

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 86 OF 2020 (IKJ)

**IN THE MATTER OF THE ESTATE OF BRIAN RICHARD SELBY UZZELL (THE
"ESTATE")**

AND

IN THE MATTER OF SECTION 8 OF THE SUCCESSION LAW (2006 REVISION)

BETWEEN:

(1) JUSTIN UZZELL

(2) JULIEN UZZELL

(3) SIMON UZZELL

(4) JASON UZZELL



Plaintiffs

-and-

ANDREA WONG SAM

Defendant

IN CHAMBERS

Appearances:

Ms Shân Warnock-Smith QC instructed by Ms Morven McMillan
and Mr Adam Huckle, Maples and Calder, on behalf of the
Plaintiffs

Mr Anthony Akiwumi, Etienne Blake, on behalf of the Defendant

Before: The Hon. Justice Kawaley

Heard: 28 July 2020

Draft Judgment
circulated:

4 August 2020

Judgment delivered:

7 August 2020



HEADNOTE

Application to remove executor for cause-whether allegations require full inquiry-whether Court's supervisory jurisdiction over the administration of estates encompasses a broader power to remove executors-loss of trust and confidence between executors-approach to removal application-Succession Law (2006 Revision), sections 8, 42-Administration of Justice Act 1985 (UK), section 50

JUDGMENT

Introductory

1. When testators leave behind them estates worth fighting over, they also often leave a family vacuum. This vacuum is often filled by probate disputes in which the sibling heirs are the main disputants. The background to the present application is a variation on that theme. Here the Testator's sons, the Plaintiffs, are united in the belief that the remaining designated executors, the 1st Plaintiff and the Defendant (the Testator's evidently trusted companion, a minor beneficiary, said to have a 5% interest in the Estate) should be replaced by an independent professional trustee. This is because the 1st Plaintiff and the Defendant have not been able to work together to progress the administration of the estate. The other non-family member named as an executor in the Will had renounced probate at the outset.
2. An application proposing the appointment of an independent sole executor on such pragmatic non-judgmental grounds might possibly have ended up being a non-contentious one. However, section 8 of the Succession Law (2006 Revision) (the "Law") provided the only straightforward basis for removing an executor who was unwilling to resign. The grounds for removal are "*neglect or misconduct*". The Plaintiffs' Originating Summons dated May 5, 2020 sought neutral relief, the replacement of the existing executors by independent professional executors. However, the Plaintiffs' supporting evidence, an Affidavit sworn on their behalf by the 1st Plaintiff, concluded with the key

assertion that the Defendant had “*neglected and mismanaged the administration of the Estate*” (paragraph 45).

3. The Defendant filed evidence of her own, a 33 page long Affidavit (attaching several binders of exhibits) making serious allegations of misconduct on the 1st Plaintiff's part and calling for his removal. Those materials were filed late and were not formally before the Court. But they formed the basis for the Defendant's preliminary legal objection to the application being dealt with on a summary basis. The simple and in my view compelling legal point advanced in the Defendant's Written Submissions was that the Court could not decide the serious allegations the parties were forensically firing at each other without adjourning for a proper trial of the issues with oral evidence and cross-examination. I reiterate the observation I made in the course of the hearing that based on the parties' initial round of submissions, I would have accepted Mr Akiwumi's central contention that the removal allegations based on section 8 of the Law could not be summarily determined and would have to be tried.
4. The Plaintiffs' counsel prepared a Supplemental Skeleton Argument which advanced the alternative argument that this Court in fact had a broader supervisory jurisdiction over executors than the express terms of section 8 of the Law would suggest. The Defendant's counsel prepared Additional Submissions as well. On the eve of the hearing, I invited the parties, having regard to the Overriding Objective, to seek to dispose of the application by consent as it appeared to be common ground that relations between the two executors had broken down and time and expense would likely be wasted by exploring the interesting legal jurisdictional dispute and, if a trial was required, resolving the various allegations of misconduct. It was agreed by the Defendant's counsel at the hearing that if Carlos de Serpa Pimentel of Appleby were prepared to accept an appointment he would be a suitable professional executor, but not that the Defendant should relinquish her office.
5. Accordingly, it was decided that I should determine whether or not the application could be dealt with summarily on the basis of a broader removal jurisdiction than that conferred by section 8 of the Law. If no broader jurisdiction existed, directions would then be made for a trial of the removal issues, including the Defendant's cross-application to remove the 1st Plaintiff.
6. For the reasons set out below, I have concluded that this Court's jurisdiction to remove executors is not limited to that conferred by section 8 of the Law and that sufficient grounds have been established by the Plaintiffs to justify summarily appointing an independent professional executor.

Findings: the scope of section 8 of the Law



7. Section 8 of the Law provides as follows:

“8. The Court may, on the petition of any beneficially interested person, remove any personal representative found responsible for neglect or misconduct in the management or administration of the estate and may appoint another suitable person in his place.”

8. In the Plaintiffs’ initial Skeleton Argument, it was submitted:

“The test for removal is well understood. The Grand Court has very recently confirmed in an ex tempore judgment on 24 April 2020 that the test for removal of a personal representative of a Cayman Island estate accords with comparable English law, specifically as that is set out in the English High Court’s decision in Harris v Earwicker.”

9. Ramsey-Hale J’s ex tempore judgment has not been published, but the Ogier press release dated June 2, 2020 provides some support for the proposition that *Harris-v-Earwicker* [2015] EWHC 1915 was applied by the Learned Judge in that case. This did not support the Plaintiffs’ initial submission, because the English authority apparently applied did not involve the application of a provision which even vaguely resembled section 8 of the Law at all. In the Defendant’s Written Submissions, reliance was placed on, *inter alia*, *In re CD* [2008] UKHL 33:

“4. The width of the Court’s discretion under Cayman Islands Law is, it is respectfully submitted, narrower than that expressed by the leading authority on this issue, namely the Privy Council’s Advice in Letterstedt v. Broers (1884), (1883-84) L.R. 9 App. Cas. 371 (South Africa P.C.)...”

10. That case was also concerned with a broad supervisory jurisdiction over executors rather than a statutory provision analogous to section 8. Ms Warnock-Smith QC also sought to place reliance on case law in a different statutory context to support the proposition that the allegations relied on to support removal under section 8 could be determined summarily: e.g. *Schumacher-v-Clarke et al* [2019] EWHC 1031 (Ch), applying and considering section 50 of the Administration of Justice Act 1975. However, in the Defendant’s Written Submissions, Mr Akiwumi placed reliance on the general rules of evidence and, *inter alia*, *In re CD* [2008] UKHL 33, where Lord Carswell opined as follows:

“27. *Richards LJ expressed the proposition neatly in R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, 497-8, para 62, where he said:*



‘Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.’

In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic...”

11. In my judgment section 8 is not broad enough to permit removal on grounds other than those prescribed by the Legislature. And the seriousness of the allegations made by the Plaintiffs and proposed to be made by the Defendant could not be resolved and determined without oral evidence and cross-examination. As this position was all but formally conceded by Ms Warnock-Smith QC in the course of the hearing, no useful purpose will be served by setting out the relevant allegations here.

Findings: does section 42 of the Law incorporate by reference broader supervisory jurisdiction over executors found in English law?

12. The Plaintiffs ultimately relied pivotally on section 42 of the Law, which provides:

“42. (1) In any matter of practice for which no provision is made by this or any other law or by any rules or other regulations made thereunder, the law¹ and practice in similar matters of the Supreme Court of Judicature in England as

¹ In response to an invitation to make editorial comments on a draft of this Judgment, the Defendant’s counsel submitted further arguments on the merits which the Plaintiff’s counsel understandably objected to my considering. A residual jurisdiction to reopen a case to consider further argument, which is rarely exercised, surely exists. It is proper for counsel to assist the Court by pointing out obvious errors of substance even though there is no positive right to reopen the hearing. I decline to exercise such discretionary jurisdiction in all the circumstances of the present case. The new arguments were to the effect that the word “practice” in section 42 does not include substantive law provisions. I have added emphasis to the word “law”, which precedes the words “*and practice*”, in the reproduced text of section 42 above to clarify the basis for the statutory construction adopted in the Judgment. I have declined to consider altogether further iterations of points which were or ought to have been made at the hearing.

nearly as may be applies, so far as local circumstances permit and subject to any directions which the Court may give in any particular matter.

(2) If any difficulty arises in respect of the operation or extent of subsection (1), the Court may give directions, either with respect to a particular matter or generally, as to the procedure to be followed for the removal of such difficulty.”
[emphasis added]

13. Reference was also made to section 11 of the Grand Court Law (2015 Revision), which states:



“(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-

(a) Her Majesty’s High Court of Justice; and

(b) the Divisional Courts of that Court,

as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.”
[emphasis added]

Mr Akiwumi, appearing to raise the Cayman Islands flag, cautioned against an overly broad importation of English law into a legal context which is governed by a local statute. He submitted that section 8 of the Law governed the removal issue and should be applied. Ms Warnock-Smith QC replied that all that the Court was being invited to do was to apply section 42 of the Law, which itself mandated recourse to English law as a gap-filling measure. In my judgment caution is indeed required in construing and applying gap-filling statutory provisions.

14. Section 11 of the Grand Court Law is most clearly designed to confer on this Court the same inherent jurisdiction and common law and equitable powers of the High Court in England, but “*subject to this and any other law*”. Section 8 of the Law in my judgment is a self-contained code for removing executors on conduct-based grounds. The remaining scope for exercising the old equitable jurisdiction to remove trustees (applied in *Letterstedt v. Broers* (1884), (1883-84) L.R. 9 App. Cas. 371), if any, is difficult to define. The need to explore this difficult question does not arise; because the Law deals with the special topic of administration of estates, and its provisions must take priority

over general legislative provisions such as section 11 of the Grand Court Law: “*Lex specialis derogat legi generali*”.

15. The Plaintiffs’ counsel primarily deployed common sense rather than technical canons of statutory construction and elaborate linguistic analysis as a basis for concluding that the only sensible reading of section 8 in its wider statutory context was as follows: it did not repeal the broad and flexible jurisdiction this Court previously enjoyed in respect of the executors and the administration of estates. I am bound to accept Ms Warnock-Smith’s submission to this effect. It is clear that the Law was first enacted in 1975. It is unclear what if any predecessor statutes existed. It seems reasonable to assume, nonetheless, that the draftsman of the Law would have been aware of the equitable jurisdiction to remove executors which the Privy Council described (in its broader canvass) in *Letterstedt v. Broers* (1884), (1883-84) L.R. 9 App. Cas. 371 at 386 as follows:



“It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story² is merely ancillary to its principal duty, to see that trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were grossly exaggerated, so that the trustee was justified in resisting them...yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed....”

16. So the traditional equitable jurisdiction to remove executors was broader than removal for cause; bearing in mind that section 8 of the Law was expressly drafted in narrower terms, it is (as I have found above) impossible to fairly construe such a narrowly drafted section as intended to confer so broad a jurisdiction. This brings us to section 42, which is an explicitly broad provision. Did the draftsman, aware of the broad equitable jurisdiction traditionally enjoyed by this Court to supervise the due execution of trusts and estates, intend section 42 to retain or repeal this important supervisory jurisdiction? Applying a purposive construction and the presumption against the Legislature intending to achieve absurd results, this question admits only one sensible answer.
17. The language of section 42(1), which bears revisiting, clearly demonstrates an intention to enact a succession equivalent to section 11 of the Grand Court Law (which, incidentally, was also seemingly enacted, in its modern form at least, in 1975):

“42. (1) In any matter of practice for which no provision is made by this or any other law or by any rules or other regulations made thereunder, the law and practice in similar matters of the Supreme Court of Judicature in England as nearly as may be applies, so

² Removal for misconduct, a jurisdiction broadly aligned with section 8 of the Law.

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far as local circumstances permit and subject to any directions which the Court may give in any particular matter.” [emphasis added]

18. This provision, carefully construed in its wider statutory context, incorporates into Cayman Islands law the “*law and practice*” of the English Supreme Court of Judicature (i.e. the High Court, in modern parlance³). The relevant “law” defining the jurisdiction of the English High Court to remove executors otherwise than for cause is section 50 of the Administration of Justice Act 1985 (the “AJA-UK”):

“50 Power of High Court to appoint substitute for, or to remove, personal representative.

(1) 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.

(2) Where the court appoints a person to act as a substituted personal representative of a deceased person, then—

(a) if that person is appointed to act with an executor or executors the appointment shall (except for the purpose of including him in any chain of representation) constitute him executor of the deceased as from the date of the appointment; and

(b) in any other case the appointment shall constitute that person administrator of the deceased's estate as from the date of the appointment.

(3) The court may authorise a person appointed as a substituted personal representative to charge remuneration for his services as such, on such terms

³ Section 11 of the Grand Court Law has been updated to reflect the modern reconstitution of the English courts since the 21st century establishment of the UK Supreme Court.

(whether or not involving the submission of bills of charges for taxation by the court) as the court may think fit.

(4)...

(5) In this section “beneficiary”, in relation to the estate of a deceased person, means a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate...”⁴

19. I find that:



(a) the Law makes no provision for this Court to remove executors in the exercise of a discretion having regard to the due administration of the estate, corresponding to the equitable jurisdiction delineated by the Privy Council in *Letterstedt v. Broers*;

(b) by virtue of section 42 of Law, the applicable law applied by the High Court in England to remove executors without having to make out an affirmative case of improper conduct or negligence is section 50 of the AJA-UK;

(c) section 50 of the AJA-UK, “so far as local circumstances permit”, forms part of Cayman Islands law, as applied by section 42 of the Law.

Findings: have the Plaintiffs made out a case for removing the Defendant and replacing both current executors with an independent professional executor?

20. Ms Warnock-Smith QC aptly relied upon *Schumacher-v-Clarke et al* [2019] EWHC 1031 (Ch) (Chief Master Marsh) to demonstrate how section 50 is applied in practice. This is a valuable persuasive authority which provides clear support for the proposition that the jurisdiction is intended to be used in a flexible and practical way without the need for costly and time-consuming factual inquiries. Chief Master Marsh held, most pertinently for present purposes, as follows:

“16 The jurisdiction under s.50 of the Administration of Justice Act 1975 is a straightforward one. The court is given a power to appoint a person as a substitute personal representative and a power to terminate the appointment of existing office holders. The section does not provide any criteria by which the power is to be operated. It is, however, a very convenient and widely used jurisdiction because it

⁴ www.legislation.gov.uk; status as at August 3, 2020.

obviates the need before the section came in to force to appoint a judicial trustee where there were difficulties in the management of an estate or a trust.

17 So far as trusts are concerned, the court has always had inherent power to remove and appoint trustees, and the considerations that apply in relation to trusts are common to those that apply in the case of personal representatives. The jurisprudence is well settled, and it is unnecessary for me to make detailed reference to it. As a matter of convenience I refer, without citing it, to the summary set out in my recent judgment in *Long v Rodman* [2019] EWHC 753 Ch, paras.19 to 28.

18 It is critical for present purposes that the core concern of the court is what is in the best interests of the beneficiaries looking at their interests as a whole. The power of the court is not dependent on making adverse findings of fact, and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the court to conclude that a party has made out a good arguable case about the issues that are raised. If there is a good arguable case about the conduct of one or more of the executors or trustees, that may well be sufficient to engage the court's discretionary power under s.50, or the inherent jurisdiction, and make some change of administrator or trustee inevitable. The jurisdiction is quite unlike ordinary inter partes litigation in which one party, of necessity, seeks to prove the facts its cause of action against another party...



20 So how does the court proceed in these circumstances? The answer is that the court proceeds in a pragmatic way. That approach can be seen from the decision of Lawrence Collins J (as he then was) in *Loftus Green & Others v Gaul & Others* [2005] WTLR 1325 at [199] and Evans-Lombe J in *Dobson v Hayman* [2010] WTLR 1151 at [26]. Plainly it will rarely suffice for the claimant, whether a beneficiary, executor or trustee, merely to say that they have fallen out with the personal representatives or trustees and or that some action or behaviour is unsatisfactory. The personal representatives or trustees should not be held hostage to allegations which may simply be mischievous. On the other hand, if, when the personal representative's or trustee's response is considered, the court has real concerns about the welfare of the beneficiaries, the court is likely to exercise its powers without determining disputed issues of fact. What it then does in the exercise of those powers will, of course, depend on the circumstances of the case." [emphasis added]

21. Both sides sought to extract helpful observations from the quoted passages. The Plaintiffs' counsel emphasised (a) the focus on the best interests of the beneficiaries, (b) the summary nature of the jurisdiction and (c) the fact that only a good arguable case for

removal needed to be made out. The Defendant's counsel relied upon the holding that "*it will rarely suffice for the claimant, whether a beneficiary, executor or trustee, merely to say that they have fallen out with the personal representatives or trustees*".

22. As I indicated in the course of Mr Akiwumi's submissions, a mere falling out between a beneficiary and an executor has far lower significance for the administration of an estate than a falling out between executors. Good relations between two joint executors are essential for the due administration of the estate. Good relations between executors and the beneficiaries is an ideal to be strived for, but it is not essential. In the present case it is ultimately blindingly obvious that the existing executors should be replaced by an independent professional acceptable to both for the following principal reasons:



- (a) each executor has sworn an Affidavit accusing the other of misconduct and calling for their removal. There is a manifest loss of trust and confidence between the two executors;
 - (b) it is accordingly implicitly common ground that the Estate cannot be efficiently administered without a changing of the administrator guard;
 - (c) the 1st Plaintiff is willing to resign and be replaced by an independent professional trustee if the Defendant steps down;
 - (d) the Defendant refuses to step down and unreasonably contends that she should continue as an executor alongside an independent executor in place of the 1st Plaintiff. If she does not get her way, she contends there should be a trial of the 1st Plaintiff's filed removal application and her own prospective removal cross-application;
 - (e) as a result it is plain that the Estate's administration will be like a boat which has broken free from its moorings, drifting hither and thither, unless an independent professional executor comes aboard and takes a firm grasp of the helm.
23. Without considering the merits of the respective accusations, the 1st Plaintiff's proposition that both disputants should step down and be replaced by an independent professional reflects a minimum objective appreciation of the need to meet the best interests of the beneficiaries as a whole. The Defendant's insistence that she remain in office despite the small size of her stake and the questions which have been raised about her fitness, regretfully, merely highlights her failure to appreciate the need for an executor who is also a beneficiary to be a champion for interests other than her own.

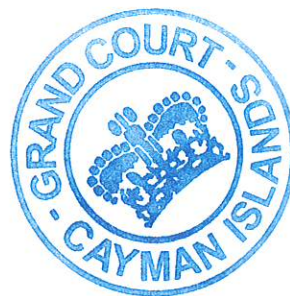
24. The penultimate paragraph of the Defendant's Additional Submissions suggests that all would be well if she was reimbursed expenses she has occurred on behalf of the Estate. That is a fanciful proposition at this stage. It may well be that, as her counsel suggested, the Defendant feels disrespected and ignored. Clearly the Defendant was respected by the Testator and deserves respect from this Court. A traditional customary law court charged with healing the breach between two members of a small community might find it imperative to privilege reconciliation over private property rights. Probate law in the Cayman Islands, particularly in the Financial Services Division, on the other hand, predominantly⁵ privileges advancing the private commercial interests of the beneficiaries of an estate. And this almost invariably requires ensuring that the administration is completed as quickly and efficiently as possible.
25. The legal rights of all beneficiaries, including the Defendant's, will of course receive proportionately equal protection from the independent professional executor, Mr Carlos de Serpa Pimentel, whom I propose to appoint in place of the incumbents if he consents, and, if needs be, this Court as well. At the hearing it was common ground that he would be a suitable appointee.

Summary

26. For the above reasons, upon the 1st Plaintiff signifying his desire to resign, the Defendant is removed from office as an executor of the Estate and Mr Carlos de Serpa Pimentel appointed as sole administrator in their place, subject to his consent. I shall hear counsel, if required, as to costs and the form of the Order to give effect to the present Judgment. Mention was made at the end of a hearing of a property transaction which it was hoped could take place on or about August 7, 2020. The Court expects the parties to use their best endeavours to agree the critical (and what ought properly to be entirely straightforward) terms of the Order as quickly as possible, even if costs need to be reserved.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT



⁵ These sophisticated traditional non-coercive adjudication processes are, it must be admitted, increasingly being redeployed under the rubric of 'alternative dispute resolution' in the modern business arena, often in the context of commercial communities which need to maintain harmonious and sustained business relations while resolving inevitable disputes in a conciliatory manner.