2015] (2) JLR 52. This earlier litigation provides very useful guidance to trustees on the manner in which they should go about their fiduciary obligations.



The law on revocation and the grounds on which the revocations could be attacked

The ability of a settlor to revoke a trust is assisted by Article 40 of the Trusts (Jersey) Law 1984, which includes the following wording:

“40 Power of revocation

- (1) A trust and any exercise of a power under a trust may be expressed to be –
 - (a) revocable whether wholly or partly; or
 - (b) capable of variation.
- (2) No such revocation or variation shall prejudice anything lawfully done by a trustee in relation to a trust before the trustee receives notice of such revocation or variation.
- (3) Subject to the terms of the trust, if it is revoked the trustee shall hold the trust property in trust for the settlor absolutely.
- (4) Where a trust is partly revoked paragraph (3) shall apply to the property which is the subject of such revocation.
- (5) In paragraph (3) “settlor” means the particular person who provided the property which is the subject of revocation.”

This is a useful starting point in that it provides clear authority for the premise that the trusts could, in principle, be revoked by their settlors. Not present in this Article, however, but accepted by the parties and the court, was the more significant point that a power of revocation was a beneficial power (as opposed to a limited or fiduciary power). This categorisation mattered because it meant that the settlors could exercise their powers to revoke the trusts as they saw fit, with no duty to have regard to the interests of the beneficiaries.

As one might expect, the daughter had not welcomed the revocations, given her anticipation that the patriarch would use the revocations to restructure the assets so as to ensure that she could not benefit from them. However, given the above categorisation of the powers of revocation as beneficial powers, it was not open to the daughter to attack the revocations on the grounds that they were exercised for an improper purpose (ie as a fraud on a power).

What did remain, however, was a potential argument that the powers of revocation had been exercised subject to the undue influence of the patriarch, or failing that, that they should be set aside on the grounds of mistake.

Undue influence

The law of undue influence in Jersey is similar to that of English law.³ In particular, undue influence is an equitable remedy designed to ensure that the influence of one person over another is not abused. This goes beyond overt acts of improper pressure or coercion, such as unlawful threats (which would be more typically characterised as duress, rather than undue influence), to more subtle scenarios where someone takes unfair advantage of another person using their position of influence.

That said, the court held that the Jersey law of undue influence was untroubled by the different historical roots of common law and equity in England that could, in some cases, cause difficulties in relation to the remedies available. In particular, the court had no hesitation in dismissing the patriarch’s argument that the only person with standing to apply to set aside a transaction effected under undue influence was the victim of that undue influence. That would have meant that only the settlors could have sought to rescind their revocations. Instead, the court held that Jersey law allows a beneficiary to seek to impugn a revocation of a trust on the ground that the settlor exercised the power when under the undue influence of another.

Having held that the daughter, as a discretionary beneficiary, had standing to bring proceedings on the ground of undue influence, the next question therefore was whether undue influence had actually affected the two trust revocations. In deciding this point, the court largely relied on evidence from the daughter, but the court held that the absence of any denials from the patriarch was also telling.⁴

³ *Toothill v HSBC Bank Plc* [2008] JLR 77

⁴ Drawing on the endorsement by Lord Sumption in *Prest v Prest* [2013] 2 AC 415 of the following statement: “the silence of one party in face of the other party’s evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence.”



The court decided that undue influence was comfortably made out on the facts. The evidence showed that, following the abortive attempt by the patriarch to replace both the trustees and himself as the protector, the patriarch had urged his lawyers to meet with the settlors, which appeared to put the settlors in difficulty as they felt it necessary to instruct their own lawyers. The settlors then sent a heartfelt plea to the family to sort out their differences and referred to letters from legal firms (the patriarch's, the court found) "threatening us", such that they were worried and felt in "torment". It appeared that the settlors had been threatened by the patriarch with "consequences" if they did not revoke the trusts and transfer the funds to the patriarch. One of the settlors in particular, when she spoke with the daughter on the telephone, was "very, very upset and audibly shaken".

Furthermore, the evidence showed that the patriarch had arranged delivery of the revocation notices to the trustees and indeed to the bank in an attempt to persuade it not to act upon the instructions of the trustees.

Mistake

The daughter had submitted that the revocation notices could also be set aside on the grounds of mistake, on the grounds that the settlors had failed to understand the Italian tax consequences of revoking the trusts and because the settlors incorrectly considered themselves to be the patriarch's nominees. However, the court held that the question of mistake could only arise if undue influence had not been made out. This is because the exercise of a power may only be set aside on the ground of mistake if the power would not have been exercised "but for" the mistake in question. As the court put it:

"If, as we have found, the power was exercised because the will of the settlors was overborne by the threats and pressure exerted by the father, the power of revocation was not exercised because the settlors were labouring under a mistake; it was exercised because of the threats by the father."

Nevertheless, the court did go on to summarise briefly its conclusions on mistake. In essence, the court's view was that, if undue influence had not been made out, there would have been insufficient evidence to establish that the settlors were unaware of the tax consequences or that they genuinely considered themselves to be the settlors' nominees. Quite the opposite, in fact.

Comment

It is helpful to have a clear Jersey authority on the application of undue influence in a trusts context. However, the case also sheds some light on some related points that may be of interest to trust practitioners.

Firstly, the case makes clear what was already clear as a matter of English law, which is that the power of revocation is a beneficial one. This means that trustees are not generally under a duty to scrutinise the reasons why a settlor is choosing to revoke a trust, assuming at least that it is clear that the settlor is doing so freely. It also means that it is not necessary for there to be a specific power in the trust documentation to enable the settlor to release his power of revocation in the event that he wishes to do so (for example, for US tax reasons, or so as to make the trust more robust from an asset-protection perspective).

Secondly, the judgment makes the point that, where assets need to be returned to more than one settlor following a revocation, one need not engage in a complicated tracing exercise where the original assets have intermingled or changed in nature. Instead, the court's view was that the assets should be transferred to the settlors in proportion to the values of the initial contributions.

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