ACTAPS

Newsletter

ASSOCIATION OF CONTENTIOUS TRUST AND PROBATE SPECIALISTS

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ACTAPS

CHAIRMAN'S REVIEW

Welcome to Issue 167 of the ACTAPS Newsletter.

In this edition we carry the Minutes of the Association AGM held on 2 September, together with an article kindly submitted by Michelle Rose and Julia Hardy of Veale Wasbrough Vizards.

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MINUTES OF AGM HELD ON
MONDAY 2 SEPTEMBER 2012 AT 12.30 PM

Venue:	**The offices of Herbert Smith Freehills LLP** **Exchange House** **Primrose Street** **London** **EC2A 2EG**
In the Chair:	**Henry Frydenson ("the Chairman"), Frydenson & Co**
In attendance:	**Committee and Members**

The Chairman declared the AGM open and welcomed all attendees.

Matters discussed

1 Overview

The Chairman presented his Annual Report, as follows.

It gives me pleasure to set out some of the highlights of ACTAPS' activities during the twelve months since the last AGM, as follows:-

September 2012

The meeting for choosing the short list in each of the three Awards categories took place, and a week before the Annual Lecture those shortlisted in each category were notified by private and confidential post of this, and their names announced at the Annual Lecture.

October 2012

The three speakers at the December 2012 Joint Seminar with STEP had agreed to repeat their lectures in January 2013 in Nottingham.

The Committee considered the possibility of recording lectures for uploading onto the Association website, and a firm who provided this service had been approached.

The possibility of having a full day conference was raised and it was decided that bearing in mind the amount of work which would be involved, the membership would first be canvassed to see if there was support for this idea. In theory, the spring Seminar could be expanded to a full day.

November 2012

The Chairman had further looked into the position of recording lectures. The charges of companies who dealt with this was felt to be too expensive. It was possible to buy a digital recorder with PC software. The Chairman agreed to look into this further and liaise with the Association IT administrator.

It was reported that members had encountered serious problems with the Family Division. The Chairman suggested taking up the matter with the membership in the Newsletter, and it was decided that he should canvass the view of the Family Law Association first.

The possibility of an all day conference was further discussed and the wording of an e-mail to the membership was decided upon

December 2012

The Chairman confirmed that the repeat lecture in Nottingham would take place on 29 January.

The purchase of a digital recorder was authorised in order to upload lectures to the website, subject to BSB and SRA confirmation on CPD position.

January 2013

The Chairman reported that we had 63 members in favour in principle of an all day Seminar, and the Royal College of Surgeons had been approached as a venue. The issue of speakers at the Seminar was addressed and also a nominal charge of approximately £100 per participant was decided upon. The Chairman would further canvass the membership to see if bearing in mind the small cost implication, there was still sufficient interest.

It was confirmed that several members had accepted the invitation to the Nottingham repeat lectures and that it would be linked, via his firm's IT people to Sheffield.

February 2013

The Chairman confirmed that arrangements for the all day Seminar were moving forward.

The repeat lecture in Nottingham had been very successful.

The digital recorder had been purchased.

An e-mail received from Lord Justice Briggs re the Chancery Modernisation Review was discussed and it was strongly felt that ACTAPS should respond.

March 2013

The Chairman reported that there had been a very healthy uptake for the April all day Seminar.

The response re the Chancery Modernisation Review was further discussed.

April 2013

The Chairman reported that we had had 75 acceptances for the all day Seminar. Five speakers on varied subjects had been arranged.

The Chairman had met with the Law Commissioner on 28 March and discussed rectification of wills, trustees' duties of disclosure and the Re McBroom anomaly. In the course of that discussion, the research carried out by Robert Hunter and Dr Clare Royston was raised, and the Law Commission had requested that she be furnished with a copy of the paper they had prepared. She also requested that the Chairman let her have a paper on improving clarity on trustee's duties of disclosure since the tests arising out of Schmidt v Rosewood and Re Londonderry were very difficult to apply on a practical level.

At the All Day Seminar, the three winners of the first Association Annual Awards were announced as follows:-

Contentious Solicitor of the Year - Angela Bowman, Henmans Freeth LLP

Contentious Barrister of the Year - David Rees, 5 Stone Buildings

Contentious Offshore Lawyer of the Year - Tina Wustemann, Baer & Karrer AG, Zurich

May 2013

Following the success of the April all day Seminar, it was agreed that this would be now become an annual all day Seminar.

Following the purchase of the digital recorder, the Chairman was liaising with the Association's IT expert regarding uploading and was checking the position regarding CPD for recorded lectures with both the SRA and BSB.

June 2013

There had been three further honorary membership acceptances - Lady Justice of Gloster, Matthew Thompson (who had become a Master of the Court of Jersey) and Stephen Dobson, long time Treasurer from the inception of the Association.

Following a meeting the Chairman had had with Chief Chancery Master Winegarten when Chief Chancery Master Winegarten had announced his retirement, the Committee felt that the Chairman should write to the Chief Master confirming that the Committee on behalf of the Association all felt that it was no exaggeration to say he had been the best Chief Chancery Master, and that we were greatly saddened to learn that he was taking this step. The Association wished the Chief Master every success in all his future endeavours.

The Law Society accreditation scheme for wills and estate administration was considered, which essentially meant that a Protocol, which is in its final edit stage, would be adopted, and that any firms which have ACTAPS members, as will be the case with firms who have STEP members or Lexel or Conveyancing Quality Scheme members, would be given credit on a risk scorecard to enable people to make the initial assessment of a firm's suitability for the scheme.

July 2013

The following problem was addressed. Practitioners in other fields of law who have found their sources of work drying up in the current recessionary times, have lighted on the fact that our education course can be completed in two years, and comprises mostly at distance learning, which can be fitted in with their other work, and most importantly, no examinations are necessary.

Having successfully completed the course, a practitioner who say, does property work, continues as an associate member for two years, and then makes application, as they are entitled to do, to be considered for full membership.

A growing number of such honest practitioners have written to the Chairman stating that they feel duty-bound to point out that their core practice is not contentious trust and probate work, and in a recent e-mail a practitioner had told the Chairman that they now no longer do any contentious trust and probate work.

The membership application form tries to ascertain both the number of years of relevant experience, ie contentious trust and probate work, and also the type of cases that they are involved in.

However, bearing in mind that whether we like it or not, the public are now beginning to recognise Association members as having the requested expertise in the fields of contentious trust and probate work, the Association would not feel happy to have a member who is in reality say a property or construction lawyer. The fact that they have written pieces of work showing that at the time they did so they were au fait with a given aspect of contentious trust and probate work, in no way means that in the absence of practising in this specialist field they have the necessary ability to advise a client appropriately.

It was felt that we ought not to dilute what ACTAPS was intended for. It was determined that the Chairman would prepare a letter for all prospective participants of the next education course which would make it plain that we needed people who were to have on-going contentious trust and probate experience, ie that this was not a short cut for a property lawyer to 'have another string to his or her bow'.

The full membership application form to be completed by associate members, would be amended to ensure that the applicant confirmed in writing that since completing the course they had a 50% active contentious trust/probate practice up to the date of their application for full membership.

The Secretary had commented that the quality of students participating in his module of the course had improved radically over the years. The Chairman reported that in the modules that he taught, this was also the case.

August 2013

The Chairman attended the valedictory for Chief Master Winegarten on the 29th July 2013 on behalf of the Association. No new Chief Master of the Chancery Division had yet been appointed.

The Chairman reported that the Committee would remain as current constituted.

Finally, the Chairman reported that the Accounts for the Association showed that we were in a very healthy position, and this was something that he hoped would continue.

2 The Committee

The Committee remained as currently constituted.

3 AOB

There were no AOB items, and the AGM ended.

To remove or not to remove?

Michelle Rose and Julia Hardy of Veale Wasbrough Vizards examine a trio of recent cases, *Angus v Emmott, Kershaw v Micklethwaite and Alkin v Raymond,* which give valuable guidance on when the Court will order the removal of personal representatives…and when it will not.

This article first appeared in TQR Volume 11, Issue 1 2013

What will it take for the Court to intervene and remove a personal representative? It is evident that the Court has inherent jurisdiction to remove or substitute personal representatives and most applications of this type are brought under s50 of the Administration of Justice Act 1985 (s50 AJA).[1]

Until recently, case law interpreting the statute was sparse and practitioners were mainly reliant upon the old, but good, authority of ***Letterstedt v Broers*** **(*Letterstedt*)**. [2] This Privy Council South African case provided the key guidance that, the same principles will apply for the removal of personal representatives as will apply to the removal of trustees and that, the overriding consideration is whether the trusts are being properly executed. The main guide for a Court in determining this must be "*the welfare of the beneficiaries*".

Letterstedt remains good law but much-needed updated guidance came for practitioners in this trio of recent cases, which were all decided in 2010.

Angus v Emmott [3]

In this unusual case, a dispute arose between the three executors in the estate of Anthony Steel. Mr Steel was convicted of murder in 1979 but after spending 19 years in prison, protesting his innocence and after finally being released in 1998 on licence, his conviction was quashed on appeal in 2003. Unfortunately, Mr Steel died before his compensation award had been determined by the Home Secretary.

[1] See also Section 1 of the Judicial Trustee Act 1896, Section 41 of the Trustee Act 1925 and s116 of the Supreme Court Act 1981
[2] *Letterstedt v Broers* (1884) 9 App Cas 371
[3] *Angus v Emmott* EWHC 154 (Ch)

Mr Steel's estate was due to benefit from the compensation award but the administration ground to a halt when a dispute arose between the three executors; Margaret Angus, (Mr Steel's partner), Angela Emmott, (Mr Steel's sister)and Donald Emmott, (Angela's husband). Theirs was an uneasy alliance from the outset. Margaret was the residuary legatee under the Will and was due to inherit a substantial proportion of the compensation award. Angela and Donald were entitled to pecuniary legacies, as were other members of Mr Steel's family. The administration was plagued by disagreements between the executors and their dispute culminated in a final falling-out over the contents and form of the compensation submission. This prompted Margaret's application for the removal of Angela and Donald as executors.

Margaret's main allegations were that Angela and Donald had acted with misconduct regarding the compensation application and also, as she put it, that "*because of the animosity and apparent distrust which [Mr and Mrs Emmott] have towards me as their co-executor, I do not believe it will be possible for us to work together in a most unsatisfactory situation*."

In considering this, the court looked first to a 2007 case, ***Thomas & Agnes Carvel Foundation v Carvel (2007) (Carvel),*** in which Lewison J reaffirmed the key principle cited in ***Letterstedt*** that the *welfare of the beneficiaries* and proper execution of the trusts should be of overriding concern. However Lewison J in ***Carvel*** also referred to the further guidance set down in ***Letterstedt*** as follows:-

- That not every mistake or neglect of duty should persuade a court to remove executors;
- But in cases of positive misconduct the Court will have no difficulty in intervening to remove trustees who have abused their trust. However, the acts 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; [4]
- That hostility or friction alone is not sufficient reason to remove personal representatives;
- But if the applicant can show that the hostility is preventing the trust from being administered, then the removal is justified.

So back to ***Angus v Emmott.*** When deciding the case, Richard Snowden QC, by reference to ***Carvel*** and ***Letterstedt***, found that Angela and Donald may have proved misguided in their actions, but there had been no misconduct. Having said that, the Judge was however persuaded that a situation existed -

[4] In ***Carvel*** it was the trustee's want of capacity which justified her removal;

"*in which there is such a degree of animosity and distrust between the executors that the due administration of the estate is unlikely to be achieved expeditiously in the interest of beneficiaries unless some change is made*."

As matters stood, the application to the Home Secretary could not be made because the three executors could not agree upon the application's form and content. However, its submission was necessary for the proper execution of the estate. The Judge therefore removed all the executors, (which notably, was not what Margaret had applied for) and replaced them all with a professional executor.

Kershaw v Micklethwaite[5]

The day after ***Angus v Emmott*** was decided, the Judgment in ***Kershaw v Micklethwaite*** was handed down.

Mrs Kershaw had died in July 2008 and had named her two daughters, Mrs Micklethwaite and Mrs Barlow as her executors, together with an accountant, Mr Humphries.

Mrs Kershaw's son was not happy about being passed over as an executor and raised a number of complaints about the executors and the manner in which they were administering the estate. Having locus as a beneficiary of the estate, he brought his application for the removal of some, or all, of the executors.

The estate contained property, including a farm and some flats. The Will, made in July 2004, stated that the residuary estate was to be split into fifths, with Mrs Kershaw's son receiving two fifths, Mrs Micklethwaite receiving the same and the last fifth going to Mrs Barlow.

The basis for the son's application was:-

1. That the executors had failed to value the assets in the Estate correctly, in particular, that they had obtained probate valuations of the farm and the flats which were too low;

2. That the executors had failed to keep the son informed of progress about the administration, including failing to provide him with a promised monthly bulletin;

3. That the executors had failed to identify the extent of the estate properly; in that boundaries to the farm had not been ascertained and the estate was entitled to certain other property assets which had not been taken into account;

[5] *Kershaw v Micklethwaite [2010] EWHC 506 (Ch)*

4. That there was potential for a conflict of interest with his sisters being executors because they may wish to acquire some of the estate's assets for themselves; and

5. That the relationship between the son and his sisters had broken down and he lacked confidence in their competence to deal with the estate.

The court dismissed each of these reasons in turn. Newey J directed that:-

1. As regards the valuations of the farm and flats, the executors had obtained valuations prepared by professional valuers and it was for HMRC to challenge the figures if necessary;

2. Regarding the monthly bulletin and updates, certain oversights were conceded by the executors regarding the timing of information provided to the son. However, the Judge found that *"these matters provide no basis for the removal of the defendants as executors."* Referring to ***Letterstedt***, Newey J stated "*it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees which will induce courts of Equity to remove a trustee (or, I would add ,an executor)."*

3. The Judge dismissed the allegations regarding the failure to identify the extent of the estate, directing that, the executors had submitted that they were missing a key conveyance document and further that, they had not been aware of the existence of the land and ground rents omitted from the assets list.

4. Regarding the potential conflicts of interest, the Judge was quick to direct that Mr Kershaw's sisters had been placed in their position as executors by their mother's testamentary direction and had therefore not chosen to put themselves in a position of conflict. Furthermore, the Judge found that such potential for conflict must be commonplace amongst family members who are also executors but that this did not create a need for their removal per se.

5. Finally, the Judge agreed that it was *"abundantly clear*" that the relationship between the sisters and the son had broken down. The Judge commented that this application was the fifth piece of litigation brought by the son against Mrs Micklethwaite. The Judge also noted that the son was expressing dissatisfaction about his mother's choice of executors very soon after her death and before he had had any experience of the executors' manner of administration.

One of the key rulings to emerge from this case was Newey J's comments as follows:-

"I am not in a position to assess the rights and wrongs of this litigation…..however, I do not consider that friction or hostility between an executor and a beneficiary is of itself a reason for removing the executor. …While, though, it may well be that the administration of the estate could be carried out

more quickly and cheaply were Mr Kershaw and his sisters to be on good terms, I do not think that the potential problems are such as to warrant the executors' removal."

1. Notwithstanding the above, reading between the lines of this case, the Judge was not persuaded by the submissions put forward for the son. The Judge also paid great attention to the reasons submitted as to why Mrs Kershaw had not chosen her son to be an executor. This may help to partially explain why each of the reasons put forward by the son for the removal were so readily dismissed.

In addition, Newey J added two further points to his Judgment:-

1. Firstly, that it was right to take into consideration the choice of the testator, Mrs Kershaw, in making her selection of executors; and

2. Secondly, a practical point on costs. The Judge commented that changing personal representatives and appointing a fresh professional executor would increase the costs of the administration significantly, which would be of course, to the detriment of the beneficiaries.

Alkin v Raymond [6]

Our final case concerns Harry Alkin, (Harry) a retired solicitor, who died in October 2008.

The applicants were Harry's widow and only daughter, Nicole Price (Nicole).[7]

The defendant executors, Mr Raymond and Mr Whelan, were both former business associates and friends of Harry. The estate was valued at around £2.5 million and was split in two parts. The first was a discretionary trust in which Harry's widow and Nicole were included as discretionary beneficiaries. The second was a life interest trust with the income payable to Harry's widow. Nicole and Harry's grandchildren were the remainder beneficiaries.

Nicole was very unhappy about the way the executors were administering the estate and applied for their removal on the following grounds:-

1. That they had not made any income payments from the discretionary trust to her mother;

2. That they had improperly offered Nicole's ex-husband a loan to pay her children's school fees;

3. That Mr Whelan's behaviour towards Nicole was allegedly disrespectful and inappropriate. The case bears reading for details of such behaviour, which include Mr Whelan's suggestions

[6] *Alkin v Raymond* W.T.L.R 1117
[7] Nicole also acted as litigation friend for her mother, who suffered from dementia

to Nicole that she might have cosmetic surgery and his gift to her one Christmas of some lingerie; and finally

4. That the executors had approved payments between themselves of invoices rendered after Harry's death, which had been back-dated to when he was alive, concerning Harry's business involvement in Mr Whelan's building company.

In making his ruling, Mr A G Bompas QC confirmed the ***Letterstedt*** principle, that the main guide the Court must apply was to ensure the *welfare of the beneficiaries*. Of course in this case, unlike the first two considered, there was a clear-cut differentiation between the defendant executors (who were not beneficiaries) and the applicant beneficiaries who were Harry's family members.

Furthermore, the Judge accepted that there could be situations in which executors could be removed even if it could be shown that charges of misconduct were not justified (as we saw in ***Angus v Emmott***). However, he emphasised that, in cases of friction or hostility between the executors and beneficiaries, the court had to be satisfied, before it would intervene to remove them, that the friction or hostility was impeding the proper execution of the trust.

The Judge considered that in exercising his discretion, considerable importance should be attached to the testator's choice of executors (as we saw in ***Kershaw v Micklethwaite***).

Therefore, in deciding ***Alkin v Raymond***, the Judge dismissed all of the beneficiary applicants' submissions on the grounds that they lacked substance, save for the submission relating to the payment of the invoice, which had been back-dated to when Harry was alive.

Had it not been for the invoice, it appears that the defendant executors would have held their own and remained in place. However, the Judge found that the invoice was unsubstantiated in its description of the works carried out, further, that it related to overheads of Mr Whelan's company and, that it had not been approved for payment prior to Harry's death.

As a result, and because Mr Raymond had supported the payment of the invoice out of the estate, the Judge directed that both executors should be replaced and replacement executors were appointed instead.

The conclusion we can draw from this case is that where is clear evidence of misconduct, an application for removal should succeed.

Practical Guidance

As practitioners, we often come across cases where personal representatives and beneficiaries cannot get on. It is not uncommon for the situation to escalate and for one party to set their sights on the

removal of the other. These recent cases have given us valuable guidance as to what the Court will consider constitutes sufficient grounds for removal and what it will not.

The following is not an exhaustive list but should serve as a useful checklist for consideration in such cases:-

- Courts tend not to look favourably upon costly applications for removal of personal representatives unless there is a clear and compelling reason(s) to justify the expense;
- The costs of the application could outweigh the benefit especially where the estate is small or an alternative means of resolving the dispute could be achieved.
- The negotiated retirement or replacement of personal representatives who are failing to please may prove to be cheaper, less risky and ultimately better.
- Where hostility between the parties is intense, consider proposing a neutral replacement executor to allow the existing parties to stand down altogether. This solution is also appropriate where a personal representative lacks capacity or otherwise is unable to act.
- Seek to advise clients that removal applications should be a last resort where all other attempts to resolve the dispute have failed.

Acting for an applicant

If you find yourself acting for the applicant in a removal application, be ready to demonstrate that the estate cannot be properly administered for the benefit of the beneficiaries in the existing situation.

Remember that applications based on insubstantial complaints or personal friction, which do not impede the administration of the estate, will be rejected.

Ask yourself whether the failing complained of is likely to prevent the proper administration of the estate?

If friction or hostility is all you have to go on, seek to show that the estate is in deadlock and that the benefits of new personal representatives will outweigh the additional costs of their replacement.

Procedure

Applications under s50 AJA are made under CPR Part 8 and are brought in the Chancery Division of the High Court. The court fee is currently £465.00. Applications may be brought separately or as part of existing proceedings. CPR Part 57.13 and PD 57 provide the criteria which must be followed.

Bear in mind that if there is only one existing personal representative, you must propose a substitute so as to ensure there is always one personal representative remaining to administer the estate. Note also that there are additional criteria required if you are seeking to substitute, as well as replace, personal representatives.

Applications can be made either before a Grant is issued or afterwards but bear in mind that making an application too soon may leave your application prejudiced because it may be hard to provide sufficient evidence of the appropriate level of misconduct or hostility on the part of the personal representatives at such an early stage.

Acting for personal representatives

If your client is faced with defending an application make sure that their witness evidence deals with why the testator chose those particular executors, where possible.

Try to show that, even if there is friction or hostility, it is still possible to administer the estate effectively.

Set out a checklist of things remaining to be done in the administration and how quickly they can be achieved to illustrate how progress is being made.

Consider proposing a neutral replacement if that appears to be the only route out of the dispute.

Bear in mind the costs risks of losing an application especially where a personal representative is not also a beneficiary.

Question whether the risks of defending an application are worthwhile? Removal or retirement may, in may cases, prove to be the wisest choice.

FORTHCOMING ACTAPS LECTURES

Date	Title	Speaker	Venue
14 October 6.00 pm	Trustee insolvency and creditors' use of a trustee's right of indemnity against trust assets	Paul Tracey	Macfarlanes LLP 20 Cursitor Street London EC4A 1LT
20 November 6.00 pm *followed by a Reception*	The role of equity in mistaken transactions	The Right Honourable Sir Terence Etherton, Chancellor of the High Court	Withers LLP 16 Old Bailey London EC4M 7EG

Articles for forthcoming issues of the ACTAPS Newsletter

The Editor welcomes articles from any ACTAPS members for inclusion in future issues of the Newsletter. Please submit your articles by e-mail to:

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