Neutral Citation Number: [2020] EWHC 2205 (Ch)

Case No: PT-2018-000846

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 10 August 2020

Before :

MASTER TEVERSON

- -

Between :

WINSTON NEVILLE WRANGLE	**Claimant**
- and -	
(1) MARLENE ALICIA BRUNT	**Defendants**
(2) DALE COLIN CHARLES BRUNT	

- -
- -

Duncan Macpherson (instructed by **Sillet Webb Solicitors**) for the **Claimant**
Sophia Rogers (instructed by **Birkett Long Solicitors LLP**) for the **Defendants**

Hearing date: 15 July 2020

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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.
Covid-19 Protocol: This Judgment was handed down remotely by the Master by circulation to the parties' representatives. The date and time for hand-down is deemed to be Monday 10 August 2020 at 10.30am.

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MASTER TEVERSON

MASTER TEVERSON:

1. On 6 July 2020, I handed down my reserved judgment following the trial of a probate claim before me in March. On 15 July, I heard submissions on costs and consequential matters. I reserved my judgment on costs in order to take time to consider counsels' written and oral submissions and in view of the wide divergence of approach between the parties' positions.

2. The Claimant, as the successful party, seeks an order that his costs be paid by the Defendants personally and on the indemnity basis. The Defendants say that the parties' costs should be paid out of the estate pursuant to the first exception to the general rule as to costs in probate claim: that where the litigation has been caused by the conduct of the testator, the costs of both parties will be ordered to be paid out of the estate. In the alternative, the Defendants say that in any event they should not be condemned in costs pursuant to the second exception to the general rule as to costs in probate claims: that where the circumstances afford a reasonable ground for investigation, an unsuccessful Defendant will not be condemned in costs.

3. Costs in probate claims are at the discretion of the court. The general rule in probate claims, as in other types of claim, is that costs follow the event. The court may however make a different order: CPR 44.2(2) (a) and (b). In probate claims there are broadly two types of situation in which the court may depart from the general rule. These exceptions to the general rule were stated by Sir Gorrell Barnes P in *Spiers v English* [1907] P 122 at 123:-

   "In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made, the Court has to consider whether the facts warrant either of those principles being brought into operation."

4. In *Kostic v Chaplin* [2007] EWHC 2909 (Ch), [2008] 2 Costs L.R. 271, Henderson J. (as he then was) confirmed that these two exceptions had survived the introduction of the Civil Procedure Rules and should in probate claims continue to guide the Court as to whether to make a different order under CPR 44.2(2)(b). In paragraph 6, Henderson J. said a positive case needed to be made out in order to depart from the general rule. He said the exceptions were neither exhaustive nor rigidly prescriptive. He said, they were guidelines, not straitjackets, and their application would depend upon the particular facts of the case.

5. On behalf of the Claimant it was submitted that looking at the larger picture, as it was put, there was no scope for either of these exceptions to apply. Reliance was in particular placed on the findings made by me in paragraphs 123, 125 and 126 of my judgment. In paragraph 123, I found that the First Defendant, Marlene, had been told by Howard Day in March 1999 that Dean was making a will although not what was in

it. In paragraph 125, I found that Marlene concealed from the family, apart from Dale, that Dean's estate was being administered under intestacy. In paragraph 126, I said "the most likely explanation" for the will not being provided to Maddersons, the Solicitors instructed to administer Dean's estate, was that Valerie had provided her copy to Marlene who took the view that it was not Dean's will but a will done by Howard Day and chose not to reveal it.

6. The finding in paragraph 123 is based on Howard Day's typed attendance note dated 2 March 1999. The finding in paragraph 125 is based on the Claimant and Venetia's evidence that they were not made aware by Marlene until at least the Spring of 2016 that Dean's estate was being administered on the basis of intestacy.

7. Paragraph 126 is not a finding of primary fact. It is an inference. It is for that reason I used the phrase "the most likely explanation". It is not a sufficient basis on which to support a finding that the Defendants have run a dishonest defence. When the will was first produced, Birkett Long LLP said in their letter dated 28 September 2018, their clients' main concern was that the will was not created in 1999. This was by reference to its contents. The suggestion that the will did not come into existence until after Dean's death was based on signature comparison by the Defendants' expert Ms Ellen Radley with Howard Day's range of signatures in comparison with his signature on the First Will.

8. In fairness to the Defendants, I should record their evidence at trial was that no one produced a will following Dean's death and that if Valerie had one in her possession, she would have produced it. The inference drawn at paragraph 126 involves a rejection of that evidence. It accepts however that the First Defendant genuinely took the view that it was not Dean's will but a will done by Howard Day.

9. The inference drawn at paragraph 126 is based on the evidence that Valerie had a copy of Dean's will (as itself evidenced by the purple folder) and told the Claimant about their legacy under Dean's will in August 2008. It explains why otherwise Valerie did not provide the will to Maddersons.

10. The inference formed the basis for a submission on behalf of the Claimant that the Defendants caused the litigation because they both knew that by February 2008 there was a document purporting to be a copy of Dean's will. It was submitted they should have discussed with Valerie and the Claimant their concerns about the authenticity of the will in 2008.

11. In my judgment, the inference at paragraph 126 should not lead me to treat the Defendants as the cause of this litigation.

12. The first exception applies where it is the testator's conduct which has been the cause of the litigation. This does not have to involve blame or moral fault or culpability on the part of the testator. In my judgment, in the highly unusual facts of the present case, the conduct of Howard Day should be treated as part of, or an extension of, the testator's conduct. According to Howard Day's attendance note, Dean was adamant that he [Howard Day] sign the will "as the family would argue if he signed it". The fact that the will was not signed by Dean but by Howard Day on his behalf was of itself bound to be a source of family argument and suspicion. Both Howard Day and Dean through proceeding in this way caused the litigation.

13. By the time of Dean's death, it was known to the Defendants that Howard Day had been convicted and sent to prison for participating in a fraudulent and dishonest scheme involving a Mr Fayers. The Defendants had reasonable grounds for doubting the validity of the will.

14. It was argued on behalf of the Claimant that had the matter been investigated soon after Dean's death, the matter would have been a great deal more straightforward as the key witnesses including John Thorpe and Howard Day would still have been alive. This places all the blame for the will not being produced at the time on the Defendants. There is no explanation as to why Howard Day did not come forward with the will earlier. He knew he held the originals. In any event, a contested probate claim was bound to follow.

15. In my view Howard Day acting on behalf of Dean in relation to the preparing and signing of the will was the cause of this litigation. Howard Day ought to have insisted that Dean sign his own will. He ought to have ensured that it was recorded on the face of the will it was signed by him at Dean's direction. The only fair outcome is that all parties' costs come out of the estate. In very many cases, where there has been an unsuccessful allegation of fraud, costs will follow the event. In the present case, whose facts are truly exceptional, I regard the allegation of forgery as one made on sufficient grounds. It was supported by the expert evidence before the court. The Second Will was only produced a month before the trial. Ultimately, the decision at trial turned on my acceptance of the oral evidence given to the Court on behalf of the Claimant.

16. My criticisms of the Defendants' conduct in my judgment related primarily to the manner in which they administered the estate and chose to conceal the Deed of Variation. I accept that they genuinely believe that Dean died intestate. I am aware that the first exception falls to be applied narrowly and only after careful scrutiny. In my view, it is just in the highly unusual circumstances of this probate revocation claim that their costs as well as those of the Claimant should come out of the estate.

17. This judgment will be handed down after my return from leave, at 10.30am on 10 August 2020 without attendances required.