In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: 124

IN THE MATTER OF THE ESTATE OF D

REASONS FOR DECISION

(in Camera)

Probate-application for grant of letters of administration-whether grant should be on limited or unlimited basis

Date of hearing: May 25, 2016
Date of Reasons: June 22, 2016

Mrs Elspeth Talbot-Rice QC of counsel, and Mr Rod S Attride-Stirling, ASW Law Limited, for the Applicant

Mr Francis Barlow QC of counsel, and Mr David Kessaram, Cox Hallett Wilkinson Limited, for the Respondents

Introductory

1. By a Summons issued on August 5, 2015, the Applicant applied for an Order that: "*Letters of administration of the Deceased's Bermudian estate be issued to the Applicant under rule 27 of the Non-Contentious Probate Rules 1974 ('the Rules') or section 19 of the Administration of Estates Act 1974*…"

2. The Bermudian estate ("the Estate") consists essentially of certain proceedings commenced by the Applicant in this Court in 2013 ("the 2013 Proceedings"), although the possibility of further assets being identified could not be ruled out. The

parties were all entitled to seek a grant as children of the Deceased who apparently died intestate. However because of the adverse positions in the 2013 Proceedings, the Respondents were in no position to suggest that they, and not the Applicant, should be granted letters of administration instead. The only real controversy was not whether the Applicant had standing to receive the grant sought. Rather, the Respondents contended only a conditional grant ought to be made. Their position in seeking to limit the scope of the grant was necessarily somewhat difficult to advance as it was their ultimate position not that limiting the grant was in the best interests of the Bermudian estate. Rather, their underlying interest lay in establishing that the estate contended for did not exist and the Applicant's desire to pursue the 2013 Proceedings and any collateral proceedings was both mischievous and misconceived.

3. On May 25, 2016 I granted letters of administration to the Applicant upon his undertaking that:

    (1) if he is unsuccessful in the 2013 Proceedings or any other proceedings on behalf of the Estate, he will not seek an indemnity from the Estate of the Deceased or his heirs wherever situate in respect of :

        (a) any costs incurred by the Applicant in such proceedings which are not ordered to be paid by another party, or

        (b) any costs liability incurred by the Applicant in such proceedings;

    (2) he would not distribute any assets collected by him as Administrator of the Estate without obtaining directions from the Court.

4. I now give reasons for that decision.

The relevant statutory jurisdiction

5. The Administration of Estates Act 1974 ("the Act") is the governing statute. The application was made under the following provisions found in section 19:

    "***Grant in special case***
    19 Where it appears to the Court by reason of special circumstances that —

        (a) it is necessary that the property of a deceased person be forthwith administered; or

(b) that some person other than the executor or a person to whom administration would be granted under section 13 be appointed to administer the property of a deceased person,

the Court may upon application and upon such notice, if any, as it may direct make a grant of administration to such person as it thinks fit and may impose such limitations and restrictions in the grant as it sees fit."

6. Of closely connected relevance are the following provisions of section 13:

"***Discretion of Court as to persons to whom administration is to be granted***
13 (1) In granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee, and any such administration may be limited in any way the Court thinks fit:

Provided that —

(a) where the deceased died wholly intestate as to his estate, administration shall be granted to some one or more persons interested in the residuary estate of the intestate if they make an application for the purpose; and

(b) every applicant for a grant of administration shall give notice in accordance with the rules, of intention to apply for administration.

(3) *This section shall apply only in the case of persons dying on or after 1 September 1974, and the Court in granting administration in the case of persons dying at any time before that date shall act in accordance with the principles and rules in accordance with which it would have acted if this Act had not been passed.*"

7. The Deceased was domiciled outside of Bermuda at his death. The following provision of the Non-Contentious Probate Rules 1974 ("the Rules") accordingly also applies:

"***Grants where deceased died domiciled outside Bermuda***
27. Where it appears from the oath that the deceased died domiciled outside Bermuda, the Registrar may order that a grant do issue—

(a) to the person entrusted with the administration of the estate by the Court having jurisdiction at the place where the deceased died domiciled;

(b) to the person entitled to administer the estate by the law of the place where the deceased died domiciled;

(c) if there is no such person as is mentioned in paragraph (a) or (b) or if in the opinion of the Registrar the circumstances so require, to such person as the Registrar may direct;

(d) if, by virtue of section 11 of the Act, a grant is required to be made to, or if the Registrar in his discretion considers that a grant should be made to, not less than two administrators, to such person as the Registrar may direct jointly with any such person as is mentioned in paragraph (a) or (b) or with any other person:

Provided that without any such order as aforesaid—

(a) probate of any will which is admissible to proof may be granted—

(i) if the will is in the English language, to the executor named therein;

(ii) if the will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the will, to that person;

(b) *where the whole of the estate in Bermuda consists of immovable property, a grant limited thereto may be made in accordance with the law which would have been applicable if the deceased had died domiciled in Bermuda.*"

8. In light of these provisions, I found that the Act conferred on the Court the discretion to appoint the Applicant on either an unlimited or limited basis. This discretion was expressed as an unfettered one. I rejected the submission that because the Applicant fell within proviso (a) of section 13(1), the preceding words conferring the discretion to limit the grant did not apply. This reading was internally inconsistent when section 13 was read as a whole. It was also inconsistent with the terms of section 19 which conferred the alternative substantive jurisdiction to make the grant for which the Applicant applied.

9. Without considering case law, it appeared obvious that the main underlying purpose of the Act was to facilitate the efficient administration of the estates of deceased persons having regard to the interests of persons interested in each relevant estate. This object is broadly similar to the impulses underpinning the statutory regimes governing personal bankruptcy and corporate insolvency.

Principles governing when limited or unlimited grants should be made

10. The central thesis advanced by Mrs Talbot Rice QC was that there was a strong presumption in favour of a person entitled to a general grant receiving an unlimited grant. Special grounds were needed for departing from this principle. She supported

this submission by reference to the opinions of text writers and the case law upon which those opinions were based. For instance:

(a) '*Tristam & Coote's Probate Practice*' states at paragraph [11.03] as follows:

"*It is not the practice to allow a person entitled to a general grant to take a limited grant except by special permission, and for very strong reasons*";

(b) Williams, Mortimore & Sunnucks, '*Executors, Administrators and Probate*' states at paragraph 24.01:

"*Only by special leave is a person entitled to a general grant permitted to take a limited grant*".

11. Mr Barlow QC countered that these statements were based upon 19th century English case law decided in a more restrictive statutory context which no longer was in force in England and Wales. The Bermudian Act was more consistent with modern UK legislation and this Court had an unfettered discretion which was "untrammelled" by the archaic English case law. These arguments did not withstand careful scrutiny. The case law the Applicant's counsel primarily relied upon was demonstrably informed by a broadly similar legislative framework to our own.

12. Section 73 of the Court of Probate Act 1857 (UK) ("*Power as to Appointment of Administrator*") was in all material respects expressed in terms substantially similar to those of the current Bermudian statutory provisions and the modern UK counterparts. This provision covered the full range of circumstances in which an appointment might be required, including intestacy, of a person who but for the 1857 Act would <u>not</u> have been entitled to a grant. This section crucially provides:

> "*…it shall be lawful for the Court, in its Discretion, to appoint such Person as the Court shall think fit to be such Administrator upon his giving such Security (if any) as the Court shall direct, and every such Administration may be limited as the Court shall think fit.*"

13. It is true that the Bermudian section 13 applies to persons entitled to a general grant and thus, unlike its 1857 UK counterpart, confers the discretion to make a grant to such persons on more flexible terms. The UK nineteenth century practice in relation grants to persons <u>entitled</u> to a general grant is best reflected in rule 29 of the Non-Contentious Business Rules 1862, which stated:

"*29. Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge.*"[1]

14. More broadly still, it is no unusual thing in common law jurisdictions for Parliament to confer a broad unfettered discretion on the courts, with conditions for the exercise of the discretion being more specifically defined through judge-made law. This does not fetter the discretion of the courts in a way which Parliament did not intend. Rather, it ensures that the courts give effect to the presumed intention of Parliament through following a principled and clearly demarcated course, instead of adopting an entirely *ad hoc* approach which makes the law resemble an unruly horse. For instance, despite the breadth of the statutory jurisdiction to grant injunctive relief conferred by section 19(c) of the Supreme Court Act 1905 ("*in all cases in which it appears to the Court to be just or convenient that such order should be made*"), it is difficult to imagine circumstances in which guideline principles developed through case law would be wholly ignored.

15. The principles contended for by the Applicant's counsel and illustrated by the case law reflect a consistent pattern of ensuring the best administration of the estate having regard to the character of the applicant and the practicalities of the peculiar administration challenges placed before the courts. For instance:

    (a) *In the Goods of Jenny Watson (deceased)* (1858) 1 SW & TR 110, the sole legatee sought a general grant but was granted a limited grant only because the next of kin were not before the court;

    (b) *In the Goods of Christopher Dodgson (deceased)* (1859) 1 Sw & Tr, Sir Cresswell Cresswell held: "*A general administration is out of the question, for Mr. Richard Davies has no interest whatsoever in the personal estate of the deceased, except as assignee of the father*…";

    (c) *In The Good of William Watts* (1860) 1 Sw. & Tr. 539, Sir Creswell Cresswell refused a limited grant, which apparently might have resulted in a substantial estate not being fully administered, explaining that he only took a contrary course in *Jenny Watson* because the applicant in that case was "*miserably poor*";

    (d) *In the Estate of Von Brentano* [1911] P. 172, the Court made a limited grant in respect of the deceased's English real estate dealt with by an English will, leaving his German real estate to be administered by separate executors appointed under a separate German will;

    (e) *In the Goods of Hampton Robinson* (1949) NI 150, Andrews LCJ made a grant limited to property in Tamnificarbet, explaining (at 152): "*The right to such an order so limited is not determined by the degree of relationship,*

[1] Mortimer and Coates, '*The Law and Practice of the Probate Division of the High Court of Justice*', 2nd edition (Sweet & Maxwell Ltd/ Stevens & Sons Ltd): London, 1927), Appendix III.

or by the ordinary principles which regulate priority to a grant, but rather by the nature and extent of the applicant's interest in the property."

16. I was satisfied that this Court should be guided by the principles established by persuasive English case law which demonstrated that where a person entitled to a general grant applies for a general grant, a limited grant will only be made in exceptional circumstances and/or where justice warrants it, having regard to the specific factual nuances of each case.

Application of principles on scope of grants to the facts of the present case

17. The key facts in the present case were ultimately not contentious and were as follows:

    (a) the Applicant was entitled to a general grant;

    (b) no other persons similarly entitled sought to receive a grant instead;

    (c) although the main asset of the Estate consisted of the 2013 Proceedings, the possibility that other Estate assets existed (e.g. bank deposits and other causes of action) could not be ruled out.

18. The Respondents expressed concern that the Applicant would use his status as Administrator to engage in abusive litigation and accordingly his grant should be limited to the 2013 Proceedings. There was no identified need for a general grant. These objections appeared to turn the recognised governing legal principles on their head. The Applicant was in fact obliged to justify why he should <u>not</u> take a general grant. It was not for alleged debtors of the Estate to accept the Applicant's standing to receive a grant while seeking to limit the scope of it seemingly for their own ends, ends which were adverse to the interests of the Estate. It is true that the Respondents were themselves entitled in theory to apply for a grant themselves, but they were bound to concede that the Applicant was in reality the most appropriate person to be cloaked with the authority of this office.

19. The relations between the parties did admittedly warrant a generalised concern that the Respondents might be vexed by unmeritorious proceedings, pursued as part of the Applicant's own litigation strategy in relation to the 2013 Proceedings. These concerns were, to my mind, substantially met by the Applicant's undertaking to fully bear the costs of all proceedings brought on behalf of the Estate where costs orders are not made in his favour. In addition, this Court is well able to restrain the pursuit of proceedings which are brought in an abusive manner.

20. The relations between the parties did, admittedly, also give rise to some genuine anxiety about the need for this Court to supervise the due administration and distribution of any assets which the Applicant might in due course recover for the

Estate. These concerns were also substantially met by the Applicant's undertaking not to make any distribution of such recovered assets without further Order of the Court.

Summary

21. For the above reasons on May 25, 2016 I granted the Applicant letters of administration on an unlimited basis.

Dated this 22nd day of June, 2016 _____
IAN RC KAWALEY CJ