Update on contentious probate and trust cases

Richard Gold, St John's Chambers

Published on 27th October

[References in square brackets are to paragraph numbers in the judgments.]

Hutchinson v Grant [2016] EWCA Civ 218; [2016] 2 Costs LR 189

1. **Date of decision**: 27 January 2016

2. **Court**: Court of Appeal

3. **Issue**: Where the parties have reached an agreement that joint administrators should be removed but have not reached an agreement about costs, does the court have to adhere to the terms of the agreement?

4. **Section 50(1) of the Administration of Justice Act 1985**: Section 50(1) provides as follows:

> "Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion—

(a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them; or

(b) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons."

5. **Facts**: Mr Grant and Mrs Hutchinson were brother and sister. Their father died intestate in 2009. They jointly took out letters of administration in respect of his estate. It was a small estate.

6. Disputes arose. In 2012 Mrs Hutchinson applied under section 50 of the Administration of Justice Act 1985 for Mr Grant to be removed as joint administrator. Mr Grant then applied for Mrs Hutchinson to be removed as administrator.

7. At the hearing, the trial judge encouraged the parties to try to reach an agreement. It was agreed in principle that both Mr Grant and Mrs Hutchinson should be replaced by an independent solicitor. However, the parties could not agree about costs.

8. The trial judge indicated that, since the costs had not been agreed, he had to hear some part of the proceedings in order to resolve the question of costs.

9. Mr Grant applied for an adjournment. The application was refused. Mr Grant left court.

10. The trial judge proceeded to hear the case in Mr Grant's absence. The trial judge ordered the removal of Mr Grant as administrator. However, contrary to the parties' own agreement, the trial judge did not order the removal of Mrs Hutchinson.

11. Mr Grant appealed.

12. **Decision**: Mr Grant had obtained permission to appeal "only on the question whether there was an agreement for the removal of both administrators and the substitution of an independent administrator, to which the judge should have adhered" [8].

13. The Court of Appeal made two main points.

14. First, the basic principle was clear [9]. Where the parties have not agreed the question of costs, the action as a whole has not been compromised. The Court of Appeal quoted from Mummery LJ's judgment in *BCT Software Solution Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939:

> "In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties 'If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well.'"

15. Second, if the trial judge had led Mr Grant to believe before he left court that both he and his sister would be replaced by an independent administrator, there may have been unfairness amounting to procedural irregularity if the trial judge then went back on what he had led Mr Grant to believe [10].

16. However, the trial judge had not led Mr Grant to believe this [15]. From listening to the trial judge, there could have been no expectation that the trial judge was simply going to follow the partial agreement that both administrators be replaced.

17. The section 50 applications remained live [16]. It was Mr Grant's choice to leave court. The trial judge made no procedural error. The trial judge explained

as clearly as he could the shape that the continuing proceedings would have, and it was up to Mr Grant to decide whether to participate in them further.

18. **Result**: The appeal was dismissed. The Court of Appeal affirmed the trial judge's decision to remove Mr Grant (but not Mrs Hutchinson) as administrator.

19. **Practical significance**: Besides the fact that it is dangerous to leave court before the end of a hearing, two points should be noted:

- Where parties have reached an agreement in principle about all matters other than costs, the judge is not obliged to adhere to that agreement. Therefore, if parties want to prevent a judge from interfering in what they have agreed, the parties need to reach agreement about costs as well.
- In a section 50 application where two joint personal representatives have fallen out with each other, the judge will not necessarily adopt the easy option of replacing them both with an independent representative. The judge may choose simply to remove one of the existing representatives.

Burns v Burns [2016] EWCA Civ 37; [2016] WTLR 755

20. **Date of decision**: 28 January 2016

21. **Court**: Court of Appeal

22. **Issue**: How important is the Golden Rule?

23. **Definition of the Golden Rule**: In *Key v Key* [2010] EWHC 408 (Ch), Briggs J said:

> "The substance of the Golden Rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to

the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings".

24. **Facts**: The Deceased and her late husband had two sons, AB and CB. Following the death of the husband in 1988, the Deceased and CB each had 50% beneficial interests in a house as tenants in common.

25. By a will dated 8 May 2003 ("the 2003 Will"), the Deceased gave her interest in the house to AB alone. The Deceased's residuary estate was left to AB and CB in equal shares.

26. The Deceased suffered from dementia. On 15 October 2003 the Deceased scored 19 out of 30 in a Mini Mental State Examination ("MMSE").

27. On 6 November 2014 the Deceased wrote to her solicitor that she would like to leave half her equity to AB and half to CB. On 7 December 2014 the solicitor wrote to the Deceased enclosing a draft will. The Deceased then confirmed by letter that everything was okay, but did not at that stage follow up the solicitor's suggestion that she should contact him to execute the will.

28. On 22 May 2005 the Deceased scored 20 out of 30 in an MMSE. On 24 May 2005 the Deceased scored 23 out of 33 in an occupational therapy Cape Assessment.

29. By a will dated 26 July 2005 ("the 2005 Will"), the Deceased left all her estate equally between her two sons. The 2005 Will was executed at the solicitor's offices in the presence of the solicitor and his receptionist. CB had taken the Deceased to the solicitor's offices, but was not present when the contents of the will were discussed or when it was signed.

30. Therefore, under the 2005 Will the Deceased's half share in the house would be divided equally between AB and CB (whereas under the 2003 Will the Deceased's half share in the house would be inherited by AB alone).

31. The Deceased died aged 89 on 21 May 2010.

32. CB brought proceedings claiming pronouncement in solemn form of the 2005 Will.

33. AB challenged the validity of the 2005 Will on the basis of lack of testamentary capacity and want of knowledge and approval. By counterclaim, AB sought pronouncement in solemn form of the 2003 Will.

34. The trial judge pronounced in favour of the 2005 Will. AB appealed.

35. **Decision**: The Court of Appeal dealt separately with testamentary capacity and knowledge and approval.

36. Testamentary capacity

The Court of Appeal's main conclusions on testamentary capacity were:

> (1) The solicitor was ignorant of the Golden Rule. The Golden Rule is a prudent guide for solicitors dealing with a will for an aged testator or one who has been seriously ill. However, the Golden Rule does not constitute a rule of law but provides guidance as to a means of avoiding disputes. As *Williams on Wills* (10th edition) says, the Golden Rule "is not a touchstone of validity or a substitute for established tests of capacity or knowledge and approval" [47].
>
> (2) While capacity is initially presumed, the raising of a real issue as to capacity will require the proponent of the disputed document to prove capacity. In this case, there were clearly doubts as to the Deceased's testamentary capacity. The burden of proving capacity rested on CB [48].
>
> (3) The trial judge relied on the rule in *Parker v Felgate* (1883) 8 PD 171, recently approved in *Perrins v Holland* [2010] EWCA Civ 840; [2011] Ch

270. Under this rule, a will drawn up in accordance with instructions given by a testator at a time when he had full testamentary capacity but executed at a time when he no longer had such capacity would nevertheless be valid provided that the testator knew that the document he was signing conformed with the instructions he had given and approved it by executing it in those terms.

(4) Thus, the trial judge found that capacity was established in late 2004, when the instructions were given and the draft will was approved. The trial judge found that the Deceased had at least the capacity to recognise that what she was signing in July 2005 was a will in the form that she had instructed the previous year [48].

(5) The trial judge was entitled to conclude that the Deceased had capacity in late 2004 when she gave instructions for what became the 2005 Will. The evidence of her capacity at this time included her letters to her solicitor [49].

(6) Although the trial judge should have dealt more fully with the countervailing considerations arising from the various mental health assessments [50], the trial judge was entitled to conclude that the Deceased had capacity in July 2005 to understand that she was executing the simple will for which she had previously given instructions, and the draft of which she had expressly approved some months earlier [51].

37. Knowledge and approval

The Court of Appeal's main conclusions on knowledge and approval were:

(1) While in many cases proof of capacity and due execution will suffice to establish knowledge and approval, in other cases more is needed. There may be circumstances which "excite suspicion" [52].

(2) In this case, there were circumstances which called for affirmative proof of the Deceased's knowledge and approval of the 2005 Will. Such circumstances included the Deceased's mental impairment and the fact that CB accompanied the Deceased to the appointment for the execution of the will [54].

(3) The trial judge accepted that the solicitor saw the Deceased by herself and read the 2005 Will over to her. The solicitor clearly reached the view that the Deceased understood and approved the contents [55].

(4) Although the burden of proof of knowledge and approval was on CB as propounder of the 2005 Will, it was not necessary for the trial judge to adopt a "two stage approach" of identifying suspicion and the burden of proof of dispelling it. The trial judge was entitled to proceed directly to whether the Deceased knew and approved the contents of the 2005 Will [56].

38. **Result**: "Not without hesitation", the Court of Appeal concluded that the trial judge was entitled to find in favour of the 2005 Will. The appeal was dismissed.

39. **Practical significance**: The case shows that:

- The importance of the Golden Rule should not be exaggerated. A will may still be valid even where a solicitor should have followed the Golden Rule and asked a medical practitioner to witness the execution of the will.
- The rule in *Parker v Felgate* means that a will may still be valid if a testator lacks full capacity at the time of execution, provided that the testator had full capacity when he gave instructions for the will.
- The Court of Appeal, though critical of some aspect of a first instance judgment, may nevertheless uphold a decision on the basis that it was a decision which the trial judge was entitled to reach on the evidence.

Elliott v Simmonds [2016] EWHC 962 (Ch)

40. **Date of decision**: 29 April 2016

41. **Court**: Chancery Division (Edward Murray)

42. **Issue**: Did a party have reasonable grounds for opposing a will, such that a costs order should not be made against her under CPR rule 57.7(5)?

43. **CPR rule 57.7(5)**: CPR rule 57.7(5) provides as follows:

> "(a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will.
>
> (b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will."

44. **Facts**: A summary of the facts and decision in the substantive trial [2016] EWHC 732 (Ch) is as follows:

- The Claimant was the Deceased's partner. The First Defendant was the Deceased's daughter.
- The Deceased made a will on 13 December 2010 ("the 2010 Will"), in which he made three specific legacies of £100,000 (one of which was to the First Defendant), with the residuary estate to the Claimant.
- The Deceased made a will on 1 February 2012 ("the 2012 Will"): no specific legacies were made; the sole beneficiary was the Claimant.
- The Deceased died on 4 August 2012 aged 75.
- The Claimant sought probate of the 2012 Will.
- The First Defendant gave notice in her Defence that she did not raise any positive case but insisted on the 2012 Will being proved in solemn form.

She invoked her right to cross-examine the witnesses who attested the will.

- Only one of the two attesting witnesses was available to be cross-examined. This was Mr Mumford, the solicitor who acted for the Deceased in relation to the 2012 Will, took instructions, drafted the will and witnessed its execution.
- The Second Defendant, a solicitor and the executor under the 2012 Will, maintained a position of neutrality.
- The judge held that the 2012 Will was duly executed, that the Deceased had testamentary capacity and that the Deceased had the requisite knowledge and approval. The judge therefore pronounced for the force and validity of the 2012 Will.

45. The costs judgment [2016] EWHC 962 (Ch) dealt with the question of whether the First Defendant had reasonable grounds for opposing the 2012 Will:

- The First Defendant submitted that she did have reasonable grounds to oppose the 2012 Will and that no costs order should be made against her.
- The Claimant submitted that the First Defendant did not have reasonable grounds to oppose the 2012 Will and that a costs order should be made against her.

46. **Decision**: It was for the Claimant to satisfy the court that there were no reasonable grounds for opposing the 2012 Will [5].

47. It did not follow that, because the court had upheld the 2012 Will, there must have been no reasonable grounds for opposing it [8]. It might be acceptable to call an attesting witness for cross-examination where, for example, his recollection is vague.

48. The First Defendant made four main arguments in support of her case that she had reasonable grounds to oppose the 2012 Will. However, the court rejected all four arguments [15]:

(1) The First Defendant submitted that there was no apparent reason why the Deceased should have wished in the 2012 Will to extinguish the legacy in favour of the First Defendant in the 2010 Will. But the court held that: this was a matter for the Deceased; it did not go to the issue of testamentary capacity; it was not an issue on which Mr Mumford would have been likely to provide any material assistance.

(2) The First Defendant submitted that she was entitled to call Mr Mumford for cross-examination because an attendance note prepared by another solicitor indicated that on 4 January 2012 the Deceased had forgotten that he had executed the 2010 Will (which included the gift to the First Defendant). But the court held that the evidence that on a single occasion the Deceased failed to recall that he had executed the 2010 Will was far from a sufficient ground to call Mr Mumford for cross-examination. When taking instructions for the 2012 Will, Mr Mumford would have discussed with the Deceased the terms of the 2010 Will, e.g. because the wills were so similar.

(3) The First Defendant submitted that she was entitled to call Mr Mumford for cross-examination due to his failure to have prepared a detailed attendance note of the instructions which he received from the Deceased in relation to the 2012 Will. But the court held that the 2012 Will was simple and that following disclosure the First Defendant had ample supporting evidence of the substance of the Deceased's instructions.

(4) The First Defendant submitted that she was entitled to cross-examine Mr Mumford about a bundle of the Deceased's medical records known as "Bundle X". But the court held that nothing of significance emerged

from cross-examination. Mr Mumford had not seen the medical records in Bundle X when he took instructions for the 2012 Will or when the will was executed.

49. The four arguments, whether taken separately or together, did not raise a reasonable ground for opposing the 2012 Will [16].

50. However, the court did accept that it should only order costs against the First Defendant from the date on which she had sufficient material to form a view about whether there was any reasonable ground to oppose the 2012 Will [17]. This was consistent with the court's inquisitorial role in probate proceedings.

51. The court held that by 3 June 2013 the First Defendant had sufficient evidence to form a view about whether to oppose the will. On this date the First Defendant had copies of Mr Mumford's witness statement, the 2010 Will and various medical records.

52. **Result**: The First Defendant did not have reasonable grounds for opposing the 2012 Will. The First Defendant was ordered to pay the Claimant's costs from the date on which the First Defendant had sufficient material on which to form a view about whether there was any reasonable ground to oppose the will.

53. **Practical significance**: This was arguably a harsh decision. One can never predict exactly how a cross-examination will turn out.

54. However, the case shows that:

- Where a party has given notice under CPR rule 57.7(5) that he does not raise a positive case, it does not automatically follow that no costs order will be made against him. A costs order will be made against him if there was no reasonable ground for opposing the will.

- The question of whether it is reasonable to oppose a will must be kept under review. It may initially be reasonable to oppose a will, but additional evidence may show that it is no longer reasonable to oppose the will. If at that point the party ceases to oppose the will, a costs order is unlikely to be made against him.

55. For a case where a party was able to rely on CPR rule 57.7(5) and avoid a costs order, see *Breslin v Bromley* [2015] EWHC 3760 (Ch) per Newey J at paragraphs 7-8.

Colin Alan Randall v Hilary Ann Jocelyn Randall [2016] EWCA Civ 494

56. **Date of decision**: 27 May 2016

57. **Court**: Court of Appeal

58. **Issue**: Does the creditor of a beneficiary of an estate have an "interest in the estate" under CPR rule 57.7(1), such that the creditor is entitled to bring a probate claim in respect of the estate?

59. **CPR rule 57.7(1)**: CPR rule 57.7(1) provides that:

> "The claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate."

60. **Facts**: The appellant ("H") and the respondent ("W") were divorced. As part of their divorce settlement, H and W agreed that, if W were to inherit more than £100,000 from her mother:

- W would keep the £100,000; and
- the balance would be split equally between H and W.

61. On her death, W's mother left £100,000 to W in her will and (after some small specific legacies) the balance of her estate (estimated at £150,000) to W's children. H contended that the will had not been duly executed.

62. If the will was valid, H would receive nothing.

63. If the will was invalid, W would be entitled to an estimated £75,000, i.e. half of the £150,000.

64. At first instance, it was held that H had no standing to bring a probate claim challenging the validity of W's mother's will. H appealed against that decision.

65. **Decision**: It was common ground that the effect of CPR rule 57.7(1) was that a probate claimant must claim an "interest" in the estate [3].

66. W was a beneficiary of her mother's estate. As a result of the divorce settlement, H was W's creditor. H was therefore a creditor of a beneficiary of the mother's estate.

67. The Court of Appeal held that H had an interest in the estate and therefore had standing to bring the probate claim. The main reasons were:

> (1) A creditor of an estate does not have sufficient interest in an estate to bring a probate claim (*Menzies v Pulbrook and Ker* (1841) 2 Curt 846). The interest of a creditor of an estate is to ensure that there is due administration of the estate. The creditor of an estate is not interested in which beneficiary receives what. On the other hand, the creditor of a beneficiary of an estate is in a fundamentally different position. His interest is to ensure that the beneficiary receives what is due to him under the will or intestacy [22].

(2) As Judge Mackie QC rightly held in *O'Brien v Seagrave* [2007] EWHC 788 (Ch); [2007] 3 All ER 633, there is no decided case which is inconsistent with a broad construction of the meaning of "interest" [24].

(3) H was in practice unlikely to be assisted by section 121(1) of the Senior Courts Act 1981, which provides that: "Where it appears to the High Court that a grant either ought not to have been made or contains an error, the court may call in the grant and, if satisfied that it would be revoked at the instance of a party interested, may revoke it" [26].

(4) The question of who has a sufficient interest to be permitted to bring a probate claim is a procedural matter. Bearing in mind the overriding objective in CPR rule 1.1, justice in the general sense required H to be able to bring his probate claim to set aside the will [28].

(5) H was not a mere busybody. He had a real interest in challenging the validity of the will [29].

68. **Result**: The appeal was allowed. H had a sufficient interest to bring the probate claim.

69. **Practical significance**: The Court of Appeal adopted a broad construction of who has a sufficient "interest" to bring a probate claim:

- The Court of Appeal expressly held that a creditor of a beneficiary of an estate has standing to bring a probate claim.
- In approving Judge Mackie QC's reasoning in *O'Brien v Seagrave*, the Court of Appeal implicitly held that a claimant under the Inheritance (Provision for Fmaily and Dependants) Act 1975 has standing to bring a probate claim.

Baker v Dunne [2016] EWHC 2318 (Ch)

70. **Date of decision**: 20 September 2016

71. **Court**: Chancery Division (Chief Master Marsh)

72. **Issue**: Beddoe application: should trustees under a will be authorised to obtain vacant possession of a pub which was the principal asset of the trust?

73. **Beddoe applications**: Trustees or executors may bring applications for directions as to whether or not to bring or issue proceedings. See CPR rule 64.2(a), paragraph 64.2.3 in the 2016 White Book and Practice Direction 64B.

74. **Facts**: Jean Montgomery ("the Deceased") died on 6 September 1997:

- The claimants were trustees of the trust of the Deceased's will.
- The three defendants were the Deceased's children and equal beneficiaries under the trusts created by her will.

75. The principal asset of the trust was a pub. The first defendant ("Jonathan") had been running a profitable business from the pub premises for at least three years without paying any rent or other compensation to the trustees. The trustees wished to obtain vacant possession of the pub from Jonathan.

76. At the time of the hearing before Chief Master Marsh, the trustees had already obtained a possession order and a number of Beddoe orders [7]:

> "In summary, therefore, the Trustees obtained an order for possession following a trial. The order for possession was not subject to a stay and the Trustees obtained permission to issue a writ of possession. At all stage[s] the Trustees have acted with the approval of the court. Steps toward obtaining possession of the Albert Arms have, therefore, reached an advanced stage and Mr Moeran QC's starting submission on behalf of

the Trustees was that they did not require the court's sanction to take steps to obtain vacant possession of the Albert Arms and to sell the freehold but were only doing so out of an abundance of caution in view of Jonathan's threat to bring a claim for breach of trust."

77. In correspondence, Jonathan's solicitors alleged that it would be a breach of trust for the trustees to seek vacant possession because the value of the premises would be increased by Jonathan remaining in possession and running the business [8(iii)].

78. In draft Particulars of Claim, Jonathan alleged that:

- The trustees' proposed sale of the pub with vacant possession and the associated business would amount to passing off because Jonathan owned the goodwill in the business [12].
- The trustees' proposed sale would amount to a breach of trust because the trustees had failed to take adequate advice, had failed to take into account Jonathan's position if vacant possession was given, had given undue weight to the position of his siblings, and had introduced barriers to a negotiated sale of the property to Jonathan [13].

79. The trustees wished to obtain authorisation to proceed to obtain vacant possession of the pub and to sell the property.

80. **Decision**: The trustees were granted Beddoe relief for a number of reasons:

(1) The trustees had received unequivocal valuation advice that the value of the property with Jonathan in occupation on the current basis was nil, whereas the value of the property run as a business without Jonathan in occupation was £2.1 million [17].

(2) Although some goodwill was personal to Jonathan, much of the goodwill relating to the business of running the pub was adhesive to the property [16]. The right to use the name of the property and the goodwill

of the business were expressly given to the trustees by the Deceased's will, and it was not open to Jonathan to appropriate that goodwill to himself by virtue of his occupation of the pub without legal entitlement [18]. Upon obtaining vacant possession, the trustees would create a new business rather than operate Jonathan's business: the trustees would make it clear that the pub was under new management [19].

(3) The long delay in realising the pub (the principal asset of the trust) was prejudicial to the second and third defendants (Jonathan's siblings) [22].

(4) There was a history of very unsatisfactory conduct on the part of Jonathan. This included: unsuccessfully resisting the trustees' application for authorisation to pursue the possession proceedings; unsuccessfully resisting the possession proceedings themselves; unsuccessfully trying to appeal the possession order; and very late in the day threatening the trustees with the claim for passing off and breach of trust [22].

(5) The trustees were perfectly entitled to proceed cautiously [24].

(6) Jonathan could not be safely left in the property while a sale was taking place. Were he to remain in possession, there was a very real risk that the trustees would not be able to realise the full value of the property [26].

81. **Result**: The trustees were:

- authorised to proceed to obtain vacant possession of the pub against any persons in occupation and to sell the property; and
- entitled to an indemnity in respect of their costs from the trust [35].

82. **Practical significance**: This case shows that:

- In the face of a difficult defendant, trustees are entitled to proceed cautiously and to obtain a number of Beddoe orders to ensure that every step which they take is authorised by the court.
- Where the main proceedings have advanced to "a stage well beyond the need for advice about prospects of success", the court may be willing to make a Beddoe order, notwithstanding the requirement in paragraph 7.2 of Practice Direction 64B that a Beddoe application be supported by "the advice of an appropriately qualified lawyer as to the prospects of success" [24].
- In an appropriate case, the court is likely to be assisted by expert valuation evidence showing the financial arguments for selling with vacant possession.

Richard Gold
St John's Chambers
richard.gold@stjohnschambers.co.uk
27 October 2016