Neutral Citation Number: [2020] EWHC 3295 (Ch)

Case No: PT-2020-BRS-000069

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 3 December 2020

Before :

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

- -

Between :

JAMES FRANCIS KNIPE	**Claimant**
- and -	
(1) THE BRITISH RACING DRIVERS' MOTOR SPORT CHARITY **(2) THE BRITISH RACING DRIVERS' CLUB** **(3) THE ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (RCN 219099)** **(4) CANCER RESEARCH UK (RCN 1089464)** **(5) WORLD CANCER RESEARCH FUND (RCN 1000739)** **(6) KATHRYN MARY MARSHALL**	**Defendants**

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- -

Matthew Wales (instructed by **Harrison Clark Rickerbys**) for the **Claimant**

Application on paper only

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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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by the claimant by undated notice for summary judgment under CPR Part 24, brought in a claim under CPR Part 8. The claim is not contested, but, because the claim is brought under Part 8, judgment in default is not available (rule 12.2), and nor is judgment on admissions (rule 8.9(b)). On the other hand, the claimant may seek summary judgment on the claim (rule 24.3(2)). The notice asks for the matter be decided without a hearing, which the court may do pursuant to CPR rule 23.8. I considered that it was appropriate to do so in this case, for the purpose of saving costs in a case where claim is not opposed.

2. The claim form was issued on 28 July 2020 by the claimant, as executor and trustee of the estate of Barrie Russell Williams deceased. He seeks relief under CPR rule 64.2 as follows:

> "(1) Declarations that on a proper construction of the Will of Barrie Russell Williams dated 26 February 2014:
>
> > (a) The First Defendant is the sole person entitled under the gift of residue to 'The British Racing Drivers Club Benevolent Fund' under clause 8(a) of the Will;
> >
> > (b) The Claimant holds the first of residue to the 'Cancer Research Fund' under clause 8(d) of the said will upon trust for the charitable purpose of funding cancer research; alternatively
> >
> > (c) The first of residue to the 'Cancer Research Fund' under clause 8(d) of the said Will fails, but shall be held by the claimant upon a scheme *cy-près* upon terms to be determined by the court or to be referred to the Charity Commission pursuant to section 69(3) of the Charities Act 2011;
>
> (2) A declaration that the Claimant shall be at liberty to distribute that part of the estate mentioned under clauses 3 and 5 of the said Will prior to the resolution of the Sixth Defendant's claim under the Inheritance Act Provision (tbc) (for Dependants & Family) Act 1975 currently proceeding in the Oxford County Court under claim number F000OX602;
>
> (3) If and in so far as necessary, orders pursuant to CPR 19.8A directing service of this claim or any judgment or order made in this claim upon any person who may be affected by it, and/or orders pursuant to CPR 19.7 appointing a person to represent any other person or persons who cannot easily be ascertained;
>
> (4) An order that the Claimant's costs of and occasioned by this application shall be met from the estate of the deceased on an indemnity basis;
>
> (5) Further or other relief as the court thinks fit … "

3. I have set out the relevant terms of the claim form exactly as found there, although there are one or two obvious errors in the drafting, which I shall deal with at the appropriate point. The claim is supported by a witness statement from the claimant dated 30 June 2020. All of the defendants have filed acknowledgements of service indicating no intention to contest the claim, and none of them has filed any evidence. Accordingly, the claimant's witness statement constitutes the whole of the evidence before me.

Summary judgment

4. However, this is not the trial of the claim. It is an application for summary judgment under CPR rule 24.2, which reads (so far as material) as follows:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> […]
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

5. On an application for summary judgment, the court is not to conduct a mini-trial, or indeed any other kind of trial. In *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, Lord Hope put it this way:

> "95. … The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

6. However, special considerations apply to those cases where the critical issue is one of construction, whether of a contract, a conveyance or (here) a will. A recent example is

the decision of the Court of Appeal in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725. That was a case where the claimant brought a claim in debt against the defendant under an agreement entered into in March 1990. The *defendant* then applied for reverse summary judgment, on the basis that a subsequent agreement of June 2002 operated to extinguish the claimant's claim. The judge at first instance had invited the parties to agree that he should decide the question whether the agreement of June 2002 extinguished the claim as a preliminary issue, but each side for its own reasons did not wish this to happen. The judge accordingly held that it was for him to decide only whether the claimant had a real prospect of succeeding on its claim despite the agreement of June 2002, and dismissed the application on the basis that it had such a prospect.

7. The Court of Appeal allowed the defendant's appeal. Moore-Bick LJ (with whom Ward and Buxton LJJ agreed), said:

> "12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."

8. In my judgment, the present case falls into this category. The will raises short points of construction on which the parties have had the opportunity to present evidence and arguments, and the claimant has done so, but the defendants have understandably chosen not to do so, because they do not challenge the claim. In addition, there is also a claim for a direction about immediate payment out of the estate to a beneficiary, but I am satisfied that in the circumstances this too can properly be dealt with summarily.

Facts

9. The evidence before me shows that the claim in the present case arises from the will of Barrie Williams who died on 8 September 2018, domiciled in England and Wales. The claimant, who is a retired accountant and was a friend of the deceased, was appointed executor of the deceased's last will dated 26 February 2004 (according to the claimant's own witness statement, and the exhibit of a copy of the original document, although the claim form refers to a will dated 26 February *2014*, which I take to be a mistake). He obtained a grant of administration of the will on 9 May 2019, showing the net estate to amount to £1,150,205. The deceased was a retired professional racing driver, and a long-standing member of the British Racing Drivers' Club (the second defendant). The sixth defendant was his long-term partner and fiancée. She has made a claim against the estate and the residuary beneficiaries in the County Court at Oxford under the Inheritance (Provision for Family and Dependents) Act 1975. The deceased was also survived by his mother, now aged 105 years.

10. By clause 3 of his will, the deceased gave his share in a property known as 70 New Road, Bromyard to his mother if she survived him. By clause 5 of his will, the deceased gave a number of pecuniary legacies. By clause 6, he gave the sixth

defendant the right to live in his house known as "The Butts", in Brackley, Northamptonshire, for the rest of her life. By clause 8, he gave the residue of his estate in a number of shares, as follows:

> "(a) as to Fifty per cent thereof to the British Racing Drivers Club Benevolent Fund;
>
> (b) as to Thirty per cent thereof to the British Racing Drivers Club absolutely, but with the request that the monies be held as the 'Barrie Williams scholarship fund' and used at the discretion of the club to provide for an annual scholarship for the training of young racing drivers;
>
> (c) as to Ten per cent for the Royal Society for the Prevention of Cruelty to Animals;
>
> (d) as to Ten per cent for the Cancer Research Fund."

11. It is two of the gifts in clause 8 which have caused the difficulties, and the various defendants have been joined to this claim in order that they should be bound by the decision of the court. One problem relates to the true construction of clause 8(a) of the will, and another relates to the true construction of clause 8(d) of the will. Unfortunately, it appears that the original will file has been destroyed, and therefore any potential evidence as to the deceased's instructions has been lost. Until the identities of the residuary beneficiaries are resolved, the Inheritance Act proceedings brought by the sixth defendant cannot be resolved either, so there is a degree of urgency in the matter.

The construction of wills

12. Section 21 of the Administration of Justice Act 1982 provides as follows:

> "(1) This section applies to a will—
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."

13. In *Marley v Rawlings* [2015] AC 129, Lord Neuberger PSC (with whom all the other judges agreed), said:

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document,

> (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. […]
>
> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. […]"

Clause 8(a)

14. The first question arises under clause 8(a) of the will. This directs that the residue of the deceased's estate is to be held by his trustee upon trust "as to Fifty percent thereof for the British Racing Drivers' Club Benevolent Fund." The problem is that there is no such institution with that name. The second defendant, the British Racing Drivers' Club, is a well-known unincorporated association, but is not a registered charity. According to the evidence, the only benevolent fund administered by the second defendant is the first defendant, the British Racing Drivers' Club Motor Sport Charity. This was founded in 2000 to support members and other people involved in the sport in times of need, that is, as a benevolent fund.

15. The claimant submits that the reference to the British Racing Drivers' Club Benevolent Fund is a reference to the first defendant, which is a registered charity. Moreover, it is the only benevolent fund administered by the second defendant. It appears that none of the defendants challenges this. In my judgment, given the deceased's professional background, his membership of the club and his long familiarity with its affairs, as well as the absence of any other candidate, I cannot believe that the deceased had any institution in mind as the beneficiary of his bounty in clause 8(a) of his will, apart from the first defendant. The opening words of the phrase "the British Racing Drivers Club Benevolent Fund" link the identity of the intended beneficiary to the second defendant and the first defendant is the only benevolent fund administered by the second defendant. This is the simple case of construing the words in the will in the context in which the deceased used them.

Clause 8(b)

16. The second question arises under clause 8(d) of the will. This directs that the residue of the deceased's estate is to be held by his trustee upon trust "as to Ten percent thereof for The Cancer Research Fund". But there is no existing registered charity known by this name. (In passing, I note that the claim form in paragraphs 1(b) and (c) of the declarations sought refers to "the *first* of residue … under clause 8(d)", but this is clearly a mistake for "*gift* of residue" *etc*, as shown in paragraph 1(a).)

17. The fourth and fifth defendants are well known registered charities with names which match at least to some extent the words used in the will. They have agreed to share the gift between them, but that does not protect the claimant as executor, in case another charity were to seek to be entitled under that clause. In those circumstances, the question for the court is whether the gift in clause 8(b) amounts to a gift to (i) an institution which did exist but had ceased to exist at the date of the deceased's death, (ii) an institution which never existed, or (iii) a gift for a charitable purpose. The

claimant submits that it is the third of these, and this is not contested by the other residuary beneficiaries (the first, second and third defendants).

18. In support of his submission, the claimant refers to operating guidance from the Charity Commission, paragraph B2.2, repeated in substance in an email to the claimant's solicitors dated 21 April 2020. This reads in part as follows:

> "B2.2 It is not always obvious whether a gift is a gift for particular purposes (a purpose gift) or whether it is a gift to a particular institution. Where a gift is a purpose gift, the executors can decide for themselves how best to dispose of the legacy so as to further the relevant charitable purposes. In the case of a gift to an unincorporated charity, this can often be regarded as a gift for the particular charitable purposes of that charity rather than to the particular charity. This may be important where the particular charity has ceased to exist …"

19. The claimant also relies on a dictum of Lord Loreburn LC in *Weir v Crum-Brown* [1908] AC 162, 167, where he said:

> "Now there is no better rule than that a benignant construction will be placed on charitable bequests".

Although the decision is one of the House of Lords, this was in fact a Scottish appeal. But I do not think that anything turns on that. On this point the Scottish and English law are the same, and the like benignant construction is given by English law also.

20. Finally, reliance is placed on a passage from *Tudor on Charities*, 10th edition, 2015, at [9-064]:

> "Where the object of the gift is an institution which has never existed but the gift is construed as a gift for the charitable purposes of the non-existent institution and these can be inferred from the will, then, provided the purposes are practicable, usually the gift will not fail and will be applicable for those purposes, usually under a regulatory (non-cy-près) scheme. Rarely in such a case the existence of the institution referred to may be considered to be an essential element of the gift, in which event the gift will wholly fail by reason of its non-existence and will pass to the next-of kin (or to whoever else is entitled in the event of failure). If the purposes cannot be ascertained, but it is clear that they were charitable purposes, the purposes may be defined by way of scheme as described in the preceding chapter. If the gift is construed as a gift to the institution rather than for its purposes, then unless a general charitable intent can be found (which will usually be difficult in such a case), the gift will wholly fail and will pass to the next-of kin (or to whoever else is entitled in the event of failure). If in such a case a general charitable intent can be found then a cy-près scheme should be made."

21. The meaning of the phrase "Cancer Research Fund" is ambiguous on the face of it, and accordingly section 21 of the 1982 Act applies, so that extrinsic evidence may be admitted to assist in its interpretation. Research on the website of the Charity Commission by or on behalf of the claimant shows that "Cancer Research Fund" was the name historically taken by certain subsidiary charities of larger registered charities (often hospitals or other medical institutions). However, all these subsidiaries have now been removed from the register of charities, whether because of amalgamations,

using up or transferring their funds to others. In 2004, when the deceased made his will there were four subsidiary charities so named, but none of them remained in existence at the time of the deceased's death. There is no evidence that the deceased had any particular registered charity in mind at the time of making his will, and neither did he have any strong connection to any particular cancer research charity.

22. In my judgment, on this material the phrase "Cancer Research Fund" used by the deceased does not refer to a particular institution, even though expressed with initial capital letters. Instead it refers to the general charitable purpose of cancer research. It is therefore for the claimant as executor of the will to apply that part of the residue given by clause 8(d) to that general charitable purpose, as for example dividing it between the fourth and fifth defendants. Even if I were wrong, and it were intended to refer to a particular institution, on this material it is clear that the identity of the particular institution would not be critical to the gift. Given the existence of other charitable elements in the will (under clauses 8(a) and 8(c)) there would be a no difficulty in discerning a general charitable intent in this case.

Clause 3

23. Finally, the claimant seeks a direction that he may distribute the proceeds of the deceased's interest in the property known as 10 New Road to his very elderly mother, in accordance with clause 3 of the will, without waiting for the Inheritance Act proceedings to be settled first. The evidence shows that the deceased's estate is worth some £1,018,491.99, comprising a one half share in 17 New Road, sold for £125,596.90, "The Butts", valued at £508,000 for probate, various road vehicles probably worth about £120,000, investments valued at £339,038, bank accounts to the value of £15,330, and premium bonds to the value of £50,000. There were credit card debts at death and also funeral costs to pay. There will also be inheritance tax to pay. The claimant says that the figures are such that the claim of the sixth defendant will be amply satisfied from the residuary estate, and the resolution of her claim should not hold up distribution under clauses 3 and 5 of the deceased's will. This is not challenged by the sixth defendant.

24. In my judgment, there is no good reason to hold up payment of the proceeds of sale of the deceased's share of 17 New Road, pending resolution of the sixth defendant's claim. On the figures it seems highly unlikely that her claim will be agreed or adjudicated in such a sum as would eat into those proceeds of sale. Moreover, she has not challenged this direction being sought. In any event, giving the direction to the executor merely gives him personal protection against any claim for devastavit or breach of trust. It does not take away the rights of the sixth defendant as against other persons, including the deceased's mother. In the circumstances I shall give the direction sought.

Disposition

25. I shall make the order more or less in the form of the draft submitted by the claimant. However, although I shall provide that the claimant's costs of the application be met from the estate of the deceased, the basis of assessment is dealt with by CPR rule 46.3 and paragraph 1 of Practice Direction 46. I know that in the past there was some doubt as to whether these were applicable if no order was made in respect of costs,

but I hope I dealt with that in a judgment I gave a few years ago in a case called *Blades v Isaac* [2016] EWHC 601 (Ch), in which I said:

> "63. For completeness I should add that CPR rule 44.10(1) provides that
>
> > 'Where the court makes an order which does not mention costs –
> >
> > > (a) […] the general rule is that no party is entitled […] to costs […] but
> > >
> > > (b) this does not affect any entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative […].'
>
> 64. This means that, where the trustee is entitled to an indemnity for any costs out of the trust fund, whether under Rule 46.3 and/or para 1 of the Practice Direction to Part 46, or indeed otherwise (*eg* a contract), there is no need for an order to that effect. An order made which does not mention costs does not prevent the trustee exercising his right to indemnity. If the trustee does so, and the beneficiary wishes to challenge this, he is still able to (formally, this could be, for example, by applying for an account and then seeking to falsify it).
>
> 65. The reference in rule 46.3(3) to 'assessed' costs does not mean that trustees cannot exercise their indemnity without a court order to that effect. Instead it just confirms the basis of assessment in any case where the costs of trustees fall to be assessed under a court order. It avoids the risk that trustees who should otherwise obtain a complete indemnity from the trust fund, but who, in respect of the litigation costs they incur are awarded costs only on the standard basis, thereby obtain less than a complete indemnity."

26. The only other point to mention is that, because of this application having been made on paper without (as I understand it) being served on the defendants, I will give liberty to any defendant within seven days of service of the order to apply to vary or set aside my order.