[2011] UKPC 17
Privy Council Appeal No 0036 of 2010

JUDGMENT

Tasarruf Mevduati Sigorta Fonu (Appellant) *v* Merrill Lynch Bank and Trust Company (Cayman) Limited and others (Respondents)

From the Court of Appeal of the Cayman Islands

before

Lord Hope
Lord Mance
Lord Collins
Lord Clarke
Lord Reed

JUDGMENT DELIVERED BY
Lord Collins
ON

21 June 2011

Heard on 31 January – 1 February 2011

Appellant
Stephen Moverley Smith QC
Alexander Pelling
Christopher Russell

(Instructed by Berwin Leighton Paisner LLP)

1st – 5th Respondents
Colin McKie
Jane Clarkson

6th *Respondent*
Nigel Meeson QC
Stephen Leontsinis
(Instructed by Lawrence Graham LLP)

LORD COLLINS (delivering the opinion of the Board):

I Introduction

1. This appeal is about the jurisdiction of the court to appoint receivers by way of equitable execution, and in particular whether the Cayman Islands court should apply the decision of the Court of Appeal in England in *Masri v Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303, [2009] QB 450 ("*Masri (No 2)*") so as to appoint receivers over a judgment debtor's power of revocation of trusts established by him in the Cayman Islands under Cayman law, the assets of which are exclusively in the Cayman Islands.

2. The appellant, Tasarruf Mevduati Sigorta Fonu ("TMSF"), was established by the Turkish State to restructure and administer failed banks whose banking licences have been revoked. As part of the restructuring and administration process, TMSF has acquired the assets of two Turkish banks, Bank Ekspres and Egebank. Under Turkish banking legislation, TMSF has authority to bring proceedings in its own name for the recovery of losses sustained by the banks.

3. Mr Demirel was the controller of a group of companies which owned Egebank. TMSF claimed that at the time of its demise Egebank had accumulated losses of over US$1.2 billion, that investigations subsequently revealed that some US$490 million had been misappropriated from Egebank by Mr Demirel, his family and associates, and approximately US$336 million had been misappropriated from other banks. On 20 November 2001 the Turkish courts gave judgment in personam against Mr Demirel in the sum of US$30 million in respect of a right of action of Bank Ekspres against Mr Demirel for damage caused by allegedly fraudulent loan transactions: see *Tasarruf Mevduati Sigorta Fonu v Demirel* [2006] EWHC 3354 (Ch), [2007] 2 All ER 815; affd [2007] EWCA Civ 799, [2007] 1 WLR 2508 (service out of the jurisdiction in claim in England to enforce the Turkish judgment).

4. TMSF learned that Mr Demirel had established two discretionary trusts in the Cayman Islands, with assets of some US$24 million. For practical purposes the beneficiaries are Mr Demirel and his wife. Mr Demirel has power of revocation of the trusts, with the consequence that he could re-vest in

himself an amount which would satisfy a very large proportion of the judgment debt. TMSF seeks the appointment of a receiver by way of equitable execution with a view to reaching the power of revocation and thereby reaching the funds in the trusts.

5. The legal background to the dispute is that the power to appoint a receiver by way of equitable execution is contained in section 37(1) of the Senior Courts Act 1981 (formerly called the Supreme Court Act 1981), as applied in the Cayman Islands by section 11(1) of the Grand Court Law (2008 Revision). Under section 37(1) the court "may by order … grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so." The appointment of a receiver by way of equitable execution is not "execution" in the ordinary legal sense of the word, but a form of equitable relief for cases in which execution in that sense is not available.

6. In *Masri (No.2)* the Court of Appeal in England held that the jurisdiction to appoint a receiver by way of equitable execution permitted of gradual and incremental development, and in particular was not limited to choses in action which were presently available for legal execution. The appointment of a receiver was not limited to such property as might be taken in execution, but extends to whatever is considered in equity to be assets: *Masri (No 2)* at [151]; Kerr, *Receivers* (1st ed 1869), p 87.

7. Mr Demirel resisted the appointment of the receiver broadly on these grounds: (1) a receiver by way of equitable execution could only be appointed over property; (2) a power of revocation was for this purpose in the same category as a general power of appointment; (3) it had been long been understood that (in the absence of legislative provision to the contrary) a power of appointment was not property; (4) the order could only be effective if the receiver were authorised to revoke the trusts on Mr Demirel's behalf and/or Mr Demirel were ordered to revoke them; (5) as a matter of law, the power to revoke was not delegable and the court had no jurisdiction to order the exercise of the power of revocation.

8. Both Smellie CJ and the Court of Appeal of the Cayman Islands refused TMSF the remedy it sought. The main question on this appeal by TMSF is whether the power of revocation of the trusts is sufficiently close to the notion of property to enable the equitable remedy of a receiver by way of equitable execution to be available to ensure that Mr Demirel has not put himself beyond the reach of the judgment creditor, and whether the appointment can be made effective by ordering Mr Demirel to transfer or delegate the power of revocation to the receivers (and, in default, ordering the transfer or delegation to be executed on his behalf).

II The Trusts and the Cayman proceedings

The Trusts

9. On 28 June 1999 Mr Demirel executed two deeds of trust, establishing two trusts, the Mana Trust and the Dolphin Trust ("the Trusts"). The trustee of the Trusts is the first respondent, Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill Lynch"). The Trusts are Cayman Islands discretionary trusts, and it is common ground that the Trusts are valid and duly constituted as a matter of Cayman Islands law.

10. The discretionary objects of both Trusts are Mr Demirel, Ayse Nur Esenler, who is now the wife of Mr Demirel, and Mr Demirel's children and remoter issue now living or born afterwards. At present, Mr Demirel has no living children or remoter issue. The residuary beneficiary is charity.

11. The assets of the Trusts are shares in Cayman companies. The shares are held by Fairfield Nominees Ltd as nominee for Merrill Lynch. The company owned by the Dolphin Trust is the fifth respondent, Medro Ltd. The companies owned by the Mana Trust are the second, third and fourth respondents, Kaffee Ltd, Barla Finance Ltd and Cunur Cash Ltd. As of 31 October 2006 these companies held cash balances at Merrill Lynch amounting in aggregate to about US$24 million.

12. Mr Demirel reserved a power to revoke, amend, vary or alter the Trusts, in these terms:

> "This Trust may be revoked, amended, varied or altered in any manner whatsoever from time to time and at any time by the Settlor by deed and delivered to the Trustees provided always that no such revocation, amendment, variation or alteration shall take effect until actual receipt of such instrument by the Trustees or with the written consent of the Trustees thereto if such revocation, amendment, variation or alteration would increase or extend the obligations, liabilities or responsibilities of the Trustees".

Cayman proceedings

13. On 1 December 2005 TMSF issued proceedings in Cayman against Merrill Lynch and the Trust Companies in cause no. 555 of 2005 (the proprietary claim). On 5 December 2005 TMSF obtained freezing orders from Levers J against the Trust Companies in that action in the sum of US$30 million, and on 5 January 2006 the freezing orders against the Trust Companies were renewed by Levers J.

14. On 23 February 2007 TMSF issued proceedings against Mr Demirel, in order to enforce the Turkish judgment in the Cayman Islands. TMSF obtained a freezing order from Levers J against Mr Demirel in the value of US$45 million.

15. On 30 March 2007 the proprietary claim was consolidated with the claim to enforce the Turkish judgment.

16. On 30 April 2007 Mr Demirel served a defence to the claim against him to enforce the Turkish judgment, and on 30 April 2008 summary judgment was given in favour of TMSF in the amount of US$30 million plus interest and costs.

17. On 22 August 2008 TMSF issued a summons seeking: the appointment of receivers by way of equitable execution over the power to revoke, amend, vary or alter the Trusts contained in the Trusts; and orders against Mr Demirel for the assignment to the receivers of the powers of revocation and/or their exercise, and upon the powers being vested in the receivers, authorisation to exercise the power to revoke the Trusts; following the exercise of the power, extending the appointment of the receivers over the share capital and the assets of the companies holding the money, and vesting in the receivers the share capital and the assets of those companies.

18. The application by TMSF was dismissed by Smellie CJ on 21 July 2009 and TMSF's subsequent appeal against that decision was dismissed on 9 September 2009 by the Court of Appeal of the Cayman Islands ("the Court of Appeal"), which gave leave to appeal to the Board.

Turkish bankruptcy

19. Meanwhile, on 31 December 2008 Mr Demirel had been declared bankrupt by the Turkish court.

III The judgments below and the appeal

Judgment of Smellie CJ

20. Smellie CJ's starting point was that the effect of *Masri (No.2)* was that, although the jurisdiction to appoint a receiver was not limited to property which was available for legal execution, it was still necessary that it be in the nature of property. The distinction between a power and property was fundamental and longstanding: *Ex Parte Gilchrist; Re Armstrong* (1886) 17 QBD 521. There was no conclusive authority that, in the absence of specific legislation, general powers (whether of appointment or of revocation) were tantamount to property. Where it was thought desirable to treat powers of appointment as property that was done by Cayman legislation: Bankruptcy Law (1997 Revision), sections 2 and 100 (equivalent to Insolvency Act 1986, sections 436 and 283(4)); Wills Law (2004 Revision), section 22 (equivalent to Wills Act 1837, section 27); Companies Law (2007 Revision), section 87 (equivalent to Companies Act 2006, section 900(5)).

21. Trust cases in which the courts had disregarded the distinction were cases in which statute defined property as including unexercised general powers of appointment. The power was not tantamount to ownership and was not delegable: *Re Triffitt's Settlement* [1958] Ch. 852. Consequently, to make the order sought would "involve nothing less than the setting aside of the settled common law principles which have distinguished powers from the property they affect, for hundreds of years" and "would strike at the very heart of the trust concept"([86] and [88]).

The judgment of the Court of Appeal

22. The Court of Appeal held that it did not have jurisdiction, as a matter of law, to appoint receivers by way of equitable execution over a power of revocation in a trust; but even if it had had jurisdiction, it would not have exercised it without much more information because Mr Demirel has been made bankrupt in Turkey at the behest of TMSF and the natural person to get in his assets was his trustee in bankruptcy.

23. The Court of Appeal said (at [31]):

> "The question, therefore, is whether a power of revocation should be available to a single creditor by way of equitable execution, so as to enable that

> single creditor to procure its execution and to recover all the settled assets to satisfy his judgment debt. We have concluded, in agreement with the Chief Justice, that if such an advance in the law is to be made, it must be made by legislation."

24. The Court of Appeal distinguished the question whether a power of revocation should be regarded as a chose in action and so as "property", and the question whether as a matter of policy, the court should recognise for the first time that equitable execution could be allowed in respect of powers of revocation of the kind in issue. The second was the real issue. The first was ultimately inconclusive. The question was whether a power of revocation should be available to a single creditor by way of equitable execution so as to enable that creditor to procure its execution and to recover all the settled assets to satisfy his judgment debt. If such an advance in the law was to be made, it had to be made by legislation.

25. The Bankruptcy Act 1825, section 77, was enacted to enable assignees to exercise such powers for the benefit of the creditors, because it had been held that that a bankrupt could not be compelled to exercise a power of appointment for the benefit of creditors: *Thorpe v Goodall* (1811) 17 Ves. 388, 460. A power of revocation was merely a narrow power of appointment and the legislature had considered the particular context, and had decided that for that specific context properties were to include general powers exercisable by their donees in their own favour. The repeated enactments of the legislature in the Cayman Islands and the United Kingdom showed that it would be unwise and inappropriate for a court to allow equitable execution over a power of revocation by way of the kind of incremental advance envisaged in *Masri (No 2).* That was not because it could not in theory be done, but was because where legislatures had for almost 200 years taken it upon themselves to decide when powers should be considered to be included in a defined package of "property" the court must assume that the legislature would not wish judges to arrogate to themselves that decision. But the Court of Appeal did not agree with the Chief Justice that inclusion of powers in the species of equitable property for which equitable execution was available would automatically strike at the very heart of the trust concept.

26. But even if the jurisdiction existed it would have been extraordinary that TMSF should, having made Mr. Demirel bankrupt, have thought it appropriate to seek equitable execution to bring US$27m worth of assets to itself to the exclusion of other creditors. The undertaking that the proceeds would be brought into the bankrupt estate emphasised that TMSF had used the wrong process and the wrong procedure. Once he had been made bankrupt, the collecting in of his assets was a matter for his trustee in bankruptcy but unless

much more information had been available, the court would not have exercised its discretion to appoint receivers in aid of equitable execution over the powers of revocation.

TMSF's arguments on the appeal

27. TMSF's arguments on the appeal were essentially these. The court's policy should be to ensure that its judgments are so far as possible enforced. The fact that the legislature has enacted statutes to include powers within the property available to a bankrupt's trustee does not imply that powers should be presumed not to fall within the scope of equitable execution unless a statute specifically says that they do, especially when section 37(1) of the Senior Courts Act 1981 provides that a receiver may be appointed "in all cases in which it appears to the court to be just and convenient to do so."

28. A settlor of a trust who has an unfettered power of revocation is entitled to call for the trust assets to be paid over to him at any time, for any reason or for no reason. Such a right is, for most practical purposes, tantamount to ownership. The English authorities going back to Sugden have acknowledged that there may be very little difference between a power to appoint trust property and ownership of the property itself. The powers of revocation are not fiduciary powers and are assignable and/or delegable, and there is no rule that the person holding the power cannot be ordered to exercise it.

The respondents' arguments on appeal

29. The arguments of the respondents are these. Unless and until the power is exercised, the donee is not the owner of the property subject to the settlement (unless he is also the trustee) and cannot be treated as owner of the property. The powers are not property. Legal title is vested in the trustee, and validly created trusts should not be destroyed to the detriment of the innocent beneficiaries of those trusts. There is no statutory provision outside bankruptcy (section 100 of the Bankruptcy Law) in favour of a single judgment creditor to enable this to be done, and no case in which the court has provided any such remedy. Any change in the law should be left to the legislature of the Cayman Islands.

30. The real substance of TMSF's application is for the court to order the powers to be delegated to the receivers, which the court has no jurisdiction to do. If the donee of a power has not shown an intention to exercise the power, the Court will not exercise it for him, unless (perhaps) his failure to exercise

the power was procured by fraud. For the court to order the exercise of the power would deprive the party of any discretion.

IV Discussion

Powers and property

31. The traditional view was that a power was distinct from property, but this was not an absolute rule. There are several early cases on the rights of creditors to reach assets which were subject to a power of appointment by a bankrupt. In modern terms they can be regarded as deciding that the property was not owned by the bankrupt or that the court had no jurisdiction to order a power to be exercised: *Holmes v. Coghill* (1802) 7 Ves. Jun. 499; *Thorpe v. Goodall* (1811) 17 Ves. Jun. 388; 17 Ves. Jun. 460; contrast *Bainton v Ward* (1741) 2 Atk 172 (criticised at Ves. Sen. Supp. 243-247). Legislation was considered necessary to depart from the traditional rule. The effect of these decisions was reversed by, the Bankrupt Laws (England) Act 1822, section 3, the predecessor of the Insolvency Act 1986, section 283(4) (which provides that "property" includes any power exercisable by the bankrupt over or in respect of property unless it cannot be exercised for the benefit of the bankrupt) via the Bankruptcy Act 1825, section 77, the Bankruptcy Act 1869, section 15, the Bankruptcy Act 1883, section 44, the Bankruptcy Act 1914, section 38, and the Insolvency Act 1985, section 130(5).

32. Section 27 of the Wills Act 1837 provided that a general devise or general bequest was to be construed as including any power to appoint and would operate as an execution of the power, unless a contrary intention appeared. See also Administration of Estates Act 1925, section 32(1).

33. As with all legal categories, context was all important. There is no doubt that while for some purposes a power was not property, for other purposes the holder of a general power could be regarded as being for all practical purposes an owner.

34. Thus Farwell, *Powers* (3rd ed 1916) said (at 1):

> "A power is an authority reserved by, or limited to, a person to dispose, either wholly or partially, of real or personal property, either for his own benefit or for that of others. … The word is used as a technical term, and is distinct from the dominion which a man has over his own estate by virtue of ownership."

35. Accordingly it was held, in the context of the Married Woman's Property Act 1882, that a bankrupt married woman's separate property did not include such a power of which she was the donee, and she could not be compelled to exercise it in favour of her trustee in bankruptcy and so as to defeat the vested interest of her son as remainderman, in default of its exercise: *Ex Parte Gilchrist; Re Armstrong* (1886) 17 QBD 521, in which Fry LJ said (at 531):

> "No two ideas can well be more distinct the one from the other than those of 'property' and 'power' ... A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his "property" than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property.' In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law."

36. So also if a power were exercised by a will, it was held that probate duty would not be payable on the property subject to the power unless legislation so provided: *Commissioner of Stamp Duties v Stephen* [1904] AC 137, 140–141, per Lord Lindley. See also *Melville v IRC* [2001] EWCA Civ 1247, [2002] 1 WLR 407 for a case in which property for the purposes of the Inheritance Tax Act 1984 did include a general power of appointment, and in which it was accepted that, but for the legislation, a general power would not be property: at [30].

37. *Morgan v IRC* [1963] Ch. 438 (CA) was a case dealing with a revocable trust. By a sub-settlement the settlor's son assigned to trustees his life interest in the settlement created by the settlor and the interest to which he was contingently entitled upon surviving the settlor. Under the sub-settlement the fund was to be held upon trust for himself for life and upon his death upon trust for the same persons who would take under the settlement created by the settlor had he predeceased the settlor. There was reserved to the son a power of revocation with the consent of the trustees. On the settlor's death the Revenue claimed estate duty on the trust fund subject to the trusts of the settlement and

sub-settlement. It was held by a majority (Upjohn and Diplock LJJ, Lord Denning MR dissenting) that estate duty was not leviable because the son continued to have a life interest notwithstanding his power of revocation.

38. Diplock LJ said (at 455):

> "The fact that the sub-settlement is revocable has the result that Peter's life interest in the income of the shares is capable of enlargement into an absolute interest in possession in the shares themselves in the future with the trustees' consent. But this enlarged beneficial interest will arise (if at all) when the sub-settlement is revoked. The possibility that some subsequent event may enlarge Peter's beneficial interest does not in my view itself constitute a beneficial interest accruing or arising on the death of the deceased."

39. Lord Denning MR dissented. He said (at 458)

> "I do not think that [the son] … did dispose of his contingent capital interest. At any rate he did not dispose of it so as to destroy it absolutely. The reason is because the [sub-settlement] was revocable. [The son] could revoke it at any time with the consent of his co-trustee. Suppose that he revoked it the day after his father's death. He could then have become entitled to the capital interest in the fund, just as if the [sub-settlement] … had never been executed. What does this come to? It means that, in order to avoid estate duty, the lawyer turns magician. He advises his client to execute a revocable settlement, and in an instant, before our very eyes, the contingent capital interest is gone. No one can see it. It is replaced by a continuous life interest. No estate duty is payable. And then, whilst we sit admiring the performance, wondering what is coming next, he can, when he pleases, bring back the capital interest. He advises his client to revoke the settlement, with, of course, the consent of his co-trustee, and at once the capital interest is there intact. It makes me rub my eyes. I cannot believe it is true. Those near me acclaim the feat. But I do not. I have a feeling that

> the contingent capital interest remained there all the time, cloaked by a revocable sub-settlement. Pull the covering aside and you will see it as it really is, a contingent capital interest which became absolute on the father's death; and on which, therefore, estate duty is payable."

40. In *Re Mathieson* [1927] 1 Ch 283 the bankrupt had exercised a general power of appointment. It was held that the avoidance in a subsequent bankruptcy by Bankruptcy Act 1914, section 42, of voluntary settlements made within 2 years of bankruptcy was limited to settlements of a settlor's own property and did not apply to settlements made in exercise of a general power of appointment. The reason was that section 42 applied only to property of the bankrupt available for his creditors at the date of the disposition: at 295, 297, 298-299. The Court of Appeal was influenced by the fact that section 38(b) of the 1914 Act expressly included powers in the property divisible among creditors and made no such provision for the purposes of section 42.

41. But even apart from express legislative intervention general powers have been regarded as giving rise to property rights. In *Clarkson v Clarkson* [1994] BCC 921 (CA) (a decision on the definition of property in Insolvency Act 1986, section 283(4)) Hoffmann LJ referred to *Re Mathieson* and said, obiter (at 931):

> "I think that even at the time this was quite a remarkable decision. Lord St Leonards [i.e. Sugden] in his book on Powers (8th edn. 1861) said: 'To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes.' "

42. So also in *Re Triffitt's Settlement* [1958] Ch 852, 861, Upjohn J said that "where there is a completely general power in its widest sense, that is tantamount to ownership". That was in the context of the question, discussed below, whether a power could be delegated.

43. As Thomas, *Powers* (2008) puts it (at para 1-08), the fundamental distinction between the concepts of power and property has not been preserved in all contexts and for all purposes. A donee of a truly general power can appoint the subject-matter of the power to himself. He therefore has an "absolute disposing power" over the property, citing Sugden, p. 394.

Consequently, for many purposes, the law regards the donee as the effective owner of that property.

44. The effect of *Re Watts* [1931] 2 Ch 302, 305 (Bennett J), and *Re Churston Settled Estates* [1954] 1 Ch 334, 344 (Roxburgh J) is that, although the holder of a general power is not in quite the same position as an owner, he may be treated, for the purpose of the rule against perpetuities, as though he were for all practical purposes the owner.

45. But in each of those cases the powers were held not to be general powers. In *Re Watts* [1931] 2 Ch 302 Mrs Abbott settled property on trust for her children, subject to a power of revocation that she was entitled to exercise only with the consent of her mother. It was held that by reason of the need to exercise the power during the lifetime of the mother, and to obtain the mother's consent, it would not be right to hold that the donee of the power was in substance the owner of the property and consequently free to deal with it in any way she pleased. Consequently it was a special power and the trusts in the revocation and appointment infringed the rule against perpetuities. Bennett J stated the question for the court as being whether, for the purpose of ascertaining whether there was an infringement of the rule against perpetuities, the power was a general power under which the donee was "thereby made the absolute owner of the settled property" (at 305).

46. In *Re Churston Settled Estates* [1954] 1 Ch 334, Roxburgh J referred to *Re Watts* and said (at 344, 346-7):

> "In my judgment it is correctly stated by Bennett J. in the passage which I have read: '…[the donee] was in substance the owner of the property, and consequently free to deal with it in any way she pleased.' One must put in the words 'in substance' or 'practically,' because even a person having a general power of appointment is not quite in the same position as an owner. True, he can give it to anybody he likes inter vivos. True, he can dispose of the property by will without referring to the power at all provided that he makes a residuary gift, but he may make a will which contains no residuary gift, or more probably, he may make no will at all, and in those circumstances the property will go as in default of appointment. So, as I have said, it is not absolutely true that even a person having a common general power of appointment is in quite the same position as

> an owner. Still, I think that the basis of the doctrine is that he is treated as though he were for all practical purposes the owner.
>
> … After all, what is the underlying broad principle of the rule against perpetuities? It is that property should not be tied up beyond a certain period of time. If the property ceases to be tied up, or, in other words, if it vests in a beneficial owner, then the mischief of the rule is avoided. Therefore, it seems to me only reasonable to suspect that the reason why a general power of appointment in the ordinary sense starts a new settlement, and has not got to be read back into the original settlement, is because the property is treated as vesting in the donee of the general power, though it is not quite strictly accurate to say that it does so; or, in other words, that the test really is: is there somebody who for all practical purposes can be treated as the owner?"

The United States authorities

47. There is an extensive jurisprudence in the United States to which the Board was referred, in which both creditors and trustees in bankruptcy have been able to reach trust assets which were subject to a power of revocation. As the leading textbook, Scott and Ascher, *Trusts* (5th ed 2007), says (vol 3, para 15.4.2):

> "With the rise, primarily in the second half of the twentieth century, of the revocable *inter vivos* trust as a popular will substitute, the error of denying the settlor's creditors access to property held subject to a revocable trust has become widely apparent. The courts, as well as the legislatures, have concluded, in a variety of contexts, that the assets of a revocable trust are, in fact, subject to the claims of the settlor's creditors, both during the settlor's lifetime and after the settlor's death, precisely because the settlor of a revocable trust necessarily retains the functional equivalent of ownership of the trust assets.
>
> …

> The trend in the courts, as well, is to conclude that the settlor of a revocable trust should be treated as the virtual owner of the trust property, especially insofar as the rights of creditors are concerned….
>
> … The Restatement (Third) of Trusts succinctly puts it this way: a revocable inter vivos trust 'is ordinarily treated as though it were owned by the settlor.' [section 25(2) (2003)] Thus, property subject to a revocable trust 'is subject to the claims of creditors of the settlor or of the deceased settlor's estate if the same property belonging to the settlor or the estate would be subject to the claims of the creditors …' "

48. The approach of the Restatement is that there is a "sound public policy of basing the rights of creditors on the substance rather than the form of the debtor's property rights" (comment *e* to section 25(1)). This approach is adopted not only in legislation (e.g. Uniform Trust Code, section 505(a)(1) ("During the lifetime of the settler, the property of a revocable trust is subject to claims of the settlor's creditors"), which has been adopted in several States), but also, in the absence of legislative intervention, by the courts: see for example the full account of the Massachusetts authorities in *Re Grassa*, 363 BR 360 (Bkrtcy D Mass, 2007).

49. The approach of the courts is that "the settlor retains all the substantial incidents of ownership" and that it would be "excessive obeisance to the form in which property is held to prevent creditors from reaching property placed in trust under such terms": *State Street Bank & Trust Co v Reiser*, 389 NE 2d 768, 771 (Mass App 1979). But the way in which that result is achieved is to treat the property as that of the settlor. It seems that the court will not compel the settlor to revoke the trust: *Re Cowles*, 143 BR 5, 8 (Bkrtcy, D Mass 1992); *Markham* v *Fay*, 884 F Supp 594, 607 (D Mass 1995) (affd in part, revd in part, 74 F 3d 1347 (1st Cir 1996)) ("No Massachusetts court to date has permitted a creditor to force a settlor to exercise a power to amend or revoke a trust during his or her lifetime in order to pay an indebtedness.") See also *United States* v *Ritter*, 558 F 2d 1165, 1167 (4th Cir 1977).

50. Although the United States authorities demonstrate the advantages of a realistic view of the revocable trust, they are only of marginal assistance on the present appeal.

Delegation

51. The question whether the power of revocation is delegable arises on this appeal because TMSF seeks an order that receivers be appointed over the powers of revocation, coupled with an order for Mr Demirel to execute deeds assigning the powers to the receivers so that the receivers may exercise them, or (to the extent that the powers cannot be assigned) delegating his powers of revocation to the receivers. The respondents say that the powers are not assignable or delegable.

52. A power of appointment is capable of being delegated where the holder of the power owes no duty of trust or confidence to another person. Sugden (Lord St Leonards), *Powers* (8th ed. 1861) states (at 179, 180–181, 195–196):

> "... wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for delegatus non potest delegare ...
>
> Where the power is tantamount to an ownership, and does not involve any confidence or personal judgement, and no act personal to the donee is required to be performed, it may be executed by attorney in the same manner as a fee-simple may be conveyed by attorney…
>
> ... the rule that a power cannot be delegated , is not ... a general inflexible rule, but is simply a regulation, that a confidence reposed in one cannot by him be delegated to another. This rule, therefore, is inapplicable to the case [where] no confidence was reposed in A, but the estate was, merely for his own convenience, conveyed to such uses generally as he should appoint."

53. In *Re Triffitt's Settlement* [1958] Ch 852 Upjohn J said that the question whether a power could be delegated was a question of construction. Delegation could take place under two circumstances. First where "there is a completely general power in its widest sense, that is tantamount to ownership, and, therefore, the donee of the power can exercise it in whatever way he pleases" (861). Secondly, where, "as a matter of construction, some power can be spelt out enabling the donee of the power to delegate his discretion." In that

case the power was within the second category and therefore delegable. Upjohn J said (at 863-4)

> "This is not a fiduciary power at all but a power conferred by the plaintiff on herself for her own benefit.
>
> … In my judgment, in a widely drawn power such as this, it is to be implied in the power that the plaintiff can delegate the exercise of discretionary powers entirely. As I have said already, it is a beneficial power conferred upon her for her own benefit."

Overall conclusion

54. The question on this appeal is whether there is a discretion to appoint receivers over the powers of revocation and to order Mr Demirel to assign or delegate the powers to the receivers (and, in default, to order that the assignment or delegation may be executed on his behalf by the receivers or other person appointed by the court).

55. The background to the decision in *Masri (No 2)* was that it had long been thought that the power in what is now section 37(1) of the Senior Courts Act 1981 (formerly the Supreme Court Act 1981) to "appoint a receiver in all cases in which it appears to the court to be just and convenient to do so" could only be exercised in circumstances which would have enabled the court to appoint a receiver prior to the Supreme Court of Judicature Act 1873, section 25(8), when it was first put on a statutory basis: *Holmes v Millage* [1893] 1 QB 551, 557 (CA); *Edwards & Co v Picard* [1909] 2 KB 903, 905 (CA); *Harris v Beauchamp Bros* [1894] 1 QB 801, 809-810 (CA); *Morgan v Hart* [1914] 2 KB 183, 189 (CA); *Maclaine Watson & Co Ltd v International Tin Council* [1988] Ch. 1, 17 (affirmed [1989] Ch 253 (CA)).

56. But in *Masri (No 2)* it was held that these decisions were based on a misunderstanding of *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, and that the court was not bound by pre-1873 practice to abstain from incremental development. The jurisdiction could be exercised to apply old principles to new situations. *Masri (No 2)* confirms or establishes the following principles: (1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1); (2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver

appointed before 1873; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations.

57. *Masri (No 2)* also confirmed that section 37(1) does not confer an unfettered power. It pointed out that there are many decisions on the injunctive power to that effect: *South Carolina Insurance Co. v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] AC 24 at 40, per Lord Brandon of Oakbrook: "... although the terms of section 37(1) of the Act of 1981 and its predecessors are very wide, the power conferred by them has been circumscribed by judicial authority dating back many years." See also *Gouriet v Union of Post Office Workers* [1978] AC 435, 500-501, 516; *The Siskina* [1979] AC 210, 256; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909, 979; *British Airways Board v Laker Airways Ltd* [1985] AC 58, 80-81; *P v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 420-421; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, 341, 360-361; *Mercedes Benz AG v Leiduck* [1996] AC 284, 298 (PC).

58. So too in *Masri (No 2)* it was confirmed that the power to appoint receivers under section 37(1) is also not unfettered, and Lawrence Collins LJ said (at [180]) that it was doubtful whether suggestions by Sir John Donaldson MR and Browne-Wilkinson LJ in *Parker v Camden LBC* [1986] Ch 162, at 173 and 176, that the jurisdiction to appoint a receiver is unlimited, could stand with the rejection by the House of Lords in *P v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 420-421 of similar statements by Lord Denning MR in *Chief Constable of Kent v V* [1983] QB 34, 42, in relation to the power to grant injunctions.

59. In the opinion of their Lordships the decisions in *Masri (No 2)* and its predecessors lead to the conclusion that in the present case the jurisdiction should be exercised. The powers of revocation are such that in equity, in the circumstances of a case such as this, Mr Demirel can be regarded as having rights tantamount to ownership. The interests of justice require that an order be made in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment.

60. There is no invariable rule that a power is distinct from ownership. Nor (as the cases on the rule against perpetuities show) is there an invariable rule that any departure from the distinction between power and property is effected solely by legislation. As Lord St Leonards said (and Hoffmann LJ approved),

"To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes," and in *Re Triffitt's Settlement* [1958] Ch 852, 861, Upjohn J said that "where there is a completely general power in its widest sense, that is tantamount to ownership".

61. In the present case the appropriate order would be that Mr Demirel should delegate his powers of revocation to the receivers, so that they can exercise them. There is no impediment to the court making such an order. The court may make an ancillary mandatory order: see *Derby & Co Ltd v Weldon (No 6)* [1990] 1 WLR 1139 (power to order transfer of assets from one jurisdiction to another in aid of *Mareva* injunction). This is not a case of an interlocutory mandatory order giving effect to a positive duty, and it is not necessary (contrary to the respondents' submission) for the judgment creditors to establish that Mr Demirel has a duty to delegate the powers.

62. In the present case the power of revocation cannot be regarded in any sense as a fiduciary power, and the respondents do not suggest otherwise. The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership.

63. It is therefore unnecessary to decide the question, canvassed in argument, whether the court has jurisdiction, instead of ordering the delegation of the powers of revocation to the receivers, to order Mr Demirel to revoke the trusts, with the result that he would have substantial assets of which the receivers could take possession. Two principal objections were made by the respondents to that course. First, they relied on the decision of Lord Eldon LC in *Thorpe v Goodall* (1811) 17 Ves 388, 460 that the court will not order the exercise of powers of appointment. But that decision was superseded by the Bankrupt Laws (England) Act 1822, is not concerned with a power of revocation, precedes the modern law on injunctions, and is not a decision on jurisdiction. The second objection was based on the decision in *Field v Field* [2003] 1 FLR 376. In that case a husband had defaulted on an order to pay a lump sum to his former wife. The husband had a non-assignable right to elect for a lump sum payment under his employer's pension scheme. It was held that the pension could not be reached by the wife through an order requiring the husband to elect for a lump sum payment and appointing a receiver to receive the proceeds. Wilson J thought that to make such an order would amount to "a free-standing enforcement procedure in its own right," which was not permitted by section 37: at [17]. The basis for such a characterisation of the order in that case is not clear. In the present case the order would be ancillary to TSMF's rights as judgment creditors. The Board considers that there is force in the criticism of the reasoning of this decision in Gee, *Commercial Injunctions*, 5th

ed 2004, paras 16.017-018, but as indicated above, this is not a question which falls to be decided on this appeal.

64. The final question is whether the discretion to make the order for delegation of the powers of revocation should be exercised. In the circumstances of the present case there is no doubt as to how the discretion to make the mandatory order should be exercised. No serious suggestion has been made on behalf of Mr Demirel that there would be any prejudice to any third party. The Court of Appeal thought that the appointment of a trustee in bankruptcy of Mr Demirel made it wrong for an order to be made in favour of TMSF as a single creditor. But the Board was informed that the power of revocation does not vest in the trustee under Turkish law. TMSF has undertaken to make the proceeds available to the creditors as a whole. In those circumstances there is no reason why the discretion should not be exercised in favour of TMSF.

65. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed. The parties will have 21 days to supply written submissions as to costs and the form of the order.