

## Estate of Moralee (2012) JRC038 Does an Executor have a Right to Remuneration and Expenses...

Insights - 19/04/2012

### Estate of Moralee (2012) JRC038 Does an Executor have a Right to Remuneration and Expenses Where the Estate is Insolvent?

#### BACKGROUND

The will of the deceased contained a charging clause which entitled professional trustees to be paid fees and reimbursed for costs and expenses relating to administration of the estate. The affairs of the deceased had been complex and although the estate was solvent at the date of death, as a result of subsequent issues, the estate became insolvent. The executor (a Jersey solicitor, appointed as executor dative by the Court) applied for directions as to the extent to which he should settle the fees of two Jersey law firms, the application raising issues as to an executor's right to preference for the costs of administration and to remuneration where the estate is insolvent.

#### HELD

##### 1. Executor's remuneration

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## 2. Costs of administration

Costs of administration could include work prior to a grant of probate being issued, provided such work did not constitute intermeddling under the Probate (Jersey) Law 1998. The doctrine of "relation back" applied in Jersey, i.e. the executor's title related back to the time of death and he could therefore ratify actions taken by the law firms prior to issue of the grant, provided these did not constitute intermeddling. Work undertaken in locating the will, advising inter alia on domicile and arranging for the appointment of the executor dative was not intermeddling. However, the costs submitted required careful scrutiny to ensure that only those incurred for the benefit of the estate were reimbursed.

## 3. Executor's priority

Jersey law has always recognised a right of preference for particular creditors in the context of insolvency. It was clear that this included costs of administration of an insolvent estate and that these had priority over other preferred claims, the position being confirmed by the Wills and Successions (Jersey) Law 1993. However, there was no authority on whether an executor had preference for costs incurred by others which he has ratified. Under English law, personal representatives had a right of retainer, allowing an executor to withdraw from the assets sufficient to pay himself and other creditors of equal preference in full. The Court accepted that the same right of retainer exists under Jersey law. Costs incurred by the executor and third parties in the administration of the estate were all costs of administration and thus of equal degree. However, it was right in principle that an executor, who has onerous duties and is under oath, is protected and that third parties not under such oath should not be reimbursed on an equal footing. Therefore, the executor had the right to withdraw from the assets in his hands sufficient to be reimbursed in full for costs of administration incurred by him.

As regards an executor's remuneration, there was no authority to say that this preceded or ranked equally with creditors. The charging clause in a will was effective only until the executor formed or should have formed the opinion that the estate was insolvent. The executor's remuneration up to that point was therefore authorised and was a cost of administration over which the executor had a right of retainer. The executor could apply to the Court for authority to charge fees from the date of insolvency to completion of administration. In most cases personal representatives should apply to Court whenever they form the opinion that the estate is insolvent and the creditors should be convened, reflecting that the estate is then being administered for their benefit. With no statutory regime for the administration of insolvent estates in place, personal representatives must make greater use of the ability to seek directions from, and protection of, the Court. The Court would be mindful that having estates competently administered was in the public interest and that professional persons acting properly would not be expected to act gratuitously.

## COMMENT

The case is reassuring in that it makes clear an executor can be reimbursed for his costs incurred in administering an insolvent estate, in priority to other creditors. However, the executor can be remunerated only if authorised by the will or by order of the Court and the authorisation under the will does not apply where the estate is insolvent. An executor must consider the financial position of the estate and be alive to the fact that, at the point he forms the opinion that the estate is insolvent, he cannot continue to charge fees without the authority of the creditors or the Court and, in any event, he should consider applying to the Court for directions.

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