Brian Goed v Advocate Andrew Begg (as Executor)

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	18 December 2020
Neutral Citation:	[2020] JRC 262
Date:	18 December 2020
Court:	Royal Court

Text

[2020] JRC 262

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, Master of the Royal Court

Between
Brian Goed
First Plaintiff
Lorraine Desiree Goed
Second Plaintiff
and
Advocate Andrew Begg (as Executor)
Defendant
Catherine Goed (née Voisin)
Prospective Second Defendant

Advocate S. B. Wauchope **for the Plaintiffs**.

Advocate A. P. Begg **in person**.

Advocate J. N. Heywood **for the Prospective Second Defendant**

Authorities

Goed and Anor v Begg and Anor [2020] JRC 245A

Re Amy [2000] JLR Note 64B

Estate of the Late Frank Lenaghan v Lenaghan [2020] JRC 158

Re Buckton [1907] 2 Ch 406

Rawlinson & Hunter Trustees SA v Chiddicks [2018] JRC 203

Watkins v Egglishaw [2002] JLR 1

Civil Proceedings (Jersey) Law 1956

Costs.

THE MASTER:

1 This judgment contains my decision on costs following on from the substantive judgment in this matter handed down 25 th November, 2020 and reported at *Goed and Anor v Begg and Anor* [2020] JRC 245A. I have used the same definitions in that judgment as in this judgment.

2 Advocate Heywood argued firstly that I had power to make a costs order in his client's favour even though she was not a party to the proceedings. He then argued that the normal starting point referred to in *Re Amy* [2000] JLR Note 64B should not apply and that the court should depart from that starting point where the circumstances of the case demanded a different outcome (see *Estate of the Late Frank Lenaghan v Lenaghan* [2020] JRC 158 at paragraph 25).

3 He therefore argued that the present case was analogous to hostile litigation between beneficiaries and fell within in the third classification of trusts disputes set out in *Re Buckton* [1907] 2 Ch 406 referred to in *Rawlinson & Hunter Trustees SA v Chiddicks* [2018] JRC 203 at paragraph 8 of the latter judgment as follows:-

> ***"The second class was in substance the same as the first class, but where the application had been made by the beneficiaries.*** He went on to say this

in relation to the third class:-

> ***"There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second.*** In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.""

4 The allegations in this case that the plaintiffs wished to bring against Mrs Goed were to join her as a party to allegations of undue influence and desertion in respect of Mr Goed's moveable estate and to make a claim for *rapport* against her.

5 Advocate Heywood accepted that not every claim in *rapport* would be characterised as hostile litigation, but the present case clearly crossed the line in relation to the third category because it was a claim brought out of time.

6 The general rules applicable in relation to the determination of a costs application as set out in the well-known judgment of Commissioner Page in *Watkins v Egglishaw* [2002] JLR 1 therefore applied.

7 In this case, Advocate Heywood argued that the plaintiffs' substantive application was bound to fail. The plaintiffs also knew that the value of the moveable estate was limited. While Advocate Heywood's primary position was that there was nothing to bring back by way of *rapport*, even if he was wrong on that view, the amount at stake was far less than the sum contained in the joint account at the date it was transferred into the sole name of Mrs Goed, because a significant proportion had been spent on care home fees for the late Mr Goed.

8 He was also critical about the lack of any pleaded grounds or evidence in relation to allegations of undue influence. In addition, in relation to those grounds, even if successful, the estate would either have passed under a Will executed in 2009 or failing that in 1991. Whichever Will applied the same analysis referred to in the substantive judgment leading to Mrs Goed electing to retain any *avances de succession* would still follow.

9 The fact that the application was bound to fail and was disproportionate to what was at stake, which was known to the plaintiffs by the time they made their application, also justified costs being awarded on an indemnity basis.

10 Advocate Begg's position was that he had taken a neutral role in relation to the application. The estate however did not have sufficient assets to meet his costs. Accordingly, his costs should be paid by the plaintiffs as the unsuccessful party who had brought the application. He also sought his costs as actually incurred as it could not be demonstrated that those costs had been incurred unreasonably.

11 Advocate Wauchope argued that the costs should be borne by the moveable estate. He accepted in reality that meant that each party should bear their own costs. He contended that the application was necessary because Mrs Goed had taken complete control of Mr Goed's finances in May 2010 and had not provided promptly information about lifetime gifts. This was set against the background of, according to the plaintiffs, Mrs Goed preventing the first plaintiff from having a relationship with Mr Goed. He also argued that the extent of the estate was still unclear. While his application had been unsuccessful, he argued his case was not hopeless. His clients did not have knowledge of whether lifetime gifts of moveables were made until March 2020. There was therefore an arguable case in empechment. He also stated he had only seen the 1991 Will for the purposes of the cost hearing. This had not been produced previously despite it being asked for.

12 Advocate Begg, in response to Advocate Wauchope's observations, stated that he had explained in correspondence that the earlier Wills were similar in nature to the 2010 Will although he had not produced a copy.

13 Advocate Heywood contended that I could not make any findings about the nature of the relationship between the plaintiffs and their father without full discovery. The justice of the case required that a costs order was made in Mrs Goed's favour because she had faced serious allegations which had been made out of time. Requiring her to bear her own costs by ordering the costs to come out of the estate was unfair.

Decision

14 The starting point of any decision on costs is Article 2 of the Civil Proceedings (Jersey) Law 1956. It is well established that under Article 2 the costs of and incidental to all proceedings in the Royal Court are in the discretion of the court which has full power to determine by whom and to what extent any costs are paid. The general principles to be applied in exercising that discretion are set out in *Watkins v Egglishaw*.

15 In this case, Mrs Goed is not a party to the proceedings albeit she was permitted by me to make submissions on the prescription question and whether she should be added as a

party.

16 I have no doubt that had the plaintiffs' application been successful, a costs order would have been sought by the plaintiffs against Mrs Goed and it would have been argued that I had jurisdiction to make such an order under Article 2. There would have been force to such a submission but equally the converse, in my judgment, is true. Where someone is invited to take part in a hearing to make submissions, if those submissions are successful, I see no reason in principle why as a matter of jurisdiction the court, given the breadth of the language in Article 2, does not have the power to make a costs order in such an entity's favour against one of the parties to the proceedings.

17 I therefore consider that I have power to make a costs order in Mrs Goed's favour against the plaintiffs.

18 Whether I should make such an order is of course a different question. In relation to this issue firstly I agree with Advocate Heywood that the proceedings should be characterised as a hostile dispute between co-heirs and therefore are analogous to the third category of *Buckton*. These proceedings are not about administration of the estate but are, firstly, about whether Mr Goed either lacked capacity or was subject to undue influence in relation to execution of his Will in 2010. They also made allegations of desertion as well as seeking recovery of any *avances de succession*. I therefore agree that while *Re Amy* is the starting point for disputes about administration of an estate, the plaintiffs' claims go far beyond anything to do with administration. This is not simply a claim to reduce a Will *ad legitimum modem*. It is a claim raising issues of lack of capacity, undue influence on the part of Mrs Goed, desertion by Mrs Goed and recovering movable assets claimed to be *avances de succession*. The only value in these claims was if a claim in *rapport* could succeed because the estate would always be governed by a will leaving everything to Mrs Goed. If any later will was set aside on the basis of undue influence, any earlier will revived as it would be deemed not to have been revoked. Desertion was also only relevant if there was an intestacy. However as noted in the main judgment Mrs Goed was always going to elect to retain what she had received.

19 The plaintiffs attempted to bring hostile claims against Mrs Goed which have failed and which were uneconomic. In my judgment costs should therefore follow the event.

20 The alternative argued for by Advocate Wauchope would not be fair. Firstly, there are insufficient assets in the estate to meet those costs. Technically this would lead to the defendant as executor having to call on the plaintiffs and Mrs Goed as co-heirs (since the Will would be reduced *legitimum modum* and therefore the plaintiffs would receive $^1/_3$ of the estate, requiring both to contribute) because the estate would be insolvent. Such an outcome would have the result of Mrs Goed having to pay $^2/_3$ of the costs of the plaintiffs and Advocate Begg. That does not reflect the result of the application.

21 The plaintiffs did not have to bring the application or look to pursue Mrs Goed. Rather they chose to do so.

22 In this case Mrs Goed was the clear winner and should receive a costs order in her favour. I return later in this judgment as to whether that costs order should be on the standard or indemnity basis.

23 In relation to Advocate Begg, he quickly adopted a neutral role and therefore there is no reason why he should not recover his costs actually incurred as executor on the same basis that trustees are permitted to recover their costs out of trusts funds as long as he has not acted unreasonably.

24 In relation to whether a costs order in Mrs Goed's favour should be on the standard basis or the indemnity basis, the allegations of undue influence and desertion were made out of time. The justification advanced for the application was that details of the moveable estate were not provided until 12 th March, 2020. However, such an empêchment defence does not apply to the claims of undue influence and desertion. These claims could have been made against Mrs Goed by joining her to the summons at the time it was served and in respect of the desertion claim by including this on the face of the summons.

25 In relation to the claim of *rapport* I stated the following at paragraph 31 of the substantive judgment:-

> ***"31. In the present case, the plaintiffs knew of the Will, they knew of the value of Mr Goed's moveable estate and they knew that gifts of Mr Goed's immoveable estate had been made in 2010. They also had some knowledge that Mr Goed during his lifetime had other moveable assets of value."***

26 This led me to conclude at paragraph 32 that the above matters were sufficient to plead a claim in *rapport*. While I accept the plaintiffs did not have knowledge of whether lifetime gifts had been made, at the time the summons was issued, they knew enough to invite the court to draw inferences.

27 However, the alternative argument put by Advocate Wauchope, although it did not prevail, was in relation to the *rapport* claim not an unreasonable one.

28 To be persuaded to make an indemnity costs order requires something to take the case out of the ordinary. I consider it is also right to remember that this is a dispute between the children of Mr Goed on the one hand and his second wife of many years on the other. Sadly, it is not uncommon in such types of dispute for tensions and feelings to become inflamed and for there to be a lack of trust and a high degree of mutual suspicion.

29 On balance I am not therefore persuaded that this is such a case where I should make such an order. The dispute was hard fought and might be said to have been ill-judged, but I am not satisfied that it is a case where I should express displeasure or the need for a sanction by imposing indemnity costs. The plaintiffs are therefore ordered to pay Mrs Goed's costs on the standard basis, such costs to be taxed if not agreed.