

Granham v PC, AC, MC, LC, Binnington, Mrc C and BNP Paribas Jersey Trust Corporation Ltd

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	13 April 2012
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Text

[2012] JRC 78

ROYAL COURT

(Probate)

Before:

M. C. St. J. Birt, **Esq.**, Bailiff, sitting alone.

IN THE MATTER OF THE ESTATE OF C (RE COSTS)

Between
Caroline Garnham
Representor
and
(1) PC
(2) AC

(3) MC
(4) LC
(5) Alan Binnington
(6) Mrs C
(7) BNP Paribas Jersey Trust Corporation Limited
Respondents

Advocate J. M. P. Gleeson for the Representor.

Advocate A. D. Robinson for the First and Second Respondents.

Advocate J. S. Dickinson for the Third and Sixth Respondents.

Advocate N. M. Sanders for the Seventh Respondent.

The Fourth and Fifth Respondents did not appear and were not represented.

Authorities

Garnham -v- PC and Others [\[2012\] JRC 050](#) .

Re MacKinnon [\[2010\] JLR 508](#) .

Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (2008 Edition).

In the matter of the Representation of MacKinnon [\[2009\] JLR 387](#) .

In Re Chapman [1895] 72 LT 66 .

Bonham -v- Blake Laphorn Linell [2006] EWHC 2513 (Ch).

Bonham -v- Blake Laphorn Linell [2007] WTLR 189 .

Trusts (Jersey) Law 1984.

Lewin on Trusts.

Estate — costs.

The Bailiff

1 Following delivery of the judgment in this case published as [\[2012\] JRC 050](#) (“the Judgment”), I sat to consider the issue of costs. In this judgment, I use the same abbreviations as in the Judgment.

2 BNP emphasises that if costs are payable out of the estate, 99% will be borne by the GDS

and only 1% by Mrs C. The GDS is held as to approximately 55% for charitable interests (see para 8 of the Judgment) and, BNP submitted, it should not therefore have ultimately to fund costs unreasonably incurred.

3 BNP sought the following orders:-

(i) that MC and Mrs C should pay the costs of all the other parties on the standard basis until 31st October, 2011, (being the date of the refined proposal referred to in paragraph 50 of the Judgment) and thereafter on the indemnity basis; and

(ii) that none of the executors or Mrs C should have their costs out of the estate.

4 MC and Mrs C opposed the application at para 3(i) above. The executors and Mrs C argued that they should all have their costs out of the estate.

(i) Position of CG, PC and AC as executors

5 Although this is the second aspect of BNP's application, I think it more convenient to consider this topic first.

6 The general position is that executors are entitled to be indemnified as to expenses (including the costs of legal proceedings) incurred in connection with the administration of the estate. The position was considered recently by the Court of Appeal in *Re MacKinnon* [2010] JLR 508. The Court approved the following extracts from *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (2008 Edition):-

" 66 – 02 If they have acted reasonably, the representative is not to be deprived of their costs from the estate. The charges and expenses of executors or trustees are not costs incident to proceedings in the High Court and are not within the discretion of the court unless misconduct is proven. The 'contract' between the author of a trust and his trustees (and presumably between a testator and his personal representatives) entitles them to receive out of the estate all proper costs incident to the execution of the trust. Costs should not be inflicted if they have done their duty or even if they have committed an innocent breach of trust. An administrator is in the same position as a trustee or executor and is entitled to be recouped in the same way. This policy is important for the 'safety' of executors and trustees and is beneficial to those who repose confidence in their friends or neighbours in the management of their property."

" 66 – 06 Once misconduct is proven the court has a discretion as to the costs of a representative in an administration claim. In cases marked by fraud, evasion, or neglect of duty, the court will not merely refuse to allow them their costs out of the assets, but will order them to pay the costs of the action, or so much of the action as is attributable to the breach of duty on their part."

- 7 The Court of Appeal went on to approve a statement of Bailhache Commissioner at first instance in that case [\[2009\] JLR 387](#) at para 14:-

“ The question being discretionary, it is not possible to lay down any hard or fast rules. Nonetheless, one can state that the executor or trustee has what might be termed a margin of discretion. He must be free to conduct himself, and to take decisions, within the parameters of a reasonable framework as he sees fit. It may be, although this must be left for decision on another day, that the margin of discretion for a professional executor or a trustee who is being remunerated should be more narrowly circumscribed. But that is not the case here. An unremunerated executor or trustee 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. At the same time, a legatee or beneficiary is entitled to expect a reasonable level of competence, proportionality and good sense from the person entrusted with protecting his interests. In short, 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 reasonably justifiable behaviour.”

- 8 Finally at para 33, Beloff JA, on behalf of the Court of Appeal, summarised the position as follows:-

" 33 From these passages I derive the following propositions:-

(i) Dishonesty or fraud may be a sufficient but is not a necessary basis for either refusing the representative payment of his own costs out of the estate or for fixing him with liability to pay the other party's costs .

(ii) The basic test is whether the costs, to justify payment out of the estate, were properly incurred .

(iii) Mere negligence or honest mistake will not deprive the representative of payment; but other than that, what is sufficient misconduct cannot be precisely described and will be a matter of fact and degree .

(iv) The refusal of payment of his costs out of the estate does not necessarily entail as its consequence the fixing of him with liability to pay the other party's costs, but the court may penalise him in both ways.”

- 9 I apply these principles to the facts of this case.

- 10 In so far as CG is concerned, BNP argues that her approach was both hostile and

disproportionate. Her initial representation sought approval of a decision not to assign the SDL claim and she only became neutral on 9th August, 2011. Advocate Sanders gave a number of examples in his skeleton argument of matters which, he submitted, showed unreasonable conduct on the part of CG.

- 11 In relation to PC/AC, BNP argues that it was not necessary for them to play as large a part as they did in the proceedings because BNP was able to argue in favour of assignment. BNP also submits that PC/AC incurred unnecessary costs by producing detailed evidence in relation to the 2004 proceedings, which in turn led to CG producing material in response. BNP says that this aspect was not necessary and that such expenditure was unreasonably incurred.
- 12 I have considered all the points made by Advocate Sanders on behalf of BNP in his skeleton as well as in oral argument. However, I am in no doubt that CG, PC and AC are entitled to their costs out of the estate on the usual basis.
- 13 So far as CG is concerned, she was faced with a split group of executors. She therefore had no alternative but to bring the representation. Furthermore she was faced with an inability to recover her firm's fees and that too was a valid reason for bringing the representation. It is of note that she was advised in this respect by leading chancery counsel Mr Robert Hildyard QC. I do not consider it to have been unreasonable on her part to have initially been of the view that assignment should not take place; nor do I consider that she subsequently played an unreasonably large part in the proceedings. The Court was assisted by Advocate Gleeson's submissions on her behalf in relation to the history of the matter and I accept that she had to respond to the matters raised by PC/AC.
- 14 As to PC/AC, they were the two executors who supported assignment of the SDL claim. Given that the executors were divided, I see nothing unreasonable in their being represented and explaining in evidence why they were of this view. As to their references to the history of the 2004 proceedings, whilst this was clearly not a fundamental part of the point at issue, nonetheless, as can be seen from the Judgment, the Court did refer to and take into account the fact that, as a result of those proceedings, there was a level of distrust between PC/AC on the one hand and CG (and MC) on the other. Taken in the round, I do not consider it unreasonable for PC/AC to have raised these matters, such that they should be deprived of their costs.
- 15 All in all, I consider that CG, PC and AC have done nothing which comes anywhere near being sufficient to disqualify them from their entitlement to recover their costs as executors from this estate.

(ii) BNP's application in respect of MC and Mrs C

- 16 Although they were both represented by Advocate Dickinson, MC and Mrs C are of course

in different positions. MC is one of the executors and accordingly her position must be judged by reference to the principles applicable to executors. Mrs C, on the other hand, was convened to the representation as a beneficiary of the estate. Her position is therefore to be assessed by reference to the principles applicable to the costs of beneficiaries who are convened to an application by executors or trustees.

- 17 I take first the position of MC as executor. I do not consider that she acted in a manner which should disentitle her from her costs or lead to a costs order against her prior to the refinement of the assignment proposal made on 31st October, 2011. As the Court said at para 50 of the Judgment, prior to that refinement, one could understand the argument that Mrs C preferred to place recovery of the loan in the hands of the executors (in whom she said she had confidence) rather than the hands of BNP (in whom she said she did not). I see nothing unreasonable in MC, as one of the executors, taking such matters into account in deciding that she too was not in favour of an assignment. Accordingly, I do not consider that MC acted unreasonably prior to the refinement proposal and accordingly there is no question until that time of depriving her of her costs or ordering her to pay the costs of any other party.
- 18 BNP argued that, even if the Court were to be against it in respect of the period prior to the October refinement, MC had behaved unreasonably thereafter. Advocate Sanders relied in particular upon the Court's finding at paragraph 95 of the Judgment that, following the October refinement, the decision on the part of MC to continue to oppose the assignment was a decision to which no reasonable executor could come.
- 19 Advocate Dickinson accepted that it might at first be thought that this would amount to the necessary element of unreasonableness as to lead to an adverse costs consequence. However, he submitted that the fact that the Court had held as it had on the substantive issue did not automatically mean that MC should be ordered to pay the costs of any other party or be deprived of her own costs. The purpose of the exercise was very different in the two cases. In relation to the substantive issue, the Court was addressing the question of whether it was entitled to intervene in relation to the assignment despite MC's opposition to the assignment. The Court held that it was so entitled. By contrast, the task on which the Court was now engaged was the task of deciding who should pay the costs of the proceedings. That was a very different matter.
- 20 In this context, he emphasised the high burden on BNP and cited the passage from *In Re Chapman* [1895] 72 LT 66 where Lindley LJ said:-

“ 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 cestuis que trust expense which would not otherwise have been incurred, the trustee must bear such expense ... ”.

- 21 Thus, he argued, a high degree of unreasonableness was required. He emphasised that MC was not a professional executor, that the Court had accepted the genuineness and sincerity of her view that the testator had chosen the executors to administer his estate and that it would have been disregarding those wishes to permit the assignment and that she felt strong feelings of loyalty to what she perceived were the testator's wishes. She also took into account Mrs C's opposition to the assignment.
- 22 I have considered all the points raised by Advocate Dickinson but in my judgment, in view of the Court's findings as set out at paragraphs 93 – 95 of the Judgment, MC did, following the October 2011 refinement, behave unreasonably to the extent that it is right to deprive her of her costs out of the estate. I propose to do so from 9th November, being the date upon which she rejected the October refinement. Accordingly I order that she should bear her own costs from 9th November, 2011.
- 23 However, I do not consider that she should be ordered to pay the costs of any other parties. As Beloff JA made clear in the passage referred to at para 8 above, a deprivation of costs does not necessarily lead to an order that an executor should pay the costs of another party. I bear in mind that this is a group of family executors (apart from CG), not professional executors. The Court has also found that MC believes sincerely and strongly that she should honour and respect what she perceives to be the wishes of the testator and she considers that he would have wished the executors to deal with the SDL loan rather than BNP. In all the circumstances, I consider it would be unduly harsh to make her pay the costs of any other parties and I decline to do so.
- 24 Advocate Dickinson submitted that, even if I were to conclude that MC had acted unreasonably as an executor, I am not entitled to deprive her of her costs out of the estate because of the terms of clause 10 of the Will which provided as follows:-

" 10. Trustees' Liability

No Executor or Trustee expressly acting as such shall be liable for any loss arising by reason of any improper investment made in good faith or retention of any investment retained in good faith or for the negligence or fraud of any agent employed in good faith by him or her or by any other Executor or Trustee (whether or not the employment was strictly necessary or expedient) or by reason of any mistake or omission made in good faith or by reason of anything except deliberate or reckless wrong-doing on the part of the Executor or Trustee whom it is sought to make."

Clearly the word 'liable' has been omitted from the end of the clause.

- 25 He referred to the decision of Kitchin J in *Bonham -v- Blake Lapthorn Linell* [2006] EWHC 2513 (Ch), [2007] WTLR 189. In that case the trustees had engaged in litigation without taking out a Beddome application. They had paid the costs of that litigation out of the trust fund and ultimately they abandoned the litigation. It was then claimed against them that

they had brought the litigation unreasonably and that their costs should be disallowed, and because the trustees had already paid the costs out of the trust fund they should have to repay them. The court in fact decided that the trustees had not behaved unreasonably and therefore they were entitled to an indemnity. However, the court went on to consider what the position would have been if the trustees had acted unreasonably in incurring these costs. Specifically, the court considered whether the trustees were protected by an indemnity clause in similar terms to clause 10 of the Will in this case. At paras 171 – 192, Kitchin J expressed the *obiter* view that the trustees were protected by the indemnity clause.

- 26 In my judgment, it is arguable as to whether that view was correct. But even if, for present purposes, I assume that it was, it seems to me that the situation is very different in this case. Here, MC is but one of the executors. She has incurred legal costs in representing her views as an individual to the Court, albeit in her capacity as an executor. This is not a case of the executors or trustees as a body incurring legal fees. Furthermore, none of her costs have hitherto been paid out of the estate. Accordingly I do not see that the estate has suffered a “loss” for the purposes of clause 10. On the contrary, as a result of my decision, she will be unable to recover the relevant proportion of her costs from the estate and it will therefore never suffer any loss for which she might otherwise be liable. There is the additional question as to whether in any event the indemnity clause in the Will is invalid as going beyond that permitted by Article 30(10) of the Trusts (Jersey) Law 1984. In all the circumstances I do not consider that the provision assists Advocate Dickinson.
- 27 Turning to Mrs C, she was convened to the representation as a beneficiary. The normal rule where trustees or executors convene beneficiaries or legatees to proceedings where the trustees or executors seek directions from the Court is that such beneficiaries will have their costs paid out of the trust or estate, usually on an indemnity basis (see *Lewin* para 21 – 85). However, as *Lewin* points out at para 21 – 82, a beneficiary may lose that privilege if he acts unreasonably.
- 28 The expression “unreasonably” must be applied in its context and the position of beneficiaries is not the same as that of an executor or a trustee. The latter owes fiduciary duties to all the beneficiaries and, whilst it may not be unreasonable for a beneficiary to make a request of executors (or trustees) to act in a particular way, a decision by the executors to do so despite their fiduciary obligations to all the other beneficiaries, may be categorised as unreasonable on their part such that, if they seek to defend it, they may be deprived of their costs.
- 29 Mrs C was married to the testator for over 50 years. It is quite understandable that she would wish to uphold his wishes as she understood them to be. Furthermore, she did not have confidence in BNP to act effectively in the recovery of the SDL claim whereas she did have such confidence in the executors. Her decision to oppose the assignment until the October refinement cannot begin to be categorised as unreasonable. She is therefore entitled to her costs out of the estate on the usual indemnity basis until then.

- 30 More difficult is whether she should suffer any adverse costs consequences thereafter. I am satisfied that it would be wholly inappropriate to order her to pay the costs of any other parties. That would be a very disproportionate order to make against a beneficiary who was simply putting forward strongly and sincerely held views as to her late husband's wishes. More difficult is whether, like MC, she should be prevented from recovering her own costs out of the estate from 9th November.
- 31 I have not found this easy. On the one hand, the Court has held that the decision of MC to maintain her opposition to assignment after the October refinement was a decision which no reasonable executor could reach and it is tempting to conclude that Mrs C was therefore being equally unreasonable in maintaining her opposition. As against that, she did not owe fiduciary duties in the way that the executors did. These proceedings were necessary because the executors were divided and her only contribution to the litigation was to express her views on the right course of action when convened to do so. She is the matriarch of this family where there are deep splits and I believe that it may well exacerbate the disunity amongst family members if I were to order their mother to be responsible for her costs in circumstances where she had not initiated these proceedings but had simply expressed her views as to what the testator would have wished when given the opportunity by the Court of doing so. On balance, I have come to the conclusion that it would be disproportionate to deprive her of her costs. If I am wrong on this, the furthest that I would have been prepared to go would have been to order that she should pay her own costs from 9th November.

Summary

- 32 In summary, my conclusions are as follows:-

- (i) The beneficiaries of the estate, namely BNP and Mrs C, should have their costs out of the estate on an indemnity basis.
- (ii) The executors CG, PC, AC (and to the extent she has properly incurred any costs LC) are entitled to their costs out of the estate on the usual trustee basis.
- (iii) MC, as executor, is entitled to her costs out of the estate on the same basis until 9th November, 2011, but thereafter she must bear her own costs.