NEW SQUARE Chambers

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# THE COSTS OF LEGACIES: *COUTTS & COMPANY V BANKS* [2002] EWHC 2460 and *HAYES V SWIFT* 2021 SKQB 132

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## JAMES MCKEAN CONSIDERS ENGLISH AND CANADIAN AUTHORITIES TO DETERMINE THE EXTENT TO WHICH THE COSTS OF A SPECIFIC LEGACY FALL INTO RESIDUE OR ARE BORNE BY THE LEGATEE.

Everyone who has the good fortune to practice the law of wills knows how the expenses of an administration are paid. The personal representatives get in and distribute the assets of the estate, and their costs of doing so are paid from residue. Right?

Not necessarily. Take a will, with a specific gift of a chattel to a legatee ('**L**') and the residue to a beneficiary ('**R**'). It might be thought that the executor would be perfectly entitled to obtain the chattel, gift it to L, and to recover the costs of doing so from residue. If the chattel is something simple and easy to distribute, that may well be the case – a gift of a car, a piece of jewellery, a garden gnome, and so on.

But what if the chattel is less easy to distribute? It might be that L is gifted a horse and carriage and a yacht which require expensive maintenance[1], or property in another jurisdiction.[2] The costs of getting hold of the chattel could be significant, and R may quite rightly complain that his or her share of residue is being unfairly eroded by the costs of a gift to another beneficiary.

This was the scenario in ***Coutts & Company v Banks*** [2002] EWHC 2460 (Ch), where L, the legatee, was gifted a chattel described by Lloyd J in intriguingly mysterious terms:

'[a gift] *which I will call the Chattel, which was in* [the testatrix's] *house at her death, but has since been removed by a person who asserts that she gave it to him during her lifetime. He has since sold it to a third party*' [4].

[1] As in ***Re Pearce*** [1909] 1 Ch. 819.
[2] As in ***Re Fitzpatrick*** [1952] Ch. 86.

L's position was:

'*that the executor is under a duty to collect the Chattel and get it in as part of the estate, and should take proceedings to recover it'* [4].

However, R, the residuary beneficiary, said:

'*the executor should not take any such proceedings unless it were indemnified against the cost by* [L]*, and that the executor's proper course of action is to assent in favour of* [L] *in respect of the Chattel, and if necessary assign to her any cause of action, and leave her to take proceedings if she wishes*' [4].

The executor sought the directions of the Court.

Lloyd J upheld the '*principle that a specific legatee bears costs incurred in connection with the subject of the gift*' [6]. The executor was directed to assent the Chattel to L and encouraged to assign to L any cause of action in respect of the Chattel's alleged misappropriation by a third party. The executor was not to issue proceedings against the third party to recover the Chattel for L:

'*It is no part of the executor's duty in those circumstances to take any other than normal or routine steps to collect the asset and see that it is delivered to the legatee'* [13].

This is all well and good, but personal representatives may wonder where to draw the line between *'normal or routine steps*' and impermissible transgressions into residue.

The issue arose more recently in the Canadian case of ***Hayes v Swift*** 2021 SKQB 132, where the Saskatchewan Court of Queen's Bench considered a gift of '*such of my woodworking tools as my said son desires to receive*' [2].

Aficionados of lathes, staple guns, and planers may enjoy Crooks J's judgment for its careful if not philosophical distinction between woodworking tools and general tools ('*simply because a tool is utilized with wood does not necessarily make it woodworking tool*' [40]).

More relevantly for present purposes, the Court also held that the costs of delivery of the tools fell on L:

*'The duty of the executor is to assent the item to the specific beneficiary. It is appropriate for an executor to incur moderate and reasonable expenses to transport a chattel to a specific beneficiary. There are a number of factors which may be relevant, such as the value of the estate, the cost of shipping or transportation, and the value and nature of the asset or chattel. However, this is within the executor's discretion. The executor is under no obligation to incur out of the ordinary expenses which would then be charged against the residue of the estate. Such expenses should be borne by the specific beneficiary'* [51].

The extent to which an executor truly enjoys a '*discretion*' in these cases may be up for debate. ***Coutts & Company***, and earlier authorities, are fairly categorical as to what an executor should or should not do. The discretion is to be exercised within firm limits.

A good rule of thumb may be: if in doubt, assent. It is hard to think of circumstances in which an executor could be criticised for assenting a chattel to a legatee, and leaving them to get on with it. It is much easier to think of how an executor could be criticised for incurring immoderate or unreasonable costs.

Finally, it should be noted that these principles will not apply where the chattel is needed to pay the expenses of the administration.

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