Neutral Citation Number: [2024] EWHC 3048 (Ch)

Case No. PT-2023-000039

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: 27/11/2024

Before :

JOANNE WICKS KC

(sitting as a Deputy Judge of the High Court)

- -

Between :

JOHN DUNCAN GRIERSON

Claimant

- and -

ROBERT JAMES GRIERSON

Defendant

- -

- -

Constance McDonnell KC (instructed by **Stevens & Bolton LLP**) for the **Claimant**

The Defendant not appearing or being represented

- -

Approved Judgment

This judgment was handed down remotely at 10:30am on 27 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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JOANNE WICKS KC sitting as a Deputy Judge of the High Court:

1. On 20 November 2024 I handed down judgment in these proceedings. I determined that I should pronounce in solemn form for the 2020 Will, including clause 1 thereof; pronounce against the validity of the 2022 Will and declare that the Declaration of Trust is void. This is my judgment on costs and the form of the order. I adopt the abbreviations which I used in my judgment on the substantive issues.

2. Clause 1 of the 2020 Will appoints Robert and Mr Grierson as executors and trustees. Thus, as matters stand, Robert is the sole executor of his mother's estate. Had I found that clause 1 of the 2020 Will was to be omitted from probate, Duncan sought the appointment of a new professional administrator. Although my conclusion was that clause 1 should not be omitted, since the trial, by email of 6 November 2024, Robert has consented to the appointment of Freeths LLP (or, more properly, Freeths Trustees Limited) ("**Freeths**") as an independent administrator of Mrs Grierson's estate.

Form of Order

3. I have been provided with a form of proposed draft order by Counsel for Duncan. The recitals, and paragraphs 1-3 of the draft order, reflect my judgment and Robert's consent to the appointment of Freeths and I shall make an order in those terms.

4. Paragraphs 4, 5 and 6 of the draft order (which require the court to send the 2022 Will to Freeths, authorise Freeths to charge for the administration of the estate and vest all assets in the estate in Freeths) are necessarily consequent on the appointment of Freeths as administrator and should be included in the order. I take the view that Robert has effectively consented to their inclusion. However, paragraphs 7, 8 and 9 of the draft order seek to impose additional obligations on Robert (including an obligation to give possession of the Property to Freeths) to which he has not been asked to consent and has not consented. These orders do not follow from the substantive judgment I have given and in the circumstances it would not be right for me to include them in any order.

Costs

5. It is clearly right in principle that Robert should pay Duncan's costs of the proceedings. Duncan is the successful party on all of the key issues. His failure to establish that clause 1 of the 2020 Will should be omitted from probate does not fundamentally detract from that success and there are no reasons to depart from the general rule in CPR 44.2(2)(a). In particular, the two common law exceptions to the usual rule as to liability for costs discussed in *Leonard v Leonard* (costs) [2024] EWHC 979 (Ch) at [13] have no part to play in this case.

6. I have taken into account in my consideration Duncan's cancellation of a mediation which was planned for November 2023. The grounds on which he did so (as reflected in a letter dated 5 October 2023) were that Robert had not made his position on the Declaration of Trust clear and that Robert had not agreed to pay the costs of the proceedings relating to the Declaration of Trust. I am not convinced that those were strong grounds for Duncan's refusal to mediate, as opposed to being matters which an experienced mediator could have helped to resolve. Nevertheless, in all the circumstances, I do not consider the refusal to mediate warrants penalising Duncan in costs.

7. Duncan contends that he has beaten a Part 36 offer he made on 12 March 2024 and that the consequences prescribed by CPR 36.17(4) should follow. The terms of the offer were:-

> "1. The 2020 Will be admitted to probate as being the Deceased's last valid will;
>
> 2. The 2020 Will shall be deemed varied as follows:
>
> a) the Defendant is replaced as executor of the 2020 Will and replaced by an independent administrator (to be agreed by the parties or appointed by the Court in default of agreement).
>
> b) the Defendant shall receive an additional pecuniary legacy of £20,000;
>
> and
>
> 3. The Deceased's estate will be administered on the basis that the Defendant has no proprietary or other equitable interest (including but not limited to a right to reside) in [the Property]."

The "relevant period" for the purposes of CPR Part 36 expired on 2 April 2024.

8. CPR 36.17(4) applies where, upon judgment being entered:

> "judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer." (CPR 36.17(1)(b))

9. In *Lamport v Jones* [2023] EWHC 667 (Ch), Mellor J gave some guidance as to how claims which are not "money claims" within the meaning of CPR 36.17(2) should be assessed for the purposes of CPR 36.17:

> "78. For money claims, with the words 'however small', CPR 36.17(2) specifies a bright line test to ascertain whether a defendant's Part 36 offer was more advantageous than the judgment obtained. Where (as here), the claim in question is a non-money claim, a comparison between the offer and the judgment still has to be undertaken. That comparison, as the Claimants submitted, was described by Hildyard J. in *Re Lehman Brothers International* [2022] EWHC 3366 (Ch) at [21] in the following terms:
>
> '…the comparison required can reasonably be undertaken by identifying whether the relief obtained in the proceedings was in broad terms more advantageous to the claimant than its offer.'
>
> 79. To similar effect, Hildyard J. also cited with approval from *Carver v BAA Plc* [2008] EWCA Civ 412, to the effect that the

> test must be more ' *open-textured'* and it *'permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight'.* I note that *Carver* is no longer good law in relation to the application of CRP 36.17 in money claims (because CPR 36.17 was amended in 2014 to provide the specific definition in CPR 36.17(2)), but Mr Nicholls submitted that there was no good reason why the observations of the Court of Appeal should not apply to non-money claims (as occurred in *Lehman*). In any event, I note these observations are in accordance with the approach approved in *Webb*, see below and in particular [13c)] in *Smith.*
>
> 80. The jurisdiction to make the orders provided for by CPR 36.17(4) arises provided the judgment against the defendant is '*at least as advantageous* ' to the claimant as the proposals in the claimant's Part 36 offer, and the court must make the orders provided for by CPR 26.17(4) ' *unless it considers it unjust to do so'* …"

10. In my judgment, taking the approach discussed in *Lamport v Jones*, the judgment given following the trial is "at least as advantageous" to Duncan as the proposals contained in his Part 36 offer. It is true that the terms of the offer included the replacement of Robert as executor by an independent administrator, which is something of importance to Duncan which he did not achieve from the judgment (only by consent). However, to offset that, the offer included an additional pecuniary legacy to Robert of £20,000. If Robert had accepted that offer, Duncan would have been financially worse off than he is under the terms of the judgment. Taken in the round, it seems to me that the judgment is at least as advantageous to Duncan as the terms he offered Robert. Robert should have accepted the offer rather than requiring this matter to be taken to trial and his failure to do so has led to substantial costs being incurred.

11. Since CPR 17(1)(b) applies, I must apply CPR 36.17(4). This provides:

> "(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— …
>
> Up to £500,000 10% of the amount awarded…"

12. I have considered whether it would be unjust to apply CPR 17.4, taking into account the factors in CPR 36.17(5), and have concluded that it would not be unjust to do so. Consequently, I will order that Duncan is entitled to:

    i) costs on the indemnity basis from 2 April 2024;

    ii) interest on those costs at the rate of 10% above base rate; and

    iii) an additional sum, being 10% of the amount awarded to Duncan in respect of costs.

13. Duncan further contends that the costs prior to 2 April 2024 should be assessed on the indemnity basis. It is submitted that this case is "taken out of the norm" (*Excelsior Commercial & Industrial Holdings Ltd v Salisbury Homer Aspden & Johnson (Costs)* [2002] EWCA Civ 879), firstly by the fact that (as he submits) Robert was from the start putting forward what he knew to be a false case and secondly by his conduct of these proceedings. Reliance is placed on the case of *Franks v Sinclair (Costs)* [2006] EWHC 3656 (Ch), in which indemnity costs were awarded against a solicitor, who had propounded a will made by his mother despite knowing that she did not know and approve of its contents. It is right to note, however, that the decision in *Franks v Sinclair* was also based on the fact that the solicitor had refused two reasonable offers of settlement which, it was held, would have been enough in itself to warrant making an order for assessment on the indemnity basis.

14. It does seem to me that for the following reasons this case is sufficiently out of the norm – i.e. outside the ordinary and reasonable conduct of proceedings (*Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 at [25]) – to justify an award of costs on the indemnity basis.

15. First, Robert had been informed well before the proceedings were commenced that the attesting witnesses' evidence would be that they were not both present at the same time. Whether or not he had appreciated this was necessary at the time he arranged for execution of the 2022 Will, he certainly appreciated it following receipt of Duncan's solicitors' letter of 22 June 2022. He should then have recognised that there was no reasonable prospect of establishing the formal validity of the 2022 Will. Instead, however, he responded with an unreasonable and wholly unwarranted allegation of professional misconduct against Duncan's solicitors, alleging in his letter of 9 December 2022 that:

> "The statement which you have procured from Andrew Clarke dated 7th June 2022…was no doubt made by Andrew Clarke under duress under the influence of your *gravitas* as solicitors and is simply not true…" (emphasis in original)

16. Secondly, as I found at paragraph 70(3) of my substantive judgment, Robert was well aware of the need for independent advice and an independent assessment of Mrs Grierson's capacity. His failure to ensure that those steps were taken before she made a will very substantially in his favour is particularly striking. Putting to one side the issues with due execution, it may be going too far to say in this case that Robert knew that he was propounding an invalid will, but he must always have appreciated that the prospects of establishing the 2022 Will's substantial validity were not good. As Richards J said in *Franks v Sinclair*, it is not necessary always to show deliberate misconduct to justify an award of indemnity costs; it may be that unreasonable conduct to a high degree will suffice. That may include bringing a speculative, weak, opportunistic or thin case: *Burgess v Lejonvarn* [2020] EWCA Civ 114, [2020] 4 WLR 43 at [44]-[45].

17. Thirdly, Robert conducted these proceedings in a way which was likely to drive up costs. An obvious example was his failure to carry through the concession made in correspondence about the invalidity of the Declaration of Trust into his pleaded case, as referred to at paragraphs 31-33 of my substantive judgment.

18. I have also been referred to offers which Duncan made and Robert failed to accept: a "without prejudice save as to costs" offer dated 29 September 2022 and an open offer of 4 December 2023. However, I do not place much if, any weight, on this factor, given Duncan's cancellation of the mediation referred to above. In the circumstances both parties must bear a share of responsibility for this matter not having settled prior to Duncan's Part 36 offer.

Payment on account

19. Duncan asks for a payment on account of his costs, pending a detailed assessment, in the amount of 90% of his incurred costs.

20. In this case, the approved costs budget is less of a useful guide to the outcome of a detailed assessment than in the usual run of cases, because the fact that the claim became undefended and the trial time was substantially reduced has meant that Duncan's incurred costs other than those governed by existing costs orders (approximately £200,000) are substantially lower than those budgeted (totalling £356,131).

21. Even with costs ordered on the indemnity basis, it will remain open to Robert to challenge the amount of Duncan's incurred costs on the grounds of reasonableness. In the circumstances it seems to me that an appropriate payment on account would be £160,000 plus VAT, approximately 80% of Duncan's incurred costs.