SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 26

ABE-A297-18

JUDGMENT OF SHERIFF PHILIP MANN

in the cause

THE PARACHUTE REGIMENT CHARITY

Pursuer

against

DEBORAH LOUISE HAY

Defender

Act: Parratt, QC
Alt: Simpson, QC

Aberdeen, 26 March 2019

The sheriff, having resumed consideration of the cause, Ordains the defender to lodge in process, and at the same time to intimate to the pursuers, an accounting of her intromissions to date with the estate of the late Gregory William Hughes and that within 6 weeks from the date hereof; Determines, without making an order at this stage in advance of settling the question of sanction for the employment of counsel, that it is appropriate to find the defender personally liable to the pursuers for the expenses of the cause to date; continues the cause to the procedure roll of 16 May 2019 at 10:00 am to settle the foregoing question and to determine further procedure.

Note

Introduction

[1] This is an action of count reckoning and payment at the instance of one of the residuary beneficiaries on the estate of the late Gregory William Hughes against the defender as executor of the deceased. This procedure roll hearing followed upon my judgment in favour of the pursuers after debate on the question of the interpretation of the deceased's Will so far as relating to a particular legacy. In that judgment I found, contrary to the position adopted by the defender, that the legacy of the deceased's interest in a particular property had adeemed.

[2] I take the opportunity to confirm that the doubts expressed at the end of my judgment about the action not having been intimated to the legatee and to the other residuary beneficiary have been resolved. Mr Parratt directed me to correspondence within the productions from which it is clear that both of these parties were made aware of the action; that it might have certain legal consequences in relation to the distribution of the estate; and that they should seek their own independent legal advice in relation to their interest.

[3] Parties were agreed that the defender should now be ordained to lodge an accounting of her intromissions as executor with the estate. I have made the necessary order.

[4] Parties were also agreed that the pursuers were entitled to an award of expenses. The defender's position was that only the expenses of the debate should be awarded at this juncture and that the award should be against the defender as executor. The pursuers' position was that the award should be for the whole expenses of the cause to date and that the defender should be found personally liable.

The Defender's Submissions

[5] Mr Simpson, senior counsel for the defender, maintained that the usual position following a debate which did not result in a final disposal of the cause was that only the expenses of the debate would be awarded and that expenses would otherwise be reserved. An award of the whole expenses of the cause to date would be premature. He did not press the point with any great vigour and made no reference to authority.

[6] As regards the basis upon which the defender should be found liable, Mr Simpson's position was that the defender was entitled to relief from the deceased's estate and thus that the award should be against her as executor. There was no realistic basis for suggesting that the defender had acted other than in good faith, honestly and reasonably. The need for her to defend these proceedings arose out of an ambiguity in the deceased's Will.

[7] The defender had obtained an opinion from Mr Kerrigan, a solicitor acknowledged as having expertise in executry matters. That opinion was that the legacy was inept and, in any event, that it had adeemed. The defender had sought a second opinion, from Mr Simpson himself, which was to the opposite effect. There was nothing unreasonable in seeking that second opinion. Having received it, there was nothing unreasonable in the defender defending this action so that the court would have to decide as to the validity of the legacy and the question of ademption.

[8] Mr Simpson took me to certain passages in the text book Wilson and Duncan *Trusts, Trustees and Executors* and to the cases cited therein. I mention those most closely related to the issue at hand. At paragraph 30-01 the authors stated that a trustee has a right to be reimbursed in respect of all expenses properly incurred by him in the administration of the trust estate. At paragraph 30-14 they stated that trustees are entitled to reimbursement of

the expenses of litigation properly incurred. They quoted Lord Ardwall at page 238 in the case of *Wemyss* v *Kennedy* (1906) 14 SLT 237 where he said:

> "I think that trustees are, as a rule, very much harassed and bullied by beneficiaries and courts of law and everybody else, but fortunately they have this decided in their favour that if they expend money in litigation in the discharge of their duty as trustees, they are entitled to take their expenses out of the trust if they are successful, or even if they are unsuccessful."

At paragraph 30-15 they stated that the right to reimbursement is not dependent upon success in the litigation. They quoted Lord McLaren at page 893 in the case of *Gibson* v *Caddall's Trustees* (1895) 22R 889 as saying:

> "It is always understood that where trustees, acting in the discharge of their duty, litigate in the name of the trust-estate and for the protection and interests of the trust, they are entitled to charge the trust with the account of expenses, upon the principle that representative persons are entitled to the costs necessarily incurred in the interests of their constituents. It would, I think, be unfair that their right should depend upon the circumstance of their being successful in the litigation."

At paragraph 30-18 they stated, under reference to the case of *Buckle* v *Kirk* (1908) 15 SLT 1002, that if trustees enter into a litigation on counsel's advice that is normally enough to entitle them to reimbursement. At paragraph 30-27 they stated that if the difficulty giving rise to the litigation was created by the testator himself, the expenses should be borne by the estate. They quoted Lord Cowan at page 713 in the case of *Wright's Trustees* v *Wright* (1870) 3 M 708 where he said:

> "Where the question arises as to the meaning of the trust-deed, and is fairly brought before the Court, we are entitled to deal with the expenses as we would in ordinary actions, and make the testator's estate pay for the ambiguities to which the trust-deed has given rise."

Mr Simpson then referred me to the Stair Memorial Encyclopaedia *Trusts, Trustees and Judicial Factors* (2016 Reissue), in particular paragraphs 231, 233 and 234 which were to the same effect.

[9] Anticipating the pursuers' position, Mr Simpson said that the only thing they relied upon was that having obtained Mr Kerrigan's opinion it was not *bona fide* to obtain an opinion from senior counsel. But, it could easily be inferred from Mr Kerrigan's opinion and from the questions which were posed to him that there was uncertainty as to the interpretation of the Will. It was difficult to infer bad faith simply from the fact that the defender sought a second opinion. The court had found that Mr Kerrigan's opinion was not wholly correct and that his, Mr Simpson's, opinion was not wholly wrong. He accepted that nothing turned on the fact that one opinion was given by a solicitor and the other was given by senior counsel.

[10] Finally, Mr Simpson pointed to the provision in the Will of the late Mr Hughes that "my executors shall not be liable or responsible for……..omissions or errors in judgement."

The Pursuers' Submissions

[11] Mr Parratt, senior counsel for the pursuers, moved for expenses of the cause to date on the basis that the debate had settled the only real question in the case and what now followed was simply an accounting by the defender.

[12] Mr Parratt took no issue with Mr Simpson's analysis of the law relating to a trustee's right of relief for expenses as derived from the authorities which he relied upon. He accepted that the outcome of the litigation was irrelevant to the question whether or not the defender was entitled to relief from the estate for an award of expenses against her. However, he said that the answer to the question depended upon whether the defender was entitled to take the second opinion. No distinction fell to be drawn between the two opinions as regards their worth arising from the fact that one was given by a solicitor and

the other was given by senior counsel. There was no justification for seeking the second opinion on that basis.

[13] Mr Parratt suggested that the view to be taken as to the question of reasonableness should be guided by the legal advice sought and had to be tested as at the point when it was sought. The defender was not entitled to have successive bites at the cherry until she obtained an opinion that she agreed with. In this case it could be seen from certain references in Mr Kerrigan's opinion that the defender also had the advice of her then solicitors to the effect that the legacy had adeemed. That was the one question which the court had found trumped all others.

[14] The defender ought to have followed Mr Kerrigan's advice. It stood to reason that she was not entitled to relief for an adverse award of expenses if she had not followed the advice that she had been given. She had not followed Mr Kerrigan's advice. Instead, she had taken a second opinion. The test was one of necessity. If it was not necessary to obtain the second opinion then the protection which was afforded to a trustee was lost if the original advice was not followed.

[15] Mr Parratt then turned his attention to certain correspondence to be found amongst the documentary productions. Initially, in correspondence with the pursuers, the defender's solicitors effectively indicated that they were following Mr Kerrigan's advice. They presented for the pursuers' approval an executry account, signed by the defender, which had been prepared on the basis of that advice. The solicitors then wrote to the pursuers indicating that the defender was departing from Mr Kerrigan's advice and intended to take advice from senior counsel. At that point the pursuers had written to the defender's solicitors indicating that they thought that Mr Kerrigan's advice was unequivocal. They threatened litigation and mentioned the possibility that the defender could be found

personally liable for the expenses of litigation. The defender therefore knew the risks inherent in not following Mr Kerrigan's advice. She could have sought indemnity for those expenses from the legatee. The defender's solicitors had also written to the pursuers to indicate that the legatee had no intention of making a claim to the legacy for her own benefit but rather that she would redirect the benefit of that legacy to charities of her own choosing.

[16] In the result, Mr Parratt maintained that the defender was not entitled to relief from the estate and that the award of expenses should be against her personally.

The Defender's Reply

[17] In a short reply, Mr Simpson maintained that the test was one of reasonableness rather than necessity. At the start of this litigation the defender had the second opinion. It was reasonable for her to defend the action on the basis of that advice.

Decision

[18] It matters not whether I apply a test of reasonableness or a test of necessity. This is because it was neither reasonable nor necessary for the defender to proceed as she did. The problem for the defender is that at the outset she had an opinion from a solicitor recognised as having expertise in this area of law. The extent to which that opinion was upheld by the court is neither here nor there. I have not upheld that advice in all respects but now having looked at that advice (albeit with the benefit of hindsight) I can see nothing so manifestly wrong with it that it would have been reasonable or necessary, at the time it was obtained, to seek a second opinion.

[19] It was neither reasonable nor necessary for the defender to defend this action. She undoubtedly had a duty to distribute the estate to the correct beneficiaries, but she had clear

advice that the legacy had adeemed. The defender had no personal interest in the matter. Of course she had the second opinion to hand when the action was raised but, leaving aside the question whether or not it was reasonable or necessary for her to obtain it, it was not the defender's place to defend the action for the benefit of the legatee. That was a matter for the legatee. In effect, the defender was fighting the legatee's battle. Furthermore, it was a battle that she knew the legatee was disinclined to engage in. In these circumstances I do not think that it can be said that the defender was truly litigating for the benefit of the estate.

[20] What the defender ought to have done was to ensure that those parties who would be affected by the outcome of the action, including the legatee, had intimation of the action, intimation that she, as executor, did not intend to defend it and intimation that it was for them to defend it if they saw fit. She should then have restricted her defence (if it were necessary to defend at all) to stating that she took no interest in the outcome. That would have left it to those affected by the outcome to enter the process, or not, as they saw fit. A very clear example of that kind of approach is to be found in the case of *Buckle* above referred to. It seems to me that that is the kind of approach that should be adopted in all cases of this sort. It is the only approach that ensures that the expense of litigation will fall on those who properly have the interest to engage in it and that the executor will not be exposed to personal liability.

[21] I am satisfied that no part of the expenses of this litigation should fall against the estate of the late Mr Hughes and for the foregoing reasons the defender is not entitled to relief from the estate for the award of expenses against her.

[22] My decision following the debate brought a discrete part of this action to an end. Nothing will now happen that will alter the fact that the pursuers have been completely successful thus far. I see no reason why the pursuers should have to wait for their expenses

until some later, as yet unpredictable, date. I have concluded that the award should be for the expenses of the cause to date.

Sanction for the Employment of Counsel

[23] As regards the employment of senior counsel, Mr Simpson was not opposed to Mr Parratt's motion that that should be sanctioned but, even so, sanction is not automatic. Sanction depends on whether or not I am satisfied that it is reasonable having regard to the matters set out in section 108 of the Courts Reform (Scotland) Act 2014. I will need to hear submissions. Unfortunately, I was unable to hear submissions at the procedural hearing due to a lack of court time. It is necessary, in any event, for there to be another procedural hearing to determine further procedure following upon the defender lodging her accounting. The question of sanction can be dealt with at that hearing.