Put up or shut up

Cobden-Ramsey v Sutton *paves the way for swifter administration of an estate held up by threat of legal proceedings, explain Henry Hickman and Edward Parkes*

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'Mr Cobden-Ramsay sought to apply Carnwath LJ's *dictum* in *Fitzhugh Gates v Sherman* in practice. He applied under CPR Part 8 for an order permitting him to distribute the estate in accordance with the will and codicil unless the defendant issued proceedings within 28 days.'

Deputy Master Behrens, in *Cobden-Ramsay v Sutton* [2009], noted:

> The claimant, Mr Cobden-Ramsay, has no personal interest in this codicil. He is a neutral party. He simply wants to know what he should do.

Probate had been granted and the executors were poised to begin making interim distributions when the defendant, Julian Sutton, alleged that the codicil to the will was invalid. At the time of the execution of the codicil, he argued, the testatrix lacked testamentary capacity.

This is hardly an unusual position for executors to find themselves in. Usually, the potential beneficiary will either retract their objection on consideration of their litigation prospects or begin an action to seek revocation of the grant of probate. However, Mr Sutton did neither of these things. Instead, he continued to maintain that the codicil was invalid while refusing to issue proceedings. It was, he argued, for the executors to bring an application to prove the codicil's validity.

There is no statutory time-bar to bringing an action in probate. Although it seems likely that an action would be struck out if there was an unreasonable delay (see the *dicta* of Carnwath LJ in *Fitzhugh Gates v Sherman* [2003]), there is little guidance in case law to suggest how long that might be, or in what circumstances a long delay might be reasonable after all.

Although it was open to the executors to distribute despite Mr Sutton's potential challenge, this would mean waiving the protection of s27 of the Administration of Estates Act 1925. This provides an indemnity for an executor who distributes an estate under a grant of probate, despite any defect in it, so long as they do so 'in good faith'. Clearly, distributing an estate after a notification that the grant of probate might be wrong would not be 'in good faith'. If Mr Sutton could find a way to hurdle the initial issue of unreasonable delay and convince the court that the codicil was invalid after all, the executors might find themselves in the unenviable position of having to reconstitute the estate out of their own pockets.

Alternatively, the executors could have done as Mr Sutton wished and brought an action to prove the will a second time in solemn form (*Re Jolley* [1964], paragraph 275 per Danckwerts LJ). However, this was an equally unpalatable choice, in terms of both cost and delay. The estate was worth £280,000, so a full-scale probate action would have used up a significant proportion of that in costs.

Rather than risk exposing himself to liability or exposing the estate to the costs of proving the grant in solemn form, Mr Cobden-Ramsay instead took a third route. He applied to court for directions as to what he should do.

Recent case law

Similar facts arose in *Fitzhugh Gates v Sherman*, a Court of Appeal hearing about a wasted costs order. Ms Sherman threatened to bring proceedings over the will of which Fitzhugh Gates was an executor for nearly eight years before she finally issued. In his judgment, Carnwath LJ observed:

> I see no reason why [the court's powers to control abuse and delay] could not

have been used to impose a time limit on a potential challenge to the probate – in effect a direction to 'put up or shut up' – following which the executor would be free to distribute under the will.

Mr Cobden-Ramsay sought to apply Carnwath LJ's *dictum* in practice. He applied under CPR Part 8 for an order permitting him to distribute the estate in accordance with the will and codicil unless the defendant issued proceedings within 28 days.

Through his counsel, the defendant objected on two points. The first was that there should be a clear basis in the rules for making such an order. The judge disagreed on the basis that the order sought was analogous to a *Benjamin* order, and he did not accept that he would need to find an explicit jurisdiction to make it.

The second objection was that the order would effectively debar the defendant from his claim. Again, the judge disagreed. Mr Sutton would be free to bring a claim at any time to revoke the probate in respect of the codicil. He could then, if he wished, sue the beneficiaries to recover money wrongly paid to them under the principle in *Re Diplock's Estate* [1951]. The purpose of the order would be to protect Mr Cobden-Ramsay in his capacity as executor. As Mr Cobden-Ramsay would be acting under an order of the court, it could not be alleged that he had distributed the estate in bad faith, and he would be entitled to the protection of s27.

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Judgment

Deputy Master Behrens made the order in the terms sought.

This case is significant because it addresses the lacuna in probate law whereby an executor, such as Mr Cobden-Ramsay, can be entirely and indefinitely tied by the spectre of impending proceedings. The slow progress of the administration of a will is a common complaint of beneficiaries.

The benefits of the *Cobden-Ramsay* order are its relative cheapness and speed, and that it gives executors a way to counter a situation which might otherwise lead to considerable delay. ■

Cobden-Ramsay v Sutton
[2009] WTLR 1303
Re Diplock's Estate
[1948] Ch 465
Fitzhugh Gates v Sherman
[2003] WTLR 973
Re Jolley
[1964] P 262