

UPDATE

Undue influence and mistake – saving trusts from revocation

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The latest judgment in the litigation concerning the Piedmont and Riviera Trusts (*In the Matter of the Piedmont Trust and In the Matter of the Riveria Trust* [2018] JRC210) concerns a beneficiary's application to challenge notices of revocation issued by the settlors of the trusts on the grounds of undue influence and mistake. It is one of the few decisions of its kind in Jersey in this area.

The proceedings were brought by the trustees of the Piedmont and Riviera Trusts whereby directions were sought as to whether notices from the settlors revoking those trusts should be set aside on the grounds of undue influence and/or mistake. The trustees themselves remained neutral. The proceedings were issued in the context of a family dispute between two of the beneficiaries of the trusts, referred to in the judgment as the "father" and the "daughter". The evidence suggested that the father's representatives had instructed the settlors to revoke the trusts and transfer the trust funds to his bank account. Revocation notices were subsequently issued by the settlors. Within these proceedings, the daughter, a beneficiary of the trusts, applied to have the revocation notices set aside on the grounds of undue influence and/or mistake.

The law of mistake in this context is governed by Article 47G of the Trusts (Jersey) Law 1984 (**Law**). It allows the court, on an application under that Article, to declare that an exercise of a power by a trustee of a person exercising a power over, or in relation to a trust, or trust property, as voidable, and: (i) having such effect as the court may determine; or (ii) having no effect from the time of its exercise.

The court may exercise its power under Article 47G in circumstances where the trustee or person exercising the power: (i) made a mistake in relation to the exercise of his or her power; and (ii) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake. The mistake must also be of so serious a character as to render it just for the court to make a declaration under that Article.

The persons that may make an application under Article 47G of the Law are: (i) the trustee who exercised the power concerned, or the person exercising a power (as the case may be); (ii) any other trustee; (iii) a beneficiary or enforcer; (iv) the Attorney General in relation to a trust containing charitable trusts, power or provisions; and (v) any other person with leave of the court.

The law of undue influence in Jersey is similar to that of English law. As stated by Lord Nicholls of Birkenhead in *Royal Bank of Scotland –v- Etridge*¹ and cited by the court in this decision, undue influence, "...arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, or of which the ascendant person then takes unfair advantage..."

¹ (No. 2) [2002] 2 AC 773.

While the mistake jurisdiction is well established in Jersey, featuring, as noted, prominently at Article 47G of the Law, the doctrine of undue influence has been traditionally confined to matters of contract law. Such cases require the party seeking to challenge the validity of the contract (which would usually be the victim of the undue influence) that undue influence was exercised; that undue influence was operative; and that without undue influence, no contract would have been made at all or would have been made in quite different terms.² However, in the context of trusts, the law is less developed and there is little judicial guidance in Jersey or elsewhere which addresses a beneficiary's ability to apply to set aside a decision, in this case the issuance of notices to revoke the trusts, made by a settlor of the trust.

The starting consideration for the court was whether a challenge on the basis of undue influence was an appropriate application for a beneficiary (who herself was not the subject of the undue influence in question) to bring. The court concluded that there was no principled reason for refusing to allow a beneficiary to challenge a revocation where that revocation was said to have been carried out by the settlor as a result of duress or undue influence. There were a number of reasons for this, including that, if a beneficiary could not challenge the revocation of a trust, it would likely mean that a revocation would not be challenged by anyone at all. In many cases, this would be an unjust result. The court further noted that the language of Article 47G of the Law expressly confirms that a beneficiary may apply to set aside the exercise of powers in relation to a trust or trust property due to mistake. The beneficiary in question, therefore, had standing to make both applications.

In determining the merits of the application based on undue influence, the court considered the evidence in support and noted the absence of any denials from the settlors or from the party alleged to have exerted undue influence. Central to the court's consideration was the strong evidence that the father had pressurised the settlors into issuing the notices: "*Nevertheless, putting everything together, there is strong evidence that the father pressurised the settlors by means of threats inter alia of 'consequences' and an injunction and that each of them only executed the relevant revocation notice because of these threats.*"³ This evidence of the settlors was acknowledged to be hearsay,⁴ however this was compounded by the absence of any denials from the settlors or the father that the revocation notices were executed under undue influence, despite there being opportunity within the court timetable for them to do so: "*In the circumstances we conclude that this is a classic case where prima facie evidence is converted into proof in relation to matters which are within the knowledge of the silent party and about which that party could be expected to give evidence.*"⁵ The court ultimately concluded that the revocation notices were executed under undue influence on the part of the father and the revocation notices were set aside and declared invalid on this ground.

In determining the merits of the application based on mistake, the court noted that it had already found that the notices of revocation would be set aside as a result of the undue influence exerted on the settlors. However, the court noted that if the settlors were not acting as a result of undue influence:

1. The court was not persuaded, contrary to the assertions of the beneficiaries, that a mistake was established in relation to tax consequences of the revocation notices. There was no evidence that the settlors were unaware of the tax consequences and, on the contrary, the thrust of the evidence was that the settlors were worried about the consequences of revocation for them. In any event, it would be for the settlors (not a beneficiary) to apply to set aside the transaction in circumstances where it would be the settlors suffering the tax consequences.
2. If the court was persuaded that the settlors genuinely believed they were nominees, as suggested by the unsworn affidavits filed on their behalves, and genuinely believed they had no alternative but to obey instructions to revoke, they were operating under a mistake. This was because the decision to revoke rested entirely with the settlors. Further, the mistake would have been of such serious character as to render it just for the court to set aside the revocation. It would be unjust to the beneficiaries of the trusts for their contingent interest in the trust funds to be revoked on such a mistaken basis. If the court had not found the existence of undue influence and had accepted the assertion that the settlors

² *Ballard v Lumb* 1968 JJ 923.

³ Paragraphs 77 and 84.

⁴ Paragraph 77.

⁵ Paragraph 80.

thought they were nominees who were duty bound to act on instructions to revoke, the court would have in those circumstances set aside the revocation notices on the ground of mistake.

In postscript, the court noted that a proportion of the Riviera Trust assets were contributed by the settlor and the balance had originated from a predecessor trust. The court considered that, if the revocation was held to be valid, the appropriate course would be to have regard to the proportions of the trust fund initially contributed from each source and to replicate this upon revocation. The court, in examining Article 40 of the Law, did not consider that the legislature would have envisaged an expensive and complex tracing exercise to try and establish which part of the trust fund as at the date of revocation originated from the assets contributed by one person and which from the assets contributed by another.

This decision provides greater clarity on the level of the Jersey court's protection and supervision of beneficiary interests arising under discretionary trusts, particularly in circumstances where it is suspected that exercises of power are being procured as a result of unlawful pressure. The decision could also produce a consequent increase in the frequency of beneficiary attacks on power holders under discretionary trusts, and those power holders would be well advised to ensure that they are extra vigilant in ensuring that there is no suggestion of impartiality or unlawful pressure in circumstances where a binding decision is intended.

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