Claim No. PT-2019-000886

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**

**PROPERTY TRUSTS AND PROBATE LIST (Ch D)**

**IN THE ESTATE OF Mr. HUAN LIU DECEASED**

7th October 2020

**Before DEPUTY MASTER LINWOOD**

**BETWEEN:**

**PU LIU (Claimant)**

**-v-**

**TIBOR MATYAS (Defendant)**

**MR D McCOMBE** (instructed by Lu Oliphant Solicitors LLP) **appeared on behalf of the Claimant**

**THE DEFENDANT appeared in Person**

## JUDGMENT ON COSTS

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DEPUTY MASTER LINWOOD:

1. This judgment should be read with my judgment earlier today (Neutral Citation No. 2020 EWHC 2807 (Ch)) on the principal point as to the exercise of my discretion as to who should be appointed as professional executor of the estate of the late Mr Huan Liu. I now turn to Issue 2, namely the question of costs. In essence Mr McCombe, for the claimant, says that the claimant should have his costs, including any costs reserved, assessed on the indemnity basis, and there should be interest, an interim payment and to the extent any cost liabilities are not paid the administrator should pay those costs out of the legacy Mr Matyas is entitled to under the deceased's will.

2. Mr Matyas, in his skeleton argument, says: "*It is clear and evident the claimant had plenty of time and cost-effective options to grant probate and filing this application was not needed at all. The claimant made a wrong step and he should do everything to avoid litigation. It is entirely the claimant's fault to litigate, the claimant's fault not to mediate and settle outside court. Therefore the claimant must pay the costs, including the defendant's costs, the defendant or the estate is not (inaudible) the claimant's unreasonable legal action, especially not financial. The estate is only for the welfare of the beneficiaries, and the claimant incurred unnecessary legal costs because of the claimant's unreasonable and unwise actions. The defendant asks the court to make a cost order for the claimant to pay the defendant's costs, in the alternative the defendant asks for a no cost order and dismiss all costs issues".*

3. The starting point is CPR 44.2, which Mr Matyas helpfully sets out in his skeleton argument: "*(1) The court has discretion as to –*

> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs; and*

*(c) when they are to be paid.*

*(2) If the court decides to make an order about costs –*

*(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*

*(b) the court may make a different order."*

4. Mr McCombe referred me to the decision of Mr Stephen Jourdan QC, sitting as a Deputy High Court Judge in *Griffin v Higgs and others* [2018] EWHC 2498 (Ch), an appeal from an earlier judgment of mine, purely on costs, following my earlier judgment wherein I had replaced three executors on the application of a beneficiary.

5. Mr McCombe referred me to paragraphs 6, 8, 9 and 10, and 35, and then 37, 38 and 39, which are to be regarded as incorporated in this ex-tempore judgment. At [48] the Deputy Judge said: *"He then addressed the first of those questions: 'Who has won' and held that Jane had won. He recorded the submissions made on behalf of Con and Con's Children (who were separately represented before him) that they had won because: (1) What Jane applied for was very narrow, namely that Mr Keenan should be appointed as the independent administrator. She failed on that and indeed maintained it should be Mr Keenan until the start of the hearing on 15 November 2017. Rather, one of the three Midlands based solicitors proposed by Con's solicitors Mr Keeley, was, at that hearing, appointed. (2) Con had shown that the majority of Jane's allegations, by number and value, were not worth investigating."*

6. And at [49]: "*The Deputy Master rejected those arguments and held that Jane had won because: (1) The executors had been removed. (2) That removal was preceded by nine requests by Jane and her lawyers for the Executors to step down over a period of a year prior to issue of the claim. (3) Jane's application was vehemently opposed by Con and*

*Con's Children. (4) The majority of the beneficiaries in number, six out of ten, and value, supported Jane. (5) The Executors were provided with Jane's draft first witness statement in May 2016, some two months before issue. They, and Con and Con's Children, were therefore well aware of the basis for the claim some time before issue. (6) The Executors initially opposed the application."*

7. At [50]: "He *did not accept that Jane was unsuccessful in the sense that the executor she requested was not appointed. Rather, he considered that the correct characterisation of the outcome was that, notwithstanding the strong opposition of Con and Con's Children, the Executors had been removed and a replacement appointed".*

8. Then Mr Stephen Jourdan QC under the heading "Was the Deputy Master wrong to hold that Jane had won and that Con and Con's Children has lost?", referred, in paragraph 68, to CPR 44.2(2)(a). He said, at paragraph 70, "*The first reason relied on to challenge the Deputy Master's decision on this point is that the Deputy Master did not appoint Mr Keenan but Mr Keeley, one of the Midlands based solicitors put forward by Con. I consider, however, that the Deputy Master was entitled to take the view that the identity of the individual chosen to replace the Executors was a relatively trivial matter. Jane's first witness statement in support of the claim did not even mention Mr Keenan. It is true that at the costs hearing a brief attempt was made by Mr Learmouth to persuade the Deputy Master to revisit this issue on the basis that it might be possible to see if Mr Keenan could be persuaded to reduce his fees. However, that came after the costs in question had been incurred and the discussion on this point takes up no more than two pages of the 79 page transcript of the costs hearing".* Then at [77]: *"I reject the arguments that the Deputy Master was wrong to treat Jane as the successful party and to treat Con and Con's Children as unsuccessful parties".*

9. I was also referred to the question of whether I was wrong to deny the executors an indemnity from the estate, and in particular Mr McCombe referred me to paragraphs110, 111, 112 and 113, setting out practice direction 46 paragraph 1. Then at [116]: *"I do not agree with the second of those submissions - that executors should only be ordered to pay the costs of a successful application to remove them, which they have resisted, if their conduct is wholly indefensible. If the claimant succeeds in hostile litigation then the general rule set out in CPR 44(2)(a) will ordinarily apply, and the unsuccessful party will be ordered to pay the costs of the successful party".*

10. Then at [126]: *"When considering whether a trustee should be deprived of his indemnity, I consider that the question is simply whether he has acted sufficiently unreasonably to make it just to deprive him of the indemnity" …"In my judgment, whether the application for removal is based upon a conflict of interest or some other ground, the test remains the same, namely whether in resisting such an application the trustee has acted unreasonably".*

11. Mr McCombe submits that his client is the successful party, as the relief sought at the outset was for an independent executor to replace both executors, and secondly, and in any event, the conduct of Mr Matyas is such that an order is merited against him and further on the indemnity basis.

12. The Part 8 claim form as I quoted in my earlier judgment requests in paragraph 5, a) the removal of the defendant, Mr Matyas, as a personal representative, or b), in the alternative, substitution of Mr Daniel for both the claimant and defendant as personal representative of the late Mr Huan Liu. It is important that position did change, and quite

early on, as Lu Oliphant, in their second letter of 16th January 2020, written some three days after receipt of the first witness statement of Mr Matyas said: *"...you will also see from our client's evidence that although this is not his preferred option he is willing for both you and him to be replaced as executives by an independent solicitor who would act as sole executor, he has proposed Mr Daniel, you consider Mr Daniel is too expensive, our client disagrees. However, our client is not wedded to Mr Daniel, if you would like to propose alternatives our client will be happy to consider that".*

13. The following paragraph says: *"We would be grateful if you could indicate whether, assuming in the alternative independent executor is acceptable to our client, you would be willing for that individual to act as sole executor in place of both you and our client. If so, then it might be possible to resolve this matter without further recourse to legal proceedings".*

14. I consider at that early stage, as of 16th January, the costs were relatively, compared to now, limited and would not or should not have been an issue between the parties. That is the ideal time when accommodations, concessions and conciliation should take place when costs are relatively low. This was a most reasonable, proportionate and appropriate letter written by Lu Oliphant at the right time and in the right terms to avoid this dispute and thereby limit the otherwise inevitably increasing costs.

15. Unfortunately, it was not accepted by Mr Matyas. In their further letter dated 7th April Lu Oliphant say: *"We wrote to you on 16 January asking if you had any proposals for a suitable independent solicitor" ..."Our clients proposed Mr Daniel, you have indicated in your evidence you believe him too expensive, it is incumbent on you to suggest suitable alternatives which we told you in our letter our client would be happy to consider. We are therefore disappointed that we have not heard from you with any proposals. Our client*

*considers the appointment of an independent solicitor as executor in place of both parties is a sensible compromise. He is not prepared for you to continue as executor and it appears you are not willing for him to continue as sole executor. If the parties are able to agree on a suitable independent executor, it will avoid a great deal of time and costs being spent on this litigation. Please therefore let us have your proposals as soon as possible".*

16. Again, another sensible, appropriate, direct letter written with the best interests, I would say, of all the parties to resolve the dispute, to move the matter on so that probate could commence, and whilst costs were rising it was still at an early stage, but with the hearings starting so costs were accelerating.

17. Mr Matyas replied on 17th April. This is a very long letter which says it is a response to the second letter of 16th January and the letter of 7th April. At paragraph three he said, *"Substitute executor was never discussed before, it is extremely detrimental and was not the preferred option either. I vehemently and absolutely and 100 per cent oppose substitute executor. The engaged substitute executor sentence into the brother mouth of the claim filed at court is absolutely no (inaudible) of the disadvantage and detriment a substitute executor calls to the estate" ... "Mr Daniel is not suitable and I very strongly object to Mr Daniel appointment to prevent extreme financial detriment committed on account of all beneficiaries on the estate. If Mr Daniel came into office none of the beneficiaries will receive a penny from Chris's estate and Mr Daniel will use the estate for his own legal costs, and properties will be sold under market value within your, albeit Mr Daniel's circle, for speedy transaction".* And then at paragraph four, *"I will never agree to the substitute executor into the office".*

18. Mr Matyas continued *"I will never agree to substitute executor and I will always strongly oppose, however you must act applying the new (inaudible) and new quotation".... "Mr Daniel is not independent but your buddy, you proposed him without searching criteria, you must be mad to propose him and state he is not expensive at 495 et cetera. You choose who you are, mad or fraud, neither good I'm afraid"..."Why is it good for the brother to make me, his parents and himself poor, while you make you and your legal buddies rich, a bit unrealistic don't you think, Mr Lu. Something is very fishy and smells rotten around you and your intention and how you manage matters for your own commercial profit and benefit".*

19. Lu Oliphant did again try to persuade Mr Matyas that an independent executor to replace both of them was appropriate in their letter of 28th April 2020, and said that they were (inaudible) by the criticisms of Mr Daniel, but at paragraph 12 *"We repeat the point, the appointment of an independent solicitor as executor in place of you and our client is an obvious compromise position, which our client is prepared to agree, please now engage constructively in the process".*

20. Unfortunately that did not happen. Lu Oliphant could not have made the point clearer. The claimant was willing to step down on the basis that a suitable replacement could be agreed. What they wanted clearly, obviously, was suggestions to agree the same. I should say also Mr Matyas did reply with various allegations of fraud and negligence, which I have to turn to later, but in any event the matters rested there until July, when, as I set out in my first judgment, the point was conceded by Mr Matyas that he had to step down. But he did not propose, as I have recited, an alternative until 7th September, exactly one month ago.

21. All this in my judgment points one way. Costs must follow the event. Mr Matyas was given every opportunity to put forward proposals to agree an alternative; he did not take them. The claimant has been successful in that a substitute executor has been appointed by me. As it happens, it is the executor that Mr Matyas just one month ago himself suggested, and I have explained in some detail my reasons why I felt Ms Bagha was appropriate, but that to my mind makes no difference that I have exercised my discretion to appoint her as opposed to Mr Daniel. The point remains the same, the claimant is the successful party here, in that these proceedings unfortunately were issued and were necessary and were pursued to the very end.

22. There are a couple of points I should deal with before I turn to conduct. Mr Matyas said that the proceedings were unnecessary. I am afraid I must disagree. It is clear, and I will come on to various points of conduct, it is clear from the language of the letters I have quoted, that Mr Matyas was determined to fight this matter, as he said he vehemently objected. He was given every opportunity to resolve it but he did not take up those offers. Another point raised by initially Russell Cooke on behalf of Mr Matyas, and which he maintains, is that the claimant, Mr Liu, could have applied for a grant of probate with power reserved, which would have meant he could have commenced the application for the grant of probate, and left power reserved to Mr Matyas.

23. That is, on the face of it, a reasonable suggestion, except that, as can be seen and appreciated from the correspondence I have quoted, and from the approach taken by Mr Matyas in these proceedings, I cannot envisage Mr Matyas would have stood back and let the probate process continue after he had so strongly said that he must be involved, and did not, until his witness statement of 10th July 2020, agree to step down, and only

because there was a clear conflict and in no possible circumstances could he continue whilst maintaining he has a claim against the estate. So I do not accept that a grant of probate with power to reserve would have been realistically possible.

24. I now turn to conduct. It is unfortunate that Mr Matyas has used in correspondence the language that he has. I emphasise the substantial difference in that before me today Mr Matyas has been measured, has made careful submissions and his language has been reasonable, professional and appropriate. But the language in his correspondence is frankly at times intemperate, and I say that notwithstanding the substantial sympathy I have for him in the very sad position that he is in, having lost his partner in life and in business. But, as I say, I must now turn to conduct.

25. Mr McCombe first point as to conduct is repeated and unsubstantiated allegations of fraud by Mr Matyas. I referred earlier to a letter from Mr Matyas of 17th April 2020 to Lu Oliphant in which he said at paragraph four, *"So my point is demonstrated that you are a fraud when you are saying that Mr Daniel is not expensive, and it is a reasonable fee for a very small estate, one million pounds to burden, (inaudible) grant it could be done for as little as £215 a substitute executor for 6847 fixed fee without you or Mr Daniel getting your fat greedy fingers involved with Chris' estate. Well it is not there for your benefit but it is for the only benefit of Chris mother, father, brother and me".* That is intemperate, unwarranted and a wholly unnecessary allegation to make as to the conduct of the solicitors. This continues at the end of that letter, namely the allegation making *"you and your buddies rich".*

26. It does not end there. There are other such references to fraud - for example, in another letter to Lu Oliphant of 30th April 2020, Mr Matyas says *"Mr Liu never objected*

*(inaudible) above although all of them indicated fraudulent and professional negligent elements. The words fraud and negligence were not in my vocabulary until recently when I changed the words listed in paragraph 1A and 1B and put them in the basket I never called fraud and negligence"..."Mr Lu is harmful, inaccurate, unethical, strategically keeps family and me apart, B, Mr Lu is incompetent, limited doubtful experience in probate field, charging high fee for his use of time and service proves his own lack of success in getting the grant. Financially benefiting on the detriment of all beneficiaries".*

27. Later in the same letter, *"In my view and direct experience, Mr Lu equals detriment and fraud and negligence, and Mr Lu as I know clearly always acted in a strategic way to make a gain for himself or another or cause loss to another, or to expose another to risk of loss, all beneficiaries of estate, Chris' family and partner have lost money at times during emotionally painful process, management dictated by Mr Lu's financial judgment".*

28. There is not a scintilla of evidence before me as to that. These allegations by Mr Matyas have made the job of Lu Oliphant even more difficult in dealing with this matter, which has its own strains, as is clear because of the family position. There was a withdrawal of these remarks in part by Russell Cooke when they came on the record and said in a without prejudice save as to costs letter dated 7th July 2020: *"In response to your comments as to our client's conduct, he realises his status as a litigant affords him no special privileges, however your client will appreciate the emotional toll his partner's death has taken on him. This together with the fact that he is not a native speaker of English may have resulted in some of his communications coming across as more inflammatory than intended. In this connection any suggestion of fraud stands withdrawn",*

29. Just after that, however, Mr Matyas disinstructed Russell Cooke and acted in person. There has been no formal withdrawal. Mr Matyas saw fit to continue with his allegations after his change of position in an email dated 14th September, to Lu Oliphant, in which he alleged *"Your fraud and negligence allegations are nothing new, it is well known by you and SRA, these allegations will not be discussed 7 October, during the removal application to avoid costs I will draw the court's attention to the matter, in fact SRA will investigate you breaching SRA code of conduct and principles and fraud allegations in relation to the removal application you filed. The allegation you are a fraud stands. I have been in touch with the SRA, I have got it in writing, the SRA is opening an investigation on you after they receive my report, and despite I am not your client. I also spoken to the barrister bar, and Duncan will be"* - that is Mr McCombe - *"will be reported to the barrister bar for reason put forward to the court false information financially benefiting himself, despite him knowingly know this information were false, unless Duncan's information was edited by you what he received from you. I hope that clarifies my cross-examination necessary".*

30. I must refer to one further letter, dated 25th September, just three days before I called for the directions hearing. This is a letter addressed to Chief Master Marsh. In it Mr Matyas says *"It is a risk to speak out against an impressive master and barrister and solicitor for a litigant in person, not speaking out is a greater risk"... "Hearing on 24 April concerns about Master Kaye, especially lack of impartiality and altered of the approved hearing transcript" ..."Concern about Duncan barrister putting through knowingly false statements, deliberately to deceive the court"... "Issues are Duncan knowingly mislead court, master's lack of impartiality, alteration of a judgment transcript, and master approving a false version. The issues are High Court Judge*

*Master Kaye ignores and goes against the legislation, master's lack of impartiality"*. That is repeated throughout this long and detailed letter.

31. I accept Mr McCombe's submission that being a litigant in person does not excuse poor conduct, particularly it does not excuse making and maintaining baseless allegations of fraud, which only increase the temperature in litigation, and make it more difficult to compromise any aspect of a claim. There is no question of fraud here, and Mr Matyas can make no such suggestion based on fact. It is serious matter to make allegations of fraud and Master Kaye did warn Mr Matyas of that when she heard him. Secondly, Mr McCombe, as to conduct, referred me to the failure to comply with court orders, namely payment of the £5,000 costs due under the order of 25 April 2020. Mr Matyas says he simply does not have the money. Mr McCombe says if it is a question of choice by Mr Matyas I cannot determine who is right in that respect, but all he can say is that this clearly has not been complied with.

32. Thirdly, Mr McCombe complains that Mr Matyas did not provide the transcript of Master Kaye's judgment despite my order of 30 September. That was resolved today - it should not have necessitated my further involvement - but Mr Matyas could and should have been more proactive in assisting the claimant in that respect; the overriding objective is clear, it is the duty of the parties to assist the court and each other in the orderly and proper conduct of litigation, which includes minimising costs where possible. Fourthly, certain documents were redacted by Mr Matyas as he thought he could keep certain parts confidential although in fairness to him he did later supply unredacted versions. I do not think that is an issue of conduct as I think it is understandable for a litigant in person in all the circumstances, and I therefore do not attach any weight to it.

33. Fourthly, Mr McCombe submits Mr Matyas' approach to the evidence was disproportionate, in including irrelevant material, some of which was inflammatory, such as the claimant's divorce, an allegation that the deceased as a child had been beaten by his father, neither of which is relevant. I agree. This increased the costs, and especially the temperature in these proceedings, making it more difficult to settle.

34. Fifthly, the approach to cross-examination. Until I called the directions hearing, Mr Matyas wanted to cross-examine three or five witnesses, all of which was, for reasons I gave in my ex-tempore judgment then, wholly unnecessary. That would have taken up a substantial amount of court time. As of now we are almost at the end of the court day and I am only part way through this judgment. Inevitably the hearing would have gone part heard had I permitted cross examination which was wholly unnecessary and inappropriate in these circumstances in view of Mr Matyas' concession in paragraph 12 of his witness statement of 10 July, and in any event usual in applications such as this.

35. Sixthly, Mr McCombe refers to the huge amount of intemperate correspondence has been sent to the court and to the parties, some 500 pages. He submits Mr Matyas should not just pay the costs but also on an indemnity basis, citing *Excelsior Commercial and Industrial Holdings ltd v Salisbury Hammer Aspden and Johnson* [2002] CP Report 67 where the Lord Chief Justice at [32] said costs should be ordered on an indemnity basis if they are sufficient to amount to "*some conduct or some circumstance which takes the case out of the norm"*.

36. I find that all the matters of conduct I have referred to are unreasonable in all the circumstances and take this case out of the norm. First, the repeated and unsubstantiated allegations of fraud result in me finding I should make an order for payment of costs on

the indemnity basis for that alone. Secondly, the disproportionate approach to the evidence in itself would warrant costs on an indemnity basis, as does the enormous volume of correspondence on what should have been a relatively straight forward matter and the approach to cross-examination.

37. As to failure to comply with the court order as to payment of costs, the failure to produce the transcript, and the redacted documents, I do not think that they warrant costs on an indemnity basis, whether individually or collectively. In summary Mr Matyas will pay the claimant's costs of these proceedings on the indemnity basis.

38. Finally, one other point I should mention is that Mr Matyas submits that he did propose mediation and he refers to his three offers to mediate, on 23rd December 2019, 24th April 2020 and 23rd June 2020. All were before his change of position, and as the quotations I have made from his correspondence show, it was highly unlikely that any mediation would have been successful in view of the position that Mr Matyas adopted in the correspondence.

39. The position is simple; there was no halfway house, the only one being suggested by Lu Oliphant when they suggested Mr Matyas should propose an alternative executor as far back as January 2020. The first time an alternative name was suggested by Mr Matyas was on 7th September 2020, almost eight months later. In those circumstances mediation would not in my judgment have resulted in settlement.

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*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*