Rescinding a Deed of Appointment

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Appointments; Liability to tax; Rescission; Trustees; Undue influence

In December 2020 the High Court handed down judgment in the appeal of *MacKay v Wesley*[1] and held that a deed of retirement and appointment appointing the claimant as a trustee (which otherwise resulted in her being exposed to a significant tax liability) could be partially rescinded, as she had been subject to the undue influence of her father.

Further, the High Court confirmed that the appointment of an individual as a trustee could not be effective without the new trustee accepting their appointment.

Facts of the case

The Isle of Man trustees of a family trust had taken advice that substantial capital gains tax liabilities could be mitigated by embarking on a "round the world" tax avoidance scheme. This required the trust to become resident in Mauritius, with Mauritian trustees who would realise the gains free of tax, and then distribute the proceeds to the UK resident beneficiaries via the Isle of Man. The final requirement for the scheme to be effective was that UK resident trustees were to be appointed to replace the overseas-resident trustees in the same UK tax year of assessment.[2]

The claimant, Nicola MacKay, was appointed as one of three UK resident trustees in March 2003 at the instigation of her father David Wesley (the defendant). The other trustees were her father and a professional trustee company, Browne Jacobson Trustees Limited (BJTL).

Mrs MacKay's appointment was pursuant to a deed of retirement and appointment (the DORA) which had been made by the retiring Mauritian trustees and which she had duly signed[3] and which contained indemnities in favour of the outgoing trustees. By the time of her appointment the assets held by the trust had decreased in value from £3.6 million to £61,000.

HMRC challenged the scheme and this resulted in a claim for joint and several liability for the trustees (being Mrs MacKay, her father and BJTL) of £1.6 million under s.65 of the Taxation of Chargeable Gains Act 1992. It so happened that Mrs MacKay was the only trustee with any assets (her father was impecunious and BJTL was in liquidation and had been dissolved by the time the appeal was heard), and so the tax liability fell on her.

Mrs MacKay contended that she was not aware that she was a trustee until September 2011 when HMRC wrote to her concerning the tax liability.

Whilst concurrently challenging the tax liability in the First-tier Tax Tribunal, Mrs MacKay sought to have her appointment as trustee set aside on the basis of undue influence from her father. At first instance

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[1] *MacKay v Wesley* [2020] EWHC 3400 (Ch) on appeal from [2020] EWHC 1215 (Ch), a decision of Deputy Master Henderson.

[2] This was to avoid a settlor of the settlement being liable under s.86 of the Taxation of Chargeable Gains Act 1992. But it was alleged to have exposed the replacement trustees to liability instead.

[3] *MacKay* [2020] EWHC 3400 (Ch) at [15].

the alternative heads of challenge were lack of capacity, mistake and *non est factum*.[4] The claim failed at first instance.

On appeal to the High Court Mrs MacKay did not persist with the arguments of *non est factum* or lack of capacity and the grounds on which Meade J was addressed were mistake, undue influence and whether an order for rescission would operate justly and fairly. The appeal was allowed.

Neither the defendant nor HMRC were represented at first instance or on appeal. HMRC made written submissions by letter to the Deputy Master at first instance but did not seek to be joined. HMRC's approach was the subject of some criticism by the Deputy Master.

The decision at first instance

Mrs MacKay's application was met with sympathy. However, Deputy Master Henderson did not accept that she did not know what she was signing or that she had been misled.

He held that the appointment should not be set aside due to under influence for two reasons:

(1) Mrs MacKay's appointment was a unilateral act by the retiring trustees, and her "acceptance" of the trusteeship by execution of the DORA "was not a necessary element of her appointment as a trustee".[5] She had the option of disclaiming her trusteeship and she did not seek to do so. The Master therefore held that Mrs MacKay's appointment was not capable of being set aside as the retiring trustees had not been subjected to undue influence; and

(2) the approach taken by Mrs MacKay of seeking to isolate the appointment of her as trustee from the other elements of the DORA was incorrect as the DORA was a "single composite document which effected a number of transactions".[6]

The Master also concluded that the appointment could not be set aside on the ground of mistake, as the particular mistake was not a relevant mistake under the principles in *Pitt v Holt*.[7] This was on the basis that the appointment was not effected by Mrs MacKay, but by the Mauritian trustees (and there was no suggestion that they were mistaken), there was not a disposition of property and the appointment of Mrs MacKay as trustee was not "voluntary" because she gave consideration in terms of the indemnities given to the retiring trustees.[8] He also held that any belief or assumption that Mrs MacKay had that her father would not ask her to sign documents that would put her in danger was not sufficiently distinct a mistake for the equitable principle to apply.[9] The other alternative grounds were also dismissed.

Furthermore, the Deputy Master said that even if the requirements for rescission had been established, he would not have ordered it without further evidence being submitted because he was not satisfied that such an order would operate justly and fairly.[10]

The decision on appeal

Mrs MacKay appealed this decision, challenging the decision that acceptance was not a necessary element of the appointment of a trustee.

Meade J granted a partial rescission of the deed of appointment and retirement by which Mrs MacKay had been appointed, namely her acceptance of the trusteeship, on the ground that she had signed it under

[4] *MacKay* [2020] EWHC 3400 (Ch) at [7].
[5] *MacKay* [2020] EWHC 1215 (Ch) at [173].
[6] *MacKay* [2020] EWHC 1215 (Ch) at [174].
[7] *Pitt v Holt* [2013] UKSC 26; [2013] A.C. 108.
[8] *MacKay* [2020] EWHC 1215 (Ch) at [136].
[9] *MacKay* [2020] EWHC 1215 (Ch) at [154].
[10] *MacKay* [2020] EWHC 1215 (Ch) at [180].

undue influence from her father. He considered the issue of unfairness and decided that the partial rescission did not cause unfairness to any other party.

As the result would be the same if Mrs MacKay succeeded on mistake or undue influence, the judge did not decide the points which arose on mistake but noted that "they are complex and potentially important; they would be better decided in a context where both sides are fully argued".[11]

In his judgment Meade J explored two key areas:

Acceptance of appointment as a trustee

Crucially, between the hearing at first instance and the appeal Mrs MacKay amended her pleadings. The amendment made it clear that what was being sought to be set aside was Mrs MacKay's *acceptance* of her appointment under the DORA, and not the *appointment* itself (as was being sought to be set aside at the first instance).

At first instance the Deputy Master had held that the appointment of Mrs MacKay was an act done unilaterally by the retiring trustees who had the power to appoint her, and that her acceptance of the appointment is not a necessary element of the process by which a person becomes a trustee, pointing to the terms of s.36 of the Trustee Act 1925, to *Mallott v Wilson*[12] and to an analogy with a transfer of property. He noted that a trustee may disclaim appointment but until then, he reasoned, their appointment is effective.[13]

Meade J disagreed with this analysis. He distinguished the case of *Mallott v Wilson*, stating that it was "primarily about whether a settlement binds the settled property, or alternatively must fail, when the trustee disclaims. It is not about the precise status of the intended trustee prior to disclaimer, and in any event it has been doubted".[14]

He also considered that:

(1) The wording of s.36 of the Trustee Act 1925 just refers to the appointor's ability to "appoint" a new trustee, and so is neutral as to the effect that it has prior to the intended appointee accepting.

(2) While the word "disclaimer" may connote undoing something that has happened, that is too weak an indication to rely on in itself.

(3) The analogy to a transfer or gift of property is not a good one, since acceptance of appointment as a trustee is effective immediately and is not dependent on transfer of the trust property.[15] Furthermore, in relation to gifts, *Scott v Bridge*[16] concluded that each party must consent (this judgment had not been given at the time of the first instance decision).

(4) As a matter of principle, central to being a trustee are the duties that it brings with it, to get in and safeguard the trust property. Meade J stated that "An intended trustee cannot have those duties imposed on them, even provisionally, without knowledge and consent." Counsel for Mrs MacKay had cited the 1841 case of *Evans v John*[17] as an example, where trust money was misapplied but one of the trustees was held not liable, even though aware of the trust, because he had not accepted appointment.

Therefore, Meade J found there is no principle in law that an appointment of a trustee operates automatically without the need for a trustee to accept the appointment.

[11] *MacKay* [2020] EWHC 3400 (Ch) at [13].
[12] *Mallott v Wilson* [1903] 2 Ch. 494.
[13] *MacKay* [2020] EWHC 3400 (Ch) at [22].
[14] *MacKay* [2020] EWHC 3400 (Ch) at [25]. The judge was referring to *Gruppo Torras SA v al Sabah (No.8)* Royal Court (Jersey), [2003] 6 WLUK 333; [2004] W.T.L.R. 1; (2003–04) 6 I.T.E.L.R. 368.
[15] *Ong v Ping* [2015] EWHC 1742 (Ch) at [98], point not considered on appeal.
[16] *Scott v Bridge* [2020] EWHC 3116 (Ch) at [120]–[122].
[17] *Evans v John* 49 E.R. 250; (1841) 4 Beav. 35.

Partial rescission

Mrs MacKay sought to have only her own acceptance of the trusteeship under the deed of retirement and appointment set aside. She did not seek to have the whole deed of retirement and appointment set aside.

At first instance, in the context of rescission for mistake, the Deputy Master held,[18] on the authority of *Kennedy v Kennedy*,[19] that there cannot be partial rescission of a contract because the court cannot impose a new deal on the parties which they themselves never made.[20] However, Meade J noted that *Kennedy v Kennedy* also held that:

> "That limitation [no partial rescission of a contract] makes sense in a contractual context and as preventing the court in effect imposing a different contract to the one the parties actually made. I see no reason, however, why that limitation should apply to a self-contained and severable part of a non-contractual voluntary transaction."[21]

Meade J concluded that he did not "read the judgment [in *Kennedy v Kennedy*] as posing any additional difficulty where rescission is sought by the setting aside of a self-contained severable part of a voluntary transaction. That is what the judgment positively says is possible at para.[46]".[22]

He concluded that if Mrs MacKay were no longer to be a trustee of the settlement, nothing else in the deed would need adjustment for it to operate and make sense—there was "both verbal and substantive severability".[23]

This enabled Meade J to hold that Mrs MacKay's appointment (or strictly, her acceptance of it as signified by her signature) was a self-contained and severable part of the deed of retirement and appointment and liable to be rescinded for undue influence if the other requirements were satisfied, which he held they were.

Fairness

The fairness of rescission was the next key factor to be decided. At first instance the Deputy Master had considered that there would be no unfairness or injustice to Mrs MacKay's father, the defendant, in the event of rescission, and he indicated that it would have been a close call in respect of unfairness to BJTL. However, with the knowledge that BJTL has been dissolved (which the Deputy Master did not have) Meade J felt able to conclude that the circumstances as a whole made it clear that rescission was fair.[24] He also helpfully made it clear that he did not consider that the fact that HMRC may lose a potentially valid claim for tax against Mrs MacKay made the rescission unfair.

Undue influence

It is also worth reminding ourselves of the criteria for undue influence to apply, as both the Deputy Master at first instance and Meade J on appeal accepted that it did apply in this case. This is unusual in a trust context.[25]

[18] *MacKay* [2020] EWHC 1215 (Ch) at [158].
[19] *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), a decision of Sir Terence Etherton C.
[20] *MacKay* [2020] EWHC 3400 (Ch) at [28].
[21] *Kennedy* [2014] EWHC 4129 (Ch) at [46].
[22] *MacKay* [2020] EWHC 3400 (Ch) at [40].
[23] *MacKay* [2020] EWHC 3400 (Ch) at [43].
[24] *MacKay* [2020] EWHC 3400 (Ch) at [48].
[25] *Daniel v Drew* [2005] EWCA Civ 507; [2005] 2 P. & C.R. DG14 concerned an unusual family dispute whereby an aged aunt alleged that her nephew procured her resignation from the family trust by undue influence. The judge set aside the deed of resignation at first instance, and the appeal against this was dismissed.

Undue influence arises where a relationship exists between two parties where there is "trust and confidence, reliance, dependence or vulnerability on the one hand, and ascendancy, domination or control on the other".[26]

This principle allows the court to interfere to protect the vulnerable party as a matter of public policy to prevent the relationship that exists between the parties, and the influence arising from that relationship, from being abused.[27]

Historically, the doctrine has most commonly been utilised in matrimonial cases. It is still argued most commonly where a person has given security for, or has guaranteed a loan to another, and was induced to do so by the undue influence of the principal debtor. The 2004 case of *Pesticcio v Huet*[28] affirmed that undue influence may be a basis for setting aside transactions whether or not one party has done something wrong.

Whether undue influence exists is a question of fact, and the burden of proving undue influence rests on the party who claims to have been so influenced. It is a large and complex area of law; however, broadly, the evidence required to discharge the burden of proof depends on:

(1) the nature of the alleged undue influence;
(2) the personality of the parties;
(3) the relationship between the parties;
(4) the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary people in that relationship; and
(5) the circumstances of the case.

If the complainant can prove that they placed trust and confidence in the other party in relation to the management of their financial affairs, and the circumstances involve a transaction which calls for explanation, a presumption of undue influence will generally arise. Once the presumption of undue influence is established, it is for the party who is presumed to have exerted undue influence, to produce evidence to counter this inference.

In this case Mrs MacKay was able to demonstrate (with supporting witness statements from her sister and husband) that she did trust her father with financial affairs, and he did not rebut this.

Conclusion

The unusual and unfortunate circumstances of this case certainly drew the courts' sympathy, both at first instance and on appeal.

Another article in this journal[29] refers to a succession of recent cases where the courts have been willing to set aside transactions relating to trusts on the basis of mistake in order to avoid unwelcome tax consequences. This case can also be added to that list, although ultimately the decision was not made on the grounds of mistake, but rather rescission on (the somewhat unusual) grounds of undue influence.

In any event the court was willing to act in order to prevent a large tax liability in what it deemed to be unfair circumstances, and it is notable that Meade J expressly stated that he did not consider that the fact that HMRC may lose a potentially valid claim for tax made the rescission unfair.

[26] *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 A.C. 773.
[27] *Allcard v Skinner* (1887) 36 Ch. D. 145.
[28] *Pesticcio v Huet* [2004] EWCA Civ 372; [2004] W.T.L.R. 699.
[29] R. Vos, "Righting Wrongs" [2021] P.C.B. 52.