Neutral Citation Number: [2024] EWHC 2038 (Ch)

Case No: PT-2021-001068

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: 1 August 2024

Before :

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

- -

Between :

MASUDUR RAHMAN	**Claimant**
- and -	
(1) DEWAN RAISUL HASSAN	**Defendants**
(2) LANA BASNEED ZAMAN	
(3) AMANI ZAMAN	
(4) FARIHAH ZAMAN	

- -
- -

Kuldip Singh KC (instructed by **direct access**) for the **Claimant**
Owen Curry (instructed by **Trowers**) for the **Defendants**

Consequential matters dealt with on paper

- -

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2 pm on 1 August 2024.

HHJ Paul Matthews :

INTRODUCTION

General

1. On 30 May 2024 I handed down my reserved judgment (under neutral citation number [2024] EWHC 1290 (Ch)) on the trial of a claim for declarations relating to transactions alleged to have taken place between the claimant and the late Mr Al-Hasib Mian Muhammad Abdullah Al Mahmood. I held that these transactions amounted to *donationes mortis causa*, or "gifts in contemplation of death". On the handing down of the judgment, I adjourned the hearing so that consequential matters could be dealt with on paper.

2. I subsequently received written submissions on various matters, which I have considered. These include the following:

   (1) a dispute over which assets are covered by my judgment;

   (2) an application by the claimant to amend his costs budget;

   (3) an application by the claimant that the defendants pay his costs of the claim, with certain enhancements;

   (4) an application by the claimant for a payment on account of those costs;

   (5) an application by the first and second defendants for certain estate expenses to be paid out of the estate;

   (6) an application by all the defendants for permission to appeal.

The assets the subject of the *donationes mortis causa*

3. I begin with a dispute between the parties which has arisen since I handed down my judgment. This is whether the decision which I made, that assets of Mr Al Mahmood were given to the claimant by way of *donatio mortis causa*, includes the 11 bank accounts listed in Schedule 3 to the claimant's draft order. The claimant says that they are included. The defendants say that they are not.

4. Paragraphs 18, 19 and 19A of the Re-Amended Particulars of Claim relevantly plead:

   > "18. In the circumstances set out above, on 15 and/or 20 October 2020, the Deceased made a gift to the Claimant of all of his real property in the UK and his bank accounts (apart from his property in Bangladesh) in contemplation of his impending death, with the intention that the gift would take effect when his death occurred and delivered dominion over the subject matter of the gift to the Claimant (as far as he was able to do so), which took effect as a *donatio mortis causa*.
   >
   > 19. The Claimant claims declarations that the Deceased gave the following property to the Claimant and that it now vests in the Claimant pursuant to a

> *donatio mortis causa* and does not form part of the Deceased's estate to be administered under the Will:
>
> […]
>
> (e) The credit balance of the bank and share accounts as follows:
>
> [There follows a list of bank and share accounts]
>
> […]
>
> 19A. Where the Deceased gave the Claimant internet banking information and login details in relation to a customer number at any financial institution mentioned in paragraph 19(e) above, the Deceased gave the Claimant all of the accounts held by that institution for that customer under that customer number, including any accounts that institution held jointly by the Deceased and Mrs Al Mahmood under their respective customer numbers."

5. The problem for the claimant is that the 11 bank accounts listed in Schedule 3 to the draft order are not listed under paragraph 19(e). The claimant refers to and relies on other paragraphs of the particulars of claim, in particular paragraphs 6, 8, 11, 13, 15, 19B, and 20, and paragraph (4) of the prayer. However, in my judgment, paragraphs 6, 8, 11, 13, and 15 simply plead occasions on which the deceased was said to have expressed a desire that *all* his UK assets should pass to the claimant. They do not plead events amounting to a *donatio mortis causa*. Paragraph 19B concerns other assets than those referred to in Schedule 3. Paragraph 20 and paragraph (4) of the prayer add nothing to the earlier paragraphs. The claimant also refers to paragraphs in the Re-Amended Reply, but these do not help him either (and in any event are the wrong place for such a claim).

6. The claimant did not seek a declaration that *all* the deceased's UK assets had passed to him by virtue of a *donatio mortis causa*. He sought declarations that specific listed assets had so passed to him. The assets referred to in Schedule 3 were not included. The fact that the deceased had on occasions expressed the intention that all his UK assets should belong to the claimant after his death does not alter the matter. The decision that I made was one in relation to the assets which were pleaded to have passed to the claimant, and not in relation to any other assets. As matters stand, therefore, the declaration to be made in my order, so far as it relates to bank accounts, will not extend to those bank accounts set out in Schedule 3 to the draft order.

Permission to appeal

The test to apply

7. I turn now to permission to appeal. Any appeal from my decision of 30 May 2024 requires permission to appeal: CPR rule 52.3(1)(a). Under CPR rule 52.6, in a first appeal (such as this is) the court may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA; *Re R (A Child)* [2019] EWCA Civ 895,

[31]. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise.

8. So the test for permission to appeal depends to an extent on the test for a successful appeal. The test for a successful appeal is set out in CPR rule 52.21, which provides (in part):

> "(3) The appeal court will allow an appeal where the decision of the lower court was—
> (a) wrong; or
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

The defendants say that my decision was wrong within paragraph (3)(a). So far as I am aware, in the present case there is no suggestion of paragraph (3)(b)'s being engaged.

9. In *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA 5, Lewison LJ (with whom Longmore LJ agreed) said:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc* [1997] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325 ; *Re B (A Child) (Care Proceedings)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477."

10. More recent decisions to the same effect include *Perry v Raleys Solicitors* [2020] AC 352, [49]-[67], *Volpi v Volpi* [2022] 4 WLR 48, [2]-[5], and *Byers v Saudi National Bank* [2022] 4 WLR 22, [99]-[105]. In *Volpi*, Lewison LJ said:

> "2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

11. Where the judge makes an evaluative decision (*eg* an assessment of proportionality), the appellate court will interfere only if it considers that the judge made a significant error of principle in reaching a conclusion or reached a conclusion which should not have been reached,: *R(Z) v Hackney LBC* [2020] 1 WLR 4327, [56], [74], SC.

Grounds of appeal

12. In written submissions, the defendants put forward in substance eight grounds of appeal. In summary form, these are as follows:

> (1) I was wrong to find, as an incorrect legal inference, rather than a primary fact, that the deceased was not attempting to make a nuncupative will from 20 October 2020 onwards;
>
> (2) I was wrong to hold that land certificates or copies of leases were *indicia* of title, rather than evidence of ownership;
>
> (3) I was wrong to hold that passwords to online accounts and bank cards were *indicia* of title;
>
> (4) I was wrong to rely in my judgment at [150] and [158] on the decision of the Court of Appeal in *Woodard v Woodard* [1995] 3 All ER 980 when considering what amounted to an *indicium* of title;
>
> (5) I was wrong to consider (at [158]-[160]) that the key question regarding transfer of dominion and *indicia* of title was one of evidence of intention; intention to make a gift is a separate part of the requirements for a deathbed gift;
>
> (6) I was wrong (at [161]) to conclude that the deceased parted with dominion over his bank accounts and associated choses in action; in particular, I was wrong to conclude that the deceased could not possibly have memorised all the details of his different accounts;

(7) I was wrong to ask "what more could he have done in the circumstances in which he found himself" (at [162]);

(8) the issues raised in this case regarding bank accounts and registered land are novel, and the decision in this case will set a precedent of importance.

13. The claimant's response to this application, again in summary form, is:

(1) the defendants' grounds challenge "every critical conclusion" made by me in my judgment, and in reality amount to a challenge to my findings of fact;

(2) but the defendants are unable to show that my findings were unsupported by all the evidence or were ones which no reasonable judge could reach;

(3) the law which I applied is well established and not subject to attack;

(4) all or most of the grounds confuse (i) the requirements for a *donatio mortis causa* in relation to what the deceased did, (ii) the position between the claimant and the first two defendants, and (iii) the question of evidence of title between the donor or donee on the one hand and a third party on the other;

(5) the grounds ignore that the court will where appropriate require the estate to perfect the gift;

(6) the grounds relating to land ignore that *Sen v Headley* is a decision of the Court of Appeal which would need to be overruled;

(7) the grounds relating to choses in action and bank accounts would equally require the overruling of Court of Appeal authority;

(8) there is no other compelling reason for the appeal to be heard; if permission is to be given, it should be given only by the Court of Appeal.

14. The claimant reminds me that, by CPR rule 52.6(2)(b), an order granting permission to appeal may be made subject to conditions. He refers to his current financial circumstances and therefore asks that, if there is to be permission to appeal, conditions should be attached enabling his proper participation. I will return to this.

Discussion

15. The first question to consider is whether any of the grounds of appeal has a real prospect of success. I shall refer to the grounds by using my numbering set out above. As to ground 1, I respectfully consider that my finding that the deceased was not attempting to make a nuncupative will was of a primary fact, but, even if it were an inference, it would have to be judged by the same test, set out at [10] above. On that basis I do not consider that there is any real prospect of showing that my conclusion on this point was rationally insupportable.

16. As to grounds 2, 3 and 4, these deal with what amount to *indicia* of title for the purposes of the law of *donatio mortis causa*. Although there is an element of intention involved, essentially these are matters of law, and there is a "real prospect" of an appellate court's taking a different view, and holding that I was wrong.

17. As to ground 5, whether "intention to make a gift is a separate part of the requirements for a deathbed gift" from transfer of dominion and *indicia* of title is also a matter of law, and equally there is a "real prospect" of an appellate court's taking a different view, and holding that I was wrong.

18. As to ground 6, I respectfully consider that my finding that the deceased parted with dominion over his bank accounts and associated choses in action was of a primary fact, and there is no real prospect of showing that my conclusion on this point was rationally insupportable.

19. As to ground 7, I do not consider that, even if I were wrong to ask the question "what more could the deceased have done" (and I do not so consider), the answer made any real difference. If the defendants do not succeed on other grounds, they cannot succeed on this one. There is no "real prospect" here.

20. As to ground 8, I accept that the decisions in principle relating to the application of the doctrine of *donatio mortis causa* to registered land and to bank accounts using online passwords and bank cards are novel, and that, even if there were no real prospect of success on them, their novelty and their increasing importance in modern society provide a compelling reason for appeals on these points to be heard.

21. Overall, I consider that I should give permission to appeal on grounds 2-5 and 8.

Conditions?

22. However, I need to consider whether, as the claimant submits, I should do so subject to certain conditions. The claimant says that, at present, he is unable to fund further legal costs, including those of opposing any appeal by the defendants. He therefore asks for

> "conditions (1) requiring the Defendants to pay at this stage a payment on account of the Defendants' costs; (2) requiring the Defendants to agree liability for a certain percentage of the Claimant's costs of the High Court proceedings in any event; (3) requiring the Defendants to agree to pay the Claimant's costs of the appeal, or a certain proportion of them, in any event".

23. CPR rule 52.6(2)(b) says:

> "(2) An order giving permission under this rule … may … be made subject to conditions."

But it does not say what test is to be applied for the imposition of conditions. The claimant did not refer me to any judicial authority on this rule. I have therefore looked for myself.

24. Some general principles are set out in *Palladian Partners LP v Republic of Argentina* [2024] EWCA Civ 139. This was a case in which permission to appeal had been granted to the losing party (the defendant), on condition that it paid the judgment debt into an escrow account. Phillips LJ said:

> "5. CPR 52.6(2)(b) provides that an order giving permission to appeal may be made subject to conditions. Whilst that rule does not identify the test to be

applied, CPR 52.18(1)(c) provides that the appeal court may impose or vary conditions upon which an appeal may be brought, CPR 52.18(2) stating that the court will only exercise that power where there is 'compelling reason' to do so. In *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065*, Days Medical Aids Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2004] EWCA 993 and *Sunico A/S v Commissioners for HMRC* [2014] EWCA Civ 1108 this Court proceeded on the basis that the compelling reason requirement also applies to the imposition of a condition under CPR 52.6(2)(b). Neither party in the present case suggested departing from that approach.

6. As explained by Briggs LJ in *Sunico* at [22], the 'compelling reason' test reflects the fact that a condition such as to pay or secure payment of the judgment debt is not routinely applied. Indeed, in *Dumford Trading AG v. OAO Atlantrybflot* [2004] EWCA Civ 1265 at [9] the imposition of a condition was described as 'unusual, perhaps rare', an approach recently adopted by Sir Geoffrey Vos MR in *Infrastructure Services Luxembourg SARL & Anr v Kingdom of Spain* [2024] EWCA Civ 52 at [10].

7. In *Sunico*, Briggs LJ (with whom Patten and Underhill LJJ agreed) emphasised at [23] that the existence of a compelling reason was only a necessary rather than a sufficient factor. The imposition of a condition remained a matter for exercise of the court's discretion.

8. At [25] Briggs LJ identified certain factors which, depending on the overall circumstances, may point to the imposition of a condition:

> '(1) Difficulties of enforcement of the court's judgment in a foreign jurisdiction;
>
> (2) An apparent sufficiency of resources to enable the judgment debtor to continue to fund litigation;
>
> (3) The absence of convincing evidence that the appellant lacks the resources, or access to the resources, which would enable it to pay the judgment debt;
>
> (4) Inadequate disclosure by the appellant of its financial affairs, or a lack of confidence on the part of the court that it has been shown the truth;
>
> (5) The combination of
>
> i) A deliberate breach of an order to pay the judgment debt
>
> ii) The refusal of a stay, and
>
> iii) Ability to pay, but a failure to do so cynically based upon the difficulties for the respondent in enforcing the judgment in a foreign jurisdiction.'

9. Briggs LJ further identified, at [26], that the main factor which is likely to tell against the imposition of a condition, if sufficiently demonstrated, is where to do so would stifle the appeal."

25. That case does not deal with conditions arising from an imbalance of resources. However, in *Smith v Royal Bank pf Scotland plc* [2021] EWCA Civ 977, Bean LJ (with whom Lewis and Elisabeth Laing LJJ agreed) said:

> "13. … In *Canada Square Operations Ltd v Potter* [2021] EWCA Civ 339, another significant case in the PPI litigation, the bank ('CSO') had lost in a small claims track trial and on appeal to a High Court judge. Lewison LJ granted PTA to this court and wrote in his reasons for giving PTA:
>
> > 'Ms Potter has asked for the grant of permission to be made conditional on CSO paying her reasonable costs of the appeal irrespective of the outcome. Similar orders have been made in other cases where the amount in issue was small and the appellant wished to clarify the law for its own benefit e.g. *Morris v Wrexham* [2001] EWHC 697 (Admin); *Ungi v Liverpool CC* [2004] EWCA Civ 1617. But this is a case to which CPR part 27.14(2) applies. That rule applies to a second appeal to this court, *Akhtar v Boland* [2014] EWCA Civ 943. Under that rule the court has no power to make an order for costs. I do not consider that where a rule expressly deals with the questions of costs it would be a proper use of the power to attach conditions to be used to sidestep the rule.'
>
> 14. When the substantive appeal in *Canada Square v Potter* was heard in this court the refusal of Lewison LJ to impose the costs condition applied for was noted at paragraph 52 and there was no suggestion that he had been in error.
>
> 15. *Ahktar v Boland* is binding on us; so that, as Mr Weir accepts, neither party to this appeal could be ordered to pay the other party's costs. It is of course quite commonplace for this court to grant a party with large resources permission to appeal (whether a first appeal or a second appeal) on terms that it pays the opposing party's costs whatever the outcome, but appeals from cases heard on the small claims are an exception.
>
> 16. There are situations in which the court can impose a condition on a party's continuing participation in a case which could not be the subject of a direct order. Mr Weir referred us to *Edwards-Tubb v J D Wetherspoon plc* [2011] EWCA Civ 136; [2011] 1 WLR 1371, a personal injury case in which the claimant, having set in train the pre-action protocol procedure for nominating experts and been examined by his nominated expert, A, then issued proceedings accompanied by a report from a different, nominated expert, B. It was held that, even though the report from expert A was the subject of privilege and could not be the subject of an order for its disclosure, the court could properly refuse permission for the claimant to reply on the report from B unless he waived privilege in, and disclosed to the defendants, the report from A. There are many other examples. An even more commonplace feature of personal injury litigation is that a court will not make a mandatory order requiring a claimant to attend a medical examination, but can say that if he declines to attend his claim will be stayed. But in neither of these cases is a court overriding an express provision in the Rules.
>
> 17. There is a distinction between a court imposing a condition which it would not ordinarily make the subject of a direct order (such as an order that party A

> should pay party B's costs on appeal whatever the outcome in a case where CPR 27.14 is not engaged), and a court imposing a condition which it could never make the subject of a direct order because statute or a rule of court expressly prohibits it. I agree with the decision of Lewison LJ in *Canada Square v Potter* that where a rule expressly prohibits orders for costs it is not a proper use of the general power to attach conditions so as to sidestep the rule."

26. In these circumstances, the question is whether there is a compelling reason for imposing any condition. The first is for a payment on account of costs. The defendants accept that there should be such a payment, though limited to 50% of budgeted costs, and in three months rather than 14 days. I will deal with the details of that in due course. Ordinarily, in circumstances where the claimant asks for a payment on account, the rules raise a presumption in favour of one, and the defendants do not oppose the principle, one might not expect there to be a compelling reason to impose this as a condition of permission to appeal. If, however, the payment were not made as required, then revoking the permission would be a more effective sanction for non-payment than other enforcement mechanisms which might be employed against non-residents. Accordingly, in this case I will make it a condition of permission to appeal that the payment on account be made by the due date.

27. The second condition is that the defendants agree liability for a certain percentage of the claimant's costs of the High Court proceedings in any event. I do not think there is a compelling reason for the imposition of this condition. The claimant launched the present claim without the benefit of any such costs cover. If he had lost, he would potentially have had to pay the defendants' costs. I see no sufficient reason for now giving him costs cover for the first instance proceedings which he never previously enjoyed as a condition of permission to appeal's being given. He willingly undertook the first instance costs risk, and if the appeal were successful, there would be no reason not to expose him to it.

28. The third condition is that the defendants agree liability for the claimant's costs of the appeal, or a certain percentage of them, in any event. For my part, given that the claimant has been able to fund his proceedings to date, and will have the benefit of a payment on account of his costs long before any appeal is heard, I am not satisfied on the material before me that there is a compelling reason to impose such liability as a condition of permission to appeal on grounds 2-5. Ground 8 is different. There the hypothesis is that there is no real prospect of success by the defendants, but it is in the public interest for the novel points decided in this case to be subject to the views of the appellate court. If the defendants wish to pursue ground 8, then they have permission to do so on condition that they pay 50% of the claimant's costs of the appeal in any event.

Costs

The general rule

29. I turn therefore to the question of costs liability. The rules on costs are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). 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 "the conduct of all the parties" and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

30. In my judgment, first of all, here the court *should* make a costs order. This was large-scale litigation, which cost a lot of money, concerning the beneficial ownership of significant assets of a deceased. The next thing that I need to consider is which party, for the purposes of the "general rule", was the successful party overall. In my judgment, this was the claimant, even if he did not obtain everything that he claimed. The defendants accept this.

31. I have been told that in September, October and November 2023 both the claimant and the defendant made a number of admissible offers otherwise then under CPR Part 36 to each other, and that none of them was accepted by the other side. The judgment which the claimant has obtained is more advantageous than any of these offers. Subject to the impact of CPR Part 36, I see no reason not to apply the general rule, with the result that there must be an order that the defendants pay the claimant's costs on the standard basis. However, I must now consider the effect of CPR Part 36.

The impact of CPR Part 36

32. On 23 January 2023, the claimant made an offer in form N242A, expressed to be an offer under CPR Part 36, in respect of the whole claim and counterclaim. The 21-day period applicable to the offer expired on 13 February 2023. In substance it would have given the claimant the house, furniture and personal chattels at 98 Streatham Road, and all the bank accounts, but everything else would have gone to the defendants. The offer was not accepted. The defendants agree that this offer was a claimant's part 36 offer within CPR rule 36.17.

33. That rule relevantly provides:

> "(1) Subject to rule 36.24, this rule applies where upon judgment being entered—
>
> (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
>
> (2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.
>
> (3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to —
>
> (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

> (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.
>
> (7) Paragraphs (3) and (4) do not apply to a Part 36 offer—
>
> (a) which has been withdrawn;
>
> (b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;
>
> (c) made less than 21 days before trial, unless the court has abridged the relevant period.
>
> […]."

(I should say that CPR rule 36.24, referred to in room 36.17(1), deals with offers made under two protocols which have no application in the present case.)

34. However, the defendants submit that

> " … this is not a case in which the Court has made a monetary award to the Claimant so r. 36.17(4)(a) does not apply. As can be seen from the issue fee on the Claim Form, this was a claim for non-monetary relief. That relief – that is declarations, accounts and vesting orders – cannot be characterised as an award of money by the Court."

35. I agree that the claim was for non-monetary relief. But I do not agree that rule 36.17(4)(a) does not apply. That rule applies wherever rule 36.17(1)(b) applies. Rule 36.17(1)(b) applies where the judgment obtained against the defendant is "at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer".

36. I assume that the defendants' argument is that rule 36.17(2) restricts the operation of rule 36.17 to money claims only, because it says

> "For the purposes of paragraph (1), in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly."

37. But I do not read rule 36.17(2) as so restricting the scope of rule 36.17. I read that rule saying that, *in the application of this rule to money claims*, 'more advantageous' and 'at least as advantageous' have a money-based meaning, and no other. That is a far cry from saying that no other kinds of claims are within the rule. On the contrary, it means that, in *non*-money-based claims (such as this one) the phrases 'more advantageous' and 'at least as advantageous' do not have a money-based meaning, but are to be construed in the ordinary sense of the words. Any other reading would mean that the words "or money element of a claim" were redundant.

38. I note in passing that the provision now contained the rule 36.17(2) was introduced following a recommendation by Jackson LJ in his "*Review of Civil Litigation Costs: Final Report December 2009*", ch 41, seeking to reverse the effects of the decision of

the Court of Appeal in *Carver v BAA plc* [2009] 1 WLR 113, where that court held that beating the defendants' offer by £51 was not 'more advantageous' than the defendant's offer. So it is clear that rule 36.17 originally had an existence without any such restriction as that which the defendants seek to introduce here.

39. So, I ask myself, is the judgment which the claimant has obtained at least as advantageous as the terms of the Part 36 offer that he made in January 2023? The main difference between the two is that, under the Part 36 offer, the claimant would have had the furniture and personal effects at the house, but not the two flats, whereas by the judgment the claimant has the two flats but not the furniture and personal effects. I do not have any valuations of these things, but I heard the evidence about the contents of the house and also about the flats, and I am in no doubt that the two flats are worth far more than the furniture and personal effects of the house. Accordingly, in my judgment what the claimant has obtained is at least as advantageous as the terms of the Part 36 offer.

40. That means that the cost consequences are as set out in room 36.17(4). Unless I consider it unjust to do so, I must order that the claimant be entitled to costs on the indemnity basis from the date of expiry of the Part 36 offer, *ie* 13 February 2023, plus interest on those costs at a rate not exceeding 10% above base rate, together with an additional amount not exceeding £75,000 and calculated in accordance with rule 36.17(4)(d)(ii). The burden lies on the defendants to establish that there would be anything unjust in my so ordering: *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch), approved in *Webb v Liverpool Women's NHS Foundation Trust* [2016] 1 WLR 3899, CA, [38]. In fact, they have not argued that this would be unjust. Accordingly, I see no reason not to do so.

41. Indeed, the defendants accept that the claimant is entitled to (i) costs, before 14 February 2023 on the standard basis (under the general rule), and from 14th of February 2023 on the indemnity basis (under rule 36.17(4)), together with (ii) interest on those costs, and (iii) the additional amount calculated in accordance with rule 36.17(4)(d)(ii). As to the rate of interest on costs, the claimant asks for 3% on costs incurred before February 2023 until the date of this order, and 8% thereafter until payment. He asks for 6% on costs incurred after 13 February 2023 until the date of this order and 8% thereafter until payment. The defendants make no suggestion as to the rate on costs incurred before 14 February 2023, but submit that 6% on costs incurred after 13 February is too high, and at the correct rate until the date of the order should be 5%. The defendants accept that 8% is the correct rate thereafter. I see no reason not to give the claimant the rates that he asks for, and I so order.

Application to vary claimant's costs budget

42. Although judgment has now been handed down, the claimant has made an application to vary his originally approved costs budget, under CPR rule 3.15A, which reads:

> "A party ('the revising party') must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions."

43. As the claimant notes in his submissions, this obligation is not a matter of choice. Either significant developments warrant this revision or they do not. If they do, the revising party must then serve particulars of the variation proposed on the other

parties (rule 3.15A(3)) and submit them promptly to the court (rule 3.15A(4)). The court may approve, vary or disallow the proposed variations, or may list a further costs management hearing (rule 3.15A(5)).

44. The claimants cost budget as originally approved on 23 August 2023 was in the sum of £320,648.50, plus any applicable VAT. The application seeks an increase in that sum of £134,931.55, again plus any applicable VAT. In making the application to vary his costs budget, the claimant relies on five matters. I summarise these as follows:

(1) I was involved in a road accident after the close of evidence and before closing submissions in the trial. The latter were postponed by just under a week.

(2) The claimant's particulars of claim were amended during the trial and additional costs were incurred.

(3) The defendants made written submissions on 8 January 2024 (in accordance with directions given by me at the end of the trial), and additional costs were incurred by the claimant.

(4) There was an interval of some 5 1/2 months between the end of the closing submissions of the circulation of the draft judgment, and additional costs were incurred by the claimant once that draft judgment was circulated.

(5) Work on the judgment in the period 29 May 2024 to 14 June 2024 resulted in additional costs being incurred by the claimant.

45. The defendants oppose the application. They say that no formal application has been made, and no evidence has been served in support of it. The budget originally approved was for representation of the claimant at trial by solicitors and counsel. In the event, the claimant was represented by counsel alone. The defendants say that there have been no significant developments sufficient to justify an increase in the original cost budget (approved three months before trial) by approximately 40%.

46. As to item 1 (the accident) they say that this was not a significant development in the litigation. It did not lengthen the trial, and, although it may have led to my decision that written closing submission should be supplied, such written submissions would have been contemplated as a possibility at the time of the original budget.

47. As to item 2 (amendment to particulars of claim), the defendants say, first of all, that this was an application which failed. Secondly, they say that the facts and matters relied on in support of the application to amend did not arise after the approval of the costs budget, and could not therefore be a development in the litigation.

48. As to item 3 (the defendants' further submissions), these were caused by the claimant's amendment of his claim during his closing submissions. But there was no need for the claimant to respond to the defendants' submissions. In any event, this was not a significant development.

49. As the item 4 (draft judgment), the need for counsel to refresh his memory of the case by reason of a lapse of time between reservation of judgment and circulation of a draft arises often, and cannot be said to be a significant development in the litigation.

50. As the item 5 (consequential matters), this would have been in the contemplation of the parties at the time that the costs budgets were approved. The nature of the claim was known and the need for consequential matters to be dealt with was foreseeable. It is not therefore a significant development.

51. I am not concerned about the lack of a formal application. I am more troubled by the lack of any evidence to support the application. The scale and extent of the extra work said to have been caused by the developments is something which could well have been the subject of a short witness statement. In the event, in the present case it does not matter.

52. I accept that all of the five matters referred to by the claimant can be regarded as "developments" in the litigation. And I accept that all of them may have had an impact on the costs incurred by the parties. But some of them are matters which arise frequently in litigation, and can properly be regarded as within the contemplation of the parties at the time that costs budgets are being formulated. Costs budgets are not *limits* on costs being incurred. Assessment is a different process which takes place later. There is nothing to stop the claimant seeking to recover the extra costs to which he says he has been put when it comes to assessment.

53. More importantly, I do not regard any of these five matters as a "significant" development in the litigation which should justify a variation of the budget. The use of the word "significant" in the rule is deliberate. It is not every development that requires variation in the budget. Otherwise large amounts of pre-trial preparation time would be taken up with making applications for budget variations. Accordingly, I dismiss the application for a variation of the costs budget.

Payment on account of costs

54. I turn now to consider the question of a payment on account of costs liability. CPR rule 44.2(8) provides that:

> "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".

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."

55. The claimant seeks a payment on account of costs equivalent to 90% of his approved costs budget of £320,648.50. This is £288,583.65, plus applicable VAT. I imagine that this approach is based on the decision of Birss J (as he then was) in *Thomas Pink Ltd v Victoria's Secret Ltd* [2014] EWHC 3258 (Ch) to award that same proportion of budgeted costs as a payment on account under rule 44.2(8):

> "60. … It seems to me that the impact of costs budgeting on the determination of a sum for a payment on account of costs is very significant although I am not persuaded that it is so significant that I should simply award the budgeted sum. Bearing in mind that unless there is good reason to depart from the budget, the budget will not be departed from, but also taking into account the vagaries of litigation and things that might occur and the fact that it is, at least, possible that the assessed costs will be less, although no good reason why that is so has been advanced before me, I will make an award of 90% of the sum in the claimant's budget (£644,829.10) rounded up to the nearest thousand."

56. The defendants accept the principle of the payment on account, but submit that the appropriate basis for the payment should be 50% of budgeted costs. They do not explain how they arrive at that proportion. Nor do they deal with the points made in the *Thomas Pink* case by Birss J, including that a budget will not be departed from on assessment, save for good reason. In light of the fact that the bill to be assessed will probably exceed the budget, because of the matters referred to in the claimant's application to vary, I think that there is no need for me to discount the budget figure beyond that which Birss J did in that case. This is the likely level of recovery of costs, with a small buffer built in to take account of possible error. I therefore order a payment on account at the level of 90% of the budget. That is, £259,725.29, plus applicable VAT.

57. The defendants ask for three months within which to make the payment. The default position is 14 days: CPR rule 44.7. The defendants do not explain why they need so long. The point of the payment on account is to reduce so far as possible the amount of time that the receiving party is out of pocket for the amount of costs which it has had to spend and which are properly to be laid to the door of the paying party: see *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138, costs [8]. The claimant will already have costs obligations to satisfy. Some two months have already elapsed since judgment was handed down. Since the defendants have not given any information on their financial circumstances, I have no sound basis for departing from the policy of the rule, and making a different decision. I therefore order the payment to be made in 14 days.

Further points on the draft order

Account by the first and second defendants

58. The claimant in paragraph 11(3) of the revised draft order seeks an account by the first and second defendants of their dealings with the whole estate, and not simply that part given to the claimant. This was not sought by the particulars of claim. Prayer (2) claims "The accounts and inquiries mentioned in paragraph 20 above", and paragraph 20 pleads that "The Claimant claims that accounts be taken and inquiries made in relation to the assets mentioned in paragraph 19 above if necessary". The assets

mentioned in paragraph 19 are those claimed by the claimant by way of *donatio mortis causa*.

59. The claimant is not otherwise a beneficiary of the deceased's estate. Accordingly, provided that he obtains the assets declared to belong to him, I do not see what economic or legal interest the claimant has in the administration of the wider estate. In my judgment he is entitled to an account only in relation to the assets given to him. The inquiry sought by paragraph 11(4) of the revised draft order will, so far as it is proper to order it, be covered by the more limited inquiry ordered under paragraph 11(3).

Claim to interest on the sum of £650,000

60. To the extent that the claimant seeks interest on the sums in the various bank accounts (listed in Schedule 2 to the draft order), said to amount to more than £650,000, this cannot be justified (as originally it was) by reference to CPR rule 36.17(4)(a)), because no sum of money has been awarded by my judgment. Instead, the court will declare that the claimant is beneficially entitled to these accounts. The claim to interest is now put on the basis of the court's general jurisdiction. However, as it seems to me, the matter should be covered by the proposed inquiry under paragraph 11(3) of the revised draft order. Whatever interest has been earned on the accounts must be accounted for to the claimant.

Joint and several liability of the defendants

61. The claimants seeks a provision that the defendants be jointly and severally liable for any monies due under the order. The defendants say that this is unnecessary. It is not clear why the defendants say that. I do not think it can be because that would be the result anyway. Different defendants can be liable on different bases. The liability of the first and second defendants as personal representatives of the deceased for acts or omissions for which they are both liable would normally be normally joint and several. If an account is taken and any sums are found due from them in that capacity, they will owe those sums to the claimant jointly and severally, and the third and fourth defendants will not owe them at all. On the other hand, if a sum is due from all four defendants to the claimant, then *prima facie* it will be a joint and several liability.

62. Costs require to be mentioned separately. In *Horn v Knott* [2023] EWHC 1351 (Comm), Foxton J said:

> "26. … I accept that, in exercising its procedural costs jurisdiction, the court can have regard, in an appropriate case, to the fact that particular parties before it are litigating in the same economic interest and/or have instructed the same legal team, when determining what costs order to make. The court's costs jurisdiction permits a wide variety of factors to be taken into account. Parties who jointly instruct a solicitor are generally required to undertake joint responsibility for the solicitor's costs. Parties who act in litigation through one legal team will incur a single set of 'own party' costs, and their co-ordinated actions in the litigation will not generally increase the level of costs incurred by the opposing party (or parties) merely because that common position is taken on behalf of a group of instructing parties, rather than a single party. How far it is appropriate to make

> joint and several costs orders will depend on the circumstances of each particular case."

63. My conclusion on the facts, and for the purposes, of this case is that any sums ordered to be paid by all four defendants to the claimant are joint and several liabilities between all four of them, that any sums ordered to be paid by the first and second defendants to the claimant are joint and several liabilities between those two, and that orders for costs of the claim as a whole (as opposed to orders for costs of a particular inquiry) are joint and several liabilities between all four defendants.

Estate expenses and incidence of costs

64. The defendants accept that they cannot use assets given by the deceased to the claimant to pay sums or costs payable under the order to the claimant. But, since they are between them beneficially entitled to the remainder of the deceased's estate, and the claimant has no interest in that remainder, there is no reason why they cannot make use of that remainder for either purpose. However, the first and second defendants say that where they have properly incurred expenses or liabilities as personal representatives in relation to assets originally thought to form part of the estate, but now found to belong beneficially to the claimant, they are entitled to an indemnity out of those assets.

65. This appears to be the law in relation to a person who in good faith intermeddles in a trust, believing him- or herself to be a trustee. In *Travis v Illingworth* [1868] WN 206, Kindersley V-C held that trustees had not been validly appointed. However,

> "where trustees had been invalidly appointed, but had acted *bona fide* in the trusts, believing themselves to have been duly appointed, they were entitled to their costs, charges and expenses, as if their appointment had been valid".

66. The question is whether a similar result should obtain in relation to a person who is the personal representative of a deceased, and in good faith believes that the will extends to assets which in fact it does not. In both cases the intermeddler believes himself to be acting in a fiduciary capacity for the benefit of others. The difference is that, in the former case, the mistake is as to trusteeship, and the asset concerned is known to be a trust asset. In the latter, the mistake is not as to the existence of the fiduciary office, but instead to whether the particular asset forms part of the estate.

67. I am not here concerned with the case where A knows that he or she is a trustee of a trust, or the personal representative of an estate, and mistakenly believes that an asset belongs (at law) to the estate, whereas in fact it belongs (at law) to B. This case is one where A knows that he or she is the personal representative of an estate, and mistakenly believes that an asset belongs (beneficially) to the estate, whereas in fact it belongs at law to A but beneficially to B.

68. In effect, in such a case, A is holding the asset on trust for B. In my judgment the same rule applies as in *Travis v Illingworth*: the purported trustee/personal representative is in principle entitled to be indemnified out of the asset for expenses and liabilities (if any) properly incurred in relation to it. This is the analogue to the original, statutory, rule (now contained in the Trustee Act 2000, section 31) for

express trustees. I have not been asked to rule on specific expenses or liabilities, and I do not do so.

Conclusion

69. For the reasons given above, I decide:

(1) that the assets the subject of the *donationes mortis causa* do not include those in Schedule 3 to the draft order;

(2) that permission to appeal be given on grounds 2-5 and 8, on the conditions that (i) the payment on account which I will order be made by the due date, and (ii) in relation to ground 8 alone, that the defendants pay 50% of the claimant's costs of the appeal in any event;

(3) that the claimant should be entitled to his costs from the defendants, before 14 February 2023 on the standard basis (and the general rule), and after 13 February 2023 on the indemnity basis (under rule 36.17(4)), together with (ii) interest on those costs, at the rate of 3% on costs incurred before 14 February 2023 until the date of this order, and 8% thereafter until payment, and 6% on costs incurred after 13 February 2023 until the date of this order and 8% thereafter until payment;

(4) the claimant should also be entitled to the additional amount calculated in accordance with rule 36.17(4)(d)(ii);

(5) the application for a variation of the costs budget is dismissed;

(6) the defendants must pay £259,725.29, plus applicable VAT, on account of costs, within 14 days of today;

(7) the claimant is entitled to the inquiry sought by paragraph 11(3) of the revised draft order only in relation to the assets given to him, and is not entitled to any wider inquiry under paragraph 11(4);

(8) the claim to interest on the sum of £650,000 is dismissed, although whatever interest has been earned on the accounts must be accounted for to the claimant;

(9) the liabilities of the defendants will be joint and several between all four for sums awarded against all four, but joint and several between the first and second defendants where sums are awarded against them in their capacity as personal representatives;

(10) the first and second representatives are in principle entitled to be indemnified out of the assets given to the claimant for expenses and liabilities (if any) properly incurred in relation to them.

70. I should be grateful to receive a draft minute of order, preferably agreed between counsel, to give effect to this judgment for approval.