



PUMP COURT

CHAMBERS

**Dealing with difficult executors, administrators
and trustees – How does one find a cost
effective solution?**

Mark Dubbery Ward

Jurisdictions

- The most common recourse will be to Part 64 of the CPR or s.50 of the Administration of Justice Act (or the equivalent provision under the s.41 Trustee Act 1925).
- Less often to the appointment of a judicial trustee under the Judicial Trustees Act 1896 Section 1 or passing over the appointment of an executor under Section 116 of the Senior Courts Act 1981.

- Full administration by the Court is a rarity. Parties should rather seek the directions of the court in response to a proposed course of action (albeit some care should be given to the diplomatic drafting thereof (...or otherwise as the court might deem just...)).
- CPR Part 64 and PD64 provide the procedure.

Section 50 AJA 1985

(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

(a) 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.

- The starting point is to try and engage in sensible dialogue to resolve problems or understand why certain steps have been taken by executors. It is not uncommon to find voluminous correspondence flows between solicitors. In the event that the correspondence has not resolved the problems or substantial difficulties remain, then an application to court will be necessary. The correspondence will then often be a critical element.

- NB under Section 50 the power is to appoint a person (the “substituted personal representative”) to act as personal representative in place of one or all of the existing personal representatives or, if there are two or more personal representatives, to terminate the appointment of one or more, but not all, of them.

- Applications under Section 50 AJA are brought in the High Court and assigned to the Chancery Division – CPR 57.13(2).
- The application is made by a claim form, unless there are existing proceedings, in which case it should be made by application notice in those proceedings – CPR57.13(5). The claimant should use a Part 8 claim form – CPR 64.3.
- CPR 57.13(3) provides that “*Every personal representative of the estate shall be joined as a party.*”

- Residuary beneficiaries, unless particularly numerous, will usually be made parties, unless their written consent to the application is available.
- CPR PD 57 paragraphs 13.1 and 13.2 specify the documents that must accompany the claim form. 57PD13.1(1)B expressly contemplates a claim to substitute or remove an executor being made before a grant of probate has been issued – consistent with the principle that an executor derives title from the will.
- The witness statement in support of the application will set out the details of the estate, how it devolves (i.e. under a will or on intestacy), beneficial entitlements and the reasons for the removal and/or substitution. Detailed reasons need to be precisely drafted. Often it is desirable to annex the chain of correspondence to a statement.

- A Chancery Master in chambers usually determines applications under Section 50. However, if the claim is complex or particularly hostile or there are allegations of fraud, it may be referred to a judge.
- NB under Section 50 the power is to appoint a person (the “substituted personal representative”) to act as personal representative in place of one or all of the existing personal representatives or, if there are two or more personal representatives, to terminate the appointment of one or more, but not all, of them.

S.41 Trustee Act 1925

- 1) *The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who . . . lacks capacity to exercise his functions as trustee, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.*
- 2) [revoked].
- 3) *An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.*
- 4) *Nothing in this section gives power to appoint an executor or administrator.*

- In exercising its discretion to remove both trustees and personal representatives, the court acts on the principles laid down by Lord Blackburn in *Letterstedt v Broers* [1884] 9 App Cas 371 (see *Thomas and Agnes Carvel Foundation v Carvel* [2007] [2008] Ch 395)

- The overriding consideration for the court will always be whether or not the trusts are being properly executed; or in alternative terms the guide must be welfare of the beneficiaries. In ***Thomas and Agnes Carvel Foundation v Carvel*** Lewison J held at para 46 endorsed that approach, by adding that “*The overriding consideration is, therefore, whether the trusts are being properly executed; or, as he put it in a later passage, the main guide must be 'the welfare of the beneficiaries.'*” The reference being to the judgment of Lord Blackburne in ***Letterstedt v Broers [1884] 9 App Cas 371*** .

Jurisprudence

- It should be noted that not every act, omission, mistake or neglect of a duty or inaccuracy of conduct will result in the removal of a personal representative. Lord Blackburn in ***Letterstedt v Broers*** held that:
 - *“the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.”*

- In ***Letterstedt*** Lord Blackburn said at p 389:

“...friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.”

- However, it is clear that misconduct is not necessary. Lord Blackburn said at p 386:
“...though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.”

Some recent authorities

- *Alkin v Raymond* [2010] WTLR 1117,
- *Angus v Emmott* [2010] EWHC 154 (Ch),
- *Kershaw v Micklethwaite* [2010] EWHC 506 (C),
- *Goodman v Goodman* [2013] EWHC 758 (Ch), [2013] 3 All ER 490
- *National Westminster Bank plc v Lucas, Estate of Jimmy Savile (dec,d),*
Re [2014] EWHC 653 (Ch), [2014] BPIR 551, [2014] WTLR 637.

Some recent authorities

- *Wilby v Rigby [2015] EWHC 2394 (Ch)*
- *Griffin v Higgs [2017] EWHC 2559 (Ch)*
- *Cockerham v Cockerham (2019) (lawtel)*
- *Griffin v Higgs (2019) WTLR 175*
- *Hudman v Morris [2021] EWHC 1400 (Ch)*
- *Caldicott v Richards [2020] 2 P & CR DG14*