Neutral Citation Number: [2019] EWHC 1231 (Ch)

Case No: C31BS158

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 15/05/2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

(1) Anita Doreen Mussell	**Claimants**
(2) David Keith Williams	
- and -	
(1) Christopher Edward Keith Patience	**Defendants**
(2) Veronica Lesley Patience	

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John Dickinson (instructed by **Brewer, Harding & Rowe**) for the **Claimants**
Steven Ball (instructed by **Clarke Willmott LLP**) for the **Defendants**

Consideration on written submissions

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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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HHJ Paul Matthews :

Introduction

1. This is my written ruling on an issue that has arisen between the parties in attempting to agree a minute of order following a hearing before me on 29 April 2019 concerning the costs of earlier proceedings. Those proceedings were dealt with by me as proceedings for an account by the claimants as executors of what they had done with the estate of the deceased. One of the several judgments in these long drawn out proceedings (handed down on 8 March 2018) has been reported at [2018] 4 WLR 57, where the parties and the proceedings are summarised. I shall not repeat those summaries here. I handed down a short ruling in April 2018 and a further written judgment in the matter on 10 December 2018.

2. The parties having been unable to agree an order to give effect to my earlier judgments, and in particular on who should pay the costs of the proceedings, I fixed the hearing of 29 April 2019 to hear argument and make a decision. The parties duly appeared by counsel, each having pre-supplied a skeleton argument, and I gave an extempore judgment on the costs issue. Notwithstanding my judgment, however, counsel have been unable to agree on the form of the order on costs, and I have therefore received written submissions on what that form of order should be.

3. The proceedings concern the estate accounts put forward by the claimant as executors of the estate of the late Louis Patience, who died as long ago as 7 April 1997, and whose will was proved on 15 December 1997. My judgment of 10 December 2018 made clear that the defendants' several objections to the accounts as such put forward by the claimants were misconceived, and that the claimant's accounts were to be confirmed. (There was also an application made by the claimants dated 15 February 2018, as to which I have ordered that the defendants must pay the claimants' costs.)

4. However, the claimants in these proceedings also sought approval by the court of a distribution account, purporting to show how much each beneficiary was entitled to under the estate. This was not strictly concerned with the executors accounting for what they had done with the estate, but instead with the effect or meaning of a mediation agreement that had been arrived at between the parties and the impact that this might have on the estate's or beneficiaries' liability to capital gains tax. These questions might well affect the amounts properly to be distributed to each of the beneficiaries of the estate, but not what had been received and spent in the estate. Accordingly, it was not appropriate for me *in these proceedings* to approve the claimant's proposed distribution account, and I declined to do so. I have now given directions for at least ascertaining how best to determine this further issue.

Extempore decision on costs

5. In my extempore judgment on costs, I decided first of all that I should make a costs order. Secondly, I decided that, overall, the defendants were the unsuccessful, and the claimants were the successful, parties. In line with the general rule on costs, contained in CPR rule 44.2(2), I proposed therefore to make an order that the defendants pay the claimants' costs. Rather than make an issue-based costs order, however, I took into account the claimants' failure in relation to the part of the proceedings concerning approval of the distribution account by reducing the costs payable by the unsuccessful

party to the successful by 20%. So I ordered the defendants to pay only 80% of the claimants' costs.

6. That order was a litigation costs order, that is, an order in relation to the subsisting legal proceedings, *as between the parties to those proceedings*. I was not asked at that hearing to decide, and I did not decide, anything in relation to the claimants' rights of indemnity out of the estate *by reason of their acting as executors of that estate*. However, as now appears from the written submissions put forward on behalf of the defendants, I am being asked *either* to apply my decision as to the litigation costs order to the claimants' general right of indemnity, *or* at least now to decide (in the same sense) what should happen to that general right of indemnity.

The dispute between the parties

7. The dispute between the parties as to the costs order is helpfully summarised in the defendants' submissions as follows:

> "1. On 29 April 2019 the court decided:
>
> A. The defendants are to pay the claimants' costs of the application dated 15 February 2018 on the standard basis to be subject of a detailed assessment if not agreed;
>
> B. The defendants are to pay 80% of the claimants' costs of the claim on the standard basis to be the subject of a detailed assessment if not agreed.
>
> 2. There is no issue that the claimants should be entitled to recover those same costs from the estate on an indemnity basis, together with the costs of updating the estate accounts. The issue between the parties is who, if anyone should pay the balance of the claimants' costs of the claim, or in other words, the other 20%. The respective positions are:
>
> A. The claimants contend that they are entitled to an order that those costs should be paid from the estate on the indemnity basis;
>
> B. The defendants contend that they should not."

Claimants' position

8. The claimants for their part say that they have

> "a contractual/legal right as in executors carrying out their task of administering the estate to be reimbursed their costs from the Estate on an indemnity basis under CPR 46.3 (2), unless they are in breach of duty and/or are shown to have acted unreasonably".

The claimants also rely on clause 6 of the will, which is a charging clause. They also refer to paragraph 63-02 of Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 21st edition. This in turn refers to and discusses CPR rule 46.3 and Practice Direction 46 paragraph 1, and also section 31 (1) of the Trustee Act 2000.

9. So far as material, and omitting footnotes, that paragraph reads as follows:

> " […] If they have acted reasonably, the representative is not to be deprived of their costs from of the estate. The charges and expenses of executors or trustees are not costs incident to proceedings in the High Court and are not within the discretion of the court unless misconduct is proven. The 'contract' between the author of a trust and his trustees (and presumably between a testator and his personal representatives) entitles them to receive out of the estate all proper costs incident to the execution of the trust. Costs should not be inflicted if they have done their duty or even if they have committed an innocent breach of trust. An administrator is in the same position as a trustee or executor and is entitled to be recouped in the same way. This policy is important for the 'safety' of executors and trustees and is beneficial to those who repose confidence in their friends or neighbours in the management of their property.
>
> Personal representatives also have a statutory right to reimburse themselves or to pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers under the Trustee Act 2000 s.31(1), which applies to personal representatives.
>
> CPR r.46.3 provides that, where a person is a party to any proceedings in the capacity of trustee or personal representative, and CPR r.44.5 (costs payable pursuant to a contract) does not apply, the general rule is that he is entitled to be paid the costs of those proceedings out of the relevant trust or estate, insofar as they are not recovered from or paid by any other person, and that those costs will be assessed on the indemnity basis. Practice Direction 46PD para.1 restricts the right to costs properly incurred, which depends on all the circumstances of the case, including whether the trustee or personal representative (a) obtained directions from the court before bringing or defending the proceedings; (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings. The trustee or personal representative is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee or personal representative personally. […]"

Defendants' position

10. The defendants say:

> "The claimants now seek costs shelter under a general umbrella of 'administration', but the distribution account was a hostile issue. In opposing that part of the claim the defendants were defending their rights as one half of the beneficiaries, whereas the claimants were pursuing the contrary interests of the other half."

(I record in passing that only the first claimant is a beneficiary under the estate. The second claimant is a solicitor executor, who is not a beneficiary. Whatever the position of the first claimant – as to which I say nothing – there is certainly no basis that I have seen for the assertion that the second claimant has departed from neutrality and has been pursuing the interests of only *some* of the beneficiaries.)

11. The defendants rely on the decision of Lightman J in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220, where the judge pointed out that trustees might be involved in three kinds of dispute, which he called trust disputes, beneficiaries disputes, and third-party disputes. He then referred to the judgment of Hoffmann LJ in *McDonald v Horn* [1995] ICR 685, 696, where the Lord Justice stated that in a beneficiaries dispute costs would usually follow the event. That was a case about whether a pre-emptive costs order could be made in favour of trust beneficiaries. The point at issue in the present case did not arise there.

12. In relation to trust disputes, Lightman J said ([1996] 1 WLR 1220, 1223):

> "[A] trust dispute … is a dispute as to the trusts on which [the trustees] hold the subject matter of the settlement. This may be friendly litigation involving *eg* the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or hostile litigation *eg* a challenge in whole or in part to the validity of the settlement by the settlor on the grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement."

What kind of dispute?

13. The defendants submit that in the present case the issue of the proposed distribution was clearly a beneficiaries dispute,

> "since the defendants were objecting to the propriety of the claimants distribution proposals contained in the accounts".

Alternatively, the defendants submitted that it was

> "at least a hostile example of the dispute of the first kind [*ie* a trust dispute]".

14. I reject this submission. This is not a beneficiaries dispute. The claimants as executors have not yet distributed or purported to distribute the estate in accordance with the accounts. They have not done anything for which a breach of trust or *devastavit* claim can be brought. They have simply put forward their view as to the entitlement of individual beneficiaries in light of the events that have happened. Even if I were wrong, and this were a beneficiaries dispute, the distribution account has caused no loss to the trust fund, and in such a case the executors would lose their indemnity only if guilty of misconduct: see *eg Turner v Hancock* (1882) 20 Ch D 303; *Blades v Isaacs* [2016] EWHC 601 (Ch).

15. However, in my judgment this is a *trust* dispute, *ie* for whom and in what shares is the estate held? Moreover, it is a *friendly* rather than a *hostile* example of a trust dispute. I accept, of course, that the parties in these proceedings are not in fact in a friendly relationship. But just because the parties show considerable animosity to each other does not make the dispute between them a "hostile" one for these purposes. The executors have put forward their view as to the beneficiaries' entitlements, and have sought the defendants' agreement to it. The defendants (as is their right) have refused to agree. I have declined to deal with it as part of these proceedings. It may be that the

court will have to decide the question hereafter. I have given directions to assist in this. But it is in all the beneficiaries' interests that the point is resolved, one way or another. It is plainly (to use the language of Lightman J) a "question arising in the course of the administration of the trust".

Litigation costs orders and executors' indemnities

16. In my judgment, it is wrong to assume that there will be any automatic "carry-over" from a litigation costs order which happens to involve trustees or executors to an order concerning the right to indemnity of such trustees or executors. Litigation costs principles are different from trust and estate costs principles. Litigation costs orders are concerned largely with who has won, and then if there are reasons to depart from the general principle that costs follow the event. On the other hand, the entitlement of trustees and executors to an indemnity for their costs (or any other trust or estate expenses) is concerned largely with whether they have acted properly (or reasonably) or not.

17. I cannot deprive executors of their indemnity out of the estate for costs or other expenses or liabilities which they have incurred for the estate unless they have incurred them *improperly*. This in summary form is the effect of section 31 of the Trustee Act 2000 (applied to executors by section 35) and CPR Part 46 Practice Direction, paragraph 1, acting as an exception to the general rule in CPR rule 46.3. In the caselaw before the CPR and the 2000 Act it was sometimes put (and is still sometimes put) in the form, had the executors or trustees behaved *unreasonably*, or committed *misconduct*? But I do not think the variation in words makes any difference in substance.

18. In any event, this question (in whatever form it is put) was not urged on me at the hearing on 29 April 2019, and therefore I did not decide that they had. I simply made the litigation costs order referred to above. In one sense therefore the defendants are now trying to have a second bite at the cherry. Nevertheless I will consider the argument on its merits.

Decision

19. In my judgment the claimants have not behaved improperly or unreasonably. At worst they have tried to ask for a question arising in the administration to be dealt with in what has turned out to be an account rather than in an application for directions or something similar. But it is, as I reiterate, a question that needs to be answered if it cannot be agreed. In my judgment the claimants as executors have sought to advance the interests of all the beneficiaries by winding up the administration, in part by setting out what they consider to be the effect of the mediation agreement and the consequent effect on the interests of the beneficiaries. Accordingly, the relevant costs were properly incurred, even if they have not so far borne fruit.

20. Accordingly, in my judgment, under the costs order the claimants are entitled to be paid 80% of their costs of the proceedings *by the defendants* on the standard basis, but under the general law are entitled to recover the difference between that and 100% of their costs on the indemnity basis *from the estate itself*. It follows that, of the two versions of the order put forward to me, that put forward on behalf of the claimants is the more correct, though I consider that, to be quite accurate, paragraph 4 should

begin with the words "Subject to paragraph 3…" The draft order will be amended accordingly.

21. For the avoidance of doubt, I add that I have not relied on the charging clause in the will in reaching my decision. The nature and effect of the rights conferred by a charging clause are not necessarily the same as those conferred on trustees and executors by the general law concerning indemnity for costs and liabilities properly incurred. And in any event the exact effect of a particular clause would depend on its terms. In the present case there is no need to consider the clause and I have not done so.