In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014 No: 205

IN THE MATTER OF THE ESTATE OF PQR, DECEASED

RULING ON COSTS

(in Camera)

Date of hearing: September 25, 2015
Date of Ruling: November 6, 2015

Mr. Ben Adamson, Conyers Dill and Pearman Limited, for the Plaintiff ("the Executor")
Mr. David Kessaram, Cox Hallett Wilkinson Limited, for the 1st Defendant ("W")
Ms. Fozeia Rana-Fahy, MJM Limited, for the 2nd Defendant ("D")

Introduction and Summary

1. On August 6, 2015, on the application of the Executor, I determined three issues arising under the Will.

2. The costs hearing took place on September 25, 2015. It was fully argued with reference to various authorities. The appropriate costs Order was agreed (namely each beneficiary would have their costs payable out of the estate) save as regards one aspect of Issue 1, which involved an attack by the testator's daughter (D) on the legal validity of a gift of interest in real estate to her step-mother (W). The Originating Summons only envisaged (as regards Issue 1) the construction of the relevant testamentary provisions with a view to determining whether the purported gift to W of an interest in real estate was operative;

    (a) according to the relevant testamentary terms; or

(b) as a gift of personalty which was to be shared equally between the two beneficiaries.

3. On balance, I accept Mr. Kessaram's submission that the rejected illegality arguments went beyond the scope of assisting the Executor to resolve the difficult questions of construction set out in its Originating Summons. D's arguments on this extraneous matter were, in substance, designed to achieve a practical result in terms of distribution which would have thwarted the Testator's clear intentions.

4. Bearing in mind that this Court last year struck down a clause in the Will designed to prevent such attacks, I am bound to find that D acted unreasonably in seizing the opportunity of participating on the Executor's Originating Summons designed to facilitate the proper administration of the Testator's Will, in accordance with his expressed intentions, to launch an unmeritorious attack on the validity of a gift to W, her step-mother. This affords grounds for displacing the usual rule on a construction Summons (as regards this particular costs item i.e. the costs of arguing the illegality issue) that all parties' costs should be payable out of the estate.

5. In the exercise of my discretion, I find that D should pay W's costs for this adversarial aspect of the application to be taxed if not agreed on the standard basis. As the Executor essentially adopted a neutral position and is entitled to its costs out of the estate in any event, no question of making an adverse costs order in the Executor's favour properly arises.

Applicable legal principles

6. Mr. Kessaram placed five authorities before the Court: *In re Buckton* [1907] 2 Ch D 406; *In re Hall-Dare* [1916] 1 ChD 272; *In re Blake* [1885] 29 Ch D 272; *Croggan-v-Allen* [1882] 22 Ch D 101; and *Alsop Wilkinson* v Neary [1996] 1 WLR 1220.

7. He submitted that the case fell into the third of the three costs categories established by Kekewich J in *In Re Buckton* and described by him ([1907] 2 Ch D 406 at 415) as follows:

> "*In this class of case 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 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, 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.*"

8. Alternatively, W's counsel submitted the illegality argument fell into the first of Lightman J's three categories of dispute in *Alsop Wilkinson-v-Neary* [1996] 1 WLR 1220 at 1223-1224:

> "*Trustees may be involved in three kinds of dispute. (1) The first…is a dispute as to the trusts on which they hold the settlement. This may be 'friendly' litigation involving e.g. the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or 'hostile' litigation e.g. a challenge in whole or in part to the validity of the settlement by the settlor….The line between friendly and hostile litigation, which is relevant to the incidence of costs, is not always easy to draw: see In re Buckton, Buckton-v-Buckton [1906] 2 Ch 406…*"

9. Ms Rana-Fahy argued that the illegality issue did not fall into the hostile litigation category. She referred the Court to *Hamza-v- Subair and James* [2011] Bda LR 23 as an example of a similar dispute between a step-mother widow and a daughter of a contentious nature where the Court ordered the costs of all parties to come out the estate. In that case an issue did arise as to whether the foreign widow was entitled to receive a gift of property without a permit under the Bermuda Immigration and Protection Act 1956. But this question only arose as a background issue. The Court was primarily required by the widow's own application to construe a related power to sell the Bermuda property and buy a new property. The controversy was whether such new property could be overseas property or was limited to Bermudian property. The relevant application in *Hamza* was clearly distinct from a hostile one as it was explicitly designed to uphold rather than invalidate the relevant testamentary disposition.

10. D's counsel further submitted that the illegality issue properly fell, for costs purposes, within the ambit of the Executor's Originating Summons because it was so closely connected with the questions of interpretation placed before this Court. She relied in this regard on the following statements of Sir Robert Megarry in *In re Gibson's Settlement Trusts* [1981] 1 Ch 179 at 187E-G:

> "*A wide-ranging series of disputed matters may be followed by a writ or originating summons which raises only a few of the issues; or a narrow dispute may be followed by proceedings which seek to resolve wider issues as well. How far does the ambit of the litigation extend or restrict the matters occurring before the issue of the writ or originating summons which may be included in the taxed costs on the common fund basis?*

> *If the proceedings are framed narrowly, then I cannot see how antecedent disputes which bear no relation to the subject of the litigation could be regarded as being part of the costs of the proceedings. On the other hand, if these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then I cannot see why the taxing master should not be able to include these costs among those which he considers to have been 'reasonably incurred'*".

11. This *dictum*, which initially appears relevant here, is in fact concerned with a quite different costs issue. There is a fundamental distinction between the issue of what costs may or may not be said to have been reasonably incurred for taxation purposes, on the one hand, and the issue of whether or not a particular matter raised in trust proceedings is hostile or non-hostile in character or not.

Application of legal principles to the factual matrix

12. The contention that a significant gift to W was ineffective because of contraventions of the Bermuda Immigration and Protection Act 1956 was not only hostile, but also invited the Court to decide an issue which could only properly be decided in the context of freestanding proceedings to which the other parties to the legal instruments in question were joined as parties.

13. Although I accepted as valid D's counsel's point that the Court had a duty not to assist in the enforcement of an illegal transaction in clear cases of illegality, I also found that the issue of illegality was not properly before the Court for determination and the purported illegality was far from clear: *Re Estate of PQR (Deceased)* [2015] SC (Bda) 53 Civ (6 August 2015), paragraphs 19, 26. As the effect of the illegality argument would have been to invalidate any gift at all, this argument was not advanced in support of D's personal entitlement interests. It was a gratuitous attack on a gift in the Will in favour of W. This was precisely the type of attack the Testator intended should not occur and attempted to forestall.

14. Clause 10 of the Will contains a 'no contest clause' in the following terms:

> "...
>
> *If my daughter or her affiliates initiate any litigation of any type relating to this will or to my wife's ownership of the* [AB] *property, or to my wife in general, then she shall forfeit this cash legacy and investment legacy, and shall receive no benefit from this will."*

15. I have previously held this clause was invalid on the *in terrorem* ground: re *PQR Deceased* [2014] Bda LR 116. As a matter of construction, such a clause is considered to be merely a 'threat' in the absence of a provision expressly providing for a gift over as a consequence of a breach of the clause. Following upon this finding, in my judgment, the clause may nevertheless be taken into account at the costs stage as indicative of the Testator's wish that the estate not be depleted by hostile challenges on the part of D.

16. My alternative finding in relation to this clause in the same Ruling was as follows:

> "*50. Had I not been required to find that clause 10 was ineffective altogether through the application of the in terrorem rule, I would have adopted the above approach to construing the clause, which both counsel in substance commended to the Court. It was adopted by way of fall-back position by D's counsel. But Mr. Kessaram affirmatively submitted that D should be permitted (a) at a minimum to enforce her rights under the Will, and (b) at most to make only those adverse challenges which were asserted in good faith or for good cause. I would have construed clause 10 as merely restricting D's right to unjustifiably commence or participate in the prohibited classes of litigation. This would include applications for the due administration of the Will and any other good faith adverse challenges for which there was good cause.*"

17. The Court ruled that the no contest provisions of clause 10 of the Will were not effective, in broad terms, with a view to enabling D to participate in the hearing of the Originating Summons. This was so that she might advance arguments in her commercial interests with a view to assisting the Court to properly interpret controversial aspects of the Will. This Ruling was not intended to facilitate applications or arguments which rode roughshod over the Testator's wish to avoid unwarranted attacks on gifts to W, which attacks he clearly anticipated.

18. The application of the recognised legal principles on costs in relation to hostile applications combined with the Testator's wishes reflected in the no contest provisions of the Will combine to make it clear that D should be ordered to pay to W the costs attributable to her unmeritorious attack on the validity of the gifts to W of the testator's interest in Bermuda real estate.

Dated this 6th day of November, 2015 _____

IAN R.C. KAWALEY CJ