In the Mater of the Piedmont Trust v Jasmine Trustees Ltd

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Olsen, Ramsden
Judgment Date:	15 November 2018
Neutral Citation:	[2018] JRC 210
Reported In:	[2018] JRC 210
Court:	Royal Court
Date:	15 November 2018

Text

Between:

In The Mater of the Piedmont Trust

Jasmine Trustees Limited
Representor
and
(1) L
(2) M
(3) N
(4) Q
(5) Z
(6) O, P, V, R, S and W

IN THE MATTER OF THE RIVIERA TRUST

Second Plaintiff

Between:
(1) Jasmine Trustees Limited
(2) Lutea Trustees Limited

Representors
and
(1) L
(2) M
(3) N
(4) Q
(5) T
(6) O, P, V, R, S and W
Respondents

[2018] JRC 210

Before:

Sir Michael Birt, **Commissioner and** Jurats Olsen **and** Ramsden.

Royal Court

(Samedi)

Trust —The Representors seek directions re: revocation notices.

Authorities

Jasmine Trustees Limited and Lutea Trustees Limited v L and Others [2015] (2) JLR 52).

Trusts (Jersey) Law 1984.

TMSF -v- Merrill Lynch and Trust Co (Cayman) Limited [2012] 1 WLR 1721 at [62].

Lewin on Trusts 19 th edition.

Royal Bank of Scotland -v- Etridge (No. 2) [2002] 2 AC 773.

Toothill -v- HSB Bank Plc [2008] JLR 77.

Snell's Equity 33rd edition.

Crociani -v- Crociani [2018] JCA 136A.

Prest -v- Prest

Advocate N. M. Sanders **for the Representors**.

Advocate F. B. Robertson **for the Second Respondent**.

Advocate M. P. Renouf **for the Sixth Respondents**.

The other parties did not appear and were not represented.

THE COMMISSIONER:

1 In these proceedings, whilst themselves remaining neutral, the Representors ("the Trustees") seek directions as to whether notices revoking the Piedmont Trust ("the P Trust") and the Riviera Trust ("the R Trust") (together "the Trusts") should be set aside on the grounds of undue influence and/or mistake. Jasmine Trustees Limited ("Jasmine") is the sole trustee of the P Trust and Jasmine and Lutea Trustees Limited ("Lutea") are joint trustees of the R Trust. However, unless it is necessary to do otherwise in a specific context, we propose to refer simply to "the Trustees" to cover the trustee(s) of bothTrusts or whichever trust is relevant in context.

Background

(i) The P Trust

2 The P Trust was established on 4 th April, 2000 by deed of settlement between the Fifth Respondent in the representation concerning the P Trust ("the P settlor") and Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill Lynch Cayman") as original trustee. The trust was governed by the law of the Cayman Islands. Jasmine was appointed as trustee in place of Merrill Lynch Cayman on 20 th October, 2008, and the proper law of the trust was changed to Jersey law by deed dated 11 th February, 2011. Jasmine is a trust company carrying on business in Jersey.

3 The First Respondent ("the father") is now aged 97. He has three children namely the Second Respondent ("the daughter"), the Third Respondent ("the elder son") and the Fourth Respondent ("the younger son") (together "the sons"). Each of the sons has three children and together they comprise the Sixth Respondents (the "adult beneficiaries"). The daughter has one daughter who is a minor and whom she represents pursuant to an earlier order of this Court.

4 The trust was a conventional discretionary trust and the class of beneficiaries was defined as being the father, the father's children and remoter issue and any persons added as beneficiaries under the power conferred by the trust deed. The father was named as the original protector.

5 5. The assets of the P Trust (other than loans made to the daughter and to the father) are held in a wholly owned company incorporated in the Cayman Islands ("P Limited"). Pursuant to the power conferred by the trust deed, the father has been appointed as the investment adviser to the company.

6 The P settlor signed a letter of wishes at the time of the creation of the trust and a further letter of wishes in February 2006. Although there are differences, the essential nature of the settlor's wishes does not seem to have altered substantially during this period. He stated that the intention of the trust was to provide for the great-grandchildren of the father's parents i.e. for the father's grandchildren. During the father's lifetime, the settlor wished the trustees to consider sympathetically any requests made by the father for distributions to him or other beneficiaries in such amount as the father might request from time to time. After the father's death, it was requested that the trust fund be divided into three equal parts, one for the family of each child of the father.

7 The P settlor provided a further letter of wishes in July 2010 by which time relations between the father and the daughter had deteriorated dramatically. This letter expressed the wish that, after the father's death, the trust fund should be divided into two equal funds, one for the children of the elder son and one for the children of the younger son.

8 Clause 4 of the trust deed provided:—

> *"4. This Trust shall be revocable."*

9 Paragraph 6(b) of Schedule IV of the trust deed provided that any notice to the trustees would only be effective as and when actually received by them at their registered office. Although Clause 4 is very brief, it was not disputed – and we agree – that the power of revocation rests with the settlor and that a revocation will only be effective when the notice of revocation is received by the trustees.

(ii) The R Trust

10 The R Trust was established on 18 th June, 2010, by deed between the Fifth Respondent in the R Trust Representation ("the R settlor") and Jasmine and Lutea as trustees. It is a discretionary trust governed by the law of Jersey. Lutea is also a Jersey company carrying on trust business in the Island. The beneficial class is the same as in the P Trust with the addition of the R settlor and one other person. Again, the assets consist substantially of shares in a wholly owned Cayman Island company ("S Limited"), which in turn holds a portfolio of quoted securities.

11 The father was appointed as first protector and as investment adviser. A letter of wishes from the R settlor dated 7 th July, 2010, indicated that she wished the trustees to consider sympathetically any request made by the father during his life for distribution to him or to other beneficiaries and that following his death, the trust fund should be divided into two equal parts, one for the children of the elder brother and one for the children of the younger brother.

12 Clause 22 of the trust deed provided that the R Trust should be revocable as follows:—

> *"22 Revocation*
>
> *This Trust is revocable and the Settlor shall have power by written instrument to revoke this Trust either wholly or in respect of any part of the Trust Fund provided that no such revocation shall take effect until such instrument is actually received by the Trustees and that no exercise of this power of revocation may prejudice or affect the validity of any payment of capital or income or other act or thing done prior thereto."*

(iii) Previous proceedings

13 As already indicated, the father and the daughter have fallen out. This appears to have begun in 2010, at which time the letter of wishes in relation to the P Trust was changed so as thereafter to refer only to the sons and their families and the letter of wishes in relation to the R Trust was signed. Subsequently, the daughter commenced litigation in New York against the father and one of the sons and in Vermont against the father and both sons. These proceedings were in connection with companies in those States which she alleged were partly owned by her but had been converted to the use of the father and/or the sons.

14 In 2014, as protector, the father purported to remove Jasmine and Lutea as trustees of the Trusts and to appoint a New Zealand trustee company in their place. Subsequently, he resigned as protector of the Trusts and purported to appoint the sons as protectors in his place. These appointments were challenged and this Court issued a judgment dated 23rd September 2015 (reported at *Jasmine Trustees Limited and Lutea Trustees Limited v L and Others* [2015] (2) JLR 52), in which it declared the appointments of the New Zealand company as trustee and of the sons as protectors to be invalid. The upshot was that Jasmine remained as trustee of the P Trust and Jasmine and Lutea remained as trustees of the R Trust. A further consequence of the Court's decision was that there was no protector of either trust because the resignation of the father was valid but the appointment of the sons as successor protectors was invalid.

15 It proved impossible for the parties to agree on the identity of a new protector and accordingly the matter came back before this Court (differently constituted) in June 2017. On 21 st November, 2017, the Court issued its reasoned judgment in which it ruled that Rysaffe Fiduciaries Sarl should be appointed as protector of the Trusts (the Court having given its decision without reasons on 22 nd June 2017). However, after the hearing and the decision referred to but before the reasoned judgment was issued, revocation notices (signed by the P settlor and the R settlor respectively) in relation to both Trusts were sent to the Trustees and received by them on 14 th August, 2017. Both notices were dated 18 th May, 2017. In the circumstances, the appointment of a new protector for the Trusts has not been proceeded with.

16 The assets of P Limited and S Limited are held in accounts with Morgan Stanley in New York. On 1 st November, 2017, Jasmine gave instructions for payment of certain fees out of the account of P Limited but on 2 nd November Morgan Stanley refused to comply with such instructions. They asserted that they had in August been supplied with copies of the two revocation notices and considered therefore they could no longer act on the instructions of the Trustees.

(iv) The present proceedings

17 In the light of concerns to which we refer below and the difficulties with Morgan Stanley, the Trustees brought two representations seeking directions as to whether the revocation notices were valid. The representations were first tabled on 21 st December, 2017, and the First to Fifth Respondents in each case were convened. Subsequently, the adult beneficiaries (who had been notified of the proceedings) were joined at their request.

18 At a directions hearing on 2 nd March, 2018, the Court ordered that the Respondents file any evidence in response to the representations (and supporting affidavits) by 16 th March and that any party wishing to serve any affidavit evidence in reply should do so by 6 th April.

19 On 17 th April, 2018, the Master made orders for disclosure by 25 th May and gave leave for the settlors to be cross-examined on any affidavit evidence filed by them. Orders were also made for the filing of expert evidence on Italian and US tax law and for skeleton arguments and bundles of authorities to be filed and served on all the parties by 17 th August, the hearing having been fixed to commence on 4 th September.

20 20. Subject to what is said below in connection with the draft affidavits of the settlors, no Respondent, other than the daughter, has served any affidavit evidence.

21 In March 2018, Messrs Bedell Cristin wrote on behalf of the settlors to say that the settlors would no longer be playing any part in the proceedings. This was re-iterated in an email by the settlors' Italian lawyers dated 3rd September. On 20 th August, 2018, Messrs Mourant wrote on behalf of the sons to say they were adopting a neutral role and would rest on the wisdom of the Court. They therefore did not intend to file any written submissions and no advocate appeared for them at the hearing. The adult beneficiaries were represented by Advocate Renouf at the hearing but he made it clear that they were neutral on whether the revocation notices were valid and he made no material submissions on their behalf.

22 The father did not file any evidence but on 3rd September, a day before the trial was due to begin, Messrs Carey Olsen filed a skeleton argument on his behalf which raised certain issues of law and also purported to make certain assertions of fact. The Court held that, in the light of the failure to comply with the Court timetable to file any evidence, it would

disregard any assertions of fact. However it invited the parties to consider the points of law raised as the Court would always wish to proceed on a correct understanding of the applicable legal principles.

The law

23 Article 40 of the Trusts (Jersey) Law 1984 ("the Law") provides (so far as material) as follows:—

> ***"40 Power of revocation***
>
> ***(1) A trust … may be expressed to be:—***
>
> ***(a) revocable whether wholly or partly***
>
> ***…***
>
> ***(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*** .
>
> ***…***
>
> ***(5) In paragraph (3) "settlor" means the particular person who provided the property which is the subject of revocation."***

24 Advocate Sanders and Advocate Robertson agreed (as do we) that a power of revocation is a beneficial power. It can be exercised purely for the personal benefit of the settlor with no duty to have regard to the interests of the beneficiaries. Thus in *TMSF -v- Merrill Lynch and Trust Co (Cayman) Limited* [2012] 1 WLR 1721 at [62], the Privy Council said this:—

> ***"In the present case the power of revocation cannot be regarded in any sense as a fiduciary power, and the defendants do not suggest otherwise.*** The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership."

25 Lewin on Trusts (19th ed) at 29–016 is to like effect:-

> ***"A power of revocation reserved to the settlor on the creation of a settlement, since the effect of exercising it will be to re-vest the assets in him, is necessarily a beneficial power."***

26 It follows that the exercise of a power of revocation cannot be set aside on the grounds, for example, of fraud on a power. However, the daughter submits that the exercises of the power of revocation in the present case can be declared invalid on two grounds. First, she submits that each settlor exercised the power under the undue influence of the father; and

secondly she submits that they can be set aside on the grounds of mistake.

27 We consider next the legal principles applicable to each of these grounds.

(i) Undue influence

28 The classic statement of the equitable doctrine of undue influence under English law is to be found in the judgment of Lord Nicholls of Birkenhead in *Royal Bank of Scotland -v- Etridge* (No. 2) [2002] 2 AC 773 at [6 – 8] as follows (omitting references):—

> ***"6. The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end, the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence*** .
>
> ***7. Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: "how the intention was produced", in the often repeated words of Lord Eldon LC, from as long ago as 1807… If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, varied too widely to permit of any more specific criterion*** .
>
> ***8. Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendency, or of which the ascendant person then takes unfair advantage…."***

29 In *Toothill -v- HSB Bank Plc* [2008] JLR 77 at [28] this Court held that the law of undue influence in Jersey is similar to that of English law.

30 In his skeleton argument filed the day before the hearing on behalf of the father, Advocate Holden submitted that the only person with standing to apply to set aside a transaction effected under undue influence is the victim of that undue influence i.e. the person who has entered the transaction because of the undue influence of another. He pointed out that the victim may choose to affirm the transaction rather than seek to rescind it and therefore clearly only the victim can seek the Court's assistance. In support of this proposition he cited three passages from Snell's Equity (33rd ed.). Para 8–010 includes the following passage:

> *"The equitable doctrine can thus be seen as attending to the same basic question as dealt with by the common law doctrine of duress: when should the means by which B's intention to enter into a certain transaction was produced allow B to set a transaction aside?"*

And at para 8–011:—

> *"It is clear that the exercise of undue influence provides grounds on which B can set aside a contract, as well as a gift or voluntary settlement.* It is also noteworthy that … undue influence exerted by X may provide a means for B to set aside a gift made to A."

Finally, at 8–012:—

> *"The probate doctrine [of undue influence] can be invoked by any party with standing to challenge the will, as it identifies "a species of restraint under which no valid will can be made".* The equitable doctrine, by contrast, does not operate so as to render a transaction invalid: a gift or contract entered into by undue influence is valid and so takes effect unless or until B exercises his or her power to rescind the transaction. The equitable doctrine, it is submitted, is based rather on the idea that, as a result of the undue influence, it would be unconscionable, in a broad sense, for A, as against B, to take advantage of the right acquired by A under the impugned transaction".

He pointed out that in each of these passages Snell envisages B (the victim of the undue influence) as the person having standing to bring proceedings to rescind the transaction.

31 We accept that, in the vast majority of cases, it is likely to be the victim who will bring an action to rescind a transaction entered into under undue influence as the transaction is likely to be disadvantageous to him and advantageous to the other party. However, that is not the position in relation to the revocation of a trust. There, the disadvantage rests entirely with the beneficiaries of the trust. They will have lost the ability potentially to benefit from the trust fund. Conversely the settlor will have benefitted as the assets will now belong to him absolutely.

32 In our judgment, the law allows a beneficiary to seek to impugn the revocation of a trust on the ground that the settlor exercised the power when under the undue influence of another.

We summarise our reasons for so concluding as follows:—

(i) If a beneficiary cannot challenge the revocation of a trust, it is likely to mean that a revocation will not be challenged by anyone, even if carried out as a result of undue influence.

(ii) Suppose that a settlor is found to have exercised a power of revocation of a trust at the point of a gun (i.e. under duress). He may decide not to seek to rescind the revocation as he may remain fearful of the person who threatened him with the gun and he will of course in any event now be the absolute owner of the assets. Is it really the case that a beneficiary (who has been prejudiced by such revocation) cannot seek to impugn such a revocation on the ground that it was effected under duress? In the circumstances envisaged above (i.e. that the settlor remains in fear) no one would be able to challenge the revocation despite it being effected under duress. We would be surprised if the law required such an outcome.

(iii) It seems to us that the position must be the same where the settlor revokes the trust as a result of undue influence rather than duress. In both cases his free will has been overborne, albeit by different means. In both cases, it must surely be right that a beneficiary who has been disadvantaged by the revocation should have the ability to challenge the revocation on the ground that it did not reflect the free will of the settlor.

(iv) In England, duress is a common law doctrine whereas undue influence was developed by the courts of equity to supplement the law of duress. The different historical roots of the common law and equity have sometimes led to difficulties in connection with remedies under English law. However, this Court is untroubled by such history and is free to approach the matter as one of principle. In our judgment, there is no principled reason for refusing to allow a beneficiary to challenge a revocation where that revocation is said to have been carried out by the settlor as a result of duress or undue influence.

(v) In any event, there seems to be no inherent difficulty in allowing a person who has been disadvantaged by the act of a person acting under undue influence to challenge that act. Thus, even under English law a person who considers that he has been disadvantaged by the terms of a will (because under intestacy or a previous will he would do better) may challenge the validity of the will on the ground that it was made as a result of undue influence exercised by another over the testator. We accept that under English law, the doctrine of undue influence in relation to wills is distinguished from the equitable doctrine in relation to *inter vivos* transactions, but that again is an accident of history. The law has clearly considered it just that a potential beneficiary should be able to challenge the validity of a will on the basis that the testator was acting under the undue influence of another. If it is satisfactory in connection with wills, we see no principled reason why it should not also be possible in connection

with actions such as the exercise of a power to revoke a trust.

33 Accordingly we hold that the daughter, as a discretionary beneficiary of the Trusts, has standing to bring proceedings to set aside the revocation notices on the ground of undue influence. It follows that she also has standing to raise the issue where the proceedings are brought by the Trustees.

(ii) Mistake

34 Article 47G of the Law is in the following terms:—

> ***"47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake*** .
>
> (1) In this paragraph, "person exercising a power" means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property.
>
> (2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and:-
>
> (a) has such effect as the court may determine; or
>
> (b) is of no effect from the time of its exercise.
>
> (3) The circumstances are where the trustee or person exercising a power: —
>
> > (a) made a mistake in relation to the exercise of his or her power; and
> >
> > (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and
>
> the mistake is of so serious a character as to render it just for the court to make a declaration under this Article."

A power of revocation conferred by the trust deed is clearly a *'power over*, or in relation to a trust or trust property' and the list of persons specified in Article 47I(2) includes at (c) *"a beneficiary"*.

35 Advocate Holden again submitted that the daughter was not an appropriate person to bring an application under Article 47G(2). He pointed to the fact that in *Crociani -v- Crociani*

[2018] JCA 136A the Court of Appeal had said at para 94 that the Court had to be satisfied that the application had been made by an appropriate person and also at para 93 that the law in relation to mistake followed the settled approach of the Royal Court developed before the amendment of the law to introduce the statutory provisions. In that respect he referred to the cases where a settlor sought to set aside a gift to a trust on the grounds of mistake and pointed out that the applications were invariably brought by the settlor. He argued that a power of revocation should be treated in like manner because, by reason of power of revocation, a settlor has complete dominion over what he may choose to do with the trust property and that if he exercises a power of revocation by mistake, it is up to him as to whether he wishes to have the exercise set aside or not. If he chooses not to, that should be the end of the matter.

36 In our judgment, this argument fails for two reasons:—

(i) The statute itself could not be clearer. Whereas applications under Article 47E and 47F (which relate to a transfer or disposition of property to a trust) can only be brought by the person making the transfer (see Article 47I(1)), Article 47I(2) specifically provides that a beneficiary may bring an application under 47G. The words of the statute are quite plain and the Court cannot go behind them. The daughter is a beneficiary of the Trusts and therefore has standing to bring an application under Article 47G.

(ii) In any event, for the same reasons as mentioned above in relation to undue influence, it is, in our judgment, clearly right that, in relation to revocation of a trust pursuant to a power conferred by the trust deed, a beneficiary should have the standing to challenge the exercise of the power if it has been done by mistake. Whether the Court will think it just to set aside revocation in such circumstances is a different matter which we shall consider further below; but the jurisdiction to do so should as a matter of principle be available at the request of a disadvantaged beneficiary.

The evidence

37 We have received affidavit evidence from Mr David Jenner, the director of Jasmine and Lutea with responsibility for the Trusts, together with affidavits from the daughter. We have also received expert evidence in the form of reports on the Italian tax position from Deloitte (instructed by the daughter) and on the US tax position from Fox Rothschild (instructed by the Trustees) and McDermott Will & Emery (instructed by the daughter). We propose to summarise only the key evidence necessary for our decision.

(i) The creation of the Trusts

(a) The P Trust

38 It is clear from the documents provided by the Trustees that the father was the instigator of the creation of the P Trust. That is not entirely surprising as he and his family were to be the beneficiaries of the Trust. The P settlor is a cousin and godson of the father. He lived in Italy at the time of the creation of the Trust and continues to do so. The firm of Wilsons, English solicitors, was instructed in connection with the creation of the trust and they executed a letter of engagement with the P settlor as their client.

39 The father had been resident in the US for many years and was also, as we understand it, a US citizen. Many of the proposed beneficiaries were also US residents and citizens. It was therefore necessary for Wilsons to take US tax advice and they obtained this from the firm of Holland and Knight. That firm advised Wilsons in letters dated 12 th and 19 th January 2000. In the first letter, they explained that it would be desirable if the trust could be structured as a grantor trust for US tax purposes. In that event, all income earned during the lifetime of the grantor (i.e. the settlor) would be attributed, for tax purposes, to the grantor and therefore the trust itself would not be regarded as having any income for tax purposes. Any payments made to US beneficiaries would be treated as a gift by the grantor and therefore not subject to US tax during the lifetime of the grantor. The letter explained that there were a number of ways of making a trust a grantor trust but the simplest way was to make it revocable. The letter also recommended that the assets to be contributed to the trust should first be placed in a foreign holding company by the grantor and that the shares of that holding company should then be contributed by the grantor to the trust.

40 In their second letter, Holland and Knight pointed out that they were assuming that the settlor was a non-US citizen or resident and that the liquid assets to be transferred to the foreign holding company had belonged solely to the settlor and had not previously been owned by a US person. The letter went on to state:—

> *"So long as the Settlor remains alive, the Trust will be treated as a grantor trust for US tax purposes and all income (including dividends and capital gains) and assets deemed attributed to the Settlor, a non-US person."*

41 It is clear from that advice that, in order for the tax advantages of a grantor trust to be obtained, it was essential that the assets contributed to the P Trust should have been legally and beneficially owned by the P settlor and not by any US person, such as the father.

42 In a document dated 4 th April, 2000, the P settlor instructed Merrill Lynch Cayman to form a company, the shares of which were to be held to his order. He went on to say that he would shortly be instructing them to transfer the beneficial ownership of the shares in the company to the new trust. He signed the trust deed for the P Trust which is also dated 4 th April and on the same date executed a document transferring 'the beneficial ownership' of the entire share capital of P Limited to Merrill Lynch Cayman as trustee of the P Trust. In the same form he confirmed that he was not a US person (i.e. a citizen or resident of the US or a person subject to US individual income tax). The transfer of the shares in P Limited was

formalised in a deed of gift dated 17 th May, 2000, whereby he gave and transferred *'all beneficial interest'* in the shares in P Limited to the Trust.

43 The P settlor held an account with Morgan Stanley in New York and instructed Morgan Stanley to transfer all the securities and cash in the account to P Limited. He later certified to Merrill Lynch Cayman on 19 th December, 2001, that he was at the date of transfer the sole legal and beneficial owner of the assets transferred to P Limited, a list of which was attached to the confirmation. On the same date he confirmed that he had been the sole beneficial owner of the shares in P Limited at the date of transfer on 4 th April 2000.

(b) The R Trust

44 It seems clear from the contemporaneous documents that the R Trust was also established at the instigation of the father. When the P Trust had been established in 2000, a second trust ("the S Trust") had also been established by the S settlor, another relative of the father who lived in Italy. The S Trust too was revocable and was in similar terms to the P Trust (i.e. the father and his family were beneficiaries and the father was the protector and investment adviser). It appears that in 2010, a dispute had arisen between the S settlor and the father and the father was concerned as to whether the S settlor could revoke the S Trust (which she could).

45 45. The upshot was that after discussion with the Trustees, it was decided to establish the R Trust. The R settlor was another cousin of the father who lived in Italy. She held an account with Citibank in New York which contained a portfolio of assets.

46 Initially, it was proposed that the new trust should be irrevocable. Wilsons were again instructed to prepare the necessary trust deed. It was subsequently pointed out by the Trustees that, for the same reasons as in connection with the P Trust, the Trust ought to be revocable and that further US tax advice would need to be sought if it were to be irrevocable. It appears that the validity of this concern must have been accepted because the trust deed was redrafted to make it revocable and that was the form in which it was executed.

47 On 18 th May, 2010, the R settlor signed the Trustees' client acceptance form. In this she confirmed that the money she proposed to contribute to the trust was as a result of inheritance and she further confirmed that the assets to be introduced were owned by her and not on behalf of any person. In due course the R settlor executed the trust deed which was dated 18 th June 2010. On 25 th June 2010, Jasmine, as trustee of the S Trust appointed the whole of the trust fund of the S Trust to be held as an addition to and upon the trusts of the R Trust. Subsequently, the R settlor transferred all the cash and investments from her account with Citibank to be held as an addition to the R Trust. The Trustees had previously received a reference from Citibank confirming that the R settlor had held the account with them since 2000 and that the account had been operated

satisfactorily. The R settlor also signed a letter of wishes dated 7 th July 2010.

(ii) Events surrounding the revocation

48 The following paragraphs are based substantially on the affidavit evidence of the daughter supported by the documents referred to.

49 The daughter explains that although she knew the settlors as cousins, she had not had frequent contact with them until recently. However that changed in 2016. On 25 th April 2016 she (and the sons) received an email from the R settlor sent on her own behalf and on behalf of the P settlor. The following is an extract from the email:—

> *"Because of our involvement, we have suddenly found ourselves entangled in legal proceedings we could have never thought of.* Our position has become more and more difficult; we have to spend time and money to simply try to understand what is going on, and we don't always manage to comprehend. We frequently receive documents from courts of justice and letters from legal firms threatening us. We are worried and exasperated. We honestly feel we don't deserve this.
>
> *The reasons why this fight started lie in your family matters and obviously we have no title nor intention to interfere.* We just ask you to allow us to get out of this business as soon as possible and with no legal or financial damage on our part, now and in the future. We also believe our reputation is in danger. We ask you to help us to put an end to this torment. We just want to have our names eliminated from any trust or amount of money destined to you, so as to live peacefully …
>
> *We trust you will understand our plead (sic) to you, and you will help us."*

50 The daughter telephoned the R settlor on the same day who said that she and the P settlor had felt obliged to engage lawyers (they had retained the law firm Elexi) but they desperately wanted the sons and the daughter to resolve the dispute without any negative consequences for the settlors. The R settlor said that she had met with the father's Italian lawyer the previous September and that he had explained certain matters to her following which she and the P settlor had felt the need to instruct lawyers.

51 On 8 th May, 2016, the daughter received another email from the settlors wondering whether any progress had been made and mentioning that they were due to speak with the father the next day, so hoped to receive the daughter's point of view regarding the current situation before that call. The daughter called the P settlor on 19 th May and agreed that she would continue to try and resolve matters with her brothers and father with regard to the Trusts in order to extricate the settlors.

52 In June 2016, she was in touch with the settlors again. They told her that they were due to meet with the father in July and that they planned to request that he resolve the *'horrible situation'* they found themselves in. She subsequently met with the settlors in Turin for a few hours and explained to them why she had initiated the US legal proceedings. The settlors indicated to her that they were very concerned about potential tax consequences for themselves, although they did not explain to the daughter any specific tax consequences. On 30 th June, 2016, the daughter's advocates, Appleby, wrote to the Trustees to inform them of the settlors' concerns as expressed to the daughter.

53 On 6 th August, 2016, the settlors sent a further letter to the father, the sons and the daughter via email. It recorded that they had met with the father on 1 st August and that there had been a subsequent meeting on 2 nd August with the Italian lawyers. In effect it urged the parties to resolve matters and indicated that the father realised how serious the situation was for the settlors and would pursue an agreement with the children that would define the amounts of money allotted to the children from the Trusts, provide a guarantee to protect the settlors from present and future risks and would consent to close the Trusts. It went on to urge *"you should decide about how to protect us from the risks we are running (e.g. in Italy) in the following years after the closure of the Trusts"*.

54 The daughter recalls periodic contact with one or other of the settlors in the following months particularly in the context of a mediation which was taking place in New York starting in January and continuing in May 2017.

55 The daughter and the R settlor would sometimes send messages to each other over WhatsApp and on 11 th April 2017 they had various exchanges. These were in Italian but we have been provided with a translation. In those messages the R settlor stated that the father had sent the settlors a threatening letter sent by email the previous week. He wanted the settlors to revoke the Trusts so that he (the father) could take the money which would go into his American account. The wording used in Italian was *'minacciaosa'* which, according to the daughter, means *'threatening'* or *'with menace'* and carries with it (in Italian) the connotation of a hostile or even violent threat. However the translator has used the simple word *'threatening'* and that is the word which we shall go on. The daughter said that she also spoke to the R settlor on the telephone in the midst of these various WhatsApp exchanges and that the R settlor was *'very, very upset and audibly shaken'*. She told the daughter that the father had said that, if the settlors failed to do as instructed by the father, there would be *'consequences'* for them.

56 The daughter says that at this point she recalled a conversation she had had in March 2016 with a woman who had worked for the father for many years in the US and who had told the daughter that the father wanted to revoke the Trusts and had been in contact with the settlors in order to achieve this. The woman said that the father had told the sons about his plan to have the Trusts revoked. The daughter's advocates had in fact written to the Trustees' advocates on 23 rd March 2016 to inform them of that conversation.

57 Reverting to the telephone call in April 2017, the daughter says that the R settlor explained that the father had sent the settlors by email a typed threatening letter which he had signed. The WhatsApp messages show that following this conversation the daughter asked to see a copy of this letter but the R settlor replied that their lawyers at Elexi did not want the settlors to share the father's letter with others. Appleby wrote to Ogier (the Trustees' advocates) on 13th April, 2017, to inform them of the exchanges which the daughter had had with the R settlor and the fact that the settlors had been threatened by the father that if they did not revoke the Trusts, there would be *'consequences'* for them.

58 58. The R settlor called the daughter again a few days later. She told the daughter that the father's Italian lawyer had instructed the settlors to revoke the Trusts and transfer the funds to the father's bank account in the USA. This was accompanied by the threat that, if they failed to do so, injunction proceedings would be brought against the settlors in Italy, compelling them do so. The R settlor informed the daughter that she was very upset and concerned by the threats made on behalf of the father. Having to take legal advice was adding to the pressure she felt, as neither of the settlors had sufficient funds to pay legal fees. Messrs Appleby wrote to the Trustees' advocates on 28 th April to report on this conversation.

59 Messrs Appleby wrote to the settlors direct on 3 rd May, 2017, explaining that the Trusts were governed by Jersey law and that as a matter of Jersey law, the settlors could not be compelled to revoke the Trusts against their will. Appleby advised that the settlors should disregard any threats from the father which, they said, were extremely concerning and wholly improper.

60 Despite this, it appears that revocation notices in respect of both Trusts were signed by the settlors on 18 th May, 2017.

61 The first time that the daughter suspected that revocation notices might exist was when she was subsequently handed a typed signed letter (in capitals as set out below) by the father in the court room in Vermont during the course of the trial of the Vermont proceedings. He apparently passed similar letters to the sons. The letter is dated 16 th July 2017, and stated as follows:—

> *"DEAR [THE DAUGHTER]*
>
> *I AM DISGUSTED BY YOUR FIGHTING*.
>
> *YOUR WASTE OF MONEY ON LAWSUITS IS INTOLERABLE*.
>
> *YOU HAVE NO RESPECT FOR HOW HARD I WORKED MY WHOLE LIFE*.
>
> *I WILL NOT ACCEPT THIS ANYMORE.* I NOW PUT AN END TO IT.

[THE SETTLORS] HAVE SIGNED REVOCATION LETTERS. JUDGE RAMOS HAS COPIES.

THE TRUSTS WILL BE REVOKED AND NONE OF THE MONEY WILL GO TO YOU, UNLESS YOU AGREE:—

(1) END ALL LAWSUITS.

(2) I GIVE EVERYTHING TO MY GRANDCHILDREN, FUNDS AND PROPERTIES, WHEN I DIE.

(3) I REMAIN IN CHARGE OF EVERYTHING, UNTIL I DIE OR DECIDE OTHERWISE.

(4) I WILL GIVE YOU LEGAL ASSURANCE THAT I WILL NOT CHANGE MY MIND OR WASTE ANYTHING.

(5) YOU MUST CONTACT JUDGE RAMOS BY JULY 31."

Judge Ramos was apparently the New York judge who had overseen the failed New York mediations in January and May 2017.

62 The daughter did not withdraw the Vermont proceedings and on 26 th July, the jury dismissed the claim against the sons but found the father liable for conversion and awarded compensatory damages of $16,000 and punitive damages of $35,000, the shares in the Vermont company having apparently previously been returned by the sons to the daughter.

63 On 14 th August, 2017, the revocation notices were served on the Trustees by courier. They were sent by a different firm of Italian lawyers (i.e. not Elexi).

64 The revocation notice in respect of the P Trust was signed by the P settlor and was in the following terms:—

"You are the current Trustees of the above-captioned trust (hereinafter the "Trust").

Article 4 of the Trust provides that the Trust is revocable.

Please take note that in accordance with the provisions of the Trust, and as Settlor thereof, I hereby exercise my power to revoke Trust and request that the Trust assets be remitted to me."

65 65. The revocation notice in respect of the R Trust was signed by the R settlor and was in materially similar terms. It read as follows:—

"You are the current Trustees of the above-captioned trust (hereinafter the

"Trust").

The terms of the Trust provide that I have the power to revoke the Trust. This power is set out in clause 22 of the Trust deed entitled "Revocation".

Please take note that in accordance with the provisions of the Trust, and as Settlor thereof, I hereby exercise my power to revoke the Trust and request that the Trust assets be remitted to me."

(iii) Events since service of the revocation notices

66 The affidavit of Mr Jenner contains a detailed account of correspondence which has taken place since service of the revocation notices on 14 th August, 2017. For our purposes it is only necessary to record the following key events:—

(i) On 15 th August, Mr Jenner notified the father, the sons and the daughter of the fact that revocation notices had been served and that the Trustees were taking legal advice.

(ii) On 16 th August, Appleby sent a letter to Ogier (for the Trustees) expressing serious concerns as to the validity of the revocation notices and asking that the Trustees take no further steps until the daughter had made a substantive response.

(iii) Following a request from Ogier that they explain the grounds upon which the daughter sought to challenge the validity of the revocation notices, Appleby replied on 23 rd August indicating that the daughter's challenge would include the grounds of undue influence on the part of the father.

(iv) On 8 th September, Ogier sent letters to both settlors explaining that the Trustees needed to be satisfied about the reliability of the revocation notices and that there had been a suggestion that undue influence had been exerted by the father. Ogier specifically asked for further information in respect of a number of matters including whether the settlors had taken any tax advice, why there had been a three month delay between the execution and delivery of the revocation notices, the rationale for revocation and, in respect of the R Trust only, pointed out that if the revocation notice was valid, those assets which had been contributed from the S Trust would return to that trust and not to the R settlor.

(v) On 19 th September, Appleby sent a letter to Ogier setting out details of their case that the revocation notices had been procured by undue influence.

(vi) On 27 th September, Elexi replied to Ogier on behalf of the settlors

stating that the settlors decision was an *'informed decision made of their own free will'* and that the revocation notices were *'genuine and have been duly executed and delivered by our clients'*. The letter said that Elexi would, to the extent that they considered them as relevant, revert in due course on Ogier's other queries.

(vii) On 12 th October, Ogier responded to Elexi's letter of 27 th September pointing out that it was imperative that full and proper explanations be provided; otherwise the Trustees might well have to obtain directions from the Court. The letter then posed a number of specific questions which included the state of health of the settlors, whether they had taken tax advice, whether the firm which had dispatched the revocation notices also acted for the settlors, if not for whom they did act, why there was the delay in delivery of the notices and whether the revocation notices had been provided to the father in advance of their delivery on 11 th August, and if so, why.

(viii) On 5 th November, Ogier sent an email to Elexi providing various letters from Appleby setting out the grounds of the daughter's allegation of undue influence and notifying them that, in view of the lack of response to queries which had been raised previously, the Trustees were instructing Ogier to prepare an application to the Royal Court for directions.

(ix) On 9 th November, Ogier wrote to Carey Olsen (who represented the father in the previous proceedings) seeking a response from the father in respect of the allegations of undue influence made against him by the daughter.

(x) No substantive response having been received from Elexi or from Carey Olsen, the representations were duly presented before this Court on 21st December.

67 Following service of the representations, the settlors instructed Bedell Cristin. On 16 th March, 2018, Bedell Cristin supplied materially identical *'approved but unsworn'* affidavits on behalf of the settlors. They were not signed. That of the P settlor contained the following relevant paragraphs:—

"7. I am the named Settlor of the Trust under the Trust Deed. The Trust was settled with assets provided by [the father], who is a relative of mine, and is a beneficiary of the Trust.

8. [The father] told me that he wanted to provide for his family and asked me to help him. I executed a number of documents including the Trust Deed, under which I act as named Settlor of the Trust, as a nominee for [the father].

9. I have no financial or other interest in the Trust Fund of the Trust, and

acknowledge that the entire Trust Fund is beneficially owned by [the father]. I have never benefitted from the Trust.

10. Throughout the Trust's existence, I have acted on [the father's] instructions whenever I have been asked to do so. …

11. Last year, [the father] asked me to revoke the Trust by serving a written notice on the Trustee. [The father] provided me with a draft revocation notice, which I executed on 14th May 2017 and returned to him.

12. As [the father's] nominee I regard myself as bound to act upon his instructions. …

13. I understand that the Trustee received the executed revocation notice on 14th August 2017. [The father] provided me with the three letters… and told me that the reason for the delay between my execution of the revocation notice and its service upon the Trustee was due to ongoing settlement discussions conducted by Justice Ramos in New York."

68 The draft affidavit from the R settlor was in materially identical terms. No signed or sworn versions of the affidavits have ever been produced and, as already mentioned, Bedell Cristin wrote on 16 th March to say that the settlors would no longer take an active role in the proceedings.

69 On 20 th July, Appleby wrote to the settlors requesting that they attend the proceedings in the Royal Court on 4 th September and a further letter to the same effect was sent on 21 st August. The only response was an email from Elexi on 3 rd September, at 17:45 (i.e. the day before the scheduled commencement of the hearing) stating that the settlors confirmed the contents of their affidavits but would not be attending the hearing.

(iv) Evidence concerning taxation

(a) Italian tax

70 Appleby has obtained a report from Deloitte in Italy on the Italian tax position. For the limited purposes of our decision it can be briefly summarised.

71 Deloitte state that, for the purposes of Italian tax law, a trust is regarded either as a 'fictitious trust' or an 'effective trust'. In the case of a fictitious trust, the trust is regarded as non-existent for Italian tax purposes and the income is treated as that of the settlor, who should therefore declare all income earned by the trust in his tax return. In the case of an effective trust, the question of whether it would be liable to Italian tax depends on where the trust is considered as being resident.

72 In the present case, if the Trusts are considered to be fictitious trusts, arrears of tax and penalties payable by the settlors could be extremely substantial, even to the extent of exceeding the assets of the Trusts. Furthermore, there would be a risk of criminal prosecution of the settlors.

73 The guidance contained in Circular letters issued by the Italian tax authorities list the possibility of revocation as an indicator of a trust being fictitious. The Deloitte opinion goes on to say that if the revocation notices are held to be valid, this would *'significantly increase'* the likelihood of the Trusts being deemed to be fictitious. In other words, say Deloitte, *'the revocation itself would be the trigger for a series of serious adverse tax consequences'*.

74 Deloitte do not consider in detail the position if the settlors have at all times been acting as nominees for the father, indicating that there is no precedent for this situation. They think that should the tax authorities accept this to be the position, income should not be imputed to the settlors, but they might be liable to prosecution for criminal offences of having cooperated to hide the untaxed profit of a third party. Deloitte summarised its overall conclusion in the following terms:—

> *"…it can be stated that if the purported revocation notices are held to be valid, there are likely to be significant adverse consequences for the settlors, both from an administrative point of view in terms of taxes and penalties claimed by [the Italian tax authorities] and also potentially in relation to criminal law sanctions.* As a result of the potential taxes and penalties, the funds currently sitting in the trusts are likely to be materially reduced if not eliminated entirely."

(b) US tax

75 As to the US tax position, the firm of Fox Rothschild (on behalf of the Trustees) and McDermott Will & Emery (on behalf of the daughter) seem to be essentially agreed. They confirm the position as advised at the time of the creation of the P Trust, with the consequence that, assuming the assets contributed belonged beneficially to the P settlor and the R settlor respectively, the Trusts will be grantor trusts with a non-US grantor, so that all the income of the Trusts is attributable to the non-US grantors. There is a small issue in relation to the portion of the R Trust which came from the S Trust. Fox Rothschild indicate that this proportion of the R Trust might be treated as a non-grantor trust whereas McDermott Will & Emery consider that, as S Trust was itself revocable, the settlor of the S Trust will be regarded as the grantor. However that is not relevant for our purposes. Both opinions make clear that, if in truth the assets contributed to the Trusts belonged to the father, he will be treated as the grantor and there will accordingly be serious adverse US tax consequences for him.

Discussion

(i) Undue influence

76 We have no hesitation in concluding on the balance of probabilities that the revocation notices were executed under undue influence on the part of the father and should be set aside and declared invalid as a result. Our findings are based essentially on the evidence summarised at paragraphs 49 —65 above but the key points can perhaps be summarised as follows:—

(i) In 2015 (i.e. shortly after the decision of this Court rejecting the appointment of the sons as protectors in place of the father) the father's Italian lawyer met with the settlors as a result of which they felt the need to instruct their own Italian lawyers, Elexi.

(ii) In April 2016, the settlors sent a heartfelt plea to the family to sort out their differences and referred to letters from legal firms *'threatening us'* such that they were worried and felt in *'torment'*. We infer that this is a reference to the father's Italian lawyer as there is no evidence of any other lawyers being in contact with the settlors at this stage.

(iii) The evidence from the WhatsApp messages and telephone conversations between the R settlor and the daughter in April 2017 are to the effect that the father had sent a threatening (" *minacciaoso"*) email to the settlors threatening them with ' *consequences'* if they did not revoke the Trusts and transfer the funds to the father in the US. The R settlor was, when she spoke with the daughter on the telephone, *'very, very upset and audibly shaken'*.

(iv) Later the same month the father's Italian lawyer again demanded that the settlors revoke the Trusts and threatened that the father would seek an injunction against the settlors if they did not do so.

(v) The revocation notices were signed on 18 th May 2017 and we infer that they were supplied to the father. This is because he told the daughter (and the sons) in July 2017 that the settlors had signed revocation letters and that the Trusts would be revoked unless the daughter, in particular, ended all lawsuits (see his letter of 16th July 2017 referred to earlier). We accept that the use of the existence of the revocation notices to threaten the daughter is not direct evidence that the settlors were threatened before the revocation notices were signed but it is supportive evidence that the revocation notices were procured by the father in order to serve his purposes rather than the purposes of the settlors. We appreciate that the letter of 16 th July was also supplied to the sons but it was the daughter bringing the litigation and we have no doubt that the threatened use of the revocation notices was aimed primarily at the daughter.

(vi) The revocation notices were not dispatched to the Trustees by Elexi, the settlors' lawyers. We infer that the revocation notices were issued to

the Trustees at the instance of the father.

(vii) It is clear that the settlors were extremely worried about tax (and possibly other) consequences and this would have made them vulnerable to pressure from the father. The P settlor is apparently in his 70s and not in good health and the R settlor does not appear to be experienced in the ways of business. The fact that they signed the revocation notices despite their fear of the tax consequences suggests that they only did so because of the threats by the father.

(viii) Although each settlor signed a separate revocation notice in respect of the relevant trust, the evidence satisfies us that each was equally affected by the threats made by the father.

(ix) We find that the father also supplied copies of the revocation notices to Morgan Stanley in August 2017 in an attempt to persuade Morgan Stanley not to act upon the instructions of the Trustees. This was, we find, consistent with an attempt on his part to obtain control of the trust funds.

77 We acknowledge that the evidence of the settlors as to the threats etc. by the father is hearsay evidence and we take that into account. 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.

78 That evidence is supported by the absence of any denials from the settlors or from the father. In this respect we refer to the observation of Lord Sumption in *Prest -v- Prest* [2013] 2 AC 415 where at [44] of his judgment he said this (excluding the references):—

> ***"44. In Herrington -v- British Railways Board … Lord Diplock, dealing with the liability of a railway undertaking for injury suffered by trespassers on the line said:—***
>
> ***"The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the conditions of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it.*** This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold. A court may take judicial notice that railway lines are regularly patrolled by linesmen and Bangers. In the absence of evidence to the contrary, it is entitled to infer that one or more of them in the course of several weeks noticed what was plain for all to see. Anyone of common sense would realise the danger that the state of the fence so close to the live rail created for little children coming to the meadow to play. As the appellants elected to call none of

the persons who patrolled the line there is nothing to rebut the inference that they did not lack the common sense to realise the danger. A court is entitled to infer from the inaction of the appellants that one or more of their employees decided to allow the risk to continue of some child crossing the boundary and being injured or killed by the live rail rather than to incur the trivial trouble and expense of repairing the gap in the fence."

The courts have tended to recoil from some of the fiercer parts of this statement, which appear to convert open-ended speculation into findings of fact. There must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities, before a court can draw useful inferences from a party's failure to rebut it. For my part I would adopt, with a modification I shall come to, the more balanced view expressed by Lord Lowry with the support of the rest of the committee in *R -v- Inland Revenue Comrs*, Ex p TC Coombs & Co.:—

"In our legal system generally, 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. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified.""

The modification referred to by Lord Sumption relates to matrimonial cases and is not relevant for present purposes.

79 The settlors and the father have had ample opportunity to rebut the allegations of undue influence in circumstances where one would expect them to do so if such allegations were untrue. First, Ogier summarised the allegations in their letters of 5 th November, 2017 to Elexi and 9 th November, 2017 to Carey Olsen and sought responses. None were provided. Secondly, Mr Jenner's affidavit filed with the representations exhibited the letters written on behalf of the daughter summarising the allegation of undue influence. Nothing was filed in response. Thirdly, the daughter's affidavit sworn in these proceedings contains full details of what the settlors had told her and her assessment of how upset they were as a result of the threats by the father of *'consequences'* if they did not revoke the Trusts. The Act of Court dated 2 nd March, 2018, allowed for affidavits to be filed in response to affidavits of any of the Respondents and accordingly the father and the settlors had the opportunity under the procedure laid down to file affidavits in response to that of the daughter. There has been no such response.

80 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.

81 We have not forgotten the draft affidavits supplied by the settlors in which they assert that they have at all times been acting as nominees for the father and that they had no option but to issue the revocation notices because they were his nominees.

82 Those affidavits have not been sworn and the settlors have not attended for cross-examination as ordered by the Court, despite the Court directing that the daughter would be responsible for their expenses in coming to Jersey. In those circumstances the draft affidavits do not constitute evidence. There is accordingly no evidence to controvert that which supports the finding of undue influence. In any event, the assertion of the settlors that they were at all times acting as the father's nominees is completely inconsistent with the documents which they both signed when the Trusts were established to the effect that the assets being transferred to the Trusts belonged legally and beneficially to them and that they were not holding the assets for any other party. Contemporaneous documents are far more persuasive than a draft affidavit produced many years later during the course of litigation.

83 Furthermore, the Court bears in mind that earlier undue influence may well continue to operate at a later stage and we take this into account when considering the assertion in the draft affidavits that they were acting as nominees and the further assertion in Elexi's brief response of 27 th September, 2017, that the settlors made their decision *'of their own free will'*.

84 In summary, we are satisfied that the settlors only executed the revocation notices because of the unlawful threats and pressure applied to them by the father and that the effect of such threats and pressure means that the execution of the notices ought not fairly to be treated as the expression of the settlors' free will (to quote from Lord Nicholls in *Etridge*). We therefore set aside the two revocation notices and declare them to be invalid.

(ii) Mistake

85 The daughter contends that the revocation notices may also set aside on the ground of mistake. She puts this in two ways. First, she submits that when executing the revocation notices, the settlors were labouring under a serious mistake as to the Italian tax consequences of doing so. Secondly, she submits that, if the Court accepts what was said in their draft affidavits to the effect that they consider themselves to be the father's nominees, that was a serious mistake as to their role as settlors and the ambit of their powers of revocation.

86 In our judgment, both of these can only arise if the Court rejects the primary contention that the revocation notices were procured by undue influence. That is because Article 47G(3)(b) makes it clear that 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. In other words the

mistake must be causative of the exercise of the power.

87 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.

88 88. As we have found that the revocation notices were only exercised as a result of the undue influence of the father, we do not consider that either case on mistake can arise. However, in case we are wrong on the question of undue influence, we shall go on briefly to summarise our conclusions on mistake on the assumption that the settlors were not acting pursuant to the undue influence of the father but were exercising their own free will unaffected by the threats which he made.

89 In relation to the alleged mistake in relation to tax consequences, we are unable to find that such a mistake is established. There is simply no evidence that the settlors were unaware of the Italian tax consequences. On the contrary, the whole thrust of the evidence we have summarised earlier is that the settlors were worried about the consequences of revocation for them. In context, this can only have been a reference to tax consequences. Indeed, the daughter asserts that in June 2016, the settlors indicated to her that they were very concerned about potential tax consequences for themselves, although they did not explain to her any specific tax consequences.

90 Advocate Robertson was reduced to asserting that they *'must have'* made a mistake as the tax consequences for them were potentially so serious, in that the whole of the revoked trust assets might disappear in payment of Italian tax and penalties and they might be liable to criminal prosecution. No one in their position, he said, would revoke the Trusts if they knew of the potential consequences. In our judgment, such an assertion is insufficient to show that the settlors were in fact operating under a mistake as to the tax consequences of revocation.

91 Even if we had concluded that they were operating under such a mistake, we would not have considered that it was of such a character as to render it just for the Court to set aside the transaction at the instance of a beneficiary of the Trusts. The adverse tax consequences would be suffered by the settlors. In the absence (on this hypothesis) of any undue influence, it is a matter for them as to whether they wish to revoke the Trusts (and suffer the tax consequences) or not to revoke the Trusts. If they applied to set aside the revocation on the ground of mistake, the Court might well grant relief under Article 47G. But if they wish to continue with the revocation of the Trusts despite the mistake as to tax consequences, that is a matter for them. We would not regard it as unjust (given the beneficial nature of the power of revocation) for them to maintain their decision to revoke in such circumstances.

92 Turning to the second alleged mistake, this only arises if the Court accepts the assertion in

the unsigned and unsworn draft affidavits of the settlors that they thought that they were nominees for the father and therefore had no alternative but to obey his instruction to revoke.

93 93. As already stated, on the evidence before us we hold that they were not in fact nominees. Thus:—

(i) Such an assertion is wholly inconsistent with the contemporaneous documents signed by the settlors (see para 82 above).

(ii) The father does not appear to have thought that settlors were nominees who had to act in accordance with his instructions in 2010. He was clearly concerned about the power to revoke held by the settlor of the S Trust and initially wished the R Trust to be irrevocable. This would not have been a problem if he thought that the settlors were his nominees and duty bound to act upon his instructions.

(iii) Furthermore, he does not appear to have thought this was the case when he wished to achieve revocation of the Trusts in 2016/2017. There is no evidence that he simply told the settlors that they had no alternative but to follow his instructions because they were his nominees; on the contrary he was forced to use threats in order to try and persuade them.

(iv) In similar vein, until the production of the draft affidavits, the settlors themselves do not appear to have thought that they had no alternative but to follow his instructions as nominee, because they were clearly very reluctant to do so with the result that the father threatened them with consequences if they did not.

94 It follows that if, by the time they came to execute the revocation notices in May 2017 the settlors (as they assert in the draft affidavits) genuinely believed that they were the father's nominees and had no alternative but to follow his instructions, they were operating under a mistake. That is because the decision to revoke in fact rested entirely with them as settlors and not with the father. The mistake related to the exercise of their power of revocation and, on that hypothesis, they would not have exercised the power of revocation but for the mistake, given their very real fear of the possible Italian tax consequences of revocation.

95 We also agree that in those circumstances the mistake would be of so serious of character as to render it just for the Court to set aside the revocation. Although the power of revocation is a beneficial power, the mistake in question would mean that the settlors were only exercising the power because they mistakenly thought they had to act on instructions of the father. 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. Accordingly, had we not found the existence of undue influence and had we accepted the assertion that the settlors thought they were nominees who were duty bound to act on the instructions of the father that they revoke the Trusts, we would in those circumstances have set aside the revocation

notices on the ground of mistake.

Conclusion

96 For the reasons given, we hold that the revocation notices were executed by both settlors under the undue influence of the father and ought not to be treated as an expression of their free will. We set aside the notices in respect of both the P Trust and the R Trust and declare such notices to be invalid. The consequence is that the Trusts have not been revoked and have at all times remained in being.

97 We would add as a postscript that, had we held the revocation notice in respect of the R Trust to be valid, the trust fund would not have been payable in its entirety to the R settlor despite her instruction to that effect in the revocation notice. As described earlier, a proportion of the assets initially contributed to the R Trust came out of the R settlor's account with Citibank but the balance came from an appointment out of the S Trust. The effect of Article 40(3) and (5) is that, upon revocation, the assets of a trust are held absolutely for the person who provided the property in question. This means that, in relation to the R Trust, a proportion would revert to the R settlor but a proportion would also revert to the S Trust (which is revocable by the S settlor).

98 We do not consider that the legislature would have envisaged that the consequence of Article 40 would be 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. We consider that 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. Thus, if for example 40% in value of the initial trust fund was contributed by the R settlor and 60% by the S Trust, then upon revocation, 40% in value of the current trust fund would revert to the R settlor and 60% would revert to the trustees of the S Trust to be held upon the trusts of the S Trust.