Neutral Citation Number: [2019] EWHC 616 (Ch)

Case No: HC-2016-000828

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: 21/3/2019

Before:

MASTER CLARK

- -

Between:

TREVOR MONTROSE GASKIN **Claimant**

- and -

(1) CHORUS LAW LIMITED
(2) MARQUITA YVONNE MURPHY **Defendants**

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- -

Michael Ashdown (instructed by **LK Solicitors Ltd**) for the **Claimant**
Sam Chandler (instructed by **Shulmans LLP**) for the **First Defendant**
Mark Baxter (instructed by **Listenlegal**) for the **Second Defendant**

Hearing date: 30 January 2019

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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.

.....

Master Clark:

1. This judgment determines the incidence of costs as between the parties in this claim under s.50 of the Administration of Justice Act 1985, which, as will be seen, was ultimately dismissed in unusual circumstances. Regrettably, though sadly not usually, the parties' combined costs of the claim (which exceed £180,000) represent just under half of the value of the estate to which the claim relates.

Background

2. On 22 June 2012, Eileen Ianthe Gaskin ("the mother") died aged 87, apparently intestate. She had three children: Trevor Montrose Gaskin, the claimant ("C"), Marquita Murphy, the second defendant ("D2") and Monica Scarlett. Ms Scarlett lives in Barbados. She took very little part in the events giving rise to the claim, and is not a party to it.

3. The main asset of the deceased's estate was her property 102 Butler Road, Harrow, Middlesex HA1 4DT ("the Property"), valued as at the date of her death at £320,000, together with about £70,000 in bank and building society accounts and shares.

4. D2's evidence is that her mother had told her that she had left a will, but that, after her death, D2 was unable to find a will. C's position as to the steps taken to search for a will is not set out in a witness statement. However, his solicitors' letter dated 3 August 2016 and email dated 18 November 2016 state that immediately after the mother's death, all three siblings went through the papers in a metal box in which the mother kept all her personal papers, together with further documents in her wardrobe. These included (according to C) several purported wills or copy wills, but the three siblings concluded that none of these were valid wills; and, therefore, that the mother had died without leaving a valid will.

5. Initially, D2 investigated obtaining a grant to and administering the mother's estate without professional help. C suggested using a solicitor, but D2 was unwilling to agree to this because of the cost. Eventually, in early 2013 they agreed to instruct the first defendant, Chorus Law Limited ("D1"), a probate company, who was recommended to them by the mother's bank, Barclays Bank.

6. On 7 February 2013, C and D2 met with a representative of D1 at the Property, and C signed a form confirming to D1 that he wished D2 to be its primary contact. C also wrote a letter to Ms Scarlett (which D2 retyped because it contained spelling errors), setting out that they had appointed a company to deal with the mother's estate, and that

> "I have already singed (*sic*) that our sister Marquita be appointed to carry out the duties as executor."

7. On 26 March 2013 D2 executed power of attorney in favour of D1. Six months later, on 19 September 2013, D1 obtained (under r.31 of the Non-Contentious Probate Rules 1987) a grant of letters of administration for the use and benefit of D2.

8. On 25 November 2013, D1 wrote to C enclosing copy letters dated 27 February 2013 in which it had asked him to send it his original birth certificate and confirmation of any lifetime gifts. He replied on 27 November 2013, saying that this was the first time he had heard from them.

9. D1's primary method of communication with D2 was by telephone. Its telephone call log shows that D2 told it on several occasions that she was not living at the Property; and that she was clearing it for sale. This continued until 8 April 2015, when C's solicitors first wrote to D1 complaining that D2 was living at the Property, and that it had not been sold. The letter asked what steps were being taken to secure an occupation rent from D2; and for evidence that the Property was being marketed. D2 replied with a holding response in its letter dated 24 April 2015, enclosing the grant and HMRC's calculation of inheritance tax.

10. D1 then contacted D2 on 27 April 2015 to ask again about clearing the Property and whether she was living there. Again, D2 told them that she was trying to clear it and that she was not living there. No further progress was made in the administration of the estate.

11. C's solicitors also wrote to D2 on 28 April 2015, enclosing their letter dated 8 April 2015 to D1, and its response dated 24 April 2015. The letter invited D2 to make contact. No reply was received to it.

12. D1 responded substantively to C's solicitors' letter of 8 April 2015 by a letter dated 8 May 2015. This set out that it had been told by D2 that she was clearing the Property in preparation for marketing and that she was not living there; and that therefore no steps had been taken regarding rent. It concluded:

> "We understand your client's concerns with regard to the length of time the administration is taking. We are endeavouring to conclude this as quickly as possible, but we are reliant on the family to take action to do this."

13. On 8 January 2016, C's solicitors wrote a letter before claim to D1. This set out that nothing had been done to deal with the Property, no interim distribution had been made and that D2 was living at the Property. It asserted that the Property could have been transferred into the names of the three beneficiaries. It concluded:

> "In these circumstances, we are instructed to put you on notice that unless, within 28 days of the date of this letter, you confirm that you are taking immediate steps to transfer the property into the names of the beneficiaries, to put the same on the open market for sale with vacant possession and an interim payment is made to the beneficiaries then our client will apply to have you and/or Ms Murphy removed as personal representatives and for him to be substituted in your place."

14. On the same date, 8 January 2016, C's solicitors also wrote to D2. The letter stated on its face that it enclosed the letter of the same date to D1. D2's counsel informed me on instructions that it was not enclosed, but did not suggest that D2 could not have requested the missing enclosure. The letter concludes:

> "our client has now instructed us to commence legal proceedings against both you and [D1] to have you removed as personal representatives your mother's estate unless steps are taken to progress the winding up and distribution of your mother's estate.
>
> Please do not ignore this letter. This will be the last communication with you before we issue court proceedings and, in that eventuality, our client will also be seeking an order for costs against you."

15. Neither defendant replied to these letters.

16. On 14 March 2016, C issued his claim form. Confusingly, and contrary to CPR 64.3 (which requires a claim for removal of personal representatives to be made by Part 8 claim), a probate claim form (N2) was used. The claim form sought the removal of both defendants as personal representatives, and the defendant's substitution in their place. The particulars of claim set out that:
    (1) the Property had not been sold or put on the market for sale;
    (2) D2 and her adult daughter were occupying it as their main residence;
    (3) no interim payment had been made to C or Ms Scarlett;
    (4) D1 had failed to deal with the estate in a proper and timeous fashion;

    The relief sought is not set out in a prayer, but is stated to be:
    (1) an order for C's substitution as personal representative in place of the defendants;
    (2) a declaration that D2 "has occupied the Property for her and her family's exclusive use and benefit since the date of death of [the mother] and that she is accordingly indebted to the estate of [the mother] for a market rent which could have been obtained on the Property since the date of [the mother]'s death to the date of the court's order."

    The claim was supported by C's consent to act and a letter from his GP stating that he was physically and mentally able to take on duties for his late mother's estate. This was apparently a misconceived attempt to provide evidence of fitness to act in accordance with CPR PD57A, para 13.2.

17. On 21 March 2016, the claim form and particulars of claim were served, together with a witness statement by C dated 14 March 2016.

18. On 7 April 2016, D1 wrote to D2 informing her that in the light of the claim, they were no longer able to act and had advised C that they would consent to an application revoking their appointment. They also stated that they were willing to hold the estate funds held by them until a new personal representative had been appointed.

19. In fact, on 8 April 2016, D1's solicitors wrote to C's solicitors "Without Prejudice Save as to Costs". In that letter D1 offered to stand down as administrator and invited C's solicitors to send a consent order for signature. The offer was not however, unconditional. It required:
    (1) payment of D1's fees from the estate funds;
    (2) no order as to costs.

    This offer was not accepted and lapsed.

20. In D1's Defence dated 18 May 2016, it:

(1) admitted that the Property had not been sold or put on the open market;
(2) admitted that no interim payments had been made to C or Ms Scarlett;
(3) did not admit that D2 and her family had occupied the Property, and referred to unanswered correspondence to her asking her whether she was in occupation;
(4) agreed to be removed as personal representative.

21. D2's Defence dated 18 May 2016 admitted the intestacy and agreed that D1 should be removed, but not to her own removal. She denied that she was required to pay an occupation rent. Her Defence was also accompanied by a witness statement. This set out a claim that she was entitled to a beneficial interest in the Property through having made a financial contribution to its purchase price; and that she was entitled, as a dependent of the mother (both financially and for the provision of accommodation) to claim under the Inheritance (Provision for Family and Dependants) Act 1975. The statement referred repeatedly to the Property being her permanent home, and to her having to move out as a result of D1's poor management of the administration. It did not assert that she had not occupied it since the mother's death. The only basis on which the claim to occupation rent was contested was that the Property was unlettable in its condition since the mother's death, because it had no electric lighting and had had no hot water since the mother's death in 2012.

22. On 21 June 2016, D2's solicitor found in papers given to her by D2 a will dated 2 August 1974 ("the 1974 will"), under which D2 is appointed sole executor and receives, after pecuniary legacies totalling £1,100, all of the residuary estate. She immediately informed the other parties; and, on 30 June 2016, I made a consent order staying the claim until 9 August 2016 to enable C to investigate the 1974 will and the parties to attempt settlement.

23. On 3 August 2016, C's solicitors wrote to D2's solicitors setting out his investigations carried out to date, which indicated that the mother had made later wills, but that those other wills had not been found; and inviting D2 to agree to a further 28 day stay. D1 agreed to the proposed stay. D2 did not agree, her solicitors stating in an email of 9 August that "the enquiries which you and your client are raising at the current time should have been raised prior the issue of your probate claim." I note that the claim is not a probate claim and, since all three siblings believed the mother died intestate, this criticism is plainly unfounded.

24. On 17 August 2016, D2 issued an application seeking an order that the 1974 will "be admitted to probate, the claim be discontinued, and that C pay D2's costs by reason of his failure to comply with the Pre-action Protocol". She sought to have this application determined without a hearing. This was misconceived in a number of respects: it was an inappropriate way to seek the determination of the validity of the 1974 will, the court has no power (other than in probate claims) to order discontinuance and in any event, it was unsuitable for determination without a hearing. C's response to the application (on 9 September 2016) was that he had recently sought advice from counsel and was awaiting that advice.

25. On 5 October 2016, D2, having apparently accepted that her application dated 17 August 2016 was misconceived, applied to dismiss it and to revoke the grant to D1.

This was supported by a witness statement by her solicitor setting out the circumstances of discovery of the 1974 will and an affidavit dated 28 September 2016 of D1's Chief Operating Officer, John Leonard. Again, D2 sought to have the application determined without a hearing. D1 initially responded to the application by saying "it all looks fine".

26. On 18 November 2016, C's solicitor wrote to both defendants setting out the evidential basis that the 1974 will had been revoked, and alleging that D2 was fraudulent in putting it forward. He suggested that the parties exchange witness statements on the issue of the validity of the 1974 will and that there be oral evidence at the hearing of the application.

27. On 11 January 2017, D1's solicitor wrote stating that it could not agree to D2's application to revoke its grant unless provision for its fees, such as by a charge over the Property was made.

28. On 16 January 2017, D2's solicitors sent to D1 a deed dated 8 August 2016 revoking D1's power of attorney.

29. On 2 February 2017, C's solicitor proposed that the issue of the validity of the 1974 will be tried as a preliminary issue; and that the parties exchange witness statements in respect of that issue.

30. On 11 May 2017, I made an order ("the May 2017 order") revoking the grant to D1 (without any provision for payment of its fees), and granting permission to C to amend his claim to challenge or seek a pronouncement in favour of any alleged will of the mother; and imposing a time limit requiring him to do so by 8 June 2017. That order was sealed by the court on 18 May 2017. C did not amend his claim within the time limit.

31. On 17 July 2017, I dismissed the claim. On 16 January 2018 a grant of probate to the mother's estate was made to D2.

Legal principles

32. The general principles governing costs are contained in CPR 44.2, which it is unnecessary to set out. The application of those principles to these unusual circumstances is not straightforward.

33. Also relevant is the Practice Direction – Pre-Action Protocol which, so far as relevant, provides:

> "**Objectives of pre-action conduct and protocols**
>
> 3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—
>
> (a) understand each other's position;
> (b) make decisions about how to proceed;
> (c) try to settle the issues without proceedings;

(d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
(e) support the efficient management of those proceedings; and
(f) reduce the costs of resolving the dispute.
…

Steps before issuing a claim at court

6. … the parties should exchange correspondence and information to comply with the objectives in paragraph 3, bearing in mind that compliance should be proportionate. The steps will usually include—

(a) the claimant writing to the defendant with concise details of the claim. The letter should include the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant, and if money, how the amount is calculated;

(b) the defendant responding within a reasonable time - 14 days in a straight forward case and no more than 3 months in a very complex one. The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed and whether the defendant is making a counterclaim as well as providing details of any counterclaim;"

Claimant's submissions

Order sought by the claimant

34. C seeks an order that:
(1) one half of his costs incurred on or before 18 May 2017 (the date of sealing of the order revoking the grant to D1) be paid by D1;
(2) the remainder of C's costs be paid by D2 from the estate of the mother.

35. It is convenient initially to consider C's claims against each of the defendants separately.

C's claim against D1

36. C's counsel submitted that he was the successful party in his claim to remove D1 as administrator. His overall position was that he brought his claim primarily because 2½ years after D1 had taken a Grant of Letters of Administration, and more than 3½ years after the mother's death, the administration of her estate had not been progressed, and D1 had not provided any satisfactory explanation or reassurance. The Property had not been sold, and no interim distribution had been made. C, he submitted, was entitled to and did take the view that D1's failure to act with due efficiency spoke for itself, and that the only way forward was to obtain D1's removal as administrator.

37. C relied in particular upon the following :
(1) his solicitors' letters dated 8 April 2015 and 8 January 2016 (referred to above), the latter putting D1 on notice that, if it did not sell the Property and make an interim distribution, C would apply to remove it as personal representative;

(2) D1 did not before the issue of the claim offer to stand down as administrator or consent to its removal and replacement;
(3) in its Defence, D1 agreed to be removed as administrator;
(4) D1 did not however consent to D2's application to revoke its grant without payment of its fees;
(5) the May 2017 order removed D1 as administrator;
(6) D1 brought this claim on itself by failing to act with due efficiency, and by its specific failings which are set out in D2's witness statement dated 18 May 2016 and her Written Argument on Costs dated 3 August 2018.

D1's submissions

38. D1's counsel approached the issue of costs by reference to 3 phases in the claim:
(1) Phase 1 (Removal phase)– issue of the claim (14 March 2016) to date of discovery of the 1974 will (21 June 2016);
(2) Phase 2 (Probate phase)– discovery of the 1974 will (21 June 2016) to expiry of the deadline for challenging the validity of the 1974 will (9 June 2017);
(3) Phase 3 (Costs phase) – expiry of deadline (9 June 2017) up and including the hearing as to costs.

39. He sought the following costs orders in respect of each phase:
(1) Phase 1 – C should pay the defendants' costs
(2) Phase 2 – C should pay the defendants' costs, or D1's costs;
(3) Phase 3 – C should pay the defendants' costs, except as to an unspecified percentage which should be borne by D2.

Phase 1 – Removal phase

40. D1's counsel submitted that the claim was unnecessary for two main reasons:
(1) It was premature and could have been resolved in pre-action correspondence;
(2) D1's removal could have been achieved by other means which C failed to explore.

41. As to the first point, D1's counsel submitted that C's solicitor's letter before claim dated 8 January 2016 failed to comply with the Pre-Action Protocol in the following respects:
(1) it did not actually invite D1 to step down;
(2) it made inconsistent demands of D1 – to transfer the Property into the beneficiaries' names; and to market it for sale and make an interim payment to the beneficiaries; and none of these were sought in the claim;
(3) there was no reference to the relevant statutory provision (s.50 of the Administration of Justice Act 1985) or any legal analysis;
(4) it did not invite participation in ADR.

42. As to the second point, D1's skeleton argument set out that if C had properly communicated with D2 before the claim was made, then she could have revoked the power of attorney and removed D1 without recourse to legal proceedings. This was not pursued in oral submissions; and, in my judgment, the revocation of the power of attorney would not be sufficient to remove D1 from office, which would require an order of the court.

Phase 1 - discussion and conclusion

43. Section 25 of the Administration of Justice Act 1925 provides:

> "25**. Duty of personal representatives.**
> The personal representative of a deceased person shall be under a duty to—
> (a) collect and get in the real and personal estate of the deceased and administer it according to law;"

44. This duty must be carried out with due diligence; and although there is no fixed rule that a personal representative must have realised the deceased's assets within any particular time, if there is a delay of more than the executor's year (1 year from the death - s.44 of the AJA 1925), the burden is on the representative to show some valid reason for the delay: see *Williams, Mortimer & Sunnucks* 21st edn, para 42.20.

45. D1's counsel did not suggest that D1 had conducted the administration of this straightforward estate with due diligence. Even treating the relevant period as running from the date of the power of attorney in D1's favour, the letter before claim was written nearly 3 years from that date. D1's counsel submitted that the responsibility for the delay was D2's, in that she repeatedly told it that she was still clearing the Property and that she was not living there. However, as between C and D1 as the administrator of the estate, D1 was under a duty to administer the estate with due diligence, and it failed to do so.

46. In my judgment, C was therefore justified in seeking to compel D1 to carry out its duties, or, if it did not do so, to remove it because of its failure to do so.

47. Turning to the pre-action correspondence, this consists of the 2 letters dated 8 April 2015 and 8 January 2015 already referred to. The first letter complained that the Property has not been sold and that D2 is living in it. It sought various information and documents in respect of the administration, including evidence that it was being placed on the market for sale. It is clear from that letter what C is expecting D1 to do.

48. The letter dated 8 January 2016 refers back to the first letter and to C's "concerns at the delays in dealing with the estate". It sets out express complaints that "nothing has been done to deal with the property" and that there has been no interim distribution of funds collected in. I accept that read literally, the demands made are inconsistent, and for that reason must be understood as being made in the alternative.

49. In my judgment, the letter made it clear to D1 what steps were required of it and that the consequences of its failure to take those steps would be that C would seek its removal. In my judgment, it was sufficiently compliant with the Pre-action Protocol. It was open to D1 at that point to offer to consent to an order removing it, but it did not do so. It did not do so and as noted, did not reply to the letter at all.

50. In these circumstances, C was in my judgment justified in bringing the claim against D1; and the fact that D1 conceded that it should step down in its Defence means that C was successful in its claim.

51. In determining what costs order to make in respect of this phase, therefore, the starting point is that D1 should pay C's costs. However, it is also necessary to consider the position between D1 and D2. She persuaded D1 to delay the sale of the Property (which was the primary outstanding matter) and misled it as to her occupation of it. She is in my judgment equally to blame with D1 for the delay in administering the estate. The appropriate costs order should reflect D2's equal responsibility for the state of affairs that led to the claim being brought.

52. In my judgment, the appropriate order in principle is that D1 and D2 should each pay 50% of C's costs of the Removal phase of his claim against D1.

Phase 2 - Probate phase

53. Once the 1974 will was discovered, the landscape of the claim radically altered. If the will was valid, C was no longer entitled to seek D1's removal. This does not in my judgment affect the costs position as against D1 in respect of phase 1.

54. D1's counsel submitted that C should pay the defendants' costs of phase 2, because of his refusal to accept the validity of the 1974 will until 8 June 2017.

55. C's counsel submitted that D1 remained liable for his costs down to the May 2017 order removing it, because D1's only offer to agree to its removal, as set out in its WPSAC letter dated 8 April 2016 was on the basis that its costs were paid from the estate and that otherwise there was no order as to costs.

56. I accept that submission, which also applies in respect of Phase 3: unless and until D1 accepted that it was liable to pay C's costs of phase 1 of the claim against it, C was entitled to pursue his claim against it and to recover from it the costs of doing so.

Phase 3 - costs

57. As indicated above, the costs in respect of this phase should reflect C's entitlement as to the costs of phase 1, which entitlement was never conceded by D1.

C's claim against D2

58. In his claim against D2, C sought:
    (1) (incorrectly, on any basis) her removal as personal representative;
    (2) the appointment of C in D1's place as personal representative;
    (3) a declaration that the estate was entitled to an occupation rent in respect of D2's occupation of the Property.

D2's submissions

59. D2's position is that C, alternatively C and D1, should pay her costs to 21 June 2016 (when the 1974 will was found); and that C should pay her costs thereafter, other than those of her application dated 5 October 2016, which should be borne by D1. The basis put forward for this order was that:
    (1) on his pleaded case, C never had any claim to remove or substitute D2 as personal representative, because she never was a personal representative;
    (2) C's failure to adduce written evidence to act pursuant to CPR 57A PD para 13.2(2);

(3) significant factual inaccuracies and/or omissions in C's pleaded case – these were not particularised;
(4) C's claim in respect of occupation rent was bound to fail, because, as C knew, the Property was unlettable.
(5) C's failure to engage in proper pre-action conduct in accordance with the Practice Direction;
(6) C's purported and ultimately abortive allegations about and investigations into the validity of the Will far beyond the agreed 6 week stay for that purpose, which were never evidenced;
(7) D1's failure to properly administer the estate;
(8) D1's failure to comply with its own terms as to communications with the beneficiaries;
(9) D1's conduct in relation to the delay in providing, and then the attempt to assert privilege over, its administration files and the effect on the time available for D2 to prepare her Defence.

60. D2's counsel submitted that she was the successful party in the claim:
(1) Her Defence sought the removal of D1 as personal representative but opposed C's claim to be appointed substitute personal representative, and defended the claims against her and;
(2) D1 was removed as a personal representative by the May 2017 without substitution, and C's claim was dismissed on 18 July 2018.

61. He submitted therefore that the starting point was that D2 was entitled to her costs as the successful party in the claim. He then relied upon the factors set out above as reinforcing D2's entitlement to costs.

62. As to D1, he submitted that no costs order should be made in its favour against D2 because of the following factors:
(1) D1's failures in the administration of the estate and failure to comply with its own standards, including failing to update D2 on progress every 4 weeks or even every 6 weeks;
(2) D1's failure to justify or explain its failure to properly administer the estate or the extreme delay in the administration;
(3) D1's failure to provide D2 with the administration files (and to assert privilege over them) until 2 days before the deadline for D2's Defence;
(4) D1's failure to provide disclosure and inspection of key documents until after its removal in May 2017, some 14 months after service.

Claimant's submissions

63. C's counsel accepted that it was an error "in technical terms" to seek an order removing D2 as personal representative. He submitted that this error had no costs implications for the following reasons.
(1) The Particulars of Claim sets out the correct position (in paras 4 and 5), namely that D2 had granted a power of attorney to D1 and it had obtained a grant for her use and benefit;
(2) The Particulars of Claim does not raise any separate issues as to D2's removal;
(3) D2 was a proper party to the claim to remove D1, given her status as a beneficiary and her involvement in the events giving rise to the claim;

(4) D2's Defence does not deny that she was a personal representative;
(5) Even if a misconceived claim that D2 was a personal representative could have had costs implications for disclosure and witness statements, it did not in fact do so – D2's Defence was filed on 18 May 2016 and just over a month later, on 21 June 2016, D2 informed C and D1 of the discovery of the 1974 will. This meant that the question of whether D2 should be removed no longer arose.

64. As for C's claim to be appointed substitute personal representative, C's counsel submitted that he was not "unsuccessful" for the purposes of CPR 44.2(2). The discovery of the 1974 will meant that this question fell away. If the 1974 will had not emerged, then, he submitted, the court might well have appointed C as a substitute administrator. D2 was too closely connected with D1's failings and had intimated claims against the estate that gave rise to a conflict of interest, both which meant she was not suitable to be appointed. Ms Scarlett's residence in Barbados made her unsuitable; and the value of the estate would not justify a more expensive professional.

65. He also submitted that even if the court concludes that C would not have been appointed, this would not detract from C's overall success in removing D1: referring me to *Griffin v Higgs* [2018] EWHC 2498 (Ch), [2018] 4 WLR 139.

66. As to the claim for occupation rent, C's counsel submitted that his claim was unanswerable:

(1) as to occupation, although D2's Defence denied she was in occupation of the Property, her witness statement dated 18 May 2016 and correspondence from her solicitors asserted that she was in permanent occupation of the Property; and C's evidence was that she was in occupation;
(2) as to occupation rent, C's counsel submitted that since the Property was valued at £320,000 as at the date of the mother's death, it is inconceivable that its rental value would be nil.

67. As to pre-action conduct, C relied upon his solicitors' letters dated 28 April 2015 and 8 January 2016 (referred to above). He submitted that these were essentially compliant with the Pre-Action Protocol.

68. As to C's conduct in phase 2, following discovery of the 1974 will, C submitted that he acted reasonably in seeking a stay in order to investigate the validity of the 1974 will; and that by November 2016 he had good reasons for believing that the 1974 will had been revoked by a later will. He submitted that C's proposals for resolving the issue of the validity of the 1974 will by filing of witness evidence and a trial at which those witnesses were cross-examined were sensible proposals. By contrast, he submitted, D2's proposal in her solicitors' email of 9 August 2016 that he should simply discontinue his claim were unreasonable.

Discussion and conclusions

69. I approach the question of costs as between C and D2 in two stages:
(1) what is the most likely outcome of the claim had the 1974 will not been discovered, and the likely costs order consequent upon that outcome;

(2) the extent, if any, of the parties' responsibility for not finding the 1974 will until June 2016; and the effect if any that this should have on the order for costs.

Claim to remove D2 as personal representative

70. As noted, it is common ground that this was misconceived. However, I accept C's counsel's submissions, set out at para 63 above. An additional reason, in my judgment, why C was a necessary party to the claim was that the grant is expressed on its face to be for her use and benefit.

Claim for C to be appointed substitute administrator

71. I also accept C's counsel's submission that C was likely to have been appointed substitute administrator. D2 was plainly an inappropriate candidate for the reasons put forward by C's counsel. D2's counsel did not suggest that C was unfit to act – he merely relied upon the absence of evidence of fitness, a minor procedural deficiency which could have been remedied at little cost.

Claim for declaration as to occupation rent

72. As to whether D2 was occupying the Property, her counsel's skeleton argument referred to C needing to prove that D2 was in occupation. I accept C's counsel's submission that D2's own evidence shows that she was in fact occupying the Property, contrary to what she was repeatedly telling D1. To this may be added the express statement in her Costs Position Statement that she "*vacated the property in May 2016*", from which it may clearly be inferred that she was in occupation of it up to that date.

73. As to whether the property was unlettable, I also accept C's counsel's submission that some occupation rent would have been payable by D2 in respect of her occupation of the property, given its value.

74. As for C's pre-action correspondence, his complaints were in my judgment set out sufficiently clearly for D2 to understand what was being alleged and its basis; his solicitors' letters were sufficiently compliant with the Pre-action Protocol. She did not reply to any of this correspondence seeking clarification or responding to the complaints in any way. This does not provide a basis for depriving C of his costs of the claim.

75. I conclude therefore that up to the discovery of the 1974 will, C was justified in bringing his claim against D2.

Effect of discovery of the 1974 will on costs

76. I have found evaluating the effect of this factor on costs as between C and D2 the most difficult part of this decision. If the 1974 will had been found at any time before the issue of the claim, then C would not have brought his claim against D2, and neither side would have incurred any costs in respect of it.

77. It is necessary, in my judgment, to consider the extent to which the non-discovery of the 1974 will was the responsibility of C and D2. After the mother's death, it was in my judgment, the responsibility of all three children to search for a will. The available evidence is that they did so and looked in the appropriate places. The

1974 will was not discovered by D2, but by her solicitor in an envelope amongst other papers including bank statements, title deeds and a contract of employment. In these circumstances, in my judgment, the person responsible for the 1974 will not being discovered at the appropriate time was the mother, who left her papers in poor order.

78. I therefore consider that the costs of the claim against D2 up to and including the discovery of the 1974 will should be paid from the estate.

79. As for the costs thereafter, I accept that C was entitled to a reasonable time to consider and investigate the 1974 will. In my judgment, that period was 6 months and C is also entitled to his costs from the estate for that period. Thereafter, C was not justified in pursuing his substantive claim. However, D2's position in correspondence was that C should pay all of her costs (see e.g. her solicitors' email dated 9 August 2016). Although C could have, at this point, discontinued his claim and applied under CPR 38.6 to disapply the usual costs consequences of discontinuance, this is likely to have increased rather than diminished the procedural complexity of this problematic case. He was therefore in my judgment justified in continuing the claim in respect of the outstanding costs issues.

80. As for costs between D1 and D2, D2's complaints are set out at para 62 above. I have already concluded that D2 was equally responsible with D1 for the delays in administering the estate. This was not a complicated estate. D1's main task was to sell the Property and distribute the proceeds. Until it had been "cleared" by D2, there was little in the way of update to provide. I accept that D1 appears not to have paid various utility bills; but if D2 had been straightforward with D1 as to her occupation of the Property, then those bills could have and should have been transferred into her name. There is therefore no basis in my judgment for ordering D1 to pay any of D2's costs of the claim generally.

81. As to D2's application dated 5 October 2016, since D2 succeeded in that application, in principle she is entitled to the costs of that application.

Conclusion

82. In deciding what costs order to make, I take into consideration the disproportionately high level of costs incurred by the parties to date. This alone makes it desirable that the order made by me should be one that would result in a straightforward assessment or would enable the parties straightforwardly to agree the amounts payable. I also take into consideration the risk of injustice arising from an excessively broad brush approach as to costs.

83. Taking the above into account, in my judgment, it is appropriate to deal with costs in time periods or phases, but without imposing additional complexity by making costs orders in respect of the two claims against the two defendants during the same period. I do so taking into account the conclusions I have reached in the body of this judgment.

Issue of claim (14 March 2016) to discovery of the 1974 will (21 June 2016)

84. In my judgment, the appropriate order as to costs is that D1 and D2 each pay 50% of C's costs of the claim. This reflects their joint responsibility for the claim being brought.

Discovery of the 1974 will (21 June 2016) to removal of D1 as administrator (11 May 2017)

85. In my judgment, the appropriate order is that D1 pays 50% of each of C's and D2's costs; and that 50% of C's and D2's costs are paid from the estate – the practical result being that 50% of C's costs are paid from the estate, and D2 bears 50% of her own costs.

86. This reflects the fact that on any basis D1 should have stepped down as administrator before the order was made, but not all the costs incurred in this period were referable to the claim against it; and that the continuation of the claim as between C and D2 was the result of the uncertainty as to whether the 1974 will was valid arising out of the circumstances of its discovery.

Removal of administrator (11 May 2017) to expiry of deadline to challenge 1974 will (9 June 2017)

87. In my judgment the appropriate order is that C and D2's costs are paid from the estate. Again, this reflects the fact that that the continuation of the claim as between C and D2 was the result of the uncertainty as to whether the 1974 will was valid; and her insistence that C pay all of her costs of the claim. To the extent that D1 incurred any costs in this phase, it should bear those costs itself.

Expiry of deadline to challenge 1974 will (9 June 2017) to costs hearing (30 January 2019)

88. In my judgment, the appropriate order as to costs is that D1 and D2 each pay 50% of C's costs. This reflects the fact that the only outstanding issue was costs, and both defendants were seeking orders that C pay their costs. Since I have not made any orders that C pay the costs of either defendant, C is clearly the successful party on this issue.