



## Précis Paper

### The Removal of Delinquent Executors

This presentation discusses the circumstances in which delinquent executors of estates can be removed by the Supreme Court, and the costs consequences that may follow.

#### Discussion Includes

- Removing delinquent executors
- Conduct giving rise to removal
- Costs consequences
- When should an executor or trustee bring or defend proceedings?
- Court's jurisdiction to remove an executor
- Advice for clients appointed as executor

## Précis Paper

### The Removal of Delinquent Executors

1. In this edition of BenchTV, Mark Sneddon (Barrister, P G Hely Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly & Company) discuss the recent decision of Robb J of the Supreme Court of NSW in *Parsons v Davison* [2016] NSWSC 1491.

#### Background and Material Facts

2. The deceased appointed his brother, the defendant, as executor of his will. The will gave the whole of the deceased's estate to the two plaintiffs and the defendant's three children in equal shares. A grant of probate was made by the NSW Supreme Court in March 2011, and as there were assets also in Western Australia, a resealing of the grant was obtained in the Supreme Court of Western Australia in October 2011.
3. The plaintiffs commenced proceedings against the defendant some four years after the grant of probate, seeking the defendant's removal as executor of the estate. The plaintiffs claimed that the administration of the estate by the defendant had been entirely dilatory; the defendant had failed to realise estate assets in a timely way; the defendant paid himself a substantial commission without authorisation (albeit that the sum has been repaid); and the defendant had failed in his attempt to pass accounts because of the manner in which he has conducted the administration. In addition to the dilatory conduct, it was alleged that the defendant had a conflict of interest in relation to part of the estate, namely shares in a company called Moore Securities, and the defendant's failure to perform a straightforward share transfer of the shares in Moore Securities to the beneficiaries was indicative of his conflict of interest.
4. The plaintiffs sought letters of administration with the will annexed, to be granted in lieu of the grant of probate to the defendant.

#### Legal Principles

5. The Court has both inherent jurisdiction to remove delinquent executors and also express statutory authority pursuant to s 66 of the *Probate and Administration Act 1898* (NSW). Any "person interested", ordinarily a beneficiary or a co-executor, can bring proceedings for removal of an executor. The Court determined this matter pursuant to its inherent jurisdiction, however the same principles apply to removal of an executor under s 66.

6. The seminal principle is that an executor has a duty to properly and punctually administer the estate. This principle was firmly established in the older cases of *Bates v Messner* (1967) 67 SR (NSW) 187 and *In the Goods of Loveday* [1900] P 154, and has also been reiterated in more recent cases. The principle was recently applied by the NSW Supreme Court in *Riccardi v Riccardi* [2013] NSWSC 1655, where Lindsay J stated at [7]:

*An executor or administrator may be removed where it appears that the due and proper administration of an estate has been put in jeopardy or has been prevented by reason of acts or omissions on the part of the executor or administrator, or by reason of matters personal to him, such as mental incapacity or ill health, establishing that he is not a fit and proper person to carry out the duties involved in the due administration of the estate.*

7. Justice Robb, in his decision in *Parsons v Davison*, also cited the NSW Court of Appeal authority *Mavrideros v Mack* [1998] NSWCA 286; 45 NSWLR 80, which reiterated the principles in relation to the revocation of a grant of probate, namely that the court must keep in mind the due and proper administration of the estate and the interests of the parties beneficially entitled thereto.
8. In relation to executors' conflicts of interest, the High Court decision in *Breen v Williams* [1996] HCA 57; 186 CLR 71 is instructive. There, McHugh and Gaudron JJ stated at [27]:

*The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that 'In lo man can serve two masters' [...] Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve.*

9. The primary obligation of the executor is therefore to preserve the estate assets and to properly and duly to administer the estate according to the will.

### Findings

10. Justice Robb found that the defendant's own shareholding in Moore Securities' put his interests in conflict with those of the estate. The Court also found that there was a possibility that the defendant had dealt with the assets of Moore Securities in an unauthorised manner.

11. Furthermore, the performance by the defendant of his duty as executor to maintain proper accounts for the estate was entirely unsatisfactory. The Court therefore made the orders sought by the plaintiffs.

### Costs

12. In accordance with the ordinary rule, costs in the case followed the event, and the defendant was ordered to pay the plaintiffs' costs. However an issue arose as to whether the defendant was entitled to be indemnified by the estate for his costs.
13. The principle established in *Re Beddoe (Downes v Cottam)* [1893] 1 Ch 547 is that a trustee can only be indemnified out of the trust for costs, charges or expenses properly incurred for the benefit of the trust. "Properly" in this context means costs that were reasonably, as well as honestly, incurred. This principle applies equally to trustees of a trust or liquidators of a company.
14. In deciding whether to pursue or defend litigation, mere bona fides is insufficient. The fact that an executor, trustee or liquidator follows the advice of a solicitor or counsel in running or defending litigation is insufficient if it is not done reasonably: see *Mead v Watson as Liquidator for Hypec Electronics Pty Ltd* [2005] NSWCA 133. Where the fund is small and easily dissipated, all litigation should be avoided unless there are such strong prospects of success that it is desirable, in the eyes of the estate, that the risk and expense should be incurred: *Re Beddoe (Downes v Cottam)* [1893] 1 Ch 547. Care should therefore be taken in prosecuting or defending proceedings, because if the pursuit of the litigation is not reasonable, the executor can lose his or her right of indemnity and be personally liable for costs.
15. Citing *Mead v Watson*, Robb J considered that this was a case where the defendant should pay the costs of the proceedings on terms that he had no right of indemnity from the assets of the estate.

### Advice for Clients Appointed as Executors

16. Mr Sneddon reminds practitioners to ensure that they advise clients of their ability to renounce their position as executor if they do not consider that they can perform the necessary tasks. However once an executor starts to intermeddle in the estate and perform duties, they will have lost their opportunity to renounce the position.

## **BIOGRAPHY**

### **Mark Sneddon**

Barrister, P G Hely Chambers, Sydney

Mark Sneddon was called to the Bar in early 2002. He specialises in appellate advocacy, commercial law, company law and equity. Mark's specialty equity practice is in real property, trusts, and wills and probate.

### **Ian Benson**

Solicitor, AR Conolly & Company

Ian Benson is a solicitor at AR Conolly & Company and holds a First Class Honours degree in law.

## **BIBLIOGRAPHY**

### **Focus Case**

*Parsons v Davison* [2016] NSWSC 1491

### **Benchmark Link**

[https://benchmarkinc.com.au/benchmark/banking/benchmark\\_25-10-2016\\_banking.pdf](https://benchmarkinc.com.au/benchmark/banking/benchmark_25-10-2016_banking.pdf)

### **Judgment Link**

<https://www.caselaw.nsw.gov.au/decision/58085ab9e4b058596cba09e5>

### **Cases**

*Bates v Messner* (1967) 67 SR (NSW) 187

*In the Goods of Loveday* [1900] P 154

*Riccardi v Riccardi* [2013] NSWSC 1655

*Mavrideros v Mack* [1998] NSWCA 286; 45 NSWLR 80

*Breen v Williams* [1996] HCA 57; 186 CLR 71

*Re Beddoe (Downes v Cottam)* [1893] 1 Ch 547

*Mead v Watson as Liquidator for Hypec Electronics Pty Ltd* [2005] NSWCA 133

### **Legislation**

*Probate and Administration Act 1898* (NSW)