

Revoking the Irrevocable

In the matter of the DDD Settlements [2011] JRC243

Introduction

Excluding someone irrevocably from benefitting from trust assets normally means just that. The magic bullets of mistake and Hastings Bass have had their wings clipped somewhat, though the Jersey Court has pursued its own course in respect of the former, and its all to play for in the Supreme Court regarding the latter. But what if there were no error involved in the exclusion in any event? What if the exclusion had been effected just as intended? That was the position the Jersey Court faced with the DDD Settlements.

The Case

There were three DDD Settlements, and the settlor was excluded from each of them. The settlor, who was and remained resident and domiciled in Singapore, had been excluded because at the time the trusts were created Singapore had an estate tax that would have given rise to a substantial liability on the death of the settlor. That tax had since been abolished and whilst it was necessary to ensure the settlor was an excluded person when the trusts were created, it was not necessary that she remain so once the tax was abolished in early 2008.

The adult beneficiaries, some of whom were resident in the UK, and the trustee, applied for the trusts to be varied pursuant to Article 47 of the Trusts (Jersey) Law 1984 so that the settlor would no longer be excluded and could be added as a beneficiary if the trustee exercised its discretion to do so. The application was also supported by the Advocate appointed to represent the interests of the unborn and unascertained beneficiaries.

Article 47 *inter alia* permits the Court to approve on behalf of unborn beneficiaries the varying or revoking of all or any of the terms of the trust, or the enlarging of the powers of the trustee to manage or administer the trust property. Approval shall not however be given unless the arrangement appears to be for the benefit of such persons. The Court recognised that Art. 47 was cast in wide terms. Whilst it rejected the notion that this was a case of the enlargement of powers to add beneficiaries, as it could not see this as necessary for the managing of trust property (the power to add being closer to a dispositive power), it accepted the wording of the article did extend to judicial revocation of all or any of the terms of the trust, including those which had arisen from the irrevocable exercise of a power by the trustee. Thus whilst any application to revoke a trust provision which resulted from an irrevocable exercise of power by the

trustee would be subjected to the closest scrutiny, the Court accepted it did have jurisdiction under Art. 47 to do as it was being asked.

The analysis therefore turned to whether what was being requested could be said to be for the benefit of the unborn beneficiaries. Three purported benefit arguments were advanced. The first was that, on the basis of fairness, there was no good reason why the settlor should be treated differently from other family members. Benefit to the settlor was not benefit to the unborns and the Court understandably rejected the argument. The second purported benefit was that of moral obligation to remove the impediment which prevented the settlor from benefitting from the trust. This argument also fell on stony ground. The Court distinguished between a settlor in need, such as was the case in the T Settlement [2002] JLR 204, where a capital gains tax liability in relation to assets over which she had no claim would have left the settlor bankrupt, and the present case, where the settlor was financially independent and lived comfortably. The Court rejected the notion that the views of the adult beneficiaries should be imputed to the unborn children, or that the Court should be bound by the views of the adult beneficiaries as to what was their moral obligation. The test was an objective one, with the views of the adult beneficiaries only acting as an aid to the objective assessment by the Court of any moral obligation.

Fortunately for the settlor, the third benefit argument, which was the only one also advanced by the Advocate for the unborns, did find favour with Court. It was asserted that if the Court were to give approval as requested, the trustee might be able to consider mechanisms by which savings to capital gains tax otherwise payable by the UK beneficiaries could be made. Citing In the Settlement of Douglas [2000] JLR 73, the Court reaffirmed the position that a variation that results in the avoidance, minimisation or deferral of tax, was a legitimate benefit for the Court to take into account. As there was a good chance that some of the as yet unborn beneficiaries would be UK resident, the Court was in no doubt that the proposed revocation, which would free up the trustee to consider tax mitigation mechanisms, was for their benefit. Orders were therefore made which had the effect of revoking the exclusion of the settlor under each trust.

Comment

This case again demonstrates the willingness of the Jersey Court, whilst still testing applicants, and requiring them to meet the relevant legal criteria, to exercise its jurisdiction in a commercial and pragmatic manner. It did not, it seems, require a blueprint for the tax saving

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mechanisms to actually be presented. Perhaps this is to be explained by the trustee having to tread the line between giving indications of possible decisions and mechanisms whilst not binding itself regarding the making of future decisions, including even a decision to add the settlor as a beneficiary.

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