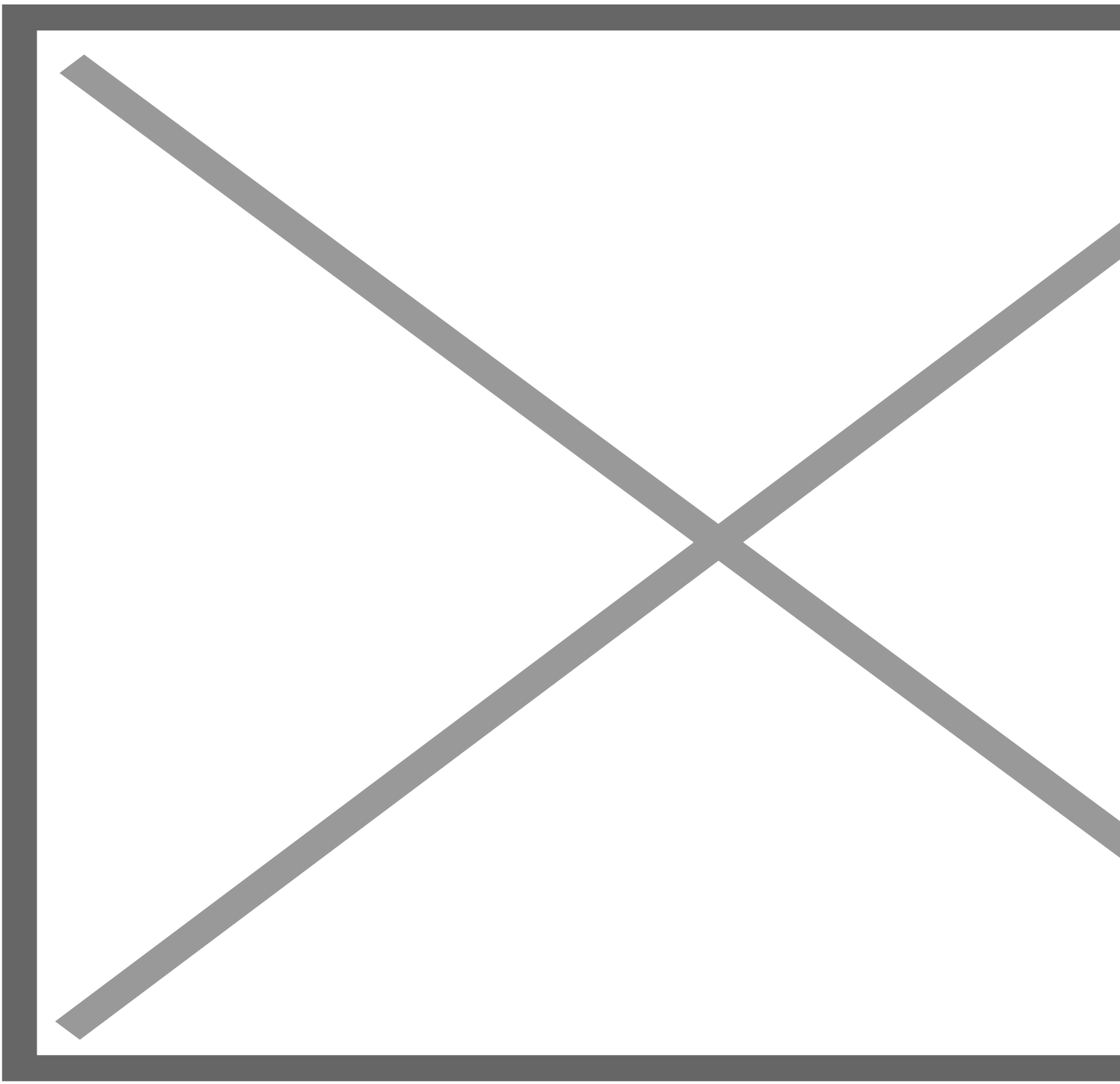
Back to the past

Personal tax



05 February 2021

Keith Gordon looks at a case in which an unexpected capital gains tax bill led to a taxpayer suing her father

Key Points

What is the issue?

In the case of Mackay v Wesley, evidence before the court suggests that an individual was neither given any advice as to the nature of the documents she was signing nor to the consequences of her doing so.

What does it mean for me?

Eight years later, a letter from HMRC advised her that, as a trustee, she was liable for any capital gains tax liability of the trust, a liability which HMRC believed to be in the region of £1 million plus interest.

What can I take away?

Underlying this case is, of course, the salutary lesson of ensuring that one is aware of the nature and significance of the documents one is signing.

I should make it clear that this is a case with which I had some background involvement. In 2013, HMRC amended the tax return previously made by the Ellen Morris 1990 Settlement so as to assess approximately £1 million of capital gains tax. It was HMRC's case that the trust had participated in what is often known as the 'Round the World' tax scheme in the course of the 2002/03 tax year.

That scheme is discussed in my article, 'Around the world in 73 days' in the context of the Smallwood case in the September 2010 issue of Tax Adviser. In brief, the scheme sought to avoid capital gains tax by taking advantage of the then double tax agreement between the UK and Mauritius by ensuring that capital gains were realised whilst the trust was resident in Mauritius. However, to succeed, it was necessary for the trust to become UK-resident (by the appointment of UK trustees) before the end of the tax year in which the gains were realised.

Although HMRC considers that the Smallwood case (which proceeded to the Court of Appeal) demonstrates that the scheme is ineffective, it is generally recognised that each case will turn on its own facts. That point was the basis of the appeal against HMRC's amendment to the trust's 2002/03 tax return, which was heard by the First-tier Tribunal last January and, at the time of writing, where the tribunal's decision is still awaited. In that appeal, I represented the taxpayers.
This article, however, concerns parallel proceedings in the High Court, between two of the individuals identified by HMRC as the UK trustees, Nicola Mackay and her father, David Wesley (Mackay v Wesley [2020] EWHC 3400 (Ch)).

The facts of the case

David Wesley and his wife were the principal beneficiaries of the Ellen Morris 1990 Settlement ('the trust'). The trust was resident in the Isle of Man, with trustees on the island. As the trust was pregnant with capital gains, the Isle of Man trustees took advice from UK advisers to ascertain whether there was any planning that would allow these gains to be allocated to the beneficiaries in a tax-efficient fashion. The trustees decided upon the Round the World scheme and set the ball rolling during the 2002/03 tax year.

In due course, Mauritian trustees were appointed and the previous trustees retired. The Mauritian trustees subsequently realised the capital gains. Aware of the perceived benefits of the scheme, the Mauritian trustees

then sought to retire later in the same tax year and be replaced by UK-resident trustees.

The natural candidates for appointment as UK trustees were Mr and Mrs Wesley and, perhaps, a professional trustee as well. Initially, it would seem that these three parties would indeed be appointed as trustees, the third being a corporate entity under the control of English solicitors. However, Mrs Wesley was in the latter stages of terminal cancer. The solicitors decided that under the circumstances it would be better for the couple's adult daughter, Mrs Mackay, to be appointed in her stead.

Paperwork was effected in March 2003 by which the Mauritian trustees would retire and be replaced by Mr Wesley, Mrs Mackay and the corporate trustee. However, as has subsequently become clear, Mrs Mackay's appointment was not completely straightforward and merited the intervention of the High Court.

Not only was Mrs Mackay having to cope with the imminent death of her mother, but she had recently suffered a particularly traumatic still birth of a daughter and, whilst her husband was out at work, also had primary care of the couple's other daughter, then a toddler.

Reflecting on her state of mind at the time, Mrs Mackay said she was 'consumed by grief and truthfully incapable of making any decisions'.

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The evidence before the court suggests that Mrs Mackay was neither given any advice as to the nature of the documents she was signing nor to the consequences of her doing so. In earlier discussions, Mr Wesley had remarked that he recalled no discussions with his daughter about the documents and that 'he simply asked [her] to sign them because that was what [the solicitors] wanted and in his mind it was a matter of process rather than choice'.

Mr Wesley also accepted that, at the time, he exerted influence over the family and that financial matters were generally left to him. The documents were presented to Mrs Mackay without advice from him or the solicitors and he simply asked her to sign them. In his mind, notwithstanding the trust structure, the money was his to do with as he wished.

This was consistent with other evidence from Mrs Mackay who commented that she was not presented with any choice but to follow her father's instructions. Mrs Mackay's sister (then aged 17) described the family dynamic as follows: 'Refusing him was simply never an option we felt we had at that time. Questioning him would result in our being shouted at and told "just do it".'

Mrs Mackay had no appreciation of what she had signed until September 2011 (i.e. eight and a half years later) when a letter from HMRC addressed to her advised her that, as a trustee, she was liable for any capital gains tax liability of the trust, a liability which HMRC believed to be in the region of £1 million, with what was then already nearly eight years' worth of interest

The subsequent nine years have proved to be an emotional rollercoaster for Mrs Mackay. Events included Mrs Mackay and her father being sidelined in the litigation of the trust's appeal against HMRC's amendment; finding out that the appeal had been struck out by the First-tier Tribunal; and Mrs Mackay facing enforcement action from HMRC in the County Court. However, I was able to ensure that the County Court proceedings would be put on hold and to get the appeal reinstated in the tribunal, with the full hearing eventually taking place early last year.

In the meantime, Mrs Mackay took steps in the High Court with a view to having her appointment as a trustee set aside. As the corporate trustee had been dissolved, the proceedings were commenced with Mrs Mackay as claimant and her father as the sole defendant.

Mrs Mackay advanced four lines of argument:

- the doctrine of non est factum, whereby the claimant argues that the document signed was of a materially different nature from that which she thought she was signing;
- lack of (mental) capacity;
- mistake (for which see my article 'One Futter in the grave for Hastings-Bass' in the July 2013 issue of Tax Adviser); and
- undue influence, by which Mrs Mackay argued that she signed the form only because of the undue influence exerted over her by her father.

Before a Chancery Master, Mrs Mackay failed on all four grounds. Furthermore, the Master held that there was insufficient evidence that rescinding Mrs Mackay's appointment would operate justly and fairly, although he would have allowed further evidence to be adduced if that had been the only hurdle (see Mackay v Wesley [2020] EWHC 1215 (Ch)).

Mrs Mackay was given permission to appeal to a High Court judge and to make a minor change to the nature of her claim. Rather than challenging her appointment as a trustee, Mrs Mackay reframed her claim so as to seek the rescission of her acceptance of that appointment. In the course of her appeal, Mrs Mackay pursued the arguments of mistake and undue influence, as well as challenging the Master's view that a rescission could not operate justly and fairly.

The court's decision

The case came before Mr Justice Meade. He accepted that the circumstances gave rise to undue influence, including the father's strong and controlling personality and the daughter's extremely traumatic health issues at the time.
The modest change of the nature of the claim meant that the court was no longer being asked to rescind the whole of the deed of appointment, which would have left the Mauritian trustees in place. Accordingly, the court's consideration of the practicalities and the overall fairness would be limited to considering the consequences of leaving the remaining UK trustee (Mr Wesley) as the sole trustee.

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By reference to earlier case law, the court recognised that the only practical issue was the matter of excising Mrs Mackay's signature from the deed of appointment as the remainder of the deed could remain intact. This, therefore, left only the question of fairness.

At the earlier hearing, the Master had held that Mr Wesley could not complain of unfairness, given that it was his undue influence that was the cause of Mrs Mackay's difficulty. So far as the corporate trustee was concerned, the Master considered the matter finely balanced and (but for his other concerns) would have required further evidence.

On the appeal, the judge, however, was presented with evidence to the effect that the corporate trustee was aware of the potential liabilities, had sought to withdraw from the appeal in the tribunal in 2016, had gone into

liquidation and was now dissolved. Furthermore, there was no evidence that the corporate trustee had ever pursued or asserted a right to contribution from other trustees, whether before or after it went into liquidation.

In the circumstances, the judge considered that rescinding Mrs Mackay's acceptance of the appointment would not cause any unfairness to the corporate trustee.

The only other potentially interested party is HMRC, as the rescission of Mrs Mackay's acceptance of her appointment as trustee could (subject to the outcome of the tribunal proceedings) remove one possible target from any subsequent enforcement proceedings in the County Court. However, the judge made it clear that he did not consider that this amounted to any unfairness to HMRC.

For these reasons, the judge allowed Mrs Mackay's appeal and ordered that Mrs Mackay's acceptance of her appointment as trustee be rescinded.

Commentary

Underlying this case is, of course, the salutary lesson of ensuring that one is aware of the nature and significance of the documents one is signing.

However, it also serves as a reminder that the law of equity will occasionally intervene so as to avoid unfairness. When doing so, the court will not look only at the position of the claimant but will also consider the wider picture. I emphasise the word 'occasionally' – the court's intervention cannot be relied upon.

What makes this case particularly interesting is that one of the usual obstacles to the court's intervention – namely, delay – was not an issue, despite the claim being made about eight years after Mrs Mackay first became aware of the potential problem (and some 16 years after the events in question). That can be explained by the unusual facts of the case and should not be seen as a general invitation to commence proceedings after such a long period of time.

What to do next

As I have said, it will be only occasionally that the law can be deployed so as to rewrite history. However, in cases where equity can intervene, it can be a very useful tool. Most of the potential lines of attack were deployed before the Master (see above), two of which were not renewed before the judge.

Because the concept of fairness will usually take into account any delay by the claimant, seeking the court's intervention should not be considered as an afterthought. If you are in any doubt as to the appropriateness of a claim in the case of one of your clients, I would recommend that you take early legal advice.

I should record my appreciation to barristers Nicholas Le Poidevin QC and Thomas Chacko, together with Hugh Gunson and Tom Watts of Charles Russell Speechly, who all acted for Mrs Mackay on a pro bono basis.