Brigette Ellen Frankgate (née Lenaghan) v Sandra Lenaghan (née Boucault)

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	07 August 2020
Neutral Citation:	[2020] JRC 158
Date:	07 August 2020
Court:	Royal Court

Text

[2020] JRC 158

ROYAL COURT

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between
Brigette Ellen Frankgate (née Lenaghan)
First Plaintiff
Susan Ann Lenaghan
Second Plaintiff
Jacqueline Patricia Weaver (née Lenaghan)
Third Plaintiff
and
Sandra Lenaghan (née Boucault)

Defendant

Advocate J. N. Heywood **for the Plaintiffs**.

Advocate A. P. Begg **for the Defendant**.

Authorities

In re Father Amy Estate [2000] Note 64b.

Costs.

CONTENTS

THE MASTER:

Introduction

1 This judgment contains my decision on costs in respect of a dispute in relation to the estate of the late Francis Patrick Lenaghan (“Mr Lenaghan”).

2 This judgment arises out of a settlement between the plaintiffs, who are the surviving siblings of Mr Lenaghan, and the defendant, who is Mr Lenaghan's widow. However, the defendant and Mr Lenaghan had been living apart for some years prior to the date of death. This gave a rise to a dispute between the plaintiffs and the defendant as to who was entitled to inherit Mr Lenaghan's estate.

3 Under the terms of a settlement reached between the parties in July this year, the parties agreed that the estate would be split into two equal shares between the plaintiffs on the one hand and the defendant on the other.

4 The agreement also contained other provisions about the distribution of the estate of Mr Lenaghan relating to the fact that he was one of the heirs (along with the plaintiffs) of a

sister (“Margaret”) who had predeceased him. The settlement therefore provided that Mr Lenaghan's interest in a property (the “Property”) which was part of Margaret's estate would be treated as forming part of the share to go to the plaintiffs. This released the defendant from having to be concerned with the sale of the Property. The agreement also provided for an interim distribution to be paid to the defendant.

5 In relation to costs the parties agreed that in default of agreement the incidence of the parties' costs and disbursements of the handling of this dispute and if necessary the basis of the assessment of such costs and disbursements was to be determined by me on the application of the parties.

Background

6 Mr Lenaghan sadly passed away on 18th May, 2017. In or around 31 st August, 2017, the defendant applied for the grant of letters of administration in respect of Mr Lenaghan's estate. The grant of administration was granted by the Probate Registrar but not released, pending the filing of an affidavit by the defendant about the nature of her separation from Mr Lenaghan. On becoming aware that the defendant had sought the letters of administration the plaintiffs applied for and placed a caveat on Mr Lenaghan's estate on 10 th September, 2017.

7 In October, 2017 the parties engaged in without prejudice save as to costs correspondence agreeing in principle that Mr Lenaghan's estate be split on a 50/50 basis with the defendant receiving a cash pay-out instead of any interest in the Property.

8 Correspondence continued dealing with ascertaining the assets and any liabilities of Mr Lenaghan's estate and that the defendant wanted to be paid her share sooner rather than later.

9 The plaintiffs also sought agreement that Voisin Executors Limited (Voisin) be appointed to administer Mr Lenaghan's estate because Voisin was already administering Margaret's estate.

10 This correspondence continued until 9 th April, 2018. From this date, no substantive correspondence was received from Advocate Begg for the defendant until April 2019. Various explanations were offered for the failure to reply during this time including absences on holiday and pressure due to other matters but the matter did not progress.

11 On 27 th March 2019, in an attempt to advance matters, Advocate Heywood, who by then had conduct of the case, sent an email providing alternatives as to how to move matters forward.

12 Advocate Begg responded on 11 th April, 2019, with a three page email with observations on a previous draft agreement but did not respond to Advocate Heywood's email of 27 th March, 2019.

13 After further chasing communications, a substantive response was sent by Advocate Begg on 29 th May, 2019. These comments lead to a revised draft being provided the next day by Advocate Heywood. However, despite further chasing emails from Advocate Heywood, nothing further was received from Advocate Begg after 30 th May, 2019. The lack of a response meant that the plaintiffs quite understandably lost patience and accordingly proceedings were issued on 20 th September, 2019, by direct service on the defendant.

14 It is right to record that Advocate Begg did email Voisin on 25 th July, 2019, to inform Voisin that Advocate Begg had a letter of consent to Voisin acting. That letter of consent to Voisin acting as administrator was only provided by Advocate Begg on 25 th September, 2019, i.e. after proceedings had been commenced, albeit the letter was dated 16 th July, 2019. It is not clear why the letter of consent was not provided to Voisin in July 2019.

15 After proceedings had been served two lengthy emails were sent by Advocate Begg on 25 th and 26 th September, 2019 to Advocate Heywood.

16 The only point of substance raised in these emails, apart from trying to persuade Advocate Heywood not to table the proceedings, was the amount of an interim payment the defendant was looking for. The plaintiffs not surprisingly wanted the proceedings tabled and then took the next step of filing particulars of claim on 16 th October, 2019.

17 A proposal about an interim payment was also sent by Advocate Heywood on 18 th October, 2019. Advocate Begg the same day agreed to take instructions and revert but did not do so, again despite being chased. The plaintiffs therefore applied for judgment in default of an answer (as the time limit to file the same had expired). Following this application, an answer was provided and filed on 29 th November, 2019.

18 In the continued absence of any response to Advocate Heywood's email of 18 th October, 2019, in December 2019 despite reminders including an email on 4 th December, 2019, referring to Advocate Begg's obligations under the Law Society code of conduct, the plaintiffs applied for a date for a directions hearing. That hearing took place on 13 th January, 2020. I recall at the hearing encouraging the parties in strong terms to conclude their without prejudice discussions. While further discussions took place in February 2020, due to a lack of progress, an application to amend the directions issued in January 2020 was made by the plaintiffs, which was listed for March 2020. That hearing however was adjourned partly to allow parties to progress and conclude the settlement and partly due to

the impact before coronavirus pandemic.

19 Ultimately, matters were resolved in early July 2020 leading to the present agreement.

Submissions

20 Advocate Heywood sought his clients' costs of the substantive proceedings including the pre-action correspondence from the defendant, because of the failure by the defendant to engage with the plaintiffs as summarised above. Advocate Heywood fairly made it clear that he could not say whether the delay was due to Advocate Begg or his client, but in either case he was critical of the defendant in not responding, in delaying for lengthy periods in responding (through Advocate Begg), for responding with irrelevant points and for advancing unsatisfactory excuses. The approach of the defendant through Advocate Begg neither sought to bring matters to a conclusion nor did it assist Voisin to progress matters. Ultimately, despite the plaintiffs' best efforts in making alternative suggestions to resolve the dispute there was no choice but to issue proceedings. Had the defendant engaged in negotiations promptly it was the plaintiffs' position that significant costs would not have been incurred. Advocate Heywood also argued that the conduct complained of justified indemnity costs.

21 Advocate Begg in his written submissions firstly contended that his client would have been successful at trial, because there was no evidence to justify desertion. He relied upon an affidavit sworn on 22 nd September 2017 by Karen Griffiths as evidence that the defendant had not deserted Mr Lenaghan. He also relied on an affidavit by the defendant sworn for the costs argument also denying desertion. He therefore contended that each party should bear their own costs.

22 In his oral submissions, Advocate Begg accepted that there had been some unjustified delays due to holidays and pressure of work, for which he apologised. He also explained there had been breakdowns in communications in part due to an incorrect email address being used. The email address he used for work was his secretary's e-mail address.

Decision

23 In relation to the approach that should be taken in relation to costs where there was a dispute about an estate, I drew the attention of the parties to the case of *In re Father Amy Estate* [2000] Note 64b which states as follows:-

> ***"The general principle was that in a dispute over a trust or an estate the court would attempt to ensure that the costs were borne by the trust or the estate as a whole pro rata by those interested in it."***

24 In this case, the parties had agreed that the estate would be divided between the plaintiffs on the one hand the defendant on the other. That was the extent of their interest in the estate.

25 In my judgment therefore the starting point following Amy is that the costs should be borne by the estate equally between the agreed interests of the plaintiffs and the defendant unless I made a different order. To be fair to both counsel they accepted this was the correct staring point.

26 Insofar as Advocate Begg contended that his client's position would always prevail, I am not able to reach such a conclusion. This is not a case where a claim would be struck out or summary judgment would be granted in favour of either party. It is a case that ultimately turns on evidence. The evidence relied upon by the defendant and Mrs Griffiths cannot be regarded as definitive without discovery, evidence from the plaintiffs' witnesses (including the plaintiffs themselves) and cross-examination. I am in no position on a costs application to reach any conclusion as to who might have prevailed if a trial had occurred based on two untested affidavits from one party only.

27 In any event it is generally not appropriate to use a costs hearing to determine who would have been successful where parties have reached a compromise but have left it to the court to determine the question of costs. There may be exceptions to that e.g. applications for injunctions where the court does express a view that a particular application was bound to fail. However, such a situation is very different in my judgment from expressing a view as to what would have happened had the matter proceeded to trial in order to decide costs.

28 In relation to whether I should depart from the general position in respect of costs for a disputed estate, up to the end of March 2018, there were negotiations between the parties which were progressing. In my judgment, having looked at the correspondence provided to me, there is no basis for this period to depart from the general position. Accordingly, the parties should recover their costs out of the estate up to 31 st March, 2018.

29 Thereafter, I accept the plaintiffs' submission that the plaintiffs incurred costs in chasing Advocate Begg and in commencing proceedings, because Advocate Begg wholly failed to engage from April 2018, apart from one substantive response, until after proceedings were commenced over a year later. Even then there were further unnecessary delays which justified the plaintiffs both taking further steps in the proceedings and chasing Advocate Begg. The delays and the excuses repeatedly advanced of being on holiday and pressure of work are simply not acceptable. Neither is blaming an email address when that address ends begg-law.com. This clearly appears to be a work email not a personal email address. However, I do not propose to express any further criticism beyond this because I consider that the entirety of Advocate Begg's file in this matter should be reviewed by the Law Society, to consider whether his conduct of this matter complies with the requirements set out in the Law Society Code of Conduct. I am therefore referring Advocate Begg's conduct to the Law Society.

30 What I do accept however is that some small amount of costs after April 2018 were justified in bringing the settlement agreement to a conclusion. Having looked at the correspondence and the issues raised compared with the original proposal in 2017, I will allow the defendant a further £3,000. These costs should be paid out of the estate. I will also allow the plaintiffs £5,000 also to be paid out of the estate generally. I regard these sums as proportionate figures for this dispute. As for the balance of the plaintiffs' costs I agree these were incurred for the sole reason of having to chase the defendant and either the defendant or Advocate Begg failing to respond. In my judgment, the balance of the plaintiffs' costs over the costs incurred up to the end of March 2018 and the additional sum of £5,000 I have allowed should therefore be paid out of the defendant's share of the estate. Finally, the defendant must bear the balance of her own costs.

31 In relation to the rate of costs recoverable, the costs that I have ordered that are payable out of the estate generally for both parties, as with trusts, is to be on the basis of the costs actually incurred. Having seen the bills and ledgers of both parties, I do not consider that it was unreasonable to have incurred those costs. For the balance of the plaintiffs' costs payable out of the defendant's share these are payable on the indemnity basis. This is the right basis as the failures by the defendant to respond were unacceptable and led to the issue of hostile proceedings.

32 I also accept the plaintiffs' submissions that these costs should include pre-action costs, not just costs since proceedings were commenced as Advocate Begg suggested. To adopt the latter approach would discourage parties from engaging in genuine discussions prior to proceedings if they could not recover such costs, should those discussions fail and proceedings have to be commenced.