PRESS SUMMARY

Marley (Appellant) v Rawlings and another (Respondents) (Costs) [2014] UKSC [51].
On appeal from [2012] EWCA Civ 61

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE JUDGMENT

This appeal related to wills made by a Mr and Mrs Rawlings. They each intended to make wills leaving their respective estates to the other, and, if the other had already died, to the appellant, Mr Marley. Owing to an oversight by their solicitor ("the Solicitor"), Mr Rawlings signed the will meant for Mrs Rawlings, and Mrs Rawlings signed the will meant for Mr Rawlings. The Supreme Court concluded that each will was nonetheless valid (see [2014] UKSC 2), contrary to the conclusions reached by the High Court and the Court of Appeal. As a result, the appellant inherited the estate of Mr Rawlings which was in the region of £70,000. If the will had been invalid, the respondents would have inherited the estate.

The question which now arises is how the costs of these proceedings should be borne. The appellant contends that this was ordinary hostile litigation, and the respondents should pay the appellant's costs in all three courts. The Solicitor's insurers ("the Insurers") have made submissions in support of the appellant's case. The respondents contend that all parties' costs should come out of the estate, or, in the alternative, should be paid by the Solicitor. The respondents' solicitors and counsel acted on a traditional basis in the High Court and the Court of Appeal, but in the Supreme Court were instructed on conditional fee agreements ("CFAs"), sometimes called "no win, no fee" arrangements.

JUDGMENT

In a judgment given by Lord Neuberger, the Supreme Court unanimously decides that the Insurers should pay the costs of both parties in the High Court and Court of Appeal. In relation to the costs in the Supreme Court, the Insurers should pay the appellant's costs, the respondents' solicitors' disbursements, and, the respondents' two counsels' fees, conditional on the respondents' counsel disclaiming any entitlement to their success fees under their CFA.

REASONS FOR THE JUDGMENT

The position disregarding the CFAs

If there had been no negligence on the part of the Solicitor, it would have been difficult to decide what order to make as between Mr Marley and the respondents. Where there is an unsuccessful challenge to the validity of a will, when the challenge is a reasonable one and based on an error which occurred in the execution of the will, the court often orders all parties' costs to come out of the estate**.** On the other hand, there is considerable force in Mr Marley's argument that, although these proceedings involved a reasonable dispute over the validity of a will, it was ultimately hostile litigation to which the usual rule of 'loser pays' should apply **[6]**.This would be especially true given the small size of the estate, because an order that costs were paid out of the estate would deprive Mr Marley of any benefit from the litigation **[7]**.

However, this is not a case where it could possibly be right to ignore the position of the Solicitor **[8]**. The problem in this case arose as a result of the Solicitor's negligence, and the Insurers, on behalf of the Solicitor,

had required Mr Marley to bring proceedings to seek to have the will the upheld. **[9]**. The appellant has a clear claim in tort against the Solicitor, who would therefore be required, in the event that costs were ordered to be paid out of the estate, to reconstitute the estate **[11].** As the Insurers have underwritten the liability of the Solicitor, the right order to make in relation to the costs of both parties in the High Court and the Court of Appeal, and of the appellants in the Supreme Court, would be that the Insurers pay all those costs **[12-13]**.

The respondents' costs in the Supreme Court

The position in relation to the respondents' costs in the Supreme Court is complicated by the fact that their solicitors and two counsel were all instructed on CFAs. The solicitors are, in the light of the terms of their CFA, only entitled to recover their disbursements, so that must be the limit of the Insurers' liability so far as the respondents' solicitors' costs in the Supreme Court are concerned **[18]**.

As to each counsel's fees, their CFAs would appear to entitle them each to their full fee if the respondents' costs are paid out of the estate. In the light of the fact that the respondents lost, the Court considers that it would be quite wrong if their counsel recovered any success fee from the Insurers: they should be limited to their base fees **[24].** But if the order simply recorded that only counsels' base fees were to be paid by the Insurers, their 100% success fees may be recoverable from the respondents or else from the solicitors (and, if so, from the Insurers as disbursements) **[25]**. Accordingly, the Insurers will only be liable to pay the respondents' counsels' fees in the Supreme Court if both counsel disclaim their entitlement to a success fee **[26]**. Counsel subsequently confirmed that they disclaimed any entitlement which they may have under the CFAs to a success fee **[28].**

References in square brackets are to paragraphs in the judgment