Trinity Term
[2014] UKSC 51
On appeal from: [2012] EWCA Civ 61

JUDGMENT

Marley (Appellant)*v* Rawlings and another (Respondents) (Costs)

Lord Neuberger
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

18th September 2014

Heard on 3 December 2013

Appellant
Robert Ham QC
Teresa Rosen Peacocke
(Instructed by Hugh Cartwright & Amin)

Respondents
Nicholas Le Poidevin QC
Alexander Learmonth
(Instructed by Gillan & Co)

LORD NEUBERGER (WITH WHOM LORDS CLARKE, SUMPTION, CARNWATH AND HODGE AGREED):

Introductory

1. On 22 January 2014, we gave judgment in *Marley v Rawlings* [2014] UKSC 2, [2014] 2 WLR 213, in which we allowed Mr Marley's appeal against the Court of Appeal's dismissal of his appeal against the decision of Proudman J. She had refused to admit to probate a document as the validly executed will of Alfred Rawlings ("the will"). On its face, this document appeared to be the will of his late wife (who had predeceased him), but it had been signed by Mr Rawlings. This was because, when the solicitor who had drafted the wills ("the Solicitor") had visited the couple for the purpose of executing their wills, Mr and Mrs Rawlings had accidently been presented with, and each had signed, the will intended for the other. Mr Marley was the residuary beneficiary under the will, if it was valid, whereas the two sons of Mr and Mrs Rawlings ("the respondents") would have inherited on an intestacy.

2. The issue which arises now is how the costs of the proceedings should be allocated. Mr Marley's primary contention is that the respondents should pay his costs of the proceedings, including the two appeals, in addition, of course, to having to pay their own costs. The respondents, on the other hand, contend that the costs of Mr Marley and the respondents should be paid out of the late Mr Rawlings's estate, or, in the alternative, that those costs should be ordered to be paid by the Solicitor, as he was responsible for the unfortunate error. The Solicitor is, of course, insured against such liabilities. Those insurers have also made submissions on costs, and they contend that the respondents should pay Mr Marley's costs.

3. These submissions all have to be seen in the light of the fact that the value of Mr Rawlings' estate ("the estate") is in the region of £70,000.

4. The position is complicated by the fact that, in the Supreme Court, the respondents' solicitors and two counsel were each acting under a conditional fee agreement (a "CFA"), although they were acting on the traditional basis in the Court of Appeal and at first instance. I will first address the position on the assumption that the respondents' solicitors and two counsel were acting on a traditional basis throughout (which will dispose of the costs below), and will then turn to the costs in the Supreme Court in the light of the CFAs.

The position disregarding the CFAs

5. On the face of things at any rate, it is possible to justify more than one different order for costs in this unfortunate case. I describe the case as unfortunate, because it has involved a hearing in the High Court, a hearing in the Court of Appeal, and a hearing in the Supreme Court, with each side represented by experienced counsel and solicitors, in order to reach a final decision as to how an estate of £70,000 is to be distributed. Even if the costs have been kept at a modest level at all stages, there is unlikely to be much, if anything, left in the estate if the only order in respect of costs which this court makes is that primarily sought by the respondents, namely all parties' costs being paid out of the estate.

6. If there had been no question of negligence on the part of the Solicitor, it would have very difficult to decide what order to make as between Mr Marley and the respondents. On the one hand, there is considerable force in Mr Marley's argument that, although this litigation relates to the validity of a will, and it is a case where both parties can say that they had a reasonable argument, it was ultimately hostile litigation between two parties fighting over money, and that, in those circumstances, the normal rule of "loser pays" applies, so that Mr Marley should receive his costs from the respondents. There is some support for this in the authorities. On the other hand, the authorities also reveal that, where there is an unsuccessful challenge to the validity of a will, and the challenge is a reasonable one and is based on an error which occurred in the drafting or execution of the will, the court often orders that all parties' costs come out of the estate.

7. In the present instance, therefore, and still ignoring the possible liability of the Solicitor, there is a case for saying that Mr Marley should recover his costs from the respondents because they took their chance in hostile litigation and lost, but there is equally a case for saying that the correct order is that the costs of all parties should be paid out of the estate, not least because the cause of the error was in the execution of the will, and the stance adopted by the respondents was far from unreasonable, as is evidenced by the fact that they succeeded both at first instance and in the Court of Appeal. A pragmatic approach might well suggest that, if the estate had been very substantial, the correct order would be to direct that costs be paid out of the estate, but one should hesitate long and hard before making such an order in a case such as the present, where the estate is modest: it would deprive the successful party, in this case Mr Marley, of any benefit from the litigation or from the estate.

8. However, this is not a case where it could possibly be right to ignore the position of the Solicitor. Indeed, there is, at least in terms of broad common sense, considerable attraction in the notion that the Solicitor should bear all the costs, in the sense that he was the person whose unfortunate error was responsible for the litigation. On the other hand, as the insurers point out, (1) a court should always be wary before making an order for costs against a third party, (2) it would, at any rate on the face of it, be odd to require the Solicitor to pay the respondents' costs, given

that he owed no duty to the respondents, and (3) it was not the Solicitor's fault that the respondents chose to fight the case.

9. Although those three arguments have some force, at least on the face of it, I do not find them particularly persuasive. It was the error of the Solicitor which caused the problem that gave rise to the proceedings, as is reflected by the fact that the insurers accepted liability to Mr Marley for his costs in the Court of Appeal and the Supreme Court. Further, when Mr Marley intimated that he had a claim against the Solicitor, the insurers required him to bring proceedings to seek to have the will upheld as valid.

10. I turn to the three specific points raised by the insurers on behalf of the Solicitor. As to point (1), it is by no means unusual to make an order for costs against a party who was funding the litigation or who was responsible for the litigation. As mentioned, the insurers are funding the litigation to the extent of underwriting Mr Marley's costs of the two appeals; further, not only was the Solicitor primarily responsible for the whole problem that gave rise to these proceedings, but the insurers required Mr Marley to bring these proceedings by way of mitigation. Further, the Solicitor has no defence whatsoever to a damages claim from Mr Marley, and therefore this is a particularly strong case for holding a third party liable for costs. As to point (2), given that the respondents' decision to fight this litigation was not unreasonable, it would be harsh if they had to pay any substantial costs, as explained above. Consequently, there is considerable force in the notion that they should obtain their costs out of the estate. However, if that happened, those costs would be ultimately borne by Mr Marley, because he is entitled to the estate, and he would suffer to the extent that it is diminished by the respondents' costs, and therefore could recover that diminution from the Solicitor. As to point (3), it was both foreseeable to the Solicitor and to the insurers that the respondents would contest the claim, and it was scarcely unreasonable of them to do so "all the way", as is demonstrated by the fact that they won in the High Court and the Court of Appeal.

11. Because an order that all parties be paid out of the estate would result in Mr Marley being able, in effect, to reconstitute the estate through a claim for damages against the Solicitor, it appears to me that the position is equivalent to one where the estate is very substantial in nature. Accordingly, an order that the parties recover all their costs out of the estate also seems justified in pragmatic terms, on the basis that all those costs would, in practice, be recovered by Mr Marley from the Solicitor, and by the Solicitor from the insurers.

12. In those circumstances, rather than ordering that the parties receive all their costs out of the estate, and leaving it to Mr Marley to recover the costs from the Solicitor, and leaving it to the Solicitor to be indemnified by the insurers, it seems

to me that, assuming that the respondents had funded the litigation traditionally, it would be appropriate to order that the insurers pay all the costs of Mr Marley and the respondents in relation to these proceedings throughout. I take some comfort from the fact that this was the order which was agreed on behalf of the negligent solicitor in not dissimilar circumstances in *In re Bimson* [2010] EWHC 3679 (Ch), an agreement which, at para 23, Henderson J referred to as "very proper", and that in *Gerling v Gerling* [2010] EWHC 3661(Ch), para 50 HH Judge Hodge QC said in a similar case that he "assume[d] that there will be no order as to costs because the costs are going to be borne by the insurers acting for the solicitors who drafted the Will".

13. Such an order would therefore be appropriate in relation to the costs up to and including those incurred in the Court of Appeal, but it is now necessary to consider what order is appropriate in respect of the respondents' costs in the Supreme Court, given that their solicitors and counsel were acting under CFAs.

The effect of the CFAs in the Supreme Court

14. Two issues arise. The first is whether the CFAs render the respondents liable for any costs in the Supreme Court. The second issue, which only arises to the extent that the answer to the first question is yes, is whether the costs we order to be paid include any uplift. These issues are in fact connected on the unusual facts of this case, as I shall explain in paras 24-27 below.

15. As to the first issue, the insurers argue that, on a true construction of the CFAs in this case, the respondents are not obliged to pay any costs to their lawyers and therefore, given the terms which I would otherwise propose in para 12 above, no order should be made in respect of the respondents' costs in the Supreme Court. This submission is based on the basis of the so-called indemnity principle as explained by Sir Herbert Cozens-Hardy MR in *Gundry v Sainsbury* [1910] 1 KB 645 and more recently by Judge LJ in *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570. The resolution of this issue turns on the terms of the CFAs, to which I now turn.

16. The CFA entered into with the solicitors is short, but it incorporates a Law Society document, the effect of which is that (i) the respondents are liable for the solicitors' costs if they recover any damages "or in any way … derive benefit from pursuing the claim", and (ii) if the respondents lose, the solicitors "may require [them] to pay [their] disbursements".

17. The respondents' primary claim in connection with the solicitors' costs is based on item (i). So far as that is concerned, the reference to "pursuing the claim" may mean, as the respondents contend, "resisting the appeal to the Supreme Court", or it may mean "the appeal to the Supreme Court". Whichever it means, at any rate

at first sight the respondents (and their solicitors) are not assisted by item (i), as they lost the appeal. However, they contend that they "derive[d] benefit from" resisting the appeal or from the appeal because they avoided an order to pay Mr Marley's costs here and below and they recovered their own costs as a result of the order I have proposed in para 12 above. I would reject that argument. The result of Mr Marley's appeal to the Supreme Court is that the respondents are plainly worse off so far as the substantive issue is concerned, and certainly no better off so far as costs are concerned, so it is hard to see how they can fairly be said to have obtained any "benefit" from the appeal. The fact that this Court has decided that they should not have to pay Mr Marley's costs, and can recover their costs from the estate, can scarcely be characterised as a benefit gained from resisting the appeal: it is a mitigation or removal of a disadvantage which they might have otherwise suffered as a result of resisting the appeal.

18. However, I accept that item (ii) assists the respondents (and their solicitors) in the present context, albeit that it is only of limited value to them. This is because, as they lost, the respondents could be rendered liable for their solicitors' disbursements, which could include counsels' fees payable pursuant to counsels' CFAs, as explained above. While it is true that the respondents' solicitors may not choose to pursue the respondents for such disbursements, they would have the right to do so.

19. The CFA entered into with each counsel provides that the solicitors were liable for costs if, *inter alia*, (i) "the appeal [is] dismissed", (ii) "the deceased [is] held intestate", (iii) "any outcome which has a value … equal to a minimum of £1" or (iv) "either the opposing party (to include the estate) agrees to pay or the court orders that they pay your costs". The respondents rely on items (iii) and (iv).

20. I do not consider that item (iii) assists the respondents for the same reason that I have given for rejecting the primary case advanced by the respondents in relation to the solicitors' CFA in para 17 above.

21. As to item (iv), the submissions of both the insurers and the respondents seem to assume that the word "your" means "the clients", ie the respondents. It may be that the word "your" should be interpreted as referring to the solicitors, given that the CFA is a contract between the solicitors and counsel, and "the Client" is a defined term. However, on any view, the word "your" is inappropriate, and it makes little sense that the recoverability of counsels' costs should depend on the recoverability of solicitors' costs as opposed to the recoverability of the client's costs. Accordingly, I am prepared to proceed on the basis of the view adopted by both parties, which appears to be quite probably correct.

22. In my judgement, on this basis, item (iv) is satisfied, provided that I adhere to the proposal expressed in para 12 above that the respondents' costs in the Supreme Court are paid by the insurers. It is true that that proposal would involve the costs being paid by the insurers rather than the estate, but that is simply a practical short-circuiting of an order that (a) the estate pays the costs, (b) the estate be reimbursed by the Solicitor, and (c) the Solicitor be reimbursed by the insurers. In other words, it is because I consider that the estate should pay the respondents' costs that I propose that the costs be paid direct by the insurers.

23. Accordingly, subject to the vexed second issue, that of the uplift on counsels' fees, the logic of the order proposed in para 12 above when applied to the costs in the Supreme Court would be that (i) it applies to counsels' fees in the Supreme Court, but (ii) it only applies to the solicitors' disbursements in connection with the appeal to the Supreme Court, but not to the other costs of the solicitors.

24. That leaves the second issue, namely whether counsels' fees should include the 100% uplift agreed in their CFAs. The parties are rightly agreed that the court has a discretion in this connection – see rule 46(1) of the Supreme Court Rules 2009. I am prepared to accept the respondents' submission that it would usually be inappropriate not to allow the lawyers who have acted for successful clients under a CFA an uplift (and normally, I expect, it would be the agreed uplift). However, this case is a very long way indeed from being normal. Counsels' lay clients in this case have not been successful; far from it: the respondents have lost the appeal. In those circumstances, it can be said with real force that their counsel are lucky to be getting anything. In my opinion, it would be quite inappropriate if any costs order resulted in the unsuccessful respondents' counsel receiving a success fee, or, to put it another way, if any costs order resulted in any party, whether the respondents' solicitors, the respondents or the insurers, having to pay a success fee to the unsuccessful respondents' counsel.

25. On the very unusual facts of this case, reflecting the order I would make as set out in para 12 above, I would be prepared to include counsels' base fees in the scope of any order against the insurers, but I would not be prepared to include any uplift for counsel. However, it seems to me that, if we were to allow the respondents to recover their counsels' base fees from the insurers, the 100% uplift may very well either be recoverable from the respondents or from the solicitors (and if it could be recovered from the solicitors, it may very well be that they could recover the uplift from the insurers as "disbursements"). As I have indicated, it would, in my view, be quite wrong to permit this.

26. Accordingly, I consider that, unless both the respondents' counsel are prepared to waive their success fees, it would be right to depart from the order which I would otherwise propose, so that the respondents would be entitled to recover no

costs from the insurers in respect of counsels' fees in connection with the Supreme Court appeal. This is, I appreciate, a fairly remarkable course to take, but the unusual facts of this case coupled with the many unsatisfactory aspects of the CFA system under the Access to Justice Act 1999 (as illustrated in our very recent decision in *Coventry v Lawrence (No 2)* [2014] UKSC 46), appear to me to require and justify an unusual approach in order to achieve a just result.

Conclusion

27. In all these circumstances, it seems to me that the right order to make in this case is that (i) the insurers of the Solicitor pay the costs of these proceedings (a) of Mr Marley up to and including the Supreme Court and (b) of the respondents up to and including the appeal to the Court of Appeal, and that (ii) the insurers of the Solicitor pay (a) the respondents' solicitors' disbursements and (b) provided that both counsel for the respondents disclaim for all purposes the right to recover any uplift to which either of them would otherwise be entitled under their respective CFAs, counsels' base fees, in relation to the further appeal to the Supreme Court. If counsel are not prepared to provide such a disclaimer, the order I would make is that the insurers pay the costs of these proceedings (a) of Mr Marley up to and including the Supreme Court, and (b) of the respondents up to and including the appeal to the Court of Appeal, and that there be no order for costs in the Supreme Court, save that the insurers pay the solicitors' disbursements.

28. In the usual way, a copy of this judgment was sent in draft to counsel for the parties and for the insurers of the Solicitor, with an invitation to make comments. Save for some helpful typographical corrections and the like, the only response of substance came from the respondents' counsel, who formally confirmed that they disclaimed any entitlement which they may have had under their CFAs to uplift or success fees "for all purposes". Accordingly, the costs order we make is as set out in the first sentence of para 27 above.