POWERS OF APPOINTMENT

Powers of appointment: All in the wording

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Elizabeth Houghton examines implied revocation of deeds of appointment

Wilberforce Chambers

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> ***Those drafting wills should be cautious about including general 'sweeper' wording unless there is a good reason to.***

In the recent case of *Equiom (Isle of Man) Ltd v Velarde* [2021] it was held that a wide power of appointment contained in a will had the effect of impliedly revoking previous deeds of appointment and making a new appointment.

This case concerns the will of a Mrs Patricia Moores, who died in 2017, and a settlement created many years before by her father (the settlement). During her lifetime Mrs Moores had a special power of appointment over property in a sub-fund of the settlement (the Patricia Trust Fund). The power could be exercised by deeds revocable or irrevocable, or by will or codicil.

The special power of appointment over the Patricia Trust Fund had been exercised twice by Mrs Moores during her lifetime. First, in 1981, Mrs Moores appointed (with effect from her death) the sub-fund between her three children (Christian, Rebecca and Matthew). That appointment was expressed to be revocable by deed, will or codicil (the 1981 appointment)

Secondly, in 1997, Mrs Moores revoked the 1981 appointment and instead appointed (from and after her death) the Patricia Trust Fund on trust to Christian and Rebecca, cutting out Matthew (the 1997 appointment).

Mrs Moores' will was made in 2007. Clause 7 of the will provided (bold emphasis from judgment):

> *I LEAVE DEVISE BEQUEATH AND* ***APPOINT*** *the whole of my real estate and the rest residue and remainder of my personal estate wheresoever situate and of whatsoever kind of or to which I shall be seised possessed or entitled at the date of my death* ***or over which I shall have any power of testamentary disposition whatsoever…*** *unto my children…*

The question for the court was whether or not clause 7 of the will revoked the 1997 appointment. If it did, then the Patricia Trust Fund would be shared equally between the siblings; if not, then it would be shared only between Christian and Rebecca.

The claimant trustees took a neutral stance. Christian argued that clause 7 did not revoke the previous 1997 appointment. Matthew argued that it did. Rebecca did not participate in

the proceedings but supported Matthew's position.

The court repeated the now well-established principles governing the interpretation of wills, and set out how those principles differ from those applicable to commercial contracts.

The Master had 'no hesitation' in finding (para 23) that, absent the previous appointments, clause 7 would have had the consequence of appointing the sub-fund equally between Christian, Rebecca and Matthew. This point does not appear to have been seriously contested by Christian. The Master found that the position was complicated only because of those two previous appointments. Both sides accepted that it was necessary for clause 7 to revoke the 1997 appointment before a fresh appointment could take effect, but they disagreed as to whether it did effect such a revocation.

Summary of position

After reviewing the relevant authorities and commentary, the Master summarised the position (at para 55) as the following:

- An intention to exercise a power of revocation must be apparent from the instrument.
- A power of revocation is distinct from a power of appointment.
- Thus the mere exercise of a power of appointment will not, without more, operate as a revocation.
- However, a power of revocation may be exercised other than in express terms.
- If a testamentary gift framed in general terms will fail altogether unless it is construed as entailing the exercise of a power of revocation (so as to bring within the ambit of the will the property which is the subject of such power), the instrument will be taken as an exercise of the power.

Turning to the interpretation of clause 7, the Master found that the following were relevant and admissible facts:

- Mrs Moores was well aware of the existence of the settlement and her powers when she made her will.
- Mrs Moores had no other power of appointment vested in her under other trusts. The only power was her power of appointment conferred by the settlement.

The Master concluded that if Christian's interpretation were adopted, the relevant part of clause 7 would be meaningless. Bearing in mind the factual matrix, the Master concluded that the court should approach the will on the basis that, so far as possible, every part of it was to have meaningful effect (para 64). He therefore concluded that clause 7 intended to revoke the 1997 appointment and make a fresh appointment in favour of all three children equally (paras 66-67).

It is understood that permission to appeal has been granted by the Master.

Analysis

There are a number of interesting points arising from the decision, and the outcome of the appeal will be closely followed. First is the question of when the exercise of a power of appointment will be treated as having impliedly revoked earlier appointments. Secondly, practitioners might be concerned to learn that a general power of appointment in a will could have the (possibly unintentional) effect of revoking earlier appointments. So, the related question of how to avoid such an inadvertent outcome is also important.

Fortunately, the facts of the case mean that it is unlikely to set a wider precedent for general words in a will being found to have impliedly revoked an earlier appointment. The special power of appointment held by Mrs Moores in relation to the sub-fund was one which was capable of being exercised by will. That in itself is not unusual, but combined with the wide words of clause 7 it made Matthew's interpretation very likely.

The clause 7 appointment was drafted in extremely broad terms. It referred to both bequeathing and appointing Mrs Moores' property and the exercise of 'any power of testamentary disposition whatsoever' held by Mrs Moores. Unlike in other cases about the interpretation of wills, there was no solicitor's note recording the deceased's wishes. The solicitor's file had been destroyed, so there was limited extrinsic evidence which could assist the court.

Another fact which it appears would have been in Matthew's favour (although it does not appear to have been argued by him, or considered by the judge) is that the two previous appointments were both made to be effective from Mrs Moores' death. There was therefore a pattern of the special power of appointment being exercised by Mrs Moores to take effect upon her death. Matthew's interpretation of the will fit with that pattern.

In the circumstances the Master was clearly right to conclude that the words of clause 7 expressed an intention to *exercise* the special power of appointment. The more difficult question is finding a simultaneous intention to *revoke* the previous appointment. Both intentions must have been present for the Master to find in favour of Matthew's interpretation.

The case law and commentary referred to by the Master was clear that an intention to exercise a power of appointment was not the same as an intention to also revoke an earlier appointment. In order to get around that difficulty the Master was forced to rely on the principle that if a testamentary gift which is framed in general terms will fail altogether unless it is construed as also entailing a power of revocation, the instrument will be taken as exercise of the power. In other words, an intention to revoke an earlier appointment will be implied where the gift in question would otherwise 'fail altogether'.

Stepping back from the judgment, it is worth considering whether clause 7 properly fell into the category of a testamentary gift which would 'fail altogether' unless Matthew's interpretation was adopted. It appears to have been common ground that the words of clause 7 (in bold above) would have had no effect if an intention to revoke was not implied, but that does not mean that clause 7 in its entirety would have 'failed'. The Master recorded that the value of Mrs Moores' estate (not including the Patricia Trust Fund), was worth £40m, and it was to be shared between all three children. The value of the sub-fund was said to be 'rather less'. Clause 7 was therefore effective in passing the bulk of Mrs Moores' property to her three children.

In those circumstances one might query whether it was strictly necessary to imply an intention to revoke in order to prevent the clause 7 gift from 'failing'. That in turn depends on whether one takes a broad view of clause 7, or a granular approach in which each sentence must be given meaning.

Ultimately, the Master appears to have restated that principle in a slightly different way before applying it. He concluded that the court should approach the will on the basis that 'every part thereof is to have meaningful effect and not be a waste of ink'. There is a subtle but important distinction between that approach and the notion that an intention to revoke should be only implied out of necessity to prevent a gift failing.

From a practical perspective, the decision serves as a reminder of several points which practitioners drafting wills should bear in mind. First, and to state the obvious, it is important that those drafting wills have a very clear understanding of the specific factual background and the assets which are held by the testatrix. In this case, the Master accepted that the drafter (her longstanding lawyer) knew about the special power of appointment, and therefore seemed to accept that he must have had it in mind when clause 7 was drafted.

Secondly, those drafting wills should be cautious about including general 'sweeper' wording unless there is a good reason to. For example, similar words to those in dispute in this case should not be included in a will unless the drafter has a specific power in mind which the testatrix intends to exercise by will.

Thirdly, to avoid any uncertainty, where a power is intended to be exercised by will it is good practice to refer to the specific power, rather than rely on general words. Had clause 7 in this case referred to the specific power of appointment expressly, there would have been no room for argument.

Fourthly, if a drafter is aware that the testatrix affairs are complex and the testatrix holds powers of appointment which have been exercised in the past, and the drafter wishes to ensure that none of those transactions or instruments are disturbed or revoked by the will, it would be prudent to include general words to the effect that nothing in the will is intended to disrupt, alter or revoke any previous powers of appointment exercised by the testatrix. If there had been a general provision to that effect in the will in this case, that would have assisted Christian's interpretation.

Finally, the dispute in this case could have been avoided had a detailed note been taken and the will file preserved.

Effect of the decision

Practitioners in this field might well have been initially surprised to hear about this decision, and possibly concerned to learn that a general power of appointment in a will might have the (unintentional) effect of revoking earlier appointments. However, the specific facts in this case meant that the 'power' referred to in clause 7 could only be a reference to the special power of appointment held and previously exercised by the deceased. That fact, coupled with the very wide words of clause 7, brings the decision in line with established principles. The case is *not* authority for a broader principle that general powers of appointment in a will should generally be read as revoking previous

appointments. If the words in clause 7 had been narrower, the decision in this case might well have been different.

The outcome of the appeal will be worth keeping an eye out for.

Cases Referenced

- Equiom (Isle of Man) Ltd & ors v Velarde & ors [2021] EWHC 1528 (Ch); [2021] WTLR 855 ChD

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