

Hong Kong Court Considers Revocability of Trusts

By Clifford Ng and Wendy Lo

Hong Kong trustees and advisors were recently treated to a rare trust case from the Hong Kong courts in the decision on *Eric Hotung v Ho Yuen Ki, Anthony Eric Ryan Hotung, Sean Eric Mclean Hotung, Hillhead Limited, Sheridan Patricia Hotung Shea, Gabrielle Marie Hotung* [2005] 264 HKCU 1. The case involved the high profile dispute between members of the Hotung family with Eric Hotung seeking to revoke the trusts he established in favor of certain of his children.

Eric is the grandson of Sir Robert Hotung and inherited the family fortune belonging to his grandfather and his father when they died within a short period of time in the mid 1950s. In the early 1980s, Eric established the Ho Trust in favor of three of his sons and the Hillhead Trust in favor of three of his daughters. The assets of the trusts are shares in two companies. The trusts were established by way of declaration by the trustees. In the case of the Ho Trust, the trustee was Eric's cousin. In



the case of the Hillhead Trust, the trustee was Hillhead Limited a service company of Arthur Young & Co, a predecessor firm of Ernst & Young.

In January 2004, Eric purported to revoke the two trusts by deeds of revocation. He claimed that the trusts were set up subject to power of revocation exercisable by himself during his lifetime and the trustees are relieved of all duties regarding the management of the companies.

The trustees including the partners of E&Y involved in setting up the Hillhead Trust at the time were called to testify about the instructions they received 26 years ago. The partners of E&Y provided the more useful evidence. They confirmed that Eric's instruction in setting up the Ho Trust was that he would retain "ultimate control." It was apparently standard practice that E&Y would provide their clients with blank transfers for the companies held by Hillhead so that the client could transfer the shares from Hillhead to any party designated by the client (presumably including the client himself) at any

time. Furthermore, the trusts were to remain confidential with their existence concealed from the children. It was only when Hillhead sought an indemnity from the daughters to replace the apparently lost blank transfers that the existence of the Hillhead Trust was revealed to the daughters.

The Court held that notwithstanding the possible existence of the blank transfers, Eric's instructions for "ultimate control" and secrecy, the trusts were not revocable. The blank transfers allowed the settlor to transfer the trust assets to another trustee and was evidence of and consistent with his desire for "ultimate control." However, they did not render the trusts revocable. While Eric's intention to have "ultimate control" is consistent with the power of revocation, it did not necessarily mean that he intended the trusts to be revocable. It should also be noted that while the testimony referred to "ultimate control," the Court also made reference to "absolute control" in its judgment. In any case, ultimate or absolute control falls short of a power of revocation.

In its ruling, the Court noted the lack of documentary evidence to support Eric's claim that the trusts were revocable and the sketchy testimony provided by the parties involved after so many years; with some witnesses in poor health or unable to be located.

The argument was also made that the trusts should fail as the shares were transferred subject to resulting trusts in favor of Eric. A standard form of blank share transfer was used and no transferor was indicated on the document. However, the Court concluded that Eric did not intend a resulting trust in his transfers of the shares to the trusts. That is, Eric did not intend that if he dies following the transfer of the shares to the trustee, the shares should go to his estate rather than his children who were beneficiaries of the trust.

The *Hotung* case is a good reminder that trust documents must reflect a client's instructions. While this may be an obvious point, planning for different purposes often leaves many things undocumented. Trusts may be in place for many years and individual trust administrators and corporate trustees may not be able to recall the settlor's instructions when the trust was originally settled. With the abolition of estate duty in Hong Kong, there should be greater scope for clarity and certainty in documenting a settlor's wishes to avoid the situation faced by the Hotung family.

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