Neutral Citation Number: [2006] EWHC 753 (Ch)

Case No: 9234/05

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2006

Before :

MR JUSTICE LIGHTMAN

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IN THE ESTATE OF EDITH LILIAN ROGERS DECEASED

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- -

Mr Christopher Tidmarsh QC (instructed by **Speechly Bircham, 6 St Andrew Street, London EC4A 3LX as Agents for TLT LLP, One Redcliff Street,. Bristol BS1 6TP**) for the Estate
Mr William Henderson (instructed by the **Treasury Solicitor, One Kemble Street, London WC2B 4TS**) as the Advocate to the Court

Hearing dates: 13th March 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE LIGHTMAN

Mr Justice Lightman:

INTRODUCTION

1. This is a case raising a question of construction of a standard form clause in a will appointing executors and trustees. It is a question of sufficient practical importance that, at the invitation of the court, the Attorney General appointed Mr Henderson as an advocate to the court to provide his assistance. I am grateful for his assistance and the assistance of Mr Tidmarsh, counsel for the applicants.

2. By clause 2 of her will dated the 23rd November 1992 ("the Will") the late Edith Lilian Rogers ("the Testatrix") provided as follows:

> "(a) I appoint the partners at the date of my death in the firm of Lawrence Tucketts … or in the firm which at that date has succeeded to and carried on its practice to be the Executors and Trustees of this my Will (and I express the wish that two and only two of them shall prove my Will and act initially in its trusts).
>
> (b) Any trustee being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done or services rendered or time spent by him or his firm."

3. By clause 3 of the Will the Testatrix gave some 12 pecuniary legacies totalling some £10,900. After a further pecuniary legacy of £500, the Testatrix directed that her residuary estate should be divided equally between seven charitable institutions.

4. In 2000 Lawrence Tucketts merged with another firm of solicitors Trumps to form the new firm of TLT. In 2004 a limited liability partnership TLT LLP was formed ("the LLP") and all the partners in TLT became members of the LLP and the LLP succeeded to (and carried on) the practice of TLT.

5. On the 23rd May 1994 the Testatrix executed a codicil ("the Codicil") deleting one legacy and otherwise confirming the Will.

6. The Testatrix died on the 23rd February 2003 without having revoked the Will or Codicil leaving an estate of just under £12,000.

7. The issue has arisen whether probate can and should be granted of the Will and the Codicil to two members of the LLP. The Probate Registry in Bristol refused to do so. The Registry apparently accept that the LLP has succeeded to the practice of Lawrence Tucketts but has taken the view that it is not "a firm" and that the members of the LLP are not "partners" within the meaning of paragraph 2 of the Will. That view is consistent with the decision of Probate Registrars made at their Annual Conference in 2003 to the effect that, where a testator has made a will appointing

partners in a firm as executors and the firm has subsequently converted to a limited liability partnership, applications for grants coming from members of the limited liability partnership will no longer be allowed.

8. The problem raised is of general application to firms of solicitors which have reconstituted themselves as limited liability partnerships. The LLP alone holds more than 1,000 wills on behalf of clients. In relation to about 40% of those wills which contain the standard form clause set out in clause 2 of the Will, it has proved difficult or impossible to trace the testator and the expense and time involved in attempting to do so has been considerable. In many cases (as in this case) the estate is comparatively small. Indeed in this case the estate can only be sufficient to pay the pecuniary legacies. In view however of the importance of the issue and to save the estate of the Testatrix the costs burden, the costs of this test action are being shared between the LLP and Speechly Bircham, with contributions from the Probate Section of the Law Society, the Law Society and a group of solicitors In this case (as in many other cases) the solicitors concerned feel a personal responsibility to obtain a grant because the Testatrix chose them to be executors and trustees and did so because she trusted them and wanted them to administer the estate. If the clause is ineffective to appoint the members of the LLP as executors and trustees, the only course open to the members to effectuate the Testatrix's intention is to apply for a discretionary grant pursuant to section 116 of the Supreme Court Act 1981 or (if the residuary beneficiaries were willing to appoint the members as attorneys for that purpose) for an attorney grant pursuant to Non-Contentious Probate Rule 31. Either of these courses will involve greater expense than a standard application for probate. If the beneficiaries opposed a discretionary or attorney grant however, the Testatrix's wish to appoint her trusted solicitors and to have their independent professional administration of the estate and will trusts would be frustrated.

9. By their summons issued in the Principal Registry of the Family Division the applicants who are two members of the LLP seek a declaration that the LLP is the firm which succeeded to the practice of Lawrence Tucketts and that the members of the LLP are "partners" in that "firm" within the meaning of clause 2 of the Will. The beneficiaries under the Will are fully aware of this application and have no wish to participate in the proceedings. By an order dated the 25th October 2005 District Judge Waller ordered that the summons be treated as an application for the construction of the Will in relation to the appointment of executors and that the application be transferred to the Chancery Division for hearing before a judge of that division.

CONSIDERATION OF ISSUE

10. The form of wording of clause 2(a) of the Will was suggested by Latey J in In re Horgan [1971] p. 50 at 61. In that case the will appointed a named firm of solicitors "who may act through any partner or partners of that firm or their successors in business at the date of my death not exceeding two in number to be the executors and trustees of this my will". The firm could not be granted probate because it did not have legal personality. The sole surviving partner applied for probate and Latey J granted him probate. In the course of his judgment Latey J said:

> "… testators often want their solicitors to act as executors and, in case the individual solicitors they have in mind at the time of giving instructions pre-decease them, they want an appointment which will enable succeeding partners to act. Also they want such appointment to cover such contingencies as the sale of the practice or its amalgamation with another….
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> The law does not permit the appointment as executor of a partnership firm as such. Where a will is so phrased as to purport to do this, the court construes it as appointing the individual partners as executors….
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> … Mr Bingham [for the Law Society] argued that prima facie it is wholly inappropriate to say: 'I appoint X, Y and Z and they can act through A, B and C.' But, he says, meaning can be given to it if one were to treat the firm as though it were a company and say 'I want the partners at the date of my death …' the natural construction of the clause as a whole is that the testator was contemplating and intending the appointment of all [the partners], a grant to two and power reserved to the others."

The judge went on to accept Mr Bingham's construction.

11. In the present case, using the language of Latey J in In re Horgan, the Testatrix wanted her solicitors (who had drafted her will) and their succeeding partners to be her executors; she wanted the appointment to cover such contingencies as the sale of the practice or its amalgamation with another firm. There can be no doubt that TLT was a firm which succeeded to and carried on the practice of Lawrence Tucketts. The issue is whether she likewise wanted to cover the contingency of a conversion of the firm or successor firm into a limited liability partnership which succeeded to or carried on its practice and the appointment of members of that limited liability partnership as her executors.

12. There are two hurdles in the way of adopting this construction. The first is that a limited liability partnership is a corporate body with a legal personality separate from that of its members: it is not a firm in the sense of a partnership. The second is that its members (whether or not profit sharing) are not partners: see section 1 of the Limited Liability Partnership Act 2000. Accordingly on a strict construction of clause 2 of the Will, unless the context admits of another construction, the members of the LLP do not qualify for appointment as executors. The context may do so. Technically the term "a firm" is a partnership of two or more persons and a one man practice is not a firm (see Oswald Hickson Colliers & Co (a firm) v. Carter Ruck [1984] AC 720 at 721G). But the context may require the adoption of a non-technical construction of the term (same at p.723F). In the context of the clause in the Will in In re Horgan (adopted in the Will) the sole surviving partner was held to answer the description of a partner in the firm so as to qualify for appointment as executor. Depending upon the context in which it is used, the term "firm" may include a company. As Vinelott J held in Re Orwell's Trust [1982] 1 WLR 1337 at 1341C:

> "Whilst the term 'firm' in its narrowest sense is apt to describe an unincorporated partnership it is in ordinary usage frequently applied as a description of a private company."

13. For testators adopting a clause in the terms of clause 2 of the Will the legal distinction between a solicitors' partnership and a solicitors' (confusingly named) limited liability partnership and between a profit sharing partner in a solicitors' partnership and a profit sharing member of a limited liability partnership is likely totally to escape them, unless given a lesson in the law which they may well not follow. Even if they do grasp the distinction, they are likely to regard it as a distinction without any relevant difference for their purposes. The profit sharing members of the limited liability partnership will be viewed (as they are for practical purposes) as partners in the solicitors' business. A member of a limited liability partnership who is appointed an executor or trustee is personally liable for breaches of duty just as a partner in a partnership would be. The Law Society has assimilated formal partnerships of solicitors and solicitors LLPs in material respects so far as clients are concerned. The same restrictions are laid down on persons permitted to be partners in a partnership and to be members of an LLP (compare the Solicitors Practice Rules 1990 rule 7(6) and the Solicitors Incorporated Practice Rules 2004 rule 13); and the indemnity insurance of a LLP carrying on the practice of a solicitor must cover the liability of members when acting as executors or trustees in the same way as must the indemnity insurance of a partnership, save that the minimum level of cover for a LLP is £3 million as opposed to £2 million for a partnership (see Solicitors Indemnity Rules 2005).

14. The issue before me is whether the intention of the Testatrix to appoint as executors the solicitors conducting the practice carried on by Lawrence Tucketts at the date of the Will is frustrated by the exercise of the option available to those solicitors to alter the legal character of the vehicle through which they carry on that practice. I think that the court can and should take a practical and common-sense view in eliciting and giving effect to the intention manifested by the Testatrix. The Testatrix focussed on the persons associated in carrying on for profit the practice carried on at the date of the Will by Lawrence Tucketts. Clause 2(a) of the Will is deliberately formulated so that changes in the vehicle by which the practice is carried on is very much of secondary importance. In the circumstances with the substitution as that vehicle of the LLP for LLT I am satisfied that the terms of clause 2 of the Will are apt to embrace the profit sharing members of the LLP (the equivalent of partners in the previous partnership), I should however make clear my view that even as the "partner in the partnership" means in the case of a partnership a profit sharing partner and not merely a salaried partner or a person merely held out (but not in fact) a partner, so when transposed to a limited liability partnership the member must mean a profit sharing member.

CONCLUSION

15. I accordingly hold that upon the true construction of the Will probate should be granted to applicants who are profit sharing members of the LLP. It is not clear on the evidence whether or not the applicants are profit sharing members of the LLP and therefore whether they fulfil this condition. If they do not, the LLP can put forward in

their place other members who do qualify. I should add that to avoid any doubts or questions arising in the future, testators will be well advised to make express provision whether on the conversion of any appointed firm of solicitors or successor firm and (if this is desired) for the appointment of employee (as well as profit sharing) members as executors.