

Rare security for costs order made in \$7 Million probate dispute

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Summary

Orders for security for costs are uncommon in probate proceedings. However such an order was made late last year by the Supreme Court of New South Wales in *Re Estate Condon; Battenberg v Phillips* [2017] NSWSC 1813 (21 December 2017). Notably in this case, the Court outlined a number of general factors for security for costs applications peculiar to probate proceedings.

Background - the testamentary instruments

Blanche Minnie Condon ('Mrs Condon') died on 13 December 2016 with an estimated estate value exceeding \$7 Million in NSW. Mrs Condon's family included a nephew who resides in Scotland (the 'Nephew'). Of the four testamentary instruments attributed to Mrs Condon, there were two at the heart of these court proceedings:

1. a will dated 22 November 2016 which made no provision for the Nephew ('2016 Will');
2. an alleged 2006 document between Mrs Condon and the adopted mother of the Nephew which provided for the Nephew ('2006 Document').

The Nephew contested the estate by filing with the Court a caveat requiring that the 2016 Will be proved in solemn form. The executors named in the 2016 Will ('Defendants') afterwards filed a summons for probate. The Nephew then filed pleadings claiming that:

- the 2006 Document was an informal will that should be admitted to probate; and
- the 2016 Will was not valid.

The Defendants in turn applied for an order that they be granted probate of the 2016 Will in solemn form. The Defendants also sought an order that the Nephew give security for their costs.

Security for costs generally

Security for costs orders aim to protect defendants benefiting from a costs order from plaintiffs failing to satisfy it.¹ It essentially reflects a risk management power between the parties.² If without a security for costs order, the legal costs of defendants are 'at the mercy of plaintiffs who may lack sufficient financial resources to satisfy an order to pay [the defendants'] costs.'³

There is a 'balancing act' when the Court considers making a security for costs order. On one hand, a chief concern 'is not to deny an impecunious plaintiff access to the courts.'⁴ On the other, the law looks for the plaintiff to give security so that there is no frustration of the Court's orders.⁵

Security for costs in probate proceedings

Orders for security for costs are uncommon in probate proceedings.⁶ However, the same principles as found in other civil cases mostly apply. The qualification with this is that the Court should also consider the substantial as opposed to the nominal position of the defendant and plaintiff. That is because the nominal position in probate

matters depends on the mode of commencing the proceedings.⁷

In addition with applying security for costs principles, probate proceedings might require the Court to consider factors not material to other civil proceedings. This is because probate proceedings focus on the administration of the deceased estate.⁸ The Court outlined these general factors as peculiar to probate proceedings to be taken into account for security for costs applications:⁹

- the special public interest element attending to probate;
- the inquisitorial character of probate proceedings;
- ensuring the probate proceedings are conducted transparently;
- the characterisation of probate proceedings as ‘interest proceedings’;
- the distinction between administrative grants of probate in common form and grants of probate in solemn form arising from substantial disputes;
- the special rules of practice in probate costs orders that often allow for costs of all parties to be paid out of a deceased estate or at least contemplate that an unsuccessful party might not have to pay costs of the successful opponent;
- whether there may be available an alternative to an order for security for costs (such as a private arrangement between the parties);
- the degree of blame that may be imputed to the respective parties;
- the effect of a security for costs order on the administration of the estate.

Outcome

The Court ordered that the Nephew give security for costs in the sum of \$75,000. In the Court’s view, there was a risk that the Nephew’s case would fail, he would be ordered to pay costs and he would be either unwilling or unable to pay costs.

Key to the Court’s decision was that the Nephew sought relief in his own interest through the 2006 Document. The Court found that that document ‘is at the core of the proceedings.’¹⁰ If it were not for the 2006 Document and related challenge to the validity of the 2016 Will, the proceedings would have been ‘a routine application for probate of a regular form of will.’¹¹

The Court otherwise founded its decision on a combination of criteria specifically relevant for probate proceedings and criteria common in other civil proceedings. These criteria were:

- in the context of the proceedings as a whole, the Nephew was effectively the plaintiff and not in the position of a defendant;
- the Nephew had no Australian assets and a costs order against him would not be enforceable within Australia;
- enforcement of a costs order against the Nephew in the UK would likely be attended by substantial inconvenience and costs;
- the Nephew’s case was arguable but perhaps not strong;
- the Court was not satisfied that an order would stifle the proceedings;
- an order for security was not militated against by delay on the part of the defendants.
- there was no particular matter of public importance, beyond the public interest element inherent in probate proceedings.

Concluding remarks

The Court's decision provides useful guidelines as to the factors the Court will take into account when deciding whether to award security for costs in probate proceedings. However, many of the general factors outlined by the Court unique to probate proceedings did not appear to impact on the Court's ultimate decision. To that extent, those factors may not be binding for subsequent court cases considering whether security for costs should be awarded in probate proceedings.

The Court also hinted that plaintiffs may alternatively circumvent the costs regime applicable in probate proceedings by pursuing a family provision claim instead. While not always realised, that has the hope of a more liberal access to an order for the payment of all costs out of the estate of the deceased.¹²

If you are thinking about commencing proceedings to contest a will, we recommend talking to your lawyers to determine the best way to do this or you may end up paying more than you may get.

¹ G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, Australia, 3rd ed, 2013) 931.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Re Estate Condon; Battenberg v Phillips* [2017] NSWSC 1813 (21 December 2017) [60] and [62].

⁷ *Ibid.*, [73].

⁸ *Ibid.*, [74]-[75].

⁹ *Ibid.*, [87]-[103].

¹⁰ *Ibid.*, [118].

¹¹ *Ibid.*, [119].

¹² *Ibid.*, [95].

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