Neutral Citation Number: [2022] EWHC 2189 (Ch)

Case No: PT-2021-000516

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

In the Estate of RICHARD STEPHEN FULLARD (Deceased)

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

Date: 24th March 2022

Before:

MASTER PESTER

- -

Between:

JOHN RICHARD FULLARD
(as Executor and Beneficiary of the estate of Richard Stephen Fullard)

Claimant

- and -

(1) DAVID GRAHAM KERSHAW
(2) LENKA ROBERTSON
(3) JILL CHADWICK
(All as executors of the estate of Richard Stephen Fullard (deceased))

Defendants

- -
- -

MR. JAMES MCKEAN (C) for the **Claimant**
MS. FAY COLLINSON (C) for the **1st & 2nd Defendants**

- -

Approved Judgment

- -

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MASTER PESTER :

INTRODUCTION

1. The only issue before me today is a dispute about costs. These proceedings relate to the estate of Richard Stephen Fullard, "The Testator". He died on 4th April 2020. He died testate, leaving a will dated 20th June 2019. The key provisions of the will are he appoints as executors, this is clause 3(a), John Richard Fullard, who is his son; his friend, David Graham Kershaw, his partner, Lenka Robertson and his daughter, Jill Chadwick to be his executors and trustees of his will.

2. He then by clause 4 gives to his partner, Lenka Robertson, the property known as Angler's Cottage and the garden thereto, which is described as being part of his property at Melin Meloch, Llanfor Bala, Gwynedd, absolutely. He gives another property known as 6 Bro Deg, Wrexham, to his children John and Jill in equal shares and then he gives various pecuniary legacies including one to his friend, Mr. Kershaw.

3. Now just to then make clear, in the proceedings before me his son, John Fullard, is the claimant. The first defendant is Mr. Kershaw, the second defendant is Ms. Robertson and the third defendant is Ms. Chadwick. So we have proceedings brought by the testator's son against his friend; Ms. Robertson, who was the former business partner who assisted in running a bed and breakfast of the testator, and the testator's daughter. One has to say, just setting out the identities of those parties one can see that there is a risk which is unfortunately eventuated of the parties not seeing eye to eye when it comes to the dealings with the estate.

4. These proceedings were commenced by a part 8 claim form dated 9th June 2021 and they sought the following relief. The claimant claims for:

> "(a) The removal of the first and second defendants as executors, the appointment of Ms. Lucy Obrey of Higgs & Sons as substitute personal representative or such other professional person as may please the court. The defendants are then to account to their actions as executors. The defendants —" by which I mean the first and second defendants "— are to exhibit an oath in the inventory of the estate. The first and second defendants are to deliver up books and records pertaining to the estate and the first and second defendants are to be personally liable for the costs of the proceedings".

5. Although the particulars of claim which accompany these proceedings do not spell it out, the relief is clearly sought under section 50 of the Administration of Justice Act.

6. Accompanying that part 8 claim form are particulars of claim. I will not set out what those particulars of claim say in any detail in this *ex tempore* judgment; I consider them to be contentious, they raise a raft of matters in dispute between the parties including with regard to the boundary of the garden of Angler's Cottage and also in relation to a loan made by Ms. Robertson to the testator, a loan of £25,000, which the claimant has certainly in the past disputed the validity of.

7. Many of the issues raised in the particulars of claim cannot be determined by me in these proceedings. However, what I can say is that there is obviously and clearly a very marked degree of animosity by the time of the issuing of the claim between the claimant and the first and second defendant.

8. Turning to the acknowledgement of service, the first defendant indicated clearly that he ticked the box: "I intend to contest this claim". He also objected to the procedure adopted, saying that there is a substantial dispute of fact and part 7 is more appropriate, and that is dated 27th July 2021. The second defendant, she ticked the box: "I do not intend to contest this claim" but she filed written evidence, to which I will come, and the third defendant, Jill Chadwick, who is the sister of the claimant, she ticked the box: "I do not intend to contest this claim" and she filed hers much earlier. I should just add almost parenthetically that Ms. Chadwick has not taken any part in these proceedings, is not represented before me and does not appear before me today.

9. The evidence that accompanied the acknowledgements of service in the form of a witness statement of Mr. Kershaw and another witness statement of Ms. Robertson is lengthy and voluminous and addresses all sorts of factual matters raised in the particulars of claim. It appears to me, looking at the witness statement, that this is obviously hostile litigation between the parties.

10. There was a hearing before me on 7th October 2021, the first hearing in the proceedings, which was a hearing for directions and certainly the impression given to me at that hearing was that, certainly as regards the first defendant, that he was opposing the claim and opposing the claim for his removal. There was then a further round of evidence following the hearing before me, there was evidence received from the claimant and then another round of evidence from both the first and second defendants. This hearing was then listed before me for a day.

11. In terms of open correspondence, I note that on 3rd November 2021 solicitors acting for the defendants wrote to the claimant's solicitor stating that: "Our client —", singular, "— is willing and able to continue with the administration as executor. The estate is relatively straightforward, there are buyers ready and willing to purchase Bro Deg and Angler's Cottage at the market rate. Subject to the boundary issue being decided on Angler's Cottage the estate can be administered quickly and at proportionate cost. There is no hostility whatsoever towards your client from our client".

12. However, that letter or that email ends by saying the following: "We are instructed to make an open offer for Graham Kershaw and Lenka Robertson to step down as executors and an independent professional be appointed to administer the estate on the basis that:

    i) Your client and Jill Chadwick are also removed as executors, and

    ii) Our client's litigation and administration costs are borne by the estate.

    We look forward to hearing from you as soon as possible and in any event, within seven days by 10th November 2021".

13. I am not sure if there was a response to that open letter, certainly not immediately. However, the difficulty, of course, at that point with accepting that offer is that the defendants were saying that their litigation and administration costs were to be borne by the estate. That was something the claimant was unwilling to do.

14. I think it is now important for me to turn, as this is an argument about costs, to the without prejudice correspondence. There was a letter before action in March 2021 which canvassed again a large number of issues between the parties. I do not think it is necessary again, in this *ex tempore* judgment, to set out all the correspondence going before that but what is seen as the letter of claim, as it is described, on 1st March 2021 is, it sets out, the basis on which removal is sought and this includes seven points, including: "Delay, inadequacy in the provision of estate accounts; (b) a complete lack of transparency in your client's conduct of the administration; (c) conflict of interest in Angler's Cottage; (d) conflict of interest, the loan agreement dated 16th February 2016; (e) a breakdown in the relationship and hostility between the executors; (f) a need to investigate claims against your clients, and (g) a failure to understand the basic rules of administration".

15. Then there are further particulars given there. Almost all of this is found in one form or another in the particulars of claim which are eventually issued.

16. This letter concludes by saying under the heading: "Next step", "We would be grateful for your reply to confirm:

> '(a) Whether or not your clients are prepared to step down as executors of the estate, and
>
> (b) The identity of three professional administrators that your clients would propose to be appointed in their place for our client to consider'".

17. It concludes by saying that: "The claimant considers the personal hostility between the clients may impede settlement and he invites a solicitor acting on behalf of the defendants to engage in without prejudice discussion with the solicitor from this firm to consider possible resolutions".

18. The response that comes back on 19th March by Hartley Thomas & Wright on behalf of the first defendant and the second defendant, again it is a lengthy letter but what it says is that: "Our clients have not failed in their duties as executors". It then addresses the various accusations and then it says under the heading: "Next steps" "Our clients are not prepared to step down as executors of the estate and will continue to act as executors to carry out the wishes of the deceased as stated in his last will and testament which your client has accepted is valid. No replacement administrators/executors will be required".

19. In response, the claimant's solicitor sent a letter dated 1st April and that contains a settlement proposal which suggests:

> "(i) Your clients step down as executors;
>
> (ii) Our client steps down as executor".

So that proposal, which was made in open correspondence on 1st April makes it clear that all the parties should step down as executors and there should be a professional administrator appointed, and two names are put forward.

20. The letter closes by saying: "Unless we have received an acceptance of this proposal or a realistic counter-proposal by 7th April we will issue proceedings".

21. Counsel for the defendants, and throughout this judgment when I refer to: "The defendants" I am referring to the first and second defendants; again, if it is not clear, I am not referring to the third defendant, counsel for the defendants complains that this letter imposed an unrealistically short timeframe. It is also pointed out to me, I believe, that was over the Easter vacation so it was even less than seven days. However, in any event, the response came back quickly within seven days, on 8th April, and what it made clear in that letter of response is that it is a failure.

22. What is taken there as again trying to address the underlying issues, it points out what is said to be the deficiencies in addressing various issues including the position of the third defendant, the need to deal with the boundary of Angler's Cottage. What are described as ridiculous and unsubstantiated allegations against Ms. Robertson. The earlier proposal made by the first defendant, 4th December 2020, to which I have already referred, put out various proposals for settlement and then it deals with the offer of settlement, and what it says is this.

23. "Your settlement proposal is rejected by our clients. The outstanding administration of the deceased's estate is straightforward and does not need professional administrators who will no doubt come at a cost". Then it identifies what it is said are the real outstanding issues, namely Angler's Cottage, the chattels, the loan agreement and the sale of the other property, Bro Deg. It says that: "— you address everything in this letter section by section and respond within ten days". Then there are some chasing letters from the defendants' solicitors and then the next thing that happens, proceedings are issued.

24. When it comes to costs, counsel for the defendants says the issuing of the proceedings on 9th June was precipitate. That is a matter to which I will return.

25. However, what is striking, and the next thing I will come to, and this is a without prejudice email from the defendants on 14th July 2021 is, it says the following: "Further to our without prejudice call just now, my clients would like to offer, subject to contract, to agree that all four executors are removed and a professional appointed in their place with costs to be borne by the estate. Clearly, there will need to be a detailed settlement agreement and I anticipate the finer detail may be the subject of some debate between the parties, which may take time. If your client is willing to agree to this proposal in principle, I propose the parties agree a short stay of the proceedings in order to explore settlement further and mediation may be helpful".

26. So that indicates, as I read it, that from 14th July 2021 the first and second defendants were agreed, certainly in principle, that they were to resign and that a professional would be appointed in their place. What it also seeks, of course, is the costs to be borne by the estate and at that stage, of course, that would be the costs of the claimant in issuing the proceedings and the particulars of claim and also any costs of the

defendants, which counsel for the defendants points out to me would at that stage have been very modest.

27. The response that eventually comes back after a few days' delay, on 19th July, states in its substantive paragraph as follows:

> "We cannot speak for the third defendant, but on 1st April 2021 we made an agreement for ourselves and the first and second defendants to step down, to be replaced by a professional. You refused this offer. For the avoidance of doubt, that offer is now withdrawn. We are happy to repeat it, but additionally your clients must pay our client's costs and to be clear, your clients cannot claim an indemnity from the estate".

28. So, very sadly, it appears that the substantive issue between the parties had been agreed on 19th July and the sticking point was costs. However, given that is the case, it does seem to me that the fact that the acknowledgments of service that were then served shortly thereafter, at end of July, 27th July, so eight days later, indicated clearly that the claim was contested.

29. Now it seems to me this is where matters went wrong. It is entirely open to the defendants to have indicated in their acknowledgement of service that they were prepared to step down but they did not accept the challenges to their integrity, their behaviour or their conduct but that they would simply step down. Then there could have been the dispute about costs and the proper incident (?) at that stage. However, that course of action was not taken by the defendants, instead they put in their own, what I have already described as voluminous evidence and indicated, certainly on the part of the first defendant, an intention to contest the claim. It seems to me it is at that point that matters went wrong.

LEGAL PRINCIPLES

30. I was referred, of course, and the starting point here is CPR rule 44.2, and the rules relating to costs are well known. Under the general law, costs are in the discretion of the court, CPR rule 44.2.1, but if the court decides to make an order about costs the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party, CPR rule 44.2.2(a).

31. However, the court may make a different order, CPR rule 44.2.2(b) and in deciding whether to make an order and if so what, the court will have regard to all the circumstances including the conduct of all the parties and any admissible offer to settle the case, not under CPR part 36, which is drawn to the court's attention, CPR rule 44.2.4. In particular the court has a raft of orders which it may make, including that a party could pay a proportion of the other party's costs and order that costs be paid from or until a certain date, and an order for costs relating only to a distinct part of the proceedings. However, before making an order of the last type, the court must first consider whether it is practicable to make one of the first two types.

32. Also relevant in this case and to which my attention has been drawn by counsel, is CPR rule 46.3 which provides:

> "This rule applies where (a) a person has been a party to any proceedings in the capacity of trustee or personal representative".

Sub-rule (2) provides that:

> "The general rule is that a person is entitled to be paid the costs of the proceedings in so far as they are not recovered from or paid by any other person out of the relevant trust or estate".

However, sub-rule (3) then qualifies that by saying:

> "Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis".

33. Also of significance when considering the indemnity is a passage in Lewin, paragraph 48-006 which sets out that a trustee may be deprived of costs or ordered to pay costs by court order on the ground of breach of trust or misconduct. The word "Misconduct", as Lewin explains, should be widely construed: "It may include caprice and obstinacy or neglect, negligence or carelessness or even conduct which is unreasonable in the circumstances. While the mere fact that a trustee has made a mistake is not enough, it is equally clear that dishonesty is not requisite. So consequently, either misconduct should be widely construed so as to cover unreasonable conduct or in the alternative, the inequitable conduct on the part of a trustee which causes his right of indemnity to be lost or curtailed includes both misconduct in the sense of dishonesty and unreasonable conduct". We will here use "Misconduct" in the wider sense.

34. I have also been referred to some case law. I was referred to the decision of *Fellner v Cleall*, a decision of Deputy Master Linwood and I was also referred to the case of *Ghafoor v Cliff*, a decision of Mr. Justice Richards. However, I am very alive to the fact that while those cases, which involve executors contesting their removal before, as was described, bowing to the inevitable, that provides at least an example of the approach the court can take, I should be very alive to the particular facts of the case before me.

35. The starting point in my analysis is to ask myself who in this case is the successful party. Counsel for the defendants very fairly accepted that the successful party in this case is the claimant. The presumption, therefore, is that the claimant should have his costs. However, of course, I can make a different order. I then need to consider whether that presumption - I should clarify, it is not strictly a presumption, it is a starting point or it is a general rule, but one can make another order and I am very alive to the fact that I can make a different order.

36. The first point counsel for the defendants makes is, she submits that the application was issued prematurely. She points out to me, I have already quoted some of the pre-action correspondence but she takes it back a little further starting in December 2020, in January 2021 where she says that in light of the other issues between the parties it would be sensible for the beneficiaries to buy out Ms. Robertson's interest in Angler's Cottage.

37. I have already said, she complains about some of the deadlines in that correspondence and she says in all the circumstances, issuing the proceedings on 9th June 2021 was precipitate. She says it was wrong to issue without considering or engaging in any form of ADR. She says it was wrong to issue - that there was only one relevant offer of settlement, that is on 1st April and she says the 1st April settlement in itself did not give enough time before the actual proceedings were sent. She complains about it being issued within three months of sending the letter of claim.

38. She also complains that the claimant issued these proceedings without addressing what I have already quoted from in the 8th April letter from the defendants' solicitors, the request for clarification about the nature of the proceedings. She says it was also wrong to ignore the defendants' correspondence, which was trying to narrow and clarify the issues.

39. While it seems to me that it might be said that issuing the claim was perhaps a little precipitate, I do not consider that any of those matters which she has identified would justify departing from the general rule. We have a letter before action which is very clear, in March 2021, and you have a perfectly sensible proposal on 1st April. Of course, the 1st April proposal is ultimately what has been agreed to by the time of the hearing before me. Then there was ample time for the defendants to take advice and consider their position. So it seems to me I cannot say that the timing of when the proceedings were issued is a ground for departing from the general rule.

40. Secondly, she turns to the proposal on 14th July whereby in the without prejudice correspondence from which I have already quoted the defendants indicated that they were prepared to step down, albeit with costs to be borne by the estate. Again, it seemed to me, I have carefully considered this point but I find it astonishing, given that recognition on the part of the defendants that so much evidence was put in, and even more importantly it seems to me it was quite wrong for the first defendant to indicate in the acknowledgement of service that he was contesting the claim.

41. It does seem to me, regrettably, that had the defendants adopted a different course, in light of the view that they had apparently taken, then it seems to me that much of this litigation could have been avoided. So it seems to me that is where, as I have indicated before, things really went wrong. It does not seem to me that that is a ground for departing from the general rule.

42. Costs were a sticking point in July, but as I say, what the first defendant could have done is say: "I don't accept the allegations made against me but it does seem to me it is appropriate for me to step down. I don't think I should be paying the costs of this. I should be getting my indemnity, having considered the position" and that short point could have been decided in the hearing at some point in July or August. Instead, we have had months of what appears to the court and certainly appeared to me at the hearing before me on 7th October, was active opposition by the first defendant.

MASTER PESTER: I am sorry, I have just noticed, have we lost Mr. McKean? Has he dropped off?

MS. COLLINSON: I cannot see him.

MASTER PESTER: I had better stop giving judgment. No, he seems to have joined us again. *(It is clarified that Mr. McKean is now present)* I will pick up the judgment again.

43. So, notwithstanding the email of 14th July 2021, it does not seem to me that that is a sufficient reason to deprive the claimant of the costs under the general rule. I am also taking into account that there were subsequent discussions between the parties, both on a without prejudice and on an open basis, and I have already referred in setting out the background to the open email of 3rd November 2021 where again the defendants offered to step down, but again they were seeking their costs. It seems to me that they had missed their opportunity to get that, it should have been done at a much earlier stage in the proceedings.

44. The third ground identified by counsel for the defendants as a reason for departing from the general rule, as she described it, is that the claimant's application was substantially unmeritorious. She goes through the various ground for the removal and makes various points about them not amounting to anything, in summary, or being wrong or being based on a misunderstanding of the actual position.

45. It seems to me, stepping back from this - I have not heard detailed submissions and I have not heard the parties - that there are a number of issues which are put forward as grounds of removal in the particulars of claim which I simply cannot decide. It seems to me the main established point, the main ground that justifies the removal is (a) the breakdown in relationships between the claimant and the first defendant. The first defendant says as far as he is concerned the relationship is strained but not hostile. That just, I am afraid, does not seem to me to reflect the position and you cannot just look at it from one party's point of view. The other ground is the conflict of interest it is said arising between the fact of the first defendant having witnessed the loan, which does seem to me to raise at least a potential conflict of interest.

46. So two out of the seven grounds are made out and the other five grounds, it seems to me, I cannot really decide it. However, it does seem to me the claimant adopted a somewhat scattergun approach in the particulars of claim, putting forward a number of points which I cannot really decide, so it might be said, and I will come back to this in the summary section of this judgment when I have to explain what I am going to do, it may be said that the particulars of claim were overly aggressive and took various points that did not need to be taken. I will consider whether that justifies some reduction in the costs order that I should ultimately make.

47. I also take into account the fact that the first defendant can be described as a professional, I understand he is a quantity surveyor. There are certainly allegations made against him that might be said to call his integrity into account. It is understandable that a professional might want to say something about that. So there may be something on ground 3, but I will have to stand back at the end and decide the right way to approach that.

48. The fourth ground which the defendant identifies as a reason for departing from the general rule is, she complains about the claimant's failure to engage in the alternative dispute resolution and she rightly says that on the authorities, refusing to engage in ADR may be a ground for making costs consequences. She points at paragraph 59 of her skeleton to various what she says are failures. She points, for example, to the fact that there was a suggestion of a stay in July 2021 so that ADR could be explored,

again in September, prior to the first hearing before me in October 2021 that there was an open offer to engage in mediation.

49. What that email says is: "We are instructed to make an open offer to mediate this matter. Our clients are hopeful that now your client has the benefit of our clients' witness evidence, the outstanding issues are capable of being dealt with by way of mediation. Costs from the directions hearing will escalate quickly and our clients hope to avoid these costs and deal with the matter quickly and amicably".

50. Now, pausing there, it seems to me that there has been a mismatch between what the parties in engaging in. The claimant has been focused on the actual issue raised in the proceedings, which is the removal of the defendants as executors. The defendants have taken the view that the mediation could address other issues between the parties, i.e. not just the costs of these proceedings but also issues relating to the boundary of the properties.

51. It is again pointed out to me by counsel for the defendants that there be an acceptance in principle of mediation but then she points me to an email of 15th November 2021 where the solicitor for the claimant suggested: "Please would you email us the points you wish to make and we will take instructions as to whether it is felt still further engagement can usefully proceed". It is said it is bizarre to be suggesting a list of points before a mediation is engaged in.

52. Again, I find it difficult to see that this goes sufficiently far to be a reason for departing from the general rule. It seems to me that there was animosity between the parties. While asking for: "A list of the points you wish to make" is perhaps somewhat unusual, it is not unheard of, it is not so out of the norm that it justifies a reduction of the claimant's costs on grounds of conduct.

53. Finally, I should turn to the fact that very recently, in March, there were various proposals made by the defendants. First there was a suggestion on 3rd March 2022 that the defendants bear their own costs and contribute £10,000 towards the claimant's costs. Then on 9th March there was a further suggestion that the defendants bear their own costs and contribute £20,000 towards the claimant's costs. So the parties are moving towards each other but again, agreement was not reached, this hearing has been necessary and we have not been able to resolve matters.

54. It also seems to me important, I would be remiss not to mention that there was another without prejudice letter, this time from the claimant's solicitors on 1st March 2022 expressed to be open for 14 days. Again, it has all the parties stepping down as executors, two, it has Ms. Obrey being appointed. Three, the defendants' bear their own costs of the proceedings and those costs should not be paid from the estate. Fourth, the defendants should pay 50 per cent of the claimant's costs with the remainder to be recovered as an indemnity from the estate.

55. It also points out that the defendants can recover any legitimate expenses properly incurred as executors, not including the costs of the proceedings. It points out very fairly that as the claimant and indeed his sister, the third defendant, are residuary beneficiaries, to the extent that any costs are paid from the estate it is really the claimant and the third defendant bearing them. So I take into account that letter on a without prejudice basis being made by the claimant, which prompted the two offers

that I have referred to by the first and second defendants on 3rd and 8th March, which is a contribution of costs.

56. In terms of disposal, what I am going to do is the following. It seems to me on any view the claimant is the successful party, therefore he should have his costs. I do ultimately take into account, it seems to me, that the particulars of claim are somewhat scattergun to have raised a number of issues which I have not been able to decide. So to a small extent it seems to me there should be a reduction in the costs payable to the claimant. Again, coming up with a figure for this is always very difficult, but it seems to me it should be 10 per cent.

57. So the starting point is the defendants should pay 90 per cent of the claimant's costs. Those costs, it seems to me, should be paid on the indemnity basis. I am afraid it also seems to me that the defendants are going to have to pay their own costs, without recourse to an indemnity (?). I have regard to the principles of what Lewin says in relation to indemnity. It seems to me that given that I have already done a reduction in the claimant's costs of 10 per cent to reflect the fact that there is a somewhat scattergun approach to the issues being raised, which was not entirely necessary, it seems to me, I am afraid, that for the entirety the defendants should not be able to recover any indemnity from the estate.

58. So with regard to that final 10 per cent that the defendants are paying to the claimant, that 10 per cent will be coming out of the estate which effectively means that it is going to be borne by the claimant and the third defendant as residuary beneficiaries. That is the order on costs that I am making, for the reasons set out in this *ex tempore* judgment.

This judgment has been approved by the Master.