Re Haji Ali Bin Haji Mohamed Noor Deceased Habsah Binte Ngasirah (W) & Anor - Plaintiffs. V. Mohamed Zain Bin Haji Ali & Ors. - [1933] SSLR 25

Judge: Whitely J, Straits Settlement Supreme Court

Facts:

The testator by his will appointed 3 executors, A., B., and C., respectively his wife, his eldest son, and his brother. They duly proved the Will. It was admitted that B., the active executor, committed various breaches of trust. It appeared that A. being a semi illiterate woman, knew little or nothing of business matters. It further appeared that in most matters relating to the management of the Estate, B. used to consult C. an elderly successful business man and obtained the latter`s opinion. C. also had seen the accounts kept by B. and was satisfied with them:-

Holdings:

Held, that A. had acted reasonably and honestly, and ought fairly to be excused. Held further, that C. did not act reasonably, and ought not to be excused and that he was accordingly not entitled to any relief under S. 60 of Trustees Ordinance 1929.

Terrell v. Matthews, (1) not followed.

Second East Dulwich Case, (2) applied.

Held further, that C. was jointly liable for the devastavit committed by B. Booth v. Booth, (3) Lincoln v. Wright, (4) Styles v. Guy,(5) applied.

The defaulting trustees should be deprived of their costs. Tan Soo Lock v. Tan Jiak Choo,(6) In re Holtum,(7) In re Skinner(8) and Easton v. Landor,(9) followed

ADMINISTRATION ACTION

The 1st and 2nd Defendants were executors of the will of the Testator. The first Plaintiff was also an executrix, and she and her co-plaintiff were also beneficiaries under the will. The 1st Defendant had been the active executor, but had in most matters relating to the management of the estate consulted the 2nd Defendant his uncle and co-executor. At the trial of the action a common form administration decree was made. The accounts and enquiries thereby directed were duly proceeded with, and the result certified. In the result the 1st Defendant was chargeable with sums of $16,325.80 and $9,380 and was also charged with interest thereon. During the proceedings the 1st Defendant was adjudicated bankrupt.

On the action coming on for further consideration the beneficiaries sought to charge the 2nd Defendant with liability for the devastavits of the 1st Defendant. The 2nd Defendant resisted liability, and further applied for relief under S. 60 of the Trustees Ordinance 1929. The 1st Plaintiff also applied for relief under that section.

WHITLEY J

Cur. Adv. Vult.

This is an administration action in the matter of the Estate of Haji Ali bin Haji Mohamed Noor deceased, who died on the 3rd November 1923, leaving a will dated the 31st July 1923.

By that will he appointed three Executors and Trustees namely :-

1. Habsah, his wife, who is the 1st Plaintiff.

2. Mohamed Zain, his eldest son, who is the 1st Defendant and who is now bankrupt.

3. Haji Yusoff, his brother, who is the 2nd Defendant.

The will was duly proved by Habsah, Mohamed Zain and Haji Yusoff on the 15th February 1924.

The Testator left 3 sons:-

Mohamed Zain,

Ahmad (who is still an infant).

Mohamed Hanafiah (who is still an infant) and 2 daughters:-

Rahminah, the 2nd Plaintiff, and Noriah.

Noriah subsequently died intestate, leaving two children Mohamed Salleh and Mariam, and Habsah took out Letters of Administration to her estate.

The writ was issued on 8th November 1928, Habsah and Rahminah claiming, as beneficiaries, against Mohamed (255) Zain and Haji Yusoff, as Executors. When Mohamed Zain was adjudged bankrupt on 16th January 1931 the Official Assignee of his property was added as 3rd Defendant. He entered an appearance, but has taken no further part in the proceedings.

Both Plaintiffs and the 1st Defendant are beneficiaries, but Haji Yusoff, the 2nd Defendant, is merely an executor, and has no beneficial interest, which no doubt explains the very casual manner in which he carried out his duties.

The Statement of Claim was filed on the 15th November 1928. In paragraph 4 it is alleged that the 1st Defendant has been the only acting Executor, the other two Executors leaving in his hands the whole administration of the Estate. The Plaintiffs claim the usual administration enquiries and accounts against the 1st and 2nd Defendants.

By his defence filed on the 28th November 1928 the 2nd Defendant admits that he proved the will, but avers that he took no part whatsoever in the administration of the estate.

The 1st Defendant, by his defence filed on the 3rd December 1928, alleges that in all matters of the administration of the Estate he always consulted his Co-executors.

On 6th March 1929 an Administration decree was made in common form, and it was ordered that further consideration be adjourned and that costs be reserved.

On 17th May 1929 the 1st Defendant filed accounts covering the period up to the 31st March 1929, and surcharges and falsifications were filed by the 1st and 2nd Plaintiffs.

Attempts to arrive at a settlement proved abortive, and on the 26th February 1932 an Order was made that the settlement be treated as abortive, and that the accounts be proceeded with.

On the 23rd July 1932 the Registrar filed his certificate by which he found, inter alia, that the 1st Defendant is chargeable on the accounts up to the 31st March 1929 with sums totalling $16,325.80, without prejudice to the question of the liability of any other person in respect of the same

Supplementary accounts covering the period subsequent to 31st March 1929 were directed, and on the 30th (256) September 1932, the Registrar filed a further certificate, by which he found, inter alia, that the 1st Defendant is chargeable with further sums totalling $9,380.29, without prejudice to the question of the liability of any other person in respect of the same.

There has been no appeal against either certificate.

The case came before me for further consideration when the questions argued were:-

1. The liability of co-executors.

2. Costs.

3 Adjustment as regards the share of Ahmad. The first question which has to be decided is whether the 1st Plaintiff Habsah and 2nd Defendant Yusoff, or either of them, are to be held responsible, as executors, for the losses suffered by the Estate as the result of the breaches of trust committed by their co-executor Mohamed Zain, the 1st Defendant.

It is quite clear on the pleadings, and on the evidence that the 1st Defendant was the managing trustee, and both the 1st Plaintiff and the 2nd Defendant seek to evade liability by saying that they left everything to him. Their cases must be considered separately, as they fall under very different categories.

I will take first the case of Habsah. It is argued on his behalf that she is entitled to relief under section 60 of the Trustees Ordinance 1929. That section reads as follows:-

If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether transaction alleged to be a breach of trust occurred before or after the commencement of this Ordinance, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.

She is a trustee who may be personally liable as a co-trustee for the 1st Defendant`s breach of trust. Has her behaviour been such as to bring her within the section. The onus is upon her to satisfy the Court on three points:-

(i) That she acted honestly,

(ii) That she acted reasonably,

(iii) That she ought fairly to be excused.

(Re Turner, (10) and Re Stuart, (11)). Applying these principles to the case for the 1st Plaintiff here it is not suggested that she did not act honestly. Did she act reasonably? One must bear in mind that she is a Mohamedan woman, who knows little or nothing of business matters, and who would naturally leave everything to her husband in his life time and to her eldest son the 1st Defendant after her husband`s death. It was, I think, reasonable for her to trust and leave matters to her eldest son, who had always assisted his father in the management of his affairs, and the 2nd Defendant who is her husband`s brother and a substantial business man. In fact, it would have been surprising if a semi-illiterate woman in her position had done otherwise. The first two points having been established, the Court has to consider whether the trustee ought fairly to be excused, looking at all the circumstances, and it is a material circumstance to consider who the trustee is, e.g. the position of a company acting as trustees and executors for reward is widely different from that of a private person acting as a gratuitous trustee (National Trustees Company of Australasia, Limited v. General Finance Company of Australasia, Limited,(12)). I am satisfied that the position of the 1st Plaintiff was such that she ought fairly to be excused, and I relieve him accordingly.

The 2nd Defendant, as I have already indicated, falls into a very different category. He is a successful business man, and must have realised that his brother appointed him as trustee and executor in order that he, with his mature experience, should advise and supervise the son who had, hitherto, merely assisted his father, and had not independent experience. There is no evidence that such was the testator`s object in appointing him, but it is reasonable to (258) suppose that it was so, and that the 2nd Defendant was aware of it. He accepted responsibility and proved the will. He now seeks to avoid all responsibility by pleading that he thereafter did nothing, and thus to bring himself within the rule in Terrell v. Matthews, (1) where Cottenham, L. C. lays it down that "One executor, though he proves the will, and thereby places himself in the situation of having control over the testator`s property, is not in general bound to act any further. He is not responsible for the devastavit of his co-executor."

But the evidence given both by the 1st Defendant and the 2nd Defendant himself shows that the 2nd Defendant did not remain wholly passive. The 1st Defendant in the course of his evidence stated:-

"I did everything, but before doing it I consulted Haji Yusoff (2nd Defendant). I kept the accounts. Haji Yusoff many times saw the accounts.

"He made suggestions as to how the Estate should be carried on and I complied. He is my uncle.

"I informed him of the expenditure of the Estate."

He then proceeded to give a number of specific instances of expenditure, e.g. the $31,500 on houses at Batu Pahat, and his borrowing the money for the same on behalf of the Estate in his own name, all with knowledge of the 2nd Defendant.

These statements are corroborated in so many particulars by the evidence of the evidence of the 2nd Defendant himself, that I feel that I must accept them as substantially accurate. The 2nd Defendant says:-

"Before the action started Habsah came to me and told me that 1st Defendant had not kept the accounts properly....I had seen the accounts many times before. I was satisfied with them.

"I knew he was entitled to spend $200 per month on the family house and maintenance. When I saw the accounts I did not look to see whether he was spending more..... I had the accounts before me but I did not examine. I merely took Habsah`s word that they were alright.

"I saw that a well, a sea wall and a tennis court had been made at the Ayer Gumuroh house (part of the authorised expenditure). I did not see any entries in the accounts relating to expenditure of Estate money on these matters. About the accounts I did not take much trouble. I did not go into details. I did not examine them properly because I trusted him.

"Before the completion of the Batu Pahat houses I asked him how much they were costing. He told me. He did not show me the accounts or contract or bills. I let the matter drop. I stood by and did nothing as he was doing the whole thing. I told him I was co-executor and I ought to be consulted but he just went on....."

"Whenever I wanted to do anything to protect the Estate Habsah would not allow me. She always said he was right. Because of her I took no action to protect the Estate. I was afraid she would get angry." I may add that the 2nd Defendant was an unsatisfactory witness. The interpreter had great difficulty in extracting answers to the simplest questions, and I received the impression that he knew considerably more than he would admit.

In view of this evidence the words of Kekewich, J. in his judgment in the Second East Dulwich case (1) seem peculiarly apposite:-

The Legislature has passed the Judicial Trustees Act, 1896, excusing trustees for breach of trust, but the Act does not apply here. According to the Act (section 3) a trustee, if he is to be excused, must act `honestly and reasonably.` The word `honest` is used in many senses. In one sense a trustee is honest if he has not done anything dishonest. Now, there is nothing of that sort urged against Streeter; there is no suggestion that he has done anything dishonest. He has paid the 391.16.4 pounds, which was found to be due to the society from Pearce, and is so far acquitted of dishonesty in the usual sense of the word. But in another sense he is not honest. It seems to me that a man who accepts such a trusteeship, and does nothing, swallows wholesale what is said by his co-trustee, never ask for explanation, and accepts flimsy explanation, is dishonest. He poses here before me as a poor man, the victim of his co-trustee. But he was not imposed upon by Pearce.

I have no hesitation in holding that the 2nd Defendant did not act reasonably, and ought not fairly to be excused, and that, accordingly, he is not entitled to any relief under section 60 from any personal liability for breach of trust, at any rate, up to the date of the decree. I have set down above passages extracted from the evidence, as bearing upon the question of whether the 2nd defendant acted reasonably. These extracts are also of great importance as bearing upon the question of his joint liability for the breaches of his co-executor.

Upon his admissions and his evidence, generally, I find, as a fact, that he actively intermeddled, and was very far from being the utterly passive executor, which from his defence and his counsel`s opening speech, it would appear that he had, until he came to Court, made himself out to be.

It seems to me abundantly clear that he knew or had means knowing that his co-executor was committing breaches of trust. He saw the accounts frequently, and the beneficiaries were entitled to think that their interests were being properly looked after, and that this independent mature business man, whom the testator had appointed to this position of trust, and who had undertaken the responsibilities of that position, was satisfying himself that the estate was being properly administered. He however does nothing. As soon as he realised that his co-executor was, or might be committing breaches, he should, either have taken effective steps to put matters right, or else have renounced his executorship. He did neither.

The law applicable to the jointly liability of co-executors is clearly laid down by Lord Langdale, M. R. in Booth v. Booth, (1):-

"This is a very unfortunate case. It is to be lamented that Batkin, by inadvertence and over good nature, should have placed himself in such a situation of responsibility as he has done. Here is a will, the terms of which are perfectly distinct. (His Lordship read it.) On the 26th October 1830, the two executors proved the will; they take on themselves the trusts and the duty of performing it.

"From that moment it was their duty to do all that was necessary for the conversion of the estate into money, and to see the dividends duly applied; but Batkin, unfortunately did not consider that, by proving the will, he had undertaken any duty, or incurred any responsibility: he says he proved the will in consequence of the request of the widow, who informed him, that he would not thereby undertake any duty, or be responsible for any thing. It is important that it should be well understood that no one can safely act in that manner, and that the law will not permit a party to neglect the duty which, by proving the will, he has undertaken. I am of opinion that he became liable for the performance of the trusts, and for any consequences arising from a breach of them.

"Part of the testator`s property was engaged in trade: that trade ought to have been put an end to and the property invested. Batkin, it appears, went to the place of business from time to time, and it is, therefore, clear that he knew, that what ought to have been done was not performed. He acquiesced, week by week, and year by year, in the breach of trust which his co-executor was committing. There is no corrupt motive-no receipt of money which he misapplied to be attributed to him, but he undertook the performance of a duty which he did not perform. This is no small blame: a man cannot be allowed to neglect a duty which he bas undertaken. He permitted his co-executor to carry on the trade, and, consequently, must be considered, in this Court, a party to this breach of duty. It is said, in extenuation, that he did this from the best motives; he thought the brother of the testator was the proper person to carry on the business; he thought there would be more profit made by this mode of dealing with the property, and that it was more advantageous for the children. All this might have been very right to do and to acquiesce in, if he had undertaken to make good any loss which might occur in the course of the experiment; he could not, however so act without incurring that responsibility, if a loss occurred.

I am of opinion, on the authorities and on the established rules of the Court, to which it is not necessary to refer, that a trustee who stands by and sees a breach of trust committed by his co-trustee, becomes responsible for that breach of trust..

Again in the case of Lincoln v. Wright, (4) the same learned Master of the Rolls observes at page 430:-

The will was proved by three executors; and it is perfectly clear, upon the evidence, that all three executors acted in the administration of the estate. The residue appears to have been ascertained, and remained in the hands of Wright one of the executors, and in consequence of his bankruptcy the whole or a great part of it has been lost. The principal object of this suit is to charge the other executors with the amount of that loss, so as to make good to the trust, that which has been abstracted from it, by the breach of trust, or by the disobedience to those plain directions which were given by the testator for the security of his residuary estate. It does not appear to me to be very material to consider, whether the three executors, or only two of them were trustees, because the residue was ascertained, the amount of it appears to have been admitted, and it seems to be perfectly clear, upon the evidence, that two of them permitted that residue to remain in the hands of the third. It is a very short case, and on those settled principles on which this Court acts, I can have no doubt whatever, but that the two executors are liable for the loss which was incurred by the bankruptcy of the third.

In the case of Styles v. Guy,(5) Lord Cottenham uses the following words:-

"If he, the executor, knows, or has means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purpose of the will, is it not part of the duty he has undertaken to interfere and to take measures, if necessary, for putting such property in a proper state of investment, or is it no part of his duty because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for such a distinction."

Mr. Cobbett for the 2nd Defendant relied upon the case of Terrell v. Matthews (supra) and a line of similar cases, all of which appear to be clearly distinguishable from the present one, inasmuch as they deal with executors who were entirely passive. Furthermore, they are all old cases, and the whole trend of more recent decisions appears to have been to tighten up the law as to the duties of executors.

There is no question of wilful default in this case, but as Chitty, L. J. pointed out in his judgment in Re Stevens, (13).

If (on taking common accounts) on the facts proved, a case of devastavit by negligence is established, other than what is technically termed wilful default, the Court ought to make the proper declaration against the executors.

Applying the principles to be gathered from the fore-going cases, I hold that such a case of devastavit has been made out against both Defendants, and that the 2nd Defendant is jointly liable with the 1st Defendant for the loss to the estate occasioned by the 1st Defendant`s breaches of trust up to the date of the decree, namely, 6th March, 1929. I entertain grave doubts as to whether he should not be held responsible also for the loss subsequent to that date, but having regard to the fact that he was acting gratuitously, that he was not a beneficiary, that he never profited from the breaches, and that he probably never really

appreciated his legal position, I am disposed to (264) I accept his counsel`s contention that, once the decree was made, he might reasonably, though mistakenly, consider that the matter had passed into other hands, as it was thence-forward to be investigated by the Court. Accordingly, in so far as the period subsequent to the decree is concerned, I find that he acted honestly and reasonably, and ought fairly to be excused. From the accounts filed, and the Registrar`s certificate, it ought to be a simple matter to ascertain the amount of the losses up to the decree without further enquiries, and, no doubt, counsel will be able to agree a figure. If not, a further short account will be necessary.

Before proceeding to consider the question of costs, there is one other matter to be decided. That is the matter of Ahmad`s share. Whether he is overdrawn, and if so to what extent, cannot be definitely ascertained until the final adjustment is made, but it will probably be found that he will have received more than his fair share in land or cash It is agreed by all counsel, including his own, that it is only equitable that all the beneficiaries should take their fair share in all assets, including a share in the loss occasioned by the breaches by the 1st Defendant. No beneficiary can be allowed to take his share in cash and land exclusively and leave the others to take the whole of the bad debt. There will accordingly be a declaration that Ahmad is liable to refund any amount which he has received in excess of his proper share, calculated on the basis of the principles which I have just enunciated and, if necessary, there will have to be a short account.

There remains the question of costs. I see no reason to deprive the 1st Plaintiff of her costs. Prima facie, she is entitled to them, both as executrix, and as a successful beneficiary. It was she who brought the matter before the Court, and she has borne the brunt of the fight. She has been a most unfortunate widow, and appears to have the sympathy of all the parties. In the view which I take of her behaviour throughout, I do not think she has done anything to disentitle her to costs. She will have her costs, as between solicitor and client, out of the estate.

The 2nd Plaintiff is clearly entitled to her costs, subject to the claim of the mortgagee of her share, who has (265) separately represented during the later stages of the action. The ordinary rule is that the owner of a share of an estate, and his incumbrancers, have but one set of costs, which is received by the first incumbrancer. Remnant v. Hood, (14). It was argued by Mr. Page on behalf of the 2nd Plaintiff that there was no need for the mortgagee to be separately represented, and that, even if such separate representation was reasonable and proper, this is a proper case in which to allow mortgagor and mortgagee separate sets of costs. I think it was reasonable of the mortgagee to instruct his own lawyers when he saw that his security was becoming endangered, and I feel that to depart from the ordinary rule with regard to one set of costs would be unfair to the other beneficiaries whose shares would be thereby diminished through the 2nd plaintiff having mortgaged her share. The 2nd Plaintiff will have her costs as between solicitor and client, subject to a charge in favour of the mortgagee for his costs taxed as between party and party.

I deprive both 1st Defendant and 2nd Defendant of their costs. There is ample authority for this course. I would refer to Tan Soo Lock v. Tan Jiak Choo,(6) in which trustees were deprived of costs though there was no loss to the estate; In re Holtum,(7) where a trustee was ordered to pay costs: In re Skinner,(8) and Easton v. Landor,(9) where a trustee was deprived of costs. The whole of this disastrous litigation, which has resulted in frittering away practically all that remained of the estate, was occasioned by the misbehaviour of the 1st Defendant and the gross negligence of the 2nd Defendant. As the 1st Defendant is bankrupt there can be no question of an order against him, but I had seriously considered the propriety

of making an order for payment of costs against the 2nd Defendant. On the whole however I come to the conclusion that he is being sufficiently penalised, and I make no order as to costs in his case.

The infants Ahmad and Mohamed Hanafiah will have their costs taxed as between solicitor and client out of the estate.

The infant children of Nuriah deceased, Mohamed Salleh and Mariam, were originally represented by the 1st Plaintiff, (266) who is their grandmother, but when it became possible that she might be liable as a co-trustee their interests became conflicting, so that they had to be separately represented. I think they are entitled to their costs as between solicitor and client out of the estate, as from the date when they became separately represented.

I would add in conclusion that, as between the two Plaintiffs, I think there can be no doubt that they are entitled to two sets of costs. Their interests were clearly divergent, and in fact the 1st Plaintiff has been, during a great part of the proceedings, rather in the position of a defendant. Application was made at the close of the hearing to have her made a Defendant instead of a Plaintiff, but this was opposed, and I refused the application, as being made too late. Such a change at so late a stage might, in my opinion, have tended to complicate still further an already sufficiently complicated case.

Judgement accordingly