Neutral Citation Number: [2024] EWHC 215 (Ch)

Case No: PT-2022-000735

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 February 2024

Before:

MASTER MCQUAIL

- -

Between:

(1) Herman Baryohai Benjamin

Claimants

- and -
(1)) Raymond Ephraim Benjamin
(2) Daisy Rebecca Benjamin **Defendants**

- -

Oliver Hilton (instructed by **Blake Morgan LLP**) for the **Claimants**
Aidan Briggs (instructed by **Howard Kennedy LLP**) for the **Defendants**
Hearing date: 6 November 2023

- -

Approved Judgment

.....

MASTER McQUAIL

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 am on 9 February 2024

Master McQuail:

Introduction

1. On 6 November I heard the claimant's application for an order departing from the default rule in CPR 38.6(1) as to the costs consequences upon discontinuance of a claim. The claimant filed a notice of discontinuance in respect of the whole of his claim on 5 July 2023 and filed this application on the same date. The application is supported by the witness statement of the claimant's solicitor, Thomas Middlehurst of Blake Morgan LLP, dated 5 July 2023. No evidence was filed in opposition to the application. The default rule would mean that the claimant would be liable for the defendants' costs of the claim.

The Claim

2. The defendants are the claimant's father and mother respectively. On 5 March 1999 the defendants settled two shares, being the then entire allotted shareholding, in the family business Benjamin Pharmacy Limited (**BPL**), on themselves as trustees of the Benjamin Family Settlement (**the Trust**) on discretionary trusts for the benefit of the claimant, his brother, Benny, and their issue.

3. In March 2021 the claimant requested from BPL's accountants a copy of its register of members. In response Robert Craig, a consultant with Howard Kennedy LLP, provided a copy of the register showing that Benny had been the sole shareholder since November 2017.

4. In due course the claimant instructed Blake Morgan to make further enquiries about the Trust. Those enquiries were not answered, and the claimant issued a Part 8 Claim Form on 1 September 2022 seeking disclosure of documents and information about the Trust. The claim was supported by a witness statement of the claimant dated 30 August 2022.

5. The second defendant was assessed as lacking litigation capacity on 7 November 2022. The first defendant was assessed as lacking litigation capacity on about 21 November 2022. Mr Slavin, a partner with BPL's accountants, signed certificates of suitability to act as litigation friend for each of the defendants on 1 December 2022. Those certificates were filed with the court by Howard Kennedy on 6 December 2022 and Mr Slavin became the litigation friend for each defendant pursuant to CPR 21.5(3).

6. By letter dated 7 December 2022 Howard Kennedy, on behalf of Mr Slavin, provided the disclosure and information the claimant had been seeking including, in particular, a Deed of Appointment dated 9 November 2017 (**the DOA**). By the terms of the DOA the entire Trust Fund was appointed irrevocably to Benny absolutely. The letter explained that the only Trust assets were the two shares in BPL which produced no income and the only trust event was the DOA so there were no further trust documents, accounts or information.

7. By letter of 20 January 2023 the claimant acknowledged that there was no benefit in pursuing the claim, asserted that the defendants' failure to engage should entitle the claimant to an order for indemnity costs, but invited agreement that there be a settlement on terms that the defendants pay his costs of the proceedings on the standard basis.

8. The claimant's present position is that the defendant should pay his costs on the indemnity basis up to 20 January 2023 and on the standard basis thereafter. The position of Mr Slavin on behalf of the defendants is that there should be no order as to costs up to 7 December 2022 and that the claimant should pay the defendants' costs thereafter.

9. The claimant's costs of and incidental to the claim are approximately £100,000. Should I make any order for payment of those costs by the defendants a detailed assessment will have to take place as the paying parties would be protected (CPR 46.4).

The Background

10. The reason the claimant sought information about the Trust is the claimant's concern that assurances he says were given to him by the defendants that half of the family business, incorporated as BPL, would eventually pass to him would not be honoured. The claimant says that he suspected, but did not know, that something had occurred that was inconsistent with the assurances. Before making any challenge to dealings with the Trust assets the claimant needed to understand what dealings had happened.

11. In fact, on 9 November 2017 as the DOA showed the Trust property was irrevocably appointed to Benny and the Trust wound up. Legal ownership of the shares in BPL was transferred to Benny on the same date.

12. The copy of BPL's share register provided by Mr Craig showed Benny had become sole shareholder in November 2017, but revealed nothing about the Trust. The records at Companies House, which referred to Benny holding 25-50% of the "voting rights" in BPL, implied that Benny was not the entire beneficial owner of the shares.

13. It was against that background that Blake Morgan wrote a letter dated 14 March 2022 to the defendants seeking information about the Trust. The claimant's witness statement records that the first defendant acknowledged that he had received that letter by saying "we do not need lawyers".

14. Companies House records show that on 18 March 2022, the share capital of BPL was increased by 998 ordinary shares and Benny's wife was appointed a director.

15. On 31 March 2022 Blake Morgan wrote to Howard Kennedy, noting that it had been that firm that had responded to the 2021 share register request, and asked if it represented the defendants in relation to the Trust. Mr Craig responded to confirm he acted for the defendants. Blake Morgan sent a copy of the 14 March 2022 letter to Howard Kennedy on 7 April 2022 and asked if Mr Craig would take his clients' instructions.

16. No response was received. The claimant therefore instructed counsel with the result that a detailed letter before action asking for disclosure of various categories of documents and information about the Trust and BPL was drafted and sent to Howard Kennedy on 26 April 2022. The letter explained that proceedings would be issued and costs would be sought if it were not answered. The letter included the claimant's undertaking to pay the costs of the defendants' giving the disclosure. That undertaking accords with the explanation in *Lewin on Trusts* 20th Edition at [21-100] that a beneficiary seeking disclosure would usually pay the costs of its provision, that the costs of answering normal enquiries should be a trust expense while the cost of assembling information not in documentary form would fall on the beneficiary.

17. No response was received.

18. On 31 May 2022 Blake Morgan wrote to Benny and to BPL, care of the company accountants, seeking essentially the same information as was sought from the defendants. Mr Craig responded on 9 June 2022 explaining that he acted for Benny and would reply "in due course". Nothing further was heard on behalf of Benny. Mr Slavin responded on behalf of BPL on 13 June 2022 enclosing an updated share register showing the 1000 allotted shares were held by Benny. Nothing was said about the Trust.

19. The Details of Claim annexed to the Claim Form echo the terms of the 26 April 2022 letter.

20. The claim was served on the defendants and sent separately to Mr Craig under cover of a letter of 9 September 2022. A response from Howard Kennedy dated 23 September 2022 raised the issue of the defendants' capacity to litigate for the first time, on the basis of their ages and residence in a care home.

21. According to Mr Middlehurst's witness statement the first defendant repeated his assurances to the claimant to the effect that half of the BPL business would pass to the claimant both before and after the date of issue of the Part 8 Claim.

22. It took some time for capacity assessments to be undertaken, but by 6 December Mr Slavin was in place as litigation friend. On 7 December 2022 Howard Kennedy sent a copy of the DOA under cover of a letter which provided also the information sought by the claim.

23. The claimant's delay in filing and serving the notice of discontinuance appears from the open correspondence in the bundle to have been because the parties tried but failed to agree the costs consequences.

The Law on Costs on Discontinuance

24. CPR 38.6(1) provides that:

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."

25. Counsel were in agreement that the principles applicable to the exercise of the court's discretion under CPR 38.6(1) were summarised by the Court of Appeal in *Brookes v HSBC Bank* [2011] EWCA Civ 354 as adopted and approved by the Court of Appeal in *Nelson's Yard Management Co v Eziefula* [2013] EWCA Civ 235 where Beatson LJ said at [14]:

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;
> (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
> (3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
> (4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
> (5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;

> (6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

26. Beatson LJ also pointed out at [15] that it is necessary to have regard to (the now) CPR 44.2 in determining whether there is a good reason to depart from the CPR 38.6(1) default position. CPR 44.2 provides that the court must have regard to the conduct of the parties which includes pre-action conduct, the extent to which pre-action protocols were followed, whether it was reasonable to pursue or contest an issue and the manner in which issues were pursued.

27. Mr Briggs pointed out that Beatson LJ said at paragraph [30] that the hurdle to displace the default rule is a high one.

28. Beatson LJ went on to refer to *Messih v MacMillan Williams* [201] EWCA Civ 844 where Pattern LJ had concluded that the settlement of a claim with one defendant could not justify departure from the default rule on discontinuance against other defendants. He said at [31]:

> "a claimant who seeks to persuade the court to depart from the default rule must provide cogent reasons and is unlikely to be able to satisfy the court that there is good reason to do so save in unusual circumstances."

29. Beatson LJ's conclusion at [40]-[44] was that there was sufficient reason to depart from the default rule where the defendant had failed to respond or respond appropriately to pre-action correspondence, such that the claimant had no choice but to issue proceedings to protect his interests and that the judge below had failed to take that failure properly into account as "undoubtedly a relevant consideration".

30. Mr Hilton referred also to the Court of Appeal decision in *Ashany v Eco-Bat Technologies Ltd* [2018] EWCA Civ 1066 where Coulson LJ, said at [21]:

> "It is also important to step back and look at this case, and the default rule, in the round. The presumption in rule 38.6 arises because, in the ordinary case, the discontinuance of a claim by a claimant against a defendant will usually amount to an admission or an acceptance that the proceedings should never have been commenced. In such a case, the starting point must be that the defendant is entitled to its costs, and that is reflected in the default rule."

31. In the *Ashany* case the default rule was partially disapplied. The purpose of the proceedings was to obtain from the defendant an email, which had not been provided pre-action. The failure to provide it justified the claimants in concluding "enough was enough" and that they had no option but to issue proceedings, during the course of which the email was disclosed, with the result that the claimants' original aim had been achieved.

32. Mr Hilton referred to *Hewson v Wells* [2020] EWHC 2722 as a further example of a departure from the presumption in CPR 38.6(1) where part of a claim was discontinued after disclosure of a relevant deed, which amounted to the claimant achieving in substance that which she was seeking and where the defendant had failed to engage pre-action by producing the deed over a period of 18 months.

33. Mr Briggs pointed out that only limited assistance may be derived from the facts of other cases and that none of the reported cases concerns incapacity.

34. Mr Hilton asked me also to bear in mind the principle in trust proceedings that, where a trustee fails to produce accounts and provide information to which the claimant beneficiary was entitled, they would be ordered to pay the costs of the claim where there is no real doubt that the Court's would exercise its discretion to order disclosure. Lewin on Trusts, 20th Edition at [48-061] points out that where there is a doubt the prudent course for the trustee would be to seek directions.

35 Mr Hilton also referred me to CPR 46.3 which provides that if the defendants as trustees do not recover their costs from the claimant, they would be entitled to reimbursement of properly incurred costs from their trust fund. Whether or not costs are properly incurred will depend on whether the trustees obtained directions, acted in the trust's best interests and acted reasonably in the proceedings.

36. Mr Hilton pointed out that there is no general rule that the Court will not make an order for costs against a protected party, and there is no evidence here that it would be pointless to do so through lack of assets: see *Barker v Confiance Ltd* [2019] EWHC 1401 at [121] & [122], which concerned a child.

Relevant Law on Incapacity

37. A 'protected party' (which, by the definition in CPR 21.1(2), includes an intended party), that is one who lacks capacity to conduct proceedings, must have a litigation friend to conduct proceedings on their behalf: CPR 21.2(1).

38. The question whether a person is a protected party for the purpose of litigation covers the pre-action period, as well as the post-issue period: *Bailey v Warren* [2006] EWCA Civ 51 at [120-124].

39. Any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise: CPR 21.3.

Submissions on behalf of the Claimant

40. Mr Hilton submitted that the authorities make it plain that the default rule in CPR 38.6(1) should be disapplied in the present case. He pointed out that Mr Slavin is not seeking a costs order which indicates his own acceptance that the default rule should not apply.

41. Mr Hilton submitted that the defendants' conduct was wholly unreasonable, and the costs of the claim should be borne by them personally for the following reasons:

(i) although it is not for me to consider whether the claim would have succeeded, I can take into account whether the claimant achieved in substance what he was seeking: *Ashany* and *Hewson v Wells*. Just as in those cases in which the claimant succeeded in obtaining documents, here the claimant achieved the original aim of his claim, namely the disclosure and information to understand the state of the Trust and what had happened to the BPL shares provided by Howard Kennedy on 7 December 2022. Discontinuance cannot be equated with failure;

(ii) as in those cases, the relevant change of circumstance here, to which the claimant did not contribute and which made continuation of the proceedings pointless, was that provision of disclosure and information;

(iii) the change in circumstances was the result of the defendants' previous unreasonable behaviour. As in *Nelson's Yard* and *Hewson v Wells*, the defendants failed to engage with the claimant's pre-action correspondence. The first defendant's behaviour included stating to the claimant that lawyers need not be involved and continuing to make assurances about BPL to him. In addition, Mr Craig said that he was instructed in relation to the Trust but failed to respond either substantively or in a way that indicated there was any difficulty about obtaining instructions. The claimant's enquiries ranged more widely than the answers provided because the claimant did not know what had happened with the Trust or BPL shares. The defendants must have had the DOA or the means to obtain a copy during the pre-action period, but no explanation has been offered as to why it was not produced before December 2022. In the circumstances the claimant was entitled in September 2022 to say "enough is enough" and issue the claim which is a consequence about which the defendants were warned by the 26 April 2022 letter;
(iv) the defendants' failure to provide information about the Trust was either inexplicable or may have been a deliberate strategy to keep information from the claimant. Once Mr Slavin was in place as the litigation friend the disclosure was given voluntarily. Paragraphs 16(a) and 16(b) of the Pre-Action Conduct Practice Direction make plain that failure to respond to pre-action correspondence may lead to adverse costs consequences including the award of indemnity costs. Under CPR 44.3 litigation behaviour "outside the norm" may lead to the award of indemnity costs. The defendants' unreasonable behaviour should be condemned in the award of indemnity costs up to 20 January 2023 by which date the claimant had had an opportunity to review the disclosure and information provided on 7 December 2022 and decide to discontinue. Thereafter Mr Hilton says the dispute was about costs and if the claimant succeeds up to that date standard basis costs are appropriate thereafter.

42. Mr Hilton said that points raised in correspondence by the defendants' solicitors do not answer his submissions:

(i) provision of the share register was no answer to the claimant's enquiry of the defendants about the Trust and that was pointed out in Blake Morgan's letter of 13 June 2022. Benny's legal ownership of the shares would have been consistent with any of his being appointed trustee in place of the defendants, with him having purchased the shares for full consideration or, as it turned out, with the shares having apparently been appointed to him beneficially;
(ii) it is not right that the claimant did not ask if Benny was a trustee, Blake Morgan asked that question in letters of 31 May and 13 June 2022 but got no answer;
(iii) that the Trust apparently no longer has assets is irrelevant, it would have assets if the DOA were not valid. Additionally, the claimant was unaware of the lack of assets because he was not told that by the defendants, but that does not affect the claimant's entitlement to disclosure and information;
(iv) the possibility that the defendants will be personally liable for costs if there are no assets from which they might be indemnified is also no answer. If the DOA is valid it expressly preserves the equitable lien or charge against the Trust assets, and there would remain a personal right of indemnity. If the defendants are not entitled to rely on their right of indemnity for the costs of the claim, it is because they were not properly incurred. It is not suggested that the defendants will seek to exercise their right of indemnity, but the claimant would oppose the defendants seeking to recover any costs liability from the Trust;

(v) the defendants' now established lack of capacity is no answer. The defendants must be assumed to have capacity unless it is established that they lack capacity, which cannot be established merely by reference to their age or condition: ss. 1(2) and 2(3) Mental Capacity Act 2005 (**MCA 2005**). There is no evidence of incapacity, in the case of the second defendant before 7 November 2022, and in the case of the first defendant before 21 November 2022. Howard Kennedy's position is that obtaining any assessment of capacity at an earlier date was of "no value". The evidence is that the claimant was not aware of any incapacity, and he was entitled to rely on Mr Craig, representing that he was acting for the defendants. If Mr Craig was aware or ought to have been or become aware of any incapacity it was incumbent upon him to deal appropriately with the claimant's correspondence in the defendants' best interests either by seeking the appointment of a deputy or directly by giving disclosure on behalf of the defendants. *Bowstead & Reynolds on Agency, 22nd Edition* at [10-020] explains that a solicitor for a client who has lost capacity will have such residual authority, which is consistent with rule 3.1 of SRA Code of Conduct which provides that where it is not possible to obtain a client's instructions there is an obligation to act in the client's best interests;

(vi) an argument that the claimant could only recover costs for the period 13 June to 23 September 2022 makes no sense. The claimant's entitlement to costs of the claim must commence with the costs of his letter of 14 March 2022 or at latest the letter of 26 April 2022. The only possible date at which there might be a break in an entitlement to costs is at 20 January 2023 when the claimant accepted the proceedings were pointless, but thereafter the question is one of "costs of costs" and should follow the event.

Submissions on behalf of the Defendants

43. Mr Briggs's first overall submission was that the litigation has been pointless and achieved nothing and so the defendants should not have to pay costs:

(i) all that has been established is what the claimant knew in 2021 which was that the BPL shares had been transferred to Benny in 2017;

(ii) of the 17 categories of documents sought by the letter of 26 April 2022 only one was provided because none of the others exist;

(iii) had an order for disclosure been made it would have been at the claimant's expense, there being no Trust assets from which the defendants could be indemnified. Since the Trust Deed excludes liability for loss to the Trust Fund, save as a result of fraud or dishonesty, a personal costs order against the defendants would have been unlikely to be made. This position was acknowledged by the claimant as he offered to pay the costs of the provision of the documents in the 26 April 2022 letter;

(iv) the claimant should have served his notice of discontinuance far earlier than July 2023, since he had achieved all he was going to achieve by the proceedings on 7 December 2022.

44. Mr Briggs's answer to the submission that it was the defendants' unreasonable behaviour in not answering enquiries before the litigation commenced was that that behaviour was attributable to their incapacity or probable incapacity. He said:

(i) there is no dispute now that the defendants lack capacity to litigate, and it must be more likely than not that they lacked that capacity in March 2022, there being no evidence of any change in either's capacity:

(ii) the claimant accepts his mother has had "mental and memory problems since around 2014 and was diagnosed with dementia in 2019" and having spoken to his

father about the claim should have appreciated that there was a risk he lacked capacity. The claimant must have known or suspected that they lacked capacity before these proceedings were issued;
(iii) the defendants cannot be criticised for failing to respond because of their lack of capacity and CPR Part 21 is there to protect protected parties by making ineffective any step in proceedings taken before a litigation friend has been appointed. If as *Bailey v Warren* makes clear incapacitous parties cannot be held to a pre-action compromise they should not be penalised for pre-action conduct;
(iv) the decision voluntarily to disclose trust documents to a beneficiary upon request is one requiring an exercise of the trustees' discretion - *Breakspear v Ackland* [2009] Ch 32 at [67] and since it must be exercised unanimously if one or both of the trustees lacked capacity to litigate it is overwhelmingly likely they lacked capacity to exercise that discretion pre-action.

45. Mr Briggs submits that the strict application of CPR 38.6(1) would not be just and that the defendants' open offer that there should be no order as to costs up to 7 December 2022 reflects an acceptance that it was neither side's fault that the defendants lacked capacity, that they cannot be blamed for failures arising from their incapacity and the claimant knew or at least must have suspected his parents' incapacity. After 7 December 2022 Mr Briggs says that the right order is that the claimant should pay the defendants' costs.

46. Mr Briggs says that Mr Craig's email of 4 April 2022 was sent in response to a general enquiry which did not identify the nature or scope of the claimant's claim and that no inference can be drawn that Mr Craig had conducted any capacity assessment or taken any instructions, without which Howard Kennedy could not act. To the extent it is said that Howard Kennedy should have acted of their own volition under rule 3.1 of the SRA Code of Conduct that does not justify an order for costs against the defendants. Nor does the extent of Howard Kennedy's responses on behalf of Benny and BPL justify an order for costs against the defendants.

The Claimant's responsive Submissions on Incapacity

47. Mr Hilton made the following points on capacity in response:
(i) the starting point is that the law presumes a person is competent. It is not for me to decide on the basis of inference that the defendants may have lacked capacity in the pre-action period, that would only be a finding open to me if evidence had been adduced to that effect, and the defendants' advisors have opted not to do that;
(ii) the claimant has never been competent to assess his parents' capacity or lack of it;
(iii) the first defendant remains a director of BPL as appears from the accounts for the year ending 30 June 2022 prepared in March 2023. He also remained a registered pharmacist during 2022;
(iv) Mr Craig's unqualified answer to the question asked by Blake Morgan whether he was acting for the defendants in relation to the Trust was in the affirmative;
(v) the threshold for capacity to act as a trustee (or former trustee) may be lower than the litigation capacity threshold, but there is in any event no evidence one way or another;
(vi) since Mr Slavin, advised by Howard Kennedy, provided the requested disclosure and information in December 2022, it is hard to see how Mr Craig or Mr Slavin or the defendants could and should not have provided the same disclosure and information in March or April 2022.

Discussion and Conclusions

Disapplication of the Default Rule

48. The claimant sought documentation and information about a Trust from his parents, the trustees. He offered to pay the costs of giving the disclosure sought. He did not receive what he asked for and commenced proceedings as a result. I must decide what order should be made as to the costs of the proceedings.

49. As a discretionary beneficiary of the trust the claimant was plainly entitled to the disclosure and information, as is borne out by the fact that no reasoned objection to production has been advanced and that, once Mr Slavin was in place as litigation friend for the defendants, the material sought was produced almost immediately.

50. I do not accept that the claimant already knew when he embarked on his enquiries or when he issued proceedings the full extent of the matters revealed by the DOA and the additional information provided on 7 December 2022. The claimant suspected that something had happened and knew from March 2021 that Benny was the owner of all the BPL shares, but there were a number of possible scenarios consistent with that state of affairs, not all of which were necessarily disadvantageous to him. The terms of the DOA and the further information that there had never been dividend payments and there had been no changes in trustees or beneficiaries meant that the categories of document and information in existence and to which the claimant was entitled was necessarily considerably narrower than the terms of the letter of 26 April 2022 and the claim. Although 17 categories of document were sought, that was because the claimant was unaware of what dealings had occurred and needed to cover all the bases when sending his letter before action and drafting his claim; he did not know that there was only one trust document.

51. I therefore reject the submission that what the claimant already knew meant that the proceedings were pointless. I also reject the submission that because the claimant only obtained one document when he had asked for many, he did not achieve all that he sought.

52. The provision of the DOA and other information to the claimant amounted to a change of circumstances to which the claimant did not contribute, and which was brought about by the unreasonable failure of the defendants to engage appropriately with the pre-action correspondence. As in *Nelson's Yard, Ashany* and *Hewson v Wells,* the failure to provide the DOA and information during the pre-action correspondence phase fairly led the claimant to conclude that "enough was enough" and that he had no option but to commence proceedings.

53. Looked at in the round the claimant's discontinuance cannot be equated with an admission that the proceedings should not have been commenced. I have in mind also that where a trustee fails to produce information when asked by a beneficiary entitled to that information and there is no real doubt that the Court would order production of that information the trustee would usually be ordered to pay the beneficiary's costs of proceedings brought to obtain it.

54. Although the hurdle to displace the default rule is high and the circumstances need to be shown to be unusual, I conclude that the hurdle is reached in this case and the circumstances are such as to justify disapplying the default rule, even apart from Mr Slavin's position that the default rule is not appropriate.

55. There is no explanation, apart from the defendants' possible lack of capacity, that amounts to a good reason for the defendants to have refused to provide disclosure and information at an earlier stage, so as to avoid the litigation being commenced and proceedings being served. Capacity apart there is nothing that justifies the behaviour of the defendants prior to 23 September 2022. There was no attempt by or on behalf of the trustees to obtain directions from the court. Only on 23 September 2022 was the issue of capacity first raised with the claimant on behalf of the defendants. From that date onwards the defendants and those acting for them did not do anything that could be characterised as unreasonable. Accordingly, the capacity point apart, I would conclude that the defendants should pay the claimant's costs of the proceedings up to 23 September 2022 on the indemnity basis and thereafter, until 20 January 2023, which was the date at which the claimant was in a position to make an informed decision to discontinue and informed the defendants of that, pay them on the standard basis.

Does Possible Incapacity Change the Answer?

56. Section 1(2) of the MCA 2005 makes clear that a person must be assumed to have capacity unless it is established that they lack capacity. The Act also provides that capacity is decision specific and time specific. Howard Kennedy made clear that the capacity assessments carried out for the defendants related only to the litigation and were not backdated. Accordingly, I cannot conclude that either or both the defendants lacked capacity for any particular act of decision making at any time before they were assessed to lack litigation capacity in late 2022. In particular, I cannot find that they lacked capacity to respond to pre-action correspondence about the Trust by inferring that to be so in the absence of any evidence to that effect.

57. The claimant's knowledge of his mother's memory problems and diagnosis of dementia does not entitle me to conclude that the claimant should have appreciated that she lacked capacity to act as a trustee and respond to correspondence with appropriate assistance, when there is no evidence enabling the court to decide that question now. So far as the claimant's father is concerned, there is again no evidence of incapacity prior to the end of 2022. He engaged to some extent with the 14 March 2022 letter by saying that lawyers were not necessary. He remained a company director and a registered pharmacist. I am again unable to conclude that the claimant should have appreciated a lack of capacity to act as a trustee and respond to correspondence with appropriate assistance.

58. It is notable that Mr Craig responded in the affirmative to Blake Morgan's specific question whether he was instructed by the defendants in relation to the Trust on 4 April 2022 and that nothing was said by Howard Kennedy until September to cast any doubt as to the capacity of the defendants to instruct Mr Craig in relation to the affairs of the Trust. No explanation has been offered. If, as is now submitted, a lack of capacity is to be inferred, that calls for an explanation why Mr Craig did not respond, as his litigation colleague did in due course, to the effect that he had concerns about capacity or was unable to obtain instructions. Having received Mr Craig's response Blake Morgan and the claimant were entitled to continue to correspond with them as they did. Without producing evidence of actual incapacity in 2022, it cannot now be said on the defendants' behalf that they can rely on such claimed incapacity to avoid what would otherwise be the costs consequences of this litigation.

59. I acknowledge that CPR 21 exists to have a protective effect for protected parties. In particular, in the case of a protected defendant to an application or proceedings, CPR 21.3

means that a claimant may not take any step except issuing and serving a claim form or applying for the appointment of a litigation friend and provides that any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise. There is nothing in CPR 21 which prevents the making of a costs order against a protected defendant.

61. Protection for a protected party as to costs is afforded by CPR 46.4(1) which provides that where in proceedings money is ordered to be paid by that party the court must order a detailed assessment of the costs payable by the protected party. In my judgment "money is ordered to be paid" must include money ordered to be paid by way of costs, even if no separate monetary order is made, or the rule would seem to be of no effect in cases where only non-monetary substantive relief were sought.

62. I conclude that the defendants cannot rely on their possible but not established incapacity to avoid what I have concluded would otherwise be the right order on discontinuance of the claimant's claim.

63. I will order that the defendants pay the claimant's costs of the proceedings to 23 September 2022 on the indemnity basis. Thereafter to 20 January 2023 the defendants will be ordered to pay the claimant's costs on the standard basis. Since the costs of the proceedings after 20 January 2023 have been incurred in endeavouring to agree the costs of those proceedings those should also be the claimant's, paid by the defendants, on the standard basis.

64. As I understand the claimant's position, he is still willing to pay what are likely to be the minor administrative costs, if any, of producing a copy of the DOA. The costs of providing the other trust information should on the principles referred to in paragraph 16 of this judgment be borne by the Trust.

65. There are two matters which appear to remain to be determined if not capable of being agreed: (i) the costs of the application itself (ii) the question of the defendants' entitlement to an indemnity out of the Trust assets now in Benny's hands. The parties should give consideration to the question whether Benny should be entitled to make representations on the second question.

Judgment

66. This Judgment will be handed down remotely and without attendance at 10am on 9 February 2024 with consequential matters to be dealt with either by agreement or at a hearing to be fixed for a later date.