Estate of Moralee

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith
Judgment Date:	20 February 2012
Neutral Citation:	[2012] JRC 38
Reported In:	[2012] JRC 38
Court:	Royal Court
Date:	20 February 2012

vLex Document Id: VLEX-792897029

Link: https://justis.vlex.com/vid/estate-of-moralee-792897029

Text

[2012] JRC 38

ROYAL COURT

(Probate)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, sitting alone**.

IN THE MATTER OF THE ESTATE OF THE LATE TERENCE JOHN MORALEE

AND IN THE MATTER OF THE PROBATE (JERSEY) LAW 1998

Between
Anthony Paul Del Amo
Representor
and
Viberts
First Respondent

Collas Crill
Second Respondent
Mrs Sakhorn Moralee
Third Respondent

and

Trevor Moralee, Tracy Sadler, Saun Moralee, Tate Moralee and Deborah Matthews
Fourth Respondents

Advocate A. J. Clarke **for the Representor**.

Advocate C. M. B. Thacker **for the First Respondent**.

Authorities

Tolley —Administration of Estates.

Trusts (Jersey) Law 1984.

Bray -v- Ford (1896) A.C. 44 .

La Cloche -v- La Cloche (1870) VI Moore N.S .

In re the estate of Florence Elizabeth Priston, widow of William Terry (1963) JJ 335 .

Wills and Successions (Jersey) Law 1993.

Probate (Jersey) Law 1998.

Probate (Jersey) Law 1949.

The Jersey Law of Property, Matthews and Nicolle.

"Has Terry lost its legs?" Richard Falle, Jersey Law Review 2002.

In re White, Pennell -v- Franklin (1898) 2 Ch 217 .

Estate of Hickman [2009] JRC 040 .

Companies (Jersey) Law 1991.

Landau -v- Anburn Trustees Limited [2007] JLR 250 .

In re Duke of Norfolk Settlement Trusts (1982) Ch 61 .

HSBC Trustees -v- Rearden & Others [2005] JRC 130 .

Bankruptcy (Désastre) (Jersey) Law 1990.

In re Rosedale Investments [1995] JLR 123 .

Goode, Principles of Corporate Insolvency Law 1990.

Insolvency Act 1986.

Halsbury's Laws of England, 4th Edition.

Abdul Rahman -v- Chase Bank CI Trust Company Limited and others [1993] JLR 156 .

Traité du Droit Coutumier de l'Ile de Jersey, Le Gros.

Administration of Estates Act (1925).

In re Rhoades (1899) 2 QB 347 .

The Attorney General -v- Jackson (1932) AC 365 .

Bankruptcy Act 1914.

Probate — representation by the executor for directions as to extent of payment of legal fees.

THE COMMISSIONER:

1 The representor applies as executor for directions as to whether and to what extent he should pay the legal fees of Viberts and Collas Crill (formerly Crill Canavan). The application raises issues as to the right of an executor to preference for the costs incurred by him in the administration of an estate and the right of an executor to remuneration where the estate is insolvent.

2 Terence John Moralee died on 5 th February, 2007, domiciled in Jersey. In his last Will, dated 6 th December, 1990, the deceased appointed an English firm of solicitors, Nalder & Son, as his executors and trustees (defined as “my trustees”). The Will contained the following charging clause:-

> *“6. ANY of my Trustees who shall be engaged in any profession or business shall be entitled to charge and be paid all reasonable and proper charges (whether professional or not) for any business transacted work done services rendered or time spent by him or her or his or her firm in or in connection with the administration of my estate or of the trusts hereof (without accounting for any commission of any kind) whether or not within the usual scope of his or her profession or business or of a nature requiring the employment of a professional or business person.”*

3 Under the terms of the Will, Deborah Matthews, one of the fourth respondents and a former

partner of the deceased, receives a pecuniary legacy and the residue is left to his three children by a former marriage and one child by Deborah Matthews who are the remaining fourth respondents. He left a widow who is the third respondent ("Mrs Moralee") who did not benefit under the terms of the Will but the Will has subsequently been reduced *ad legitimum modum* so that she is entitled to her *légitime*.

4 Following the death of the deceased, Mrs Moralee instructed Viberts and the fourth respondents instructed Collas Crill respectively to advise them on the estate. Both firms have carried out work they say was required to enable probate to be granted, but it is fair to say that Viberts carried out the lion's share. Nalder & Son renounced the executorship and the representor ("the Executor") was eventually appointed executor dative on 21 st January, 2009.

5 Viberts submitted fees to the executor in the sum of £25,001.75p and Collas Crill fees in the sum of £7,870.96p. The executor brought the representation seeking the directions of the Court on 18 th December, 2009. In his representation, he states that he is satisfied that some of the legal fees claimed by Viberts had been properly incurred through advice given with regard to the estate of the deceased, but is unsure whether the remaining legal fees claimed by Viberts and Collas Crill should be considered debts of the estate or the individual clients of those firms personally.

6 The Court convened the respondents and directed that the executor should file an affidavit setting forth a summary of the estate within four weeks, with the respondents having two weeks thereafter to reply or otherwise deemed to rest *à la sagesse de la Cour*. After eight weeks, the parties were directed to apply for a hearing date. Viberts alone have taken an active part in the proceedings thereafter with the remaining respondents resting *à la sagesse de la Cour*. The executor filed his affidavit on 3 rd March, 2010, but for reasons which were not explored at the directions hearing, the matter did not come before the Court for directions to be given until 4 th November, 2011. The matter then had to be adjourned so that counsel could carry out research into the issues raised and file written submissions which they have now done.

7 The affairs of the deceased were convoluted but suffice it to say for the purposes of this judgment, that the material assets of the estate at the date of death comprised:-

(i) A bank account with Barclays Bank plc of £116,738.63p;

(ii) Beneficial ownership of 50% of a company known as Siam Casa Limited, the remaining beneficial owner being Mrs Moralee. This company operated a restaurant business from leasehold premises in Jersey with the rental being guaranteed by the deceased and Mrs Moralee.

(iii) Beneficial ownership of 50% of a company known as Quarto Limited, the remaining beneficial owner again being Mrs Moralee. This company owns two

apartments in St Helier, one of which has been constructed on an area of land in contravention of a restrictive covenant, and furthermore would appear to encroach upon Crown land.

8 The interim estate accounts as at 3 rd March, 2010, show that no value was attributed to the shares in Siam Casa Limited, but a value of £450,000 was placed on the shares in Quarto Limited. According to those accounts, the estate was solvent at the date of death in that its assets when realised were sufficient to meet in full all the debts and other liabilities.

9 The executor has had serious difficulties in relation to both companies in which the estate has an interest. In relation to Siam Casa Limited, he and Mrs Moralee worked together to attempt to dispose of the restaurant business. In the end, the lease was cancelled as at 24 th June, 2010, with the lessor reserving its position as against the lessee and the guarantors in respect of its claim for loss of rent, damages and costs. On account of the estate's liability as co-guarantor, the rent, legal fees and other outgoings in respect of the restaurant business were paid by the estate on the basis that Mrs Moralee would indemnify it as to one half. In relation to Quarto Limited, the value of the two apartments has been seriously compromised by the problems in relation to the breach of the restrictive covenant and the encroachment.

10 As the result of these and other problems, the interim estate accounts as at 28 th October, 2011, show a potential surplus of assets over debts of only £13,335.50p. Mrs Moralee appears to be indebted to the estate in substantial sums but there is doubt about her ability to pay. In his affidavit of 31 st October, 2011, the executor said that given these issues there remained the possibility that the estate may be insolvent. Mr Clarke in his submissions to me informed me that the estate is potentially if not certainly insolvent. In view of this, the executor has indicated that he intends to make a further representation to the Court for directions as to how to proceed.

11 As for this representation, I was asked by the executor to consider the following issues of law, namely whether:-

(i) The executor is entitled to the payment of his appropriately incurred costs ahead of all other creditors of the estate in the form of a priority.

(ii) The actions of Messrs Viberts and Collas Crill should be deemed “costs of administration” of the estate, and

(iii) If the actions of Messrs Viberts and/or Collas Crill are considered “costs of administration” either in full or in part, the executor is entitled to take his costs as a priority ahead of the costs of Viberts and Collas Crill.

12 I also raised the issue of whether an executor's right to remuneration would survive the

insolvency of the estate.

13 It is helpful to separate out the potential liabilities of an estate into three categories, firstly the debts of the deceased due at the date of his death, secondly the costs and expenses incurred by an executor in the proper performance of the executor's duties, which I will refer to as “the costs of administration”, and thirdly, the professional charges of an executor, which I will refer to as “the executor's remuneration”.

The Executor's Remuneration

14 The role of an executor is very similar to that of a trustee. Quoting from Tolley – Administration of Estates, paragraph A8.5:-

> ***“Personal representatives and trustees***
>
> ***A8.5 For many purposes a personal representative can be equated with a trustee, being subject to much the same burdens and liabilities.*** During the period of administration, however, the residuary beneficiary has no interest in the assets of the estate but possesses merely a chose in action, namely a right to compel due administration of the estate (see *Stamp Duty Commissioner (Queensland) -v- Livingston* [1965] AC 694 . ***Once the residue has been ascertained the position changes and the personal representative then holds assets on trust for the beneficiary whether or not there has been a formal assent to himself (or other persons) as trustees.*** Precisely when the residue is ascertained is a question of fact but it is not necessary for all liabilities to have been discharged, provided that funds have been set aside to meet those liabilities (*IRC -v- Smith* [1930] 1 KB 713; *Corbett -v- IRC* [1938] 1 KB 567).

15 An estate would come within the definition of a trust under Article 2 of the Trusts (Jersey) Law 1984, namely that a trust exists where a person (known as a trustee) holds property (of which the person is not the owner in the person's own right) for the benefit of any person (known as a beneficiary). However, the provisions of that Law do not apply to executors acting as such, pursuant to the saving provisions under Article 59(4).

16 All the same, an executor is in a fiduciary position and like a trustee, subject to the rule that he or she is not allowed to derive any personal advantage from the administration of an estate that is not expressly authorised. In the words of Lord Herschell in *Bray -v- Ford* (1896) A.C. 44 at 51:-

> ***“It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.*** It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is

danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

17 The status of an executor under Jersey law was explained in the Privy Council decision of *La Cloche -v- La Cloche* (1870) VI Moore N.S. at page 400 in this way:-

> ***"Under the maxim 'le mort saisit le vif' the children of a testator are from the moment of the death the true owners of that part of the moveable estate which belongs to them, but it is equally true that the law makes the executors les procureurs légaux of the heir, which procuration is irrevocable until l'accomplissement du testament, and in this character the law gives the executors full right and title, d'eux memes, that is, in their own names, to take possession of and recover and receive the whole of the moveables for the purposes of administration ….*** Subject to the right of the heir to interpose and demand possession from the executors by depositing with them the full amount of the debts and other charges of administration, and of the bequests made by the Will, if at least there be such a custom in the island of Jersey, as there seems to be in the Coutume Réformée of Normandy, and in the Coutumes of Orléans and Paris."

18 Notwithstanding the fiduciary nature of the role of executor, under Jersey law and by ancient custom the executor had the right to take the " *année de jouissance"* (the income for a year and a day), unless other provision is made for his remuneration. That right derived from the status the executor enjoyed as legal procurator of the principal heir.

19 The " *année de jouissance"* was considered by the Royal Court in the case of *In re the estate of Florence Elizabeth Priston, widow of William Terry* (1963) JJ 335, which confirmed the following principles:-

(i) That the executor is the legal procurator of the heir;

(ii) That the executor has the lawful possession (but not ownership) of the personal property of the deceased for the year of administration;

(iii) That as the representative of the heir, the executor has the right to the *année de jouissance* unless the Will makes explicit provision of the remuneration of the executor.

20 Radical changes to the customary law position were brought about by the Wills and Successions (Jersey) Law 1993 ("the Wills and Successions Law"). Article 12 expressly abolished the " *année de jouissance"* and Article 14 abolished the right of the principal heir to demand possession of the moveable estate from the executor on depositing with the executor the full amount of the bequests made under the Will, together with the debts and

other charges of the administration.

21 Under the Probate (Jersey) Law 1998 (as under the Probate (Jersey) Law 1949), a grant is required to recover the movable estate in Jersey (Article 19(1)) and it is a criminal offence to do so without a grant (Article 23) so that even the principal heir must obtain a grant. The apparent conflict between the two "saisines", that of the principal heir, arising upon the death of the deceased, and that of the executor, deriving from the issue of the grant, is explained by what Matthews and Nicolle in The Jersey Law of Property at paragraph 8.30 describe as ***"the legal fiction"*** that the executor is the legal procurator of the principal heir.

22 In his article "Has Terry lost its legs?" Jersey Law Review 2002, page 41, Richard Falle argues that these changes make it clear that the executor can no longer claim to be the legal procurator of the principal heir and is simply the particular person appointed by virtue of the Will or by the Court. Mr Thacker submitted that the analysis in Terry is still the correct statement of law but either way, it is clear that the executor's remuneration is now dependent on appropriate authority in the Will and in the absence of such authority the executor must, like all fiduciaries, act gratuitously.

23 The executor in the instant case does have authority under the Will of the deceased to charge but does that authority remain effective if the estate is insolvent? Counsel were unable to find any authority on the point under Jersey law. The position under English law is clear. In the case of *In re White, Pennell -v- Franklin* (1898) 2 Ch 217, Chitty LJ explained the position in this way:-

> ***"The law is that, in the absence of a direction to the contrary, a trustee must give his services gratuitously.*** The declaration made by the testator is bounty on his part. No one can claim the bounty until the creditors are satisfied. The principle applies not only to solicitor –trustees, but to all trustees, to accountant-trustees, to architect-trustees, and surveyor-trustees; in fact, to all professional trustees."

24 The logic of this position seems to me inescapable. The authority to charge remuneration comes from the testator. He can give that authority to the extent that he has free funds to do so, but such an authority cannot be effective as against his creditors if the estate is insolvent. He cannot impose a right to remuneration in favour of his appointee payable out of assets in which the creditors alone have an interest.

25 Insolvency brings about a shift in focus towards the interests of the creditors analogous to that seen in company law when a summary winding up, on insolvency, becomes a creditors winding up. In *Estate of Hickman* [2009] JRC 040, which was concerned with an insolvent estate, the executor convened the creditors to a directions hearing in order for the Court to approve a procedure to enable him to deal with the competing claims of the creditors. Consistent with the principle set out above, the executor did not rely on any charging provisions within the Will, but on a fresh authority approved by the Court, having heard the

creditors.

26 Mr Clarke sought to distinguish the position of the executor in the instant case with the professional executor in *Re White*, *Pennell* on the grounds that the executor has been appointed executor dative and has undertaken executorship work on that basis but has not been appointed solicitor to the estate – a third party contractual relationship that would require terms of engagement between him and the estate. Mr Thacker submits, and I agree, that there is no such distinction. The executor is a solicitor and is the sole executor of the Will. Article 13(4) of the Probate (Jersey) Law 1998 provides that where probate is granted to an executor dative, the Will of the deceased will be performed and observed in the same manner as if the probate had been granted to an executor nominate. The principle, as enunciated by Chitty LJ applies to the executor as it applies to all professional executors.

27 All personal representatives have to monitor the financial position of the estate and that imposes no greater burden upon them than that imposed upon a liquidator or directors of a company under Article 151 of the Companies (Jersey) Law 1991, where, under pain of criminal penalty, a number of steps have to be undertaken to convert a summary winding up into a creditors' winding up when they “form the opinion” that the company will be unable to discharge its liabilities within six months.

28 In the case of an estate, when the personal representatives form the opinion that the estate is insolvent, the estate should thereafter be administered as such. A professional executor in such an estate cannot continue to charge against assets in which the creditors alone have an interest without their authority, failing which the remedy of the executor is to apply to the Court for directions. The Court, in my view, would be cognisant of the need for the estate to be competently administered and would not ordinarily expect a professional executor to provide his or her services gratuitously.

29 It is well established that the Court has an inherent power to allow remuneration in a proper case. The Court exercised that inherent jurisdiction in *Landau -v- Anburn Trustees Limited* [2007] JLR 250 in the case of a trustee. The Court (at paragraph 19) saw no reason to consider the supervisory jurisdiction of this Court was any narrower than that possessed by the Chancery Division of the English High Court, explained by Fox LJ in the case of *In re Duke of Norfolk Settlement Trusts* (1982) Ch 61 at 78:-

> ***“When the court authorises payment of remuneration to a trustee under its inherent jurisdiction it is, I think, exercising its ancient jurisdiction to secure the competent administration of the trust property just as it has done when it appoints or removes a trustee under its inherent jurisdiction.”***

30 In authorising an executor of an insolvent estate to be remunerated, the Court would be securing the competent administration of the estate and although it is a power to be exercised sparingly (paragraph 21 of *Landau*), it would ordinarily be in the interests of the

creditors for the estate to be wound up by a professional executor properly remunerated. The Court has in recent years recognised the need for professional skills in the management and administration of trusts (see, for example, *HSBC Trustees -v- Rearden & Others* [2005] JRC 130) and that has now been recognised in the proposed Trusts (Amendment No 5)(Jersey) Law 201—which will provide that where the terms of a trust are silent as to remuneration, a professional trustee shall be entitled to reasonable remuneration for services that the professional trustee provides.

31 I therefore conclude that under Jersey law an executor, like all fiduciaries, has to give his, her or its services gratuitously unless authorised by the will and such authority is not effective where the estate is insolvent. In the event of insolvency, such authority can be conferred by the creditors of the estate or by the Court.

32 I have not been addressed by counsel as to the test for insolvency in this context. The test for insolvency under the Bankruptcy (Désastre)(Jersey) Law 1990 is the cash flow test, namely the inability of the debtor to pay his, her or its debts as they fall due. That test was considered by the Court in the case of *In re Rosedale Investments* [1995] JLR 123 at page 132, from which, drawing from *Goode, Principles of Corporate Insolvency Law, 1990* at pages 26–27, it is clear that it is a test applied to individuals or companies in the on-going conduct of their activities or business. The fact that the debtor's assets may exceed the liabilities on the balance sheet test is generally irrelevant. If the debtor cannot pay the debts as they fall due then the creditors cannot be expected to wait until assets are realised. In an estate, however, the affairs of the deceased are being wound up finally and creditors of the estate can be expected to wait until the assets are realised. The fact that the assets may exceed the liabilities is therefore relevant. In my view the balance sheet test would here seem more appropriate. I note that it is the test for insolvency of an estate under section 421 of the Insolvency Act 1986, namely that the estate of a deceased person is insolvent if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject.

Costs of Administration prior to grant

33 Both counsel are agreed that the costs of administration can include work carried out prior to the grant being issued, provided that such work does not constitute intermeddling for the purposes of Article 23(1) of the Probate (Jersey) Law 1998. Pursuant to Article 23(2) it is not intermeddling to place in safe custody or otherwise to preserve the movable estate. The executor accepts in principle that work which had been done for the benefit of the estate should form part of the costs of administration but had difficulty in distinguishing the work done by Viberts and Collas Crill for the benefit of the estate and for the benefit of their respective clients.

34 Counsel referred to English law and the doctrine of relation back (see Halsbury's Laws of England, 4th edition, volume 17 paragraphs 735 and 736). In order to prevent injury being done to a deceased person's estate without remedy the English courts have adopted the doctrine that upon the grant being made the administrator's title relates back to the time of

death. The doctrine applies to render valid dispositions of the deceased's property made before the grant, when it was shown that those dispositions were for the benefit of the estate or were made in due course of administration. The disposition need not have been made by the person who ultimately obtains the grant provided it is ratified by the administrator on obtaining the grant.

35 Although not expressly referred to, the doctrine was applied in my view in *Abdul Rahman -v- Chase Bank CI Trust Company Limited and others* [1993] JLR 156 where the personal representative of an estate with the approval of the Court adopted work which was for the benefit of the estate that had been carried out by a firm of English solicitors before his appointment.

36 Mr Thacker submits that because the nominated executors were reluctant to become involved in any way with the estate in the interval between the death of the deceased in February 2007 and the appointment of the executor dative in 2009 the administration of the estate was in effect undertaken by Mrs Moralee with Viberts' assistance. By virtue of the reduction of the Will, Mrs Moralee was an heir and the work she undertook had the tacit approval of the children of the deceased, which included the principal heir.

37 I accept the doctrine as applying under Jersey law, and that the executor is able to ratify work carried out by Viberts and Collas Crill in the administration and for the benefit of the estate prior to his appointment provided it does not constitute intermeddling. It is clear that work was undertaken in the locating of the Will, advising on domicile (inter alia) and arranging for the appointment of an executor dative and that work properly forms part of the cost of the administration of the estate if ratified by him. Such work would not in my view constitute intermeddling.

38 Although Viberts and Collas Crill have been convened directly to the proceedings, counsel accepted that as a matter of contract they were retained by their respective clients who were responsible for the discharge of their fees and it is the clients that are seeking reimbursement from the executor. I also agree with Mr Clarke that the costs submitted require careful scrutiny to ensure that the estate only reimburses the clients' costs incurred for the benefit of the estate. The executor does in principle ratify the work undertaken but needs assistance in ensuring that it was work carried out in the administration and for the benefit of the estate and that the charges are reasonable. He is entitled to the assistance of the Court in this respect and I agree to have the bills submitted by Viberts and Collas Crill referred to the Judicial Greffier. Directions will be issued when this judgement is handed down to put this into effect.

Executor's priority

39 Jersey law has always recognised a right of preference for certain creditors in an insolvency. Le Gros in his Traité du Droit Coutumier de l'Ile de Jersey, in the chapter *Du Droit de Préférence sur le Meuble dans les Faillites* says this:-

> ***"Les biens d'un débiteur sont le gage commun de ses créanciers; toutefois les créances préférentielles ont un avantage sur les autres créances…*** .
>
> ***La créance la plus privilégiée de toutes est celle des frais qui ont été encourus dans le cours de la faillite.*** Ces frais étant indispensables à la conservation et à la réalisation des biens, les créanciers profitent du produit de la vente."

40 *Le Gros* then identifies a number of preferential debts including frais funéraires, Médecin, dernière maladie, salaries et gages and rât paroissial.

41 At page 344, *Le Gros* then addresses the issue of the order of payment if the assets of the debtor are insufficient to pay all of these preferential debts:-

> ***"La jurisprudence n'a pas tranche définitivement cette question.*** Elle s'est occupée de la concurrence entre deux réclamations de nature différentes sans toutefois établir une règle générale de l'ordre de paiement .
>
> ***A notre avis, cet ordre peut être établi comme suit:***
>
> ***Frais de la faillite*** .
>
> ***Frais funéraires du défunt*** .
>
> ***Les frais de médecin encourus pendant la dernière maladie …*** .
>
> ***Salaires et gages pour la préférence accordée."***

42 It is clear from Le Gros' reference to funeral expenses and medical costs of the last illness that he was addressing insolvency in broad terms and was including insolvent estates. Furthermore, it is clear that in his view the costs of administration have a preference over all other preferred claims.

43 The preferential position of the costs of administration is confirmed by Article 15 of the Wills and Successions Law which provides as follows:-

> ***"15 Costs of administration***
>
> ***The costs of administration of the movable estate of a deceased person shall be paid out of the gross movable estate unless the deceased person's will provides otherwise."***

44 In my view, this puts it beyond doubt that the costs of administration are to be preferred over all other claims. This is consistent with the position in England under the

Administration of Estates Act (1925), superseded by the Insolvency Act 1986, where it is stipulated that the reasonable funeral, testamentary and administrative expenses have priority over the preferential debts listed in the Act.

45 What Article 15 and *Le Gros* do not address is whether an executor has preference for the costs of administration an executor has incurred over the costs of administration incurred by others which the executor has ratified; in this case, by the fourth respondents through Viberts and Collas Crill.

46 There would appear to be no Jersey authority on the point but English law recognises a right of retainer over the assets in the hands of an executor. In the case of *In re Rhoades* (1899) 2 QB 347, Lindley, MR explains the right of retainer in the context of a lay executrix who was a creditor of the estate in this way:-

> ***"It is true that an executor with a right of retainer has not all the rights of a secured creditor; but his right to retain is a right to withdraw from the assets in his hands and distributable amongst himself and other creditors of equal degree enough to pay himself in full.*** His right to retain does not extend to assets which he has not got in and which are not in his possession, nor to equitable assets; but no question as to them arises here. His right extends both in law and in equity to all legal assets which he has in his hands, and there is nothing in s. 125 to deprive him of this right. The judgment of Vaughan Williams J. in the case of *In re Williams* ***supports this conclusion."***

47 The personal representative's right of retainer was considered by the House of Lords in *The Attorney General -v- Jackson* (1932) AC 365, where it was held that a personal representative's right of retainer could not be exercised so as to defeat debts which were given priority by the Bankruptcy Act 1914. Lord Tomlin said this:-

> ***"The right to retain or to prefer has not been altered, but the degrees in which debts are ranged have been changed, and it is in the field as so changed that the rights in question must to-day operate.*** The result is that all debts fall within one or other of two degrees. There are no other degrees where the Act of 1925 applies. If, therefore, a legal personal representative is a creditor for a debt in the higher of the two degrees he can retain against all creditors of whichever degree they may be. If however, his debt falls within the lower degree he can retain against all creditors of such degree, but against none in the higher degree."

48 Mr Clarke submitted that there was an overriding public policy issue for the Court to consider. In the circumstances where third parties were undertaking actions and incurring costs of administration without taking the oath of executor, great care must be taken in dealing with remuneration of the appointed and sworn executor. A policy that provides the reimbursement of third parties on equal footing with that of the executor serves, he said, to diminish the import and status of the role of executor as it offers a third party the comfort of

payment without the onerous obligation under the oath, and also serves as a substantial deterrent to persons being prepared to take the oath.

49 I accept that under Jersey law, personal representatives enjoy the same right of retainer as exists under English law. I agree with Mr Clarke that it is right in principle that the personal representatives who undertake the role are protected in this way. Costs incurred by the executor and the costs incurred by the fourth respondents are all costs of administration and therefore of equal degree. However, the executor has a right to withdraw from the assets in his hands enough to pay himself in full.

Summary

50 Returning to the questions of law posed to me, I would summarise the position as follows:-

(i) The costs of administration of the estate take priority over all other claims in an estate.

(ii) In principle, work carried out by Viberts and Collas Crill in the administration and for the benefit of the estate prior to the grant are costs of administration if ratified by the executor.

(iii) The executor has a right of retainer against creditors of equal degree entitling him to withdraw funds from the assets in his hands, paying himself in full for the costs of administration he has incurred.

(iv) The authority in the Will for the executor to be paid professional remuneration is not effective if the estate is insolvent.

51 The date at which the estate in this case became insolvent (if it is insolvent) is a matter of fact which I cannot decide as a single judge. However a further point of practical importance arises. Mr Thacker submits that there is no authority to say that an executor's remuneration precedes or even ranks equally with the creditors. Following *Re White*, *Pennell* he says the charging clause is bounty on the testator's part and in the event of insolvency would rank for payment with the legatees and below the creditors. In my view that reflects the position for fees charged after the point at which an executor forms or should have formed the opinion that the estate is insolvent. Up to that point an executor's remuneration is authorised and therefore forms part of the costs of administration of the estate over which the executor is entitled to exercise a right to retain.

52 I appreciate that this decision may create difficulties for the executor, who has carried out a great deal of work in good faith. He has intimated that he will be seeking further directions and it will be open to him to apply to the Court for authority (should he indeed form the view that the estate is insolvent) to charge for his fees from the date of the insolvency to the completion of the administration.

53 It seems to me that in most cases it would be appropriate for personal representatives to apply to the Court for directions whenever they form the opinion that an estate is insolvent and convening the creditors to that hearing. It reflects the fact that the estate is now being administered for the benefit of the creditors and it allows them to be heard on any directions then given. The absence of a statutory regime for the administration of insolvent estates means that personal representatives must make greater use of their ability to seek directions from and the protection of the Court. The Court will be mindful of the public interest in having estates competently administered and will not expect professional persons acting properly to provide their services gratuitously.