

Turkish delight: revocable trusts and settlors' creditors

If a settlor of a trust retains the power to revoke the trust, judgment creditors of the settlor may be able to enforce their judgments against the assets secreted in the trust. This can be achieved by the court appointing a receiver over the settlor's power of revocation, and the receiver then exercising that power. Once the trust has been revoked and the trust assets put back in the hands of the settlor, those assets are fair game for the settlor's creditors. Many will consider this to be obviously the right result, but the Privy Council decision that reached it only did so by reversing the decision of the lower courts and by revisiting some basic trust principles.

People set up trusts for many purposes: to protect assets for future generations, to reduce the burden of taxation, and to avoid forced heirship rules, to name but three. One other, perhaps less noble, reason for establishing a trust is to shield assets from the settlor's creditors. But, equally, the settlor might not want to be deprived of his assets for ever. As a result, a settlor sometimes includes in the trust deed a power for the settlor to revoke the trust, restoring the trust's assets to the settlor. But the Privy Council's decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Company (Cayman) Ltd* [2011] UKPC 17 indicates that the inclusion of a power of revocation may defeat an original purpose of the trust, rendering the trust's assets vulnerable to execution by the settlor's creditors. Settlors may not be able to eat their cake and have it.

Tasarruf arose from alleged transgressions within a Turkish bank. Mr Demirel (D) was accused of siphoning off money from the bank, which he controlled. C, a Turkish body established in order to sort out the situation, obtained judgment against D in Turkey. D had set up a Cayman discretionary trust, with himself and his family as the discretionary objects of the trust. As settlor, D had also reserved to himself the right to revoke, amend, vary or alter the trust. The trust contained almost enough money to meet the judgment debt.

C applied for the appointment of a receiver by way of equitable execution over D's power to revoke the trust. C's plan was that the receiver should then exercise the power of revocation, as a result of which the assets would revert to D. Once back in D's hands, C could snaffle the assets by executing its judgment in the usual way. D objected to this cunning plan on the basis that a power to revoke a trust is not a property right, and receivers can only be appointed over property. D also argued that the exercise of the power was personal to him and therefore incapable of being delegated to a receiver.

The Privy Council's approach was to look at the substance. Following the US courts, the Privy Council considered that there are sound policy reasons for treating assets subject to a revocable trust as being available to the settlor's creditors. Historically, powers might not have been viewed as property rights, but the distinction had blurred with the passage of time. If the reality was that the holder of a power had control over the assets the subject of the power, the power could be treated as sufficiently akin to property for this purpose. The Privy Council would not allow ancient categorisations to prevent them doing what they considered to be the right thing.

As to the ability of someone other than D to exercise the power of revocation, that depended upon whether the power was a power that had to be exercised

Key Issues

- Does the settlor of a revocable trust really divest himself of the assets placed in the trust?
- The Privy Council has concluded that there are policy reasons for holding that he has not done so.
- If the settlor can get assets out of the trust, so can the settlor's creditors.

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in a fiduciary manner or was a power that the settlor could exercise howsoever he saw fit, including for his own benefit. No one argued that the power in this case was a fiduciary power, so there was no obstacle to someone other than D exercising the power.

So those who have set up trusts might wish to look carefully at the terms of those trusts. A power of revocation could thwart a fundamental purpose of establishing the trust. Equally, creditors of those who claim to have no assets because their apparent assets are tied up in trust may want to look at the terms of the trust to see if the debtor really has divested himself completely of the assets.

However, the appointment of a receiver will not necessarily be the end of the story for a creditor of the

settlor in all situations. In *Tasarruf*, the assets in the trust were situated in the Cayman Islands - the assets comprised shares in Cayman companies that in turn held cash in accounts at a Cayman bank. If the Privy Council (the Cayman Islands' final appeal court) appoints a receiver over D's power of revocation, if the receiver puts the trust's assets back into D's name, and if the Cayman courts then allow C to enforce its judgment against those assets, the creditors can be sure that the assets will be theirs. If, however, a trust's assets are outside the jurisdiction of the court ordering equitable execution, there may be questions of private international law as to whether steps taken pursuant to the order will be recognised in the place where the assets are located.

But that is for another day.

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