A costly sibling clash

Wilby v Rigby *[2015] has useful practitioner points on applications for the removal of executors. Nicholas Pointon reports*

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In *Wilby v Rigby* [2015] the court exercised its jurisdiction under s50 of the Administration of Estates Act 1985 to remove both executors of an estate in favour of an independent administrator. The protagonists were brother and sister. By their late mother's will each were appointed executor and were to share equally in her estate. Judgment arrived almost four years after the death of their mother in November 2011. No grant of probate had yet issued in favour of either party, not least because the claimant had issued a caveat against the will in May 2012.

The case is significant in three respects. First, it reiterates the now established principle that misconduct on the part of an executor is no prerequisite to their removal. Second, it contains useful lessons on the subject of costs protection when bringing applications for removal. Third, it is a rare demonstration of the court calling an executor to account for *devastavit* in unusual circumstances.

Misconduct

For a long time it was accepted without challenge that a trustee would not be removed from office without evidence of some misconduct on their part. Even then, it was not every instance of misconduct which would see the trustee removed. In Story's *Equity Jurisprudence*, s1289 it was said:

> But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

It is telling that the reported arguments of counsel in *Letterstedt v Broers* [1884] are extremely concise on the issue of removal of the trustees and focus exclusively on whether or not they were guilty of misconduct – indeed, the report of the submissions made by counsel for the respondents simply reads:

> Then, with regard to the removal of the board, it was contended that they had not been guilty of any misconduct or maladministration.

Nevertheless, *Letterstedt* represented the beginning of a shift in emphasis, away from the conduct (or misconduct) of trustees and towards the welfare of beneficiaries.

The passage of Story excerpted above was cited with apparent approval by Lord Blackburn, giving the decision of the Board of the Privy Council, at 386. Before concluding Lord Blackburn was at pains to stress that the fact of disagreement between beneficiary and trustee would not suffice. At 389 his Lordship notes:

> It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of trustees.

The Board nevertheless removed the trustees, on the basis that 'their main guide must be the welfare of the beneficiaries' (at 387). The only saving grace for the outbound trustees came in the Board's decision on costs. Despite having succeeding in their application to remove the trustees, the plaintiffs were ordered to bear their own costs. The trustees were relieved of any liability to pay costs, save for their own costs of the appeal (on the basis that they lost other points).

As was observed in *Dobson v Heyman* [2010], the trustees in *Letterstedt* escaped liability for costs because of the absence of misconduct, but were nevertheless removed in the name of the welfare of beneficiaries. In a series of cases since 1884 the courts have gradually built upon the thin foundation laid by Lord Blackburn, slowly expanding the jurisdiction to remove trustees and marginalising the importance of misconduct. By way of example, in *Dobson* the court was unwilling to overturn an order for removal made by a Deputy Master, citing the 'friction' and 'difficulties' between the executors as sufficient basis for their removal. In *Re Steel* [2010] the court went so far as to state (at para 108] that:

> The Court's power to remove and replace a personal representative is in no way limited to cases of misconduct.

In *Wilby*, HHJ Hodge QC had no hesitation in finding (at para 19):

> ... that there has been a complete breakdown between the two appointed executors. There is a clash of personalities and a lack of confidence in Mr Rigby by Mrs Wilby and in Mrs Wilby by Mr Rigby.

Although alluding to the conduct of each party, His Honour studiously avoided making any findings of misconduct. Indeed, if anything criticism attended Mrs Wilby's conduct in placing a caveat against the will, thereby preventing any grant of probate and in turn the full administration of the estate. Nevertheless, her application to remove her brother as executor succeeded on the basis that, at para 20:

> the two have no trust in each other, and I am satisfied that they cannot work together.

Wilby arguably goes further than the case law which preceded it, by acceding to an application for the removal of an executor despite conduct on the part of the applicant herself, which prevented completion of the administration of the estate. As the claimant readily conceded, the entering of a caveat against the will was improper in circumstances in which no challenge to the validity of the will itself was being advanced. In fact a number of caveats had been entered by Mrs Rigby or on her behalf during the currency of the dispute. The presence of those caveats arguably rendered it impossible to progress the administration of the estate (save in respect of any bank accounts falling beneath the threshold at which banks would require sight of a grant) and, to that extent, Mr Rigby's hands were tied. It is therefore all the more significant that the court should exercise its jurisdiction to remove the executors as a result of a breakdown in trust and confidence to which each contributed.

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The decision therefore marks the furthest extent to which the jurisdiction has progressed from the days of *Letterstedt* – diverting attention away from the misconduct of individual trustees and towards their continuing ability to discharge their functions for the benefit of beneficiaries.

Costs

The second important aspect of the decision in *Wilby* is the approach of the court to the question of costs. Any reader of the transcript of the extemporary judgment will notice the extensive recitation of the open correspondence and attempts to compromise the dispute emanating from Mrs Wilby's legal advisers (at paras 11-16). What will not be apparent to the reader of that transcript is that, having had regard to that stream of correspondence and the intransigence with which it was met by Mr Rigby, the court ordered Mr Rigby to bear the entirety of Mrs Wilby's costs to be assessed on the standard basis.

In one sense, Mrs Wilby undoubtedly succeeded in her attempt to remove her brother as executor and to cause him to account to the estate for loss sustained by reason of his wasting of the estate's assets. Yet in another it is clear that neither party was without blame in respect of the series of events constituting the breakdown in relations which caused the court to exercise its jurisdiction to do so. The ultimate outcome of the case was that neither party would continue as executor, with both being removed and replaced by an independent practitioner.

The key to understanding the court's decision on costs lies in analysis of the offers being made by Mrs Wilby in her attempts to reach settlement. As the judgment itself recites, Mrs Wilby proposed that both executors stand down and be replaced by her son, or alternatively by an independent practitioner. Indeed she went so far as to invite her brother to suggest some independent practitioners who might be appointed in their stead.

As is common in probate disputes concerning small estates, the court was acutely aware of the risk that the costs incurred in such

litigation might easily become disproportionate to the value of the estate itself. Similar remarks were made by Evans-Lombe J in *Dobson* at para 16. It should therefore come as no surprise that the court was keen to reward the proactive attempts at compromise made by Mrs Wilby and to penalise the refusal by Mr Rigby to accede to any of those proposals.

The message for practitioners is therefore two-fold. Firstly, when making such applications attempts should be made to propose alternative solutions in the most reasonable terms possible. Ideally a variety of different solutions should be explored, such as the appointment of representatives of each protagonist or, preferably, the appointment of a single independent administrator. As to the identity of the latter, various mechanisms might be employed, such as inviting the proposal of three candidates from which to choose, failing which agreeing to have a practitioner appointed by an entity such as the Society of Trust and Estate Practitioners (as formed part of the final order made in *Wilby* itself).

Secondly, any party on the receiving end of an application or threatened application for their removal should similarly take positive steps to explore alternative solutions, which may well involve their removal and the use of independent parties. The outcome of *Wilby* illustrates the perils of flatly refusing or ignoring offers of settlement in the belief, whether rightly or wrongly, that you are not guilty of any misconduct.

Devastavit

The final interesting aspect of *Wilby* is the treatment of the *devastavit* claim brought against Mr Rigby for the wasting of an asset of the estate. Mr Rigby had, since at least October 2012, permitted the grandson of his partner to occupy the deceased's house without making any payment of rent to the estate. The grandson remained in the property as at the date of trial, on the basis that he had always intended to purchase it but could not do so because no grant of probate could issue in the face of the caveats that Mrs Wilby had put in place.

The court found Mr Rigby liable to account to the estate for the rental income which ought to have been generated by the property from November 2012 to date, at the market rent of £750 per month. The court effectively afforded the grandson a rent-free period of occupation until the end of October 2012 by way of credit for certain improvements he had carried out.

Technically Mr Rigby was unable to sell the property or to give good receipt for any rental income until a grant of probate could issue in his name.

The court's findings in relation to the *devastavit* element of the claim are significant in demonstrating the importance the court places upon the prompt and efficient administration of the estate. Technically Mr Rigby was unable to sell the property or to give good receipt for any rental income until a grant of probate could issue in his name. That process was impeded by the caveats which Mrs Wilby had entered, which in turn were lodged as a result of the dispute between the parties as to the administration of the estate. In effect the court has recognised that the dispute as to who should administer the estate could and should have been resolved far sooner, by any of the means proposed by Mrs Wilby. Consequently Mr Rigby did not escape liability for wasting an asset of estate in the meantime, despite the fact that he could not lawfully sell the property as a result of Mrs Wilby's caveat.

This holistic way of looking at the dispute serves to remind practitioners that the court places the greatest importance upon the timely and effective administration of the estate. A party who unreasonably impedes that process risks incurring a considerable liability in respect of any failure to generate income from the estate's assets for so long as the dispute rumbles on. In short, the financial ramifications of imprudently disputing who should administer an estate can quickly mount up and rival, if not exceed, any inheritance at stake.

Conclusion and points of practice

In summary, *Wilby* demonstrates three important points for practitioners:

- First, misconduct on the part of an executor or trustee is not a pre-requisite for their removal. The focus is firmly upon the practical ability of the trustee(s) to perform their function of administering the trusts for the benefit of the beneficiaries. A breakdown in relations between the parties entailing a loss of trust and confidence in one another will ordinarily suffice, and does not depend upon which of those parties is at fault.

- Second, the court will expect the parties to explore alternative solutions to their dispute and will readily reflect the intransigence or belligerence of either party in costs orders. Practitioners should seek to explore as many reasonable alternative solutions as possible, whether making or responding to an application for removal.

- Third, the financial risks of unreasonably impeding an application for removal extend beyond adverse costs consequences and may well include an account of any lost income which ought to have been generated by the estate's assets during the period in which their administration was delayed by reason of the dispute. ■

Dobson v Heyman
[2010] WTLR 1151
Letterstedt v Broers
(1884) 9 App. Cas. 371
Re Steel
[2010] WTLR 531
Wilby v Rigby
[2015] WTLR 1845;
[2016] WTLR 513