Neutral Citation Number: [2022] EWHC 389 (Ch)

Case No: PT-2021-BRS-000065

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

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

Date: 23 February 2022

Before :

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

- -

Between :

(1) TIMOTHY DAVID DUNBABIN	**Claimants**
(2) ADAM CHRISTOPHER DUNBABIN	
(3) VICTORIA DUNBABIN	
(4) SAM JAMES HUMPHREY	
- and -	
SIMON CHARLES DUNBABIN	**Defendant**

- -
- -

Alex Troup (instructed by **Hugh James LLP**) for the **Claimants**
The defendant in person

Costs issues dealt with on paper

- -

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.

.....

HHJ Paul Matthews :

Introduction

1. On 10 February 2022 I handed down my written judgment on this claim brought under part 8 of the Civil Procedure Rules in relation to issues which had arisen in the administration of the estates of Angela and John Dunbabin. The main issue related to the beneficial interests in the house which they owned and in which they lived. This depended on whether Angela and John had severed their beneficial joint tenancy, so that thereafter they held the legal title as joint tenants upon trust for themselves as tenants in common in equal shares. The claimants (two of their sons and the estate of a third) said they had. The defendant (the fourth son) said they had not.

2. I held that they had. The result of this was that, when Angela died, her half share devolved according to her own will, instead of passing automatically to John by survivorship. That in turn meant that her half share was divided four ways, between the four sons (including the estate of the one who survived his mother but died before his father). There was also a subsidiary issue about accounts, which in fact fell away once the defendant had given evidence.

Costs rules

3. 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). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including 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).

4. In particular, the court may make an order (amongst others) that a party must pay a proportion of another party's costs, an order that costs be paid from or until a certain date only, and an order for costs relating only to a distinct part of the proceedings: CPR rule 44.2(6)(a), (c) and (f). But 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: CPR rule 44.2(7). So, an issues-based order is possible, but the rules require the court first to consider making a proportion of costs order or a time limited order.

The "successful party"

5. The general rule requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue". Here the successful party overall was the claimants' side. It is true that I made no order on the claim for an inventory and account, but that was only a minor part of the claim, and took very little time at trial. In any event, it was not so much that the claimants lost on this, as that it ceased to be of any importance in light of the evidence given by the defendant, which assuaged the concerns that they had.

6. The general rule would therefore operate here so as to require the defendant to pay the claimants' costs. The first question therefore is whether there is any basis for my making a different order. The defendant asks me to consider ordering that both sides pay their own costs, on the basis that he had "spent a considerable sum in defending this case as executor, and [has] funded this personally rather than deplete the estate funds". He said that the was "defending what [he] was clearly told by [his] parents to be the true facts".

7. In my judgment I accepted (at [36]) that John may have said something to support the defendant's case at trial that no severance had taken place. That may be relevant to the question of indemnity out of the relevant estate, but I do not think it is sufficient to mean that I should make a different order from the general rule. Nor (if it is be relied upon) is it sufficient that the defendant acted as a litigant in person. In this regard the same rules apply to unrepresented as to represented parties: *cf Barton v Wright Hassall* [2018] 1 WLR 1119, [18], [42]. So, I will order that the defendant pay the claimants' costs on the standard basis.

Mode of assessment

8. The claimants do not ask me to assess the costs summarily. Instead, they ask that I direct a detailed assessment, but also order a reasonable sum to be paid on account of those costs under CPR rule 44.2(8). The defendant welcomes the idea of a detailed assessment, but also asks the court to direct whether certain costs claimed have been reasonably and properly incurred. If I direct a detailed assessment, that is what will indeed have to be decided. It will not therefore fall to me to do so. In the circumstances, I will direct a detailed assessment.

Payment on account

9. As to payment of a sum on account, rule 44.2(8) provides:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so".

The claimants say there is no such good reason here. The defendant does not suggest there is any good reason taking the matter out of CPR rule 44.2(8). For my part, I can see none, and will therefore order the payment of a sum on account of the claimants' costs.

10. The assessment of the "reasonable sum" under rule 44.2(8) is not so straightforward as it might be. There is no costs budget in this case, because this was a Part 8 claim. The claimants' costs schedule filed before trial, and signed by a partner in the claimants' solicitors, states that costs and disbursements came to £59,208.30, a total of £70,693.36, once VAT is included. Given the nature of the case, the modest value of the estates concerned, and the relative shortness of time that it took to try, I find those figures rather on the high side.

11. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ said:

> "22. It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'…
>
> 23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

12. The claimants ask for a payment of account of 60%, amounting to £42,416 (including applicable VAT). I think that this feels about right, and will adopt it. A 40% margin should be sufficient to deal with whatever happens on assessment. If, for whatever (unforeseen) reason it did not, it is the case that the claimants will have an entitlement to monies under the estates of their parents which at present remain in the defendant's hands. This should be a sufficient security for the defendant that he would be repaid.

Right to indemnity

13. The next question is whether the defendant should be deprived of his indemnity to recover his costs (and any he is ordered to pay) out of the estate or estates for which he acted in this litigation. The claimants say that he should be so deprived. The defendant says he should not.

The statutory rules

14. Section 31 of the Trustee Act 2000 provides:

> "(1) A trustee—
>
> (a) is entitled to be reimbursed from the trust funds, or
>
> (b) may pay out of the trust funds,
>
> expenses properly incurred by him when acting on behalf of the trust."

15. *Costs* in trust and estate litigation are the subject of special provisions in the CPR, which in effect implement the basic rule in the 2000 Act. Rule 46.3 and para 1 of the Practice Direction to Part 46 contain the main ones. Rule 46.3 is as follows:

> "(1) This rule applies where –
> (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
> (b) rule 44.5 does not apply.
> (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.

> (3) 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."

(I interpose to say that rule 44.5, referred to in rule 46.3(1)(b) above, concerns costs payable under a contract, and is not relevant to this case.)

16. Para 1 of the Practice Direction to Part 46 is as follows:

> **"1.1** A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') –
> (a) obtained directions from the court before bringing or defending the proceedings;
> (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and
> (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.
>
> **1.2** The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally."

Which estate(s)?

17. The first question, as it seems to me, is to be clear which estate or estates we are talking about. Both the claimants and the defendant say it is the estates of both parents. But the defendant, though named executor in the will of each of his parents, only proved his father's. No probate has so far been applied for, let alone granted, in relation to his mother's will. As I say below, the defendant appears to have taken the view, consistent with his case on severance, that there was nothing of substance in his mother's estate.

18. The claim form and particulars of claim state that the claimants sue the defendant in three capacities: (1) personally, (2) as sole executor of the estate of John, and (3) as sole surviving executor of the estate of Angela. So far as the second and third of these capacities are concerned, there are allegations that

> "15. The Defendant is the sole surviving executor of Angela's estate, pursuant to the terms of her last will of 22 April 2008 and the sole executor of John's estate pursuant to his last will of 22 November 2019. The Claimants have invited the Defendant to prepare and provide them with a full inventory and account in proper form in relation to each estate. The Defendant has declined to provide the inventory and account in proper form sought."

The prayer seeks orders that "the Defendant … provide an inventory and account in proper form" in relation to the estate of each of Angela and John.

Angela

19. The "defence statement" prepared by the defendant makes clear that he considered that there was no need for probate of Angela's will, because all her assets were owned jointly with John, and therefore passed to him by survivorship. There is nothing to show that he ever knowingly acted in the estate of Angela. Of course, I have held that the joint tenancy was in fact severed, so that when the house was sold the defendant was in fact selling an asset, one half of which belonged beneficially to Angela's estate.

20. But what is clear is that the defendant never purported to be acting as Angela's estate's executor, only as that of John's. By resisting the claim that there had been a severance, he certainly acted in the interests of John's estate, and against those of Angela's. He also acted in his own interest, in the sense that he personally stood to gain more if there were no severance than if there were one. Notwithstanding the obvious conflict of interest in which he found himself, he did not attempt to take the directions of the court.

21. In these circumstances, I consider that the defendant did not incur any litigation costs properly in relation to Angela's estate, and accordingly should not be entitled to any indemnity out of her estate.

John

22. The position in relation to John's estate is somewhat different. First of all, it is clear that, by asserting in the terms he did that there had been no severance, the defendant not only acted in the interests of John's estate, but also that he considered that he was so acting. Moreover, I consider that he had an evidential basis for taking that view. In particular, his evidence was that there was no severance document to be found after John's death, and that John had told him that he and Angela had not signed any such document. It is correct that the defendant acted also in his own interests, but I accept that in substance he was acting for John's estate. As he says, he has spent a lot of his own time and money in refurbishing the house in order to maximise the benefit to (as it turned out) John's estate.

23. As I have said, the defendant did not apply for directions. But as at present advised I cannot say that, at the time he would have asked, the court would necessarily have told him he should defend the case at his own expense. The claimants also submit that he acted unreasonably in a number of ways, including going "off course", and giving "excessive or irrelevant information", in his evidence, and being "aggressive and confrontational" in correspondence.

24. Whilst the first two matters of conduct mentioned are not to be encouraged, they are more easily understandable from a litigant in person, who has no experience of the right way to give evidence. It will be recalled that I found that the defendant

> "was doing his best to assist the court, and … that he did not tell me anything he knew to be untrue."

I do not think that, in this case at least, they should lead to the loss of the executor's indemnity.

25. As for the third, I agree that aggressive and confrontational correspondence should be avoided, but I made no findings about the correspondence in my judgment, and in any event I do not know what the defendant would say about the particular letters referred to. But, in any event, if (as I hold) the costs were otherwise "properly incurred", I do not think that aggressive letter-writing should operate to deprive the defendant of his indemnity out of John's estate.

Conclusion

26. In these circumstances, I will order the defendant to pay the claimants' costs on the standard basis, to be subject to detailed assessment if not agreed, with a payment on account of those costs of £42,416 (including applicable VAT) by 4 pm on 10 March 2022. The defendant does not have any indemnity for these costs out of Angela's estate, but he does have one out of John's. I would be grateful to receive a minute of order for approval, to give effect both to this ruling and to the main judgment.