

In the matter of the Representation of Kenneth James Mackinnon (2009) JRC 218

This case considered for the first time the extent of the jurisdiction of the Royal Court to penalise an executor or a trustee by holding them personally responsible for the costs of an administrative action, and the relevant test to be applied in considering the imposition of such penalties.

Facts

The case concerned an application by the legatee of an estate (the “**representor**”) for an order that the costs of a representation brought by the representor concerning the conduct of the executor be paid by the executor and that the executor be prevented from claiming his costs in respect of the representation from the estate. However, the decision will be of interest to trustees as the Court considered that no material distinction should be drawn in the context of the costs of an administrative action between the position of an executor and the position of a trustee as both owe fiduciary duties, either to the legatees or to the beneficiaries as the case may be.

Having established that the Court had a broad discretion to award costs incidental to proceedings in the Royal Court under Article 2 of the Civil Proceedings (Jersey) Law 1956 and a similar broad discretion under Article 53 of the Trusts (Jersey) Law 1984 in respect to the payment of costs out of trust property, three issues were identified by the Court for determination:-

- Should an order for costs be made against the executor personally?
- Should it be on an indemnity basis?
- Should the executor be prevented from recovering his own costs in relation to the representation out of the estate?

Decision

Firstly, as to whether an order for costs should be made against the executor personally, the Court considered that this question was discretionary. The Court stated that an executor or trustee has a margin of discretion and must be free to conduct himself, and to take decisions, within the parameters of a reasonable framework as he sees fit.

The Court left for another day consideration as to whether the margin of discretion for a professional executor or

trustee who is being remunerated should be more narrowly circumscribed than that of an unremunerated executor or trustee.

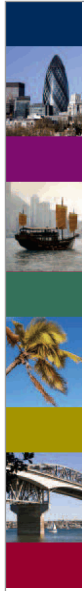
However, the Court stated that an unremunerated executor or trustee will not lightly be ordered to pay the costs of litigation if he has made an innocent mistake or acted in a manner which has *ex post facto* been shown to be misguided or even careless. At the same time, a legatee or beneficiary is entitled to expect a reasonable level of competence, proportionality and good sense from the person entrusted with protecting his interests.

Therefore, the Court held that an element of intransigence or unreasonableness was required before an executor can be held liable to pay the costs of a legatee in an administrative action, but that it is not necessary to show fraud or dishonesty. The test is that the executor’s conduct must have crossed the threshold of reasonably justifiable behaviour.

Secondly, as to whether costs should be awarded on a standard basis or indemnity basis, the Court relied upon the leading authority of Dixon-v-Jefferson Seal [1998] JLR 47 wherein the general principle was endorsed that an award of indemnity costs requires “*some special or unusual feature*” or “*a particular reason for departing from normal practice.*”

In Ogier Trustee (Jersey) Limited-v-CI Law Trustees Limited and another [2006] JRC 158, Deputy Bailiff Birt (as he then was) stated that the normal order where a trustee fails in its duty should be an order for indemnity costs, the reason being that it is hard to see why costs incurred because of a breach of a fiduciary duty owed by a trustee should fall on the beneficiaries. Such a breach would constitute special or unusual circumstances.

Thirdly, as to whether the executor should be prevented from recovering his own costs in relation to the representation out of the estate, the Court stated that, as matter of general principle, an executor is entitled to recover the costs of the administration from the estate and, therefore, if an executor brings an application to the Court regarding the administration of the estate, he will ordinarily be able to recover the costs of such an application from the gross moveable estate.



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However, if an executor is ordered to pay the costs of an administrative action personally, it is likely to follow that he will be deprived of his usual indemnity from the estate. The Court stated that there would be no logic in ordering an executor to pay the costs of a legatee, while at the same time allowing the executor to recover his costs from the gross estate at the expense (in whole or in part) of that same legatee.

On the facts of the case, the Court considered that there had been a breach of fiduciary duty by the executor, but that the breach of duty was not so grave as to justify the imposition of indemnity costs. The executor was, therefore, ordered to pay the representor's costs on the standard basis from the date that "*his conduct crossed the threshold of what was justifiable, proportionate and reasonable*" and, furthermore, the executor was deprived of an indemnity for his own costs from the estate.

Comment

This case is helpful for two reasons. Firstly, because of the useful comparison drawn by the Court between the analogous offices of executor and trustee, and, secondly, for any person, professional or otherwise, undertaking the role of executor.

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