No Indemnity for Intransigence

As originally appeared in Resolution – Jersey Winter 2009/10

BY JEREMY HEYWOOD

In the recent case of **MacKinnon v. MacKinnon** [2009] JRC 218, the Royal Court examined the circumstances in which an order for costs ought to be made against an executor personally. The court also considered whether an executor ought to be prevented from recovering his own costs, incurred in contesting the litigation, out of the estate.

The testatrix, Dorothy MacKinnon, died on 15 October 2002. Part of her estate was contained within certain family trusts. These trusts became the subject of dispute between the testatrix's sons; James and Andrew. They reached a compromise in April 2006, and, as part of that compromise, a grant of probate was issued to Andrew on 10 May 2006.

Grant of Probate

Disagreement then arose as to Andrew's administration of the estate, which resulted in James issuing a Representation, on 15 May 2008, which sought, *inter alia*, orders that Andrew disclose various documents relating to the administration of the estate. The hearing of the Representation was adjourned a number of times, eventually being heard on 21 May 2009.

On 29 April 2009, lawyers for James faxed Andrew's lawyers with proposals to avoid the hearing, but no response was received within the timeframe specified. An Act of Court was issued following the hearing which made a number of orders, addressed principally to Andrew, substantially in the terms requested by James.

Indemnity Costs

James then sought an order that the costs of and incidental to the Representation be met by Andrew, on the indemnity basis, and further, that Andrew be prevented from claiming his costs out of the estate.

James' advocate submitted that the court had such a power under article 2 of the **Civil Proceedings (Jersey) Law 1956** which confers on the court a broad discretion in questions of costs. The court also referred to the similarly broad discretion conferred by article 53 of the **Trusts (Jersey) Law 1984**.

He argued that there was no requirement to show fraud or dishonesty on the part of an executor in order to justify an award of costs against the executor personally, referring to **Re Chapman** [1896] 2 Ch. 763 (CA) where Lindley, LJ, held:

> "*A trustee may be honest, and yet, from over-caution or some other cause, he may act unreasonably; and if his conduct is so unreasonable as to be vexatious, oppressive or otherwise wholly unjustifiable and he thereby causes his* cestui que trust *expense… the trustee must bear such expense.*"

Element of Dishonesty

Andrew's advocate submitted that there was a need for some element of dishonesty as well as unreasonableness or, if the court was against him on that point, that it was necessary for there to have been gross neglect or wholly indefensible conduct on the part of an executor. He referred to **Re Radclyffe** (1881) 50 LJ Ch 317 where Bacon VC held:

> "*If the plaintiff is driven to invoke the assistance of the law to obtain that which it is her perfect right to have, am I to say that she is to do that at her own expense? Am I to allow executors who have withheld the amounts and rendered an untrue account to pass through the operation of this suit, and to do it at the expense of the residuary legatee? Upon no ground of reason or justice could I do that…*"

The court found that "*even in England*" fraud or dishonesty was not necessary to support an adverse costs order against an executor, and thus rejected the contention that either was a necessary prerequisite for such an order in Jersey.

The court then considered what the test in Jersey was, beginning with the view that there was no material difference (in the context of the costs of an administrative action) between the position of an executor and that of a trustee, as both owed fiduciary duties to a legatee or a beneficiary respectively. The court allowed that an executor did have a "*margin of discretion*" as to how to act and commented that it may be that such margin was more circumscribed in the case of a professional, or remunerated, executor. An unremunerated executor:

> "…*will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has* ex post facto *been shown to be misguided or even careless.*"

Reasonable Level of Competence

However, the court went on to state that a legatee was entitled to expect a reasonable level of competence, proportionality and good sense from an executor:

> "… *an element of intransigence or unreasonableness is in my judgment required before an executor can be held liable to pay the costs of a legatee in an administrative action. It is not necessary to show fraud or dishonesty, but the executor's conduct must have crossed the threshold of reasonable justifiable behaviour.*"

Principles of Trust Law

The court again followed principles of trust law in considering when it might be appropriate for an award of indemnity costs against an executor, following decisions of the now Bailiff, where it was held that a trustee's breach of fiduciary duty was, of itself, a sufficiently 'special' or 'unusual' circumstance to justify such an order (**Ogier Trustee (Jersey) Limited v. CI Law Trustees Limited** [2006] JRC 158 and in **Re the H Trust** [2009] JRC 158).

The court confirmed that the general principle is that an executor is entitled to recover the costs of the administration from the estate, citing Article 15 of the **Wills and Successions (Jersey) Law 1993**. However, it went on to hold that, logically, where an executor is ordered to pay the costs of a legatee personally it would be wrong to allow an executor to recover his own costs from the gross estate at the expense (in whole or in part) of the same legatee.

Grave Breach of Fiduciary Duty

In the instant case the court held that the breach of fiduciary duty on the part of Andrew was not so grave as to justify an award of indemnity costs, but ordered that Andrew pay James's costs of and incidental to the Representation, from 29 April 2009, and that Andrew be deprived of an executor's usual indemnity out of the estate for his own costs.

Jeremy Heywood
Barrister
jheywood@applebyglobal.com
TEL: +44 (0)1534 818 375

This publication is intended only to provide a summary of the subject mattered covered. It does not purport to be comprehensive or to provide legal advice. No person should act in reliance on any statement contained in this publication without first obtaining specific professional advice.
January 2010
© Appleby