Neutral Citation Number: [2022] EWHC 2293 (Ch)

Case No: PT-2022-000029

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: 4/10/2022

Before:

MASTER CLARK

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Between:

CLARE ALISON LAIRD
(as executor and trustee of the estate of Robert John Simcock) **Claimant**

- and –

(1) CATHERINE ANNE LOWDER SIMCOCK
(as executor, trustee and beneficiary of the estate of Robert John Simcock)
(2) CHARLOTTE REBECCA SIMCOCK
(3) ELIZABETH JUNE SIMCOCK
(4) GEMMA LOUISE SIMCOCK **Defendants**

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Paul Burton (instructed by **Shakespeare Martineau LLP**) for the **Claimant**
Michael O'Sullivan (instructed by **RWK Goodman**) for the **First Defendant**
Rupert Coe (instructed by **Blythe Liggins LLP**) for the **Second, Third and Fourth Defendants**

Hearing date: 18 August 2022

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Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 4 October 2022, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

Introduction

1. This is my judgment on the costs of this claim to rectify a deed of appointment dated 31 December 2019 ("the Deed"), following my judgment on 27 July 2022, in which I dismissed the claim: [2022] EWHC 1865 (Ch) ("the main judgment").

Parties' positions

Claimant

2. The claimant's position is that I should make no order as to costs. She seeks an order that she is to be indemnified by the estate in respect of her costs, and is neutral as to whether an order should be made for the defendants' costs to be paid out of the estate.

First Defendant (Catherine)

3. Catherine seeks an order that the claimant pay her costs of the claim, and that the claimant is not entitled to be indemnified by the estate in respect of her own costs or any costs paid to the defendants. In the alternative, if the claimant is not ordered to pay her costs, Catherine seeks an order that her costs are payable out of the estate.

Second to Fourth Defendants (the daughters)

4. The daughters' position is that the claimant should pay the defendants' costs of the claim, and not be indemnified by the estate. If the claimant is not ordered to pay Catherine's costs, then the daughters say that Catherine should bear her own costs and they should not be paid out of the estate.

Legal principles

Liability for costs

5. The legal principles are well established, and were largely common ground.

6. Section 51 of the Senior Courts Act 1981 provides in part that, subject to rules of court, the costs of and incidental to all proceedings in the High Court are in the discretion of the court, and that the court has full power to determine by whom and to what extent the costs are to be paid.

7. CPR rule 44.2(1) provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Rule 44.2(2) provides if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. This general rule has no obvious application in this case, where the claim was unopposed but unsuccessful – there is no party who could aptly be described as the successful party.

8. In any event, the general rule is subject to the special rules applicable to trusts and estate litigation. The general position in relation to reimbursement of a trustee from the trust fund is now to be found in section 31(1) of the Trustee Act 2000 . It provides as follows:

> "(1) A trustee-
> (a) is entitled to be reimbursed from the trust funds, or
> (b) may pay out of the trust funds,

expenses properly incurred by him when acting on behalf of the trust."

9. The effect of s.31(1) is to codify the law as it then stood: *Price v Saundry* [2019] EWCA Civ 2261 at [22].

10. In relation to the costs of proceedings in which a trustee is or has been involved, there are specific provisions in the CPR. Rule 46.3 provides, so far as relevant:

> "(1) This rule applies where –
>
> (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
>
> …
>
> (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.
>
> (3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis."

11. This is supplemented by para 1 of the Practice Direction to Part 46, which provides:

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

12. The source of the right to an indemnity is s.31(1) of the Trustee Act 2000, and the provisions of the CPR are only a commentary on and complementary to that section: *Price v Saundry* at [22].

13. As explained by Asplin LJ in *Price v Saundry* (at [24]), the test for whether the indemnity is available or has been lost or curtailed is best expressed in the form of two questions:
    (1) were the expenses properly incurred?
    (2) were the expenses incurred by the trustee when acting on behalf of the trust?

The answer to these questions depends upon all the circumstances of the case.

14. "Properly incurred" means "not improperly incurred": *Price v Saundry* at [24], citing *Easton v Landor* (1892) 62 L.J. Ch 164 and in *In re Beddoe, Downes v Cottam* (1893) 1 Ch 547. This means that if there is any doubt as to whether the costs were properly incurred, the trustee has the benefit of the doubt: *Easton v Landor* at 165, where Lindley LJ (with whom Bowen and Smith LJJ concurred) stated that that: "The rule is that where a trustee has by his misconduct occasioned a suit, and costs are incurred, the costs are in the discretion of the court."

15. Misconduct is to be widely construed and may include neglect, negligence or carelessness, or even conduct which is unreasonable in the circumstances. While the mere fact that the trustee has made a mistake is not enough, it is equally clear that dishonesty is not necessary. See *Lewin on Trusts* (20th edn) at para 48-006.

16. Also relevant to this claim is the summary of the law found in para 48-038 of *Lewin on Trusts* (20th edn):

> "**Whether poor drafting has an effect on trustee's costs**
> 48-038
> Poor drafting by the settlor or testator or his professional advisers will not in itself affect the trustee's entitlement to costs, though where it is the professional advisers who are at fault, the trustees may have a claim against the professional advisers, at any rate in the case of a testamentary trust, and in exceptional circumstances, if the liability is clear and the trust fund is small, the court may consider making a third party costs order against the advisers' insurers. We do not consider that the fact that an instrument construed by the court on the application of a trustee was a document prepared and executed by the trustee in itself has an effect on costs, even if the court considers, with the benefit of hindsight, that if greater care had been taken in preparing the instrument, the need for an application to the court might have been avoided. There may, however, be cases where the drafting of the instrument prepared by the trustee is so crass or inept, or ambiguities so obvious, that the court may take the view that the trustee should not be allowed costs of making an application to the court which would have been unnecessary but for the trustee's culpable neglect in failing to detect glaring mistakes in drafting which occasioned the application, particularly if the trustee fails to offer any explanation to the court for his poor drafting. Whether or not the trustee personally is at fault, the trustee should consider whether the trustee has a professional negligence claim against the drafter of a poorly-drawn instrument prepared for the trustee, so that ultimately costs might be borne by the drafter's insurers rather than by the trust fund or the trustee personally, with the possibility of a direct third-party costs order against the insurers in exceptional circumstances."

17. Reference is made in the above passage to the costs decision in *Marley v Rawlings (No.2)* [2014] UKSC 51, [2015] A.C. 157. In that case, a husband and wife had drafted wills in identical terms. Each spouse left his or her estate to the other and, if the other had already died, to the claimant who was the residual beneficiary. When a solicitor visited the couple for the purpose of executing their wills, he accidently presented them with, and each signed, the will intended for the other. The claimant was ultimately

successful in the Supreme Court in establishing the validity of the wills against the defendant intestacy beneficiaries.

18. Having accepted in principle that the right order for costs was that the parties' costs be paid out of the estate, the Supreme Court took the "pragmatic decision" to order the solicitors' insurers to pay their costs. Lord Neuberger made several points as to this:
    (1) the insurers had required the claimant to bring the claim by way of mitigation;
    (2) the solicitor had no defence whatsoever to a damages claim by the claimant;
    (3) the claimant would therefore be able to recover from the solicitor any costs ordered to come out of the estate;
    (4) the solicitor would be indemnified against that claim by their insurers.

19. In this case, the defendants are not submitting that I order the claimant's firm or their insurers to pay the costs of the claim. They rely on the fact that in *Marley* the court reached, for the purposes of its decision as to costs, a conclusion as to the negligence of the solicitor without a formal claim having been made against him.

Analysis and conclusions as to liability for costs

20. I turn therefore to consider the application of the above principles to the facts as found by me in the main judgment.

21. In my judgment, the claimant's signing of the Deed in the circumstances set out in the main judgment showed a sufficiently high level of carelessness to justify depriving her of her indemnity as to costs, and, additionally, to order her to pay the defendants' costs. The relevant aspects of those circumstances are that when executing the Deed, she did so lacking any knowledge of the provisions of the Will, the nature of the estate, what assets were being appointed by the Deed, or what was intended to be achieved by it. Indeed, as I stated in para 51 of the main judgment, if she had known what Mr Sharp was apparently intending to achieve by the Deed, it is difficult to see how, having read it, she could have signed it.

22. I also consider that the claimant's conduct after the Deed was executed is to be criticised. Thus, in his letter of 21 July 2020 and email of 4 May 2020, Mr Sharp (on her behalf) stated that the effect of the Deed was to convert the discretionary trust (of the residuary estate) into a life interest trust for Catherine, without any acknowledgement that this did not reflect what was stated in his letter dated 20 December 2019 to Catherine.

23. This position was confirmed when Andrew Wilkinson of Shakespeare Martineau replied (also on the claimant's behalf) on 7 August 2020 to the daughters' solicitors' question: "Why was the discretionary trust appointed out to the life interest trust?" first by confirming that the Deed had that effect, and secondly by stating that both the claimant and Catherine were in agreement with the appointment out. It was not until 24 May 2021, following extensive correspondence with the daughters' solicitors that Mr Wilkinson accepted on behalf of the claimant that there had been a drafting error in the Deed. It was only at that stage that Catherine, who had previously refused to revoke the Deed, agreed that it should be rectified.

24. There was therefore a period of nearly 17 months (until 24 May 2021) during which the claimant did not accept that there was any issue to be put before the court.

25. As noted in the main judgment, the initial evidence in support of the claim did not include any evidence from the claimant or Catherine. That evidence was only filed later when the daughters' solicitors challenged its omission in Elizabeth's witness statement of 10 February 2022.

26. Also, as noted in the main judgment, the claimant's initial witness statement dated 22 February 2022 said that her intention in executing the Deed was that it should only appoint the tax-bearing assets onto the life interest trust. This was inconsistent with her evidence in her second witness statement, which makes it clear that she lacked the knowledge to form any relevant intention.

27. Finally, I note that in correspondence the claimant's firm agreed, on the date when they accepted an error had been made by Mr Sharp, to pay the defendants' costs of the claim if unopposed, and this offer was repeatedly made in further correspondence: see their letters dated 24 May 2021, 12 August 2021,17 September 2021. In particular, on 28 January 2022, the daughters' solicitors wrote to the claimant's solicitors saying that they were considering joining that firm and/or their insurers to the claim, to which the response was:

> "Claire Laird is covered by this firm's insurance in respect of the litigation. As we have confirmed previously, we will cover the reasonable costs of the litigation. A breakdown of those costs will be required in order to ensure that no unrelated costs are being charged. Any other claims for costs can and should be dealt with separately.
> …
> I would suggest that the order is made on the basis of no order as to costs, and confirmation can be included in the order that Clare is not entitled to look to the estate for her costs of the application, on the basis that Shakespeare Martineau will cover those costs. …
> In the light of the above, there is simply no need for Shakespeare Martineau to be added as a party to the proceedings."

28. This was confirmed by the claimant's solicitors in their email of 5 August 2022. Indeed, the first occasion on which it was proposed that the claimant be indemnified by the estate was in her counsel's skeleton argument filed for the hearing.

29. The claimant's counsel put forward a number of arguments in support of his submission that the claimant should be indemnified by the estate, and not ordered to pay the defendants' costs.

30. First, he submitted that the issue having arisen, the only reasonable and proper course was for the claimant to put the issue before the court. I agree that the claimant needed to put the matter before the court. However, in my judgment, it was her failure set out above (together with Mr Sharp's failure to draft the Deed in accordance with his letter dated 20 December 2019) that caused the need to make the application. The claim would have been unnecessary, and the costs of it would not have been incurred, without those failures.

31. Secondly, the claimant's counsel submitted that the effect of my decision is that the Deed did not fail correctly to record the trustees' intentions, and therefore accorded with those intentions. It cannot therefore be said, he submitted, that there was any wrongdoing or negligence on the part of the claimant. The execution of the Deed was, he said, well within the powers and discretion of the trustees, and cannot impugned as being ultra vires or for an improper purpose.

32. I reject that analysis. I found that the claimant had no relevant intention when executing the Deed. In the absence of any evidence, let alone convincing evidence that she had any relevant intention, then the Deed itself stood as the only manifestation of the trustees' intentions. That is not the equivalent of a positive finding that the trustees' subjective intention was that expressed in the Deed.

33. Thirdly, the claimant's counsel submitted that the court was not in a position to make findings of improper conduct following a disposal hearing in an unopposed claim. No facts, he said, were put in issue between the parties or dealt with by the court which established any grounds that established any grounds to remove her as trustee. The court did not, he said, make a finding that the claimant acted improperly, and it was too late to do so now.

34. I also reject this analysis. In order to determine the rectification claim, it was necessary to make findings about the events leading up to and including the execution of the Deed. That determination did not require any evaluations to be made from those facts as to the propriety of the claimant's conduct. However, the court is then entitled to take those facts into account when deciding what costs order should be made: see *Marley*. The fact that the claim was unopposed is immaterial. The court still made findings of fact on the evidence available to it. I reject the argument that in order to determine the appropriate costs order, the allegations relied upon must be pleaded and formally proved. The claimant's counsel did not refer me to an authority to this effect, or in which this had been done. The court's determination as to costs is not to be conducted as a trial within a trial.

Scope of the costs order

Legal principles

35. The principles governing the scope of the costs order are as follows. My jurisdiction as to costs is limited to the costs of and incidental to the claim. Although in *Marley* the Court made an order reflecting the fault of the solicitor, its order was confined to the costs of the claim. To that extent, I accept the claimant's submission that the relevant costs are the costs of the litigation.

36. Those costs are not however confined to those incurred after the issue of the claim. The following propositions can be derived from *Re Gibson's Settlement Trusts* [1981] Ch 179:
    (1) Costs which would otherwise be recoverable are not disallowed only because they were brought before the claim was issued: p184E;
    (2) However reasonably incurred, costs which are neither costs "of" the proceedings nor costs "incidental to" them cannot be awarded under an order for costs: p186A-B;
    (3) It is important therefore to identify the proceedings. This involves not only taking the correct stage of the proceedings, but also determining the nature of

those proceedings. Only when it is seen what is being claimed can it be seen what the proceedings are to which the costs relate: p186A-B;

(4) If the proceedings are framed narrowly, then antecedent disputes which bear no real relation to the subject of the litigation are not to be regarded as being part of the costs of the proceedings: p187G;

(5) If, however, these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then these costs are to be included in those costs "reasonably incurred:" p187G.

37. It will be apparent from the above that whether costs form part of the costs reasonably incurred is a question of fact and degree.

Analysis and conclusions as to scope of the costs order

38. Catherine's counsel submitted that the recoverable costs extended to the costs of the preparation and execution of the Deed itself. I reject that submission. Those costs are not referable to any dispute between the parties, and are plainly for non-contentious work. Insofar as Mr Sharp was negligent in the preparation of the Deed, and the claimant negligent in executing it in the circumstances set out in the main judgment, then that may found a damages claim, in which the costs of the preparation and execution of the Deed may be recoverable. Those costs are not however, in my judgment, costs of this claim.

39. I turn to consider the correspondence following the execution of the Deed, commencing, in the case of the daughters, with their solicitors' letter dated 7 July 2020, and, in the case of Catherine, with her solicitors' letter dated 5 June 2020. Not all of this correspondence relates to the Deed. It concerns a number of other matters relating to the estate and the Trust. However, insofar as it does concern the Deed, it arises directly from the fact that the Deed did not reflect the advice given in Mr Sharp's letter dated 20 December 2019 to Catherine and his emails to Elizabeth between 26 and 31 December 2019. This was the fact which ultimately gave rise to and indeed formed the factual basis of the rectification claim.

40. The queries raised (by all the defendants) in respect of the Deed, and the challenges (by the daughters) made to it in correspondence are in my judgment "in some degree relevant" to the claim as ultimately made. They bore a relation to the subject matter of the claim. Furthermore, it was in my judgment reasonable to conclude that the issues arising from the effect of the Deed (and its inconsistency with Mr Sharp's advice) would need in some way to be brought before the court.

41. That is not of course to say that all of the costs of this correspondence is recoverable, only that part of the correspondence which relates to the effect of that part of the Deed which gave rise to the rectification claim.

42. In addition, Catherine's counsel submitted that Mr Sharp's and the claimant's negligent failures in respect of the Deed caused the breakdown of Catherine's relationship with the daughters, triggering the daughters' application to remove Catherine as executor and trustee (and presumably her application to remove Elizabeth and Charlotte as trustees). This, he submitted, justified Catherine recovering the costs of all her solicitors' correspondence from 1 January 2020 to date, including costs referable to the

two removal applications. The total claimed is the sum of £156,024.64. I also reject that submission. On the available evidence, there were numerous factors which gave rise to the breakdown, including but not limited to the overall liquidity of the estate, and the temperaments of the various immediate and extended family members. The breakdown of the relationship and the consequences of it are not in my judgment sufficiently relevant to the claim so as to make the costs referable to them costs of this claim.