Neutral Citation Number: [2023] EWHC 2052 (Ch)

Case No: **CH-2022-LDS-000014**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
APPEALS LIST (ChD)

ON APPEAL FROM THE ORDER OF **PT-2022-LDS-000071**
DEPUTY DISTRICT JUDGE WHITEHEAD
DATED 13 DECEMBER 2022

Leeds Combined Court Centre
1, Oxford Row, Leeds, LS1 3BY

Date: 09/08/2023

IN THE MATTER OF the Estate of INA MARGARET LUMB (Deceased)

Before :

HH JUDGE DAVIS-WHITE KC
(sitting as a Judge of the Chancery Division)

- -

Between :

MICHAEL LUMB
(as Executor and Beneficiary of the Estate of Ina Margaret Lumb (Deceased))

Claimant/ Appellant

- and –

STUART LUMB

Defendant/ Respondent

- -
- -

Ms Sarah Egan (instructed by **Shoosmiths LLP**) for the **Claimant/Appellant**
Mr Piers Hill (instructed by **Chadwick Lawrence LLP**) for the **Defendant/Respondent**
Hearing date: 26 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HH Judge Davis-White KC (sitting as a Judge of the Chancery Division)

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Judge Davis-White KC :

Introduction

1. This is an appeal against the costs order of Deputy District Judge Whitehead dated 13 December 2022, whereby he made no order as to costs but granted permission to the Appellant to appeal. The context was a successful summary judgment application by the Claimant, seeking pronouncement in solemn form in favour of the validity of the will dated 25 January 2019 of Ina Margaret Lumb (deceased) and ancillary orders.

2. Although the Claimant was successful in his summary judgment application, the learned Judge found that the usual costs rule, that is that costs follow the event, did not apply because it was displaced by a rule singular to probate proceedings. Under CPR r57.7(5)(a):

> "*a defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will".*

3. If a defendant gives such a notice under CPR r57.7(5) (a), then under sub-paragraph (b):

> *"…the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will."*

4. In this case, such a notice was given. An application for summary judgment for pronouncement in favour of the 2019 will was made. Again, somewhat anomalously and in contrast with the usual position on a summary judgment application, on a summary judgment application seeking pronouncement in solemn form in favour of a will, being a case where a notice under CPR r57.7(5)(a) has been given: (a) the evidence in support of the application must include written evidence proving the due execution of the will and (b) the person giving such a notice is entitled to require the attesting witnesses to attend court for cross-examination (see CPR PD57 paragraphs 5.1 and 5.2).

5. That right was exercised in this case. One of the attesting witnesses, Ms Lynn Snowdon, the solicitor who had conduct of the drafting of the 2019 Will, had sadly died by the time of the trial. The remaining attesting witness, Ms Sarah Watson, who at the time of execution of the 2019 Will was Ms Snowdon's legal assistant, and a trainee legal executive, was called and cross-examined. At the relevant time both had worked at Ramsdens Solicitors LLP.

6. Seven separate grounds were put forward by Mr Hill, Counsel for the Defendant at the time and before me on this appeal, as to why summary judgment should not be granted.

7. As I have said, the Judge gave summary judgment in favour of the Claimant. He held that none of the seven points or grounds raised by Mr Hill gave rise to any doubt as to Mrs Lumb's capacity such as to require the case to go to trial on the basis that there might be a defence to the claim, which defence had a realistic prospect of success.

8. When it came to costs, the seven points raised by Mr Hill were also relied upon by him as being reasonable grounds for opposing the validity of the 2019 Will on the basis of the lack of capacity of the testatrix at the relevant time. Though deciding that none of these grounds had a reasonable prospect of success, the Judge considered that the same were "reasonable arguments to run" and that under CPR 57.7(5)(b) he was required to make no order for costs against the Defendant even though he considered that this was "a rather unsatisfactory outcome". His judgment, containing the explanation as to why he regarded the costs outcome as unsatisfactory, was tied to some conduct of the Defendant which he regarded as the sort of conduct that would be grounds for an adverse costs order. However, in the form N460 recording his grant of permission to appeal, the Judge recorded that he regarded CPR 57.7(5) as containing clear wording which however "*yielded an unfair result in this instance*". He considered that an appeal Judge might, taking policy considerations into account, construe the rule differently or decide that the Defendant did not have reasonable grounds for opposing the will.

The background to the summary judgment application

9. The Appellant and Respondent are brothers. The deceased is their mother.

10. For convenience, and meaning no disrespect, I refer to the Appellant as "Michael" and the Respondent as "Stuart". Michael is the younger brother.

(a) The wills

11. On the face of it, and subject to any issue of validity, the 2019 Will was the deceased's last will. Prior to that she had, apparently, made a will dated 5 May 2015 (the "2015 Will") and, before that, one dated 6 February 2014 (the "2014 Will").

12. Each will was fairly short and straightforward. In essence, the position under each is outlined below though it does not spell out the full details (e.g., any entitlement of Michael's son tended to depend upon his reaching a certain age and relevant perpetuity provisions as regards the 2019 Will).

13. Under the 2014 Will, the deceased's hi-fi equipment was left to Stuart. Her furniture, carpets, soft furnishings and articles of household or garden use or ornament in and about her house ("Household Objects") were left to Michael. Her principal residence was left on trust, with a direction that her trustees allow Michael to live there rent free but in certain events the house was to be held on trust for Michael and Stuart in equal shares (if then living) and in the event of Michael having died, then on trust equally for Stuart and Michael's son. The residue was left on trust for Michael and Stuart, as should survive her, but in the event that Michael predeceased her, then to Stuart and Michael's son.

14. Under the 2015 Will, the hi-fi was left to Stuart as under the 2014 Will. The Household Objects and any car were left to Michael. The principal residence was left absolutely to Michael, or (if he predeceased her) then equally to Stuart and Michael's son. The

residue was given to Michael and Stuart as should be living at her death and, if both, in equal shares. The Judge proceeded on the basis that the residue would have been of no or minimal value. That was not challenged on appeal.

15. Under the 2019 Will, the residuary estate (in effect the whole estate after payment of any debts as there were no other bequests or legacies) was left to Michael. However, if he predeceased her then it was to be paid to Michael's friend, Vance Pearson, to be held on trust to pay or apply the whole or any part of the income for the benefit of Michael's dog Jake or any other dog that Michael owned at the date of his death and after the date of death of such dog(s), on trust absolutely for Mr Pearson. As I understand it, the hi-fi equipment had already been gifted to Stuart during his mother's lifetime.

16. The deceased died on 5 August 2020.

(b) the dispute between the brothers

17. The Respondent entered a caveat on 16 September 2020 which was renewed on 15 March 2021 and 16 September 2021.

18. By letter of 18 January 2021 (incorrectly dated 18 January 2020), Chadwick Lawrence LLP, solicitors for Stuart, wrote to Ms Snowdon at Ramsdens seeking a copy of Ramsden's will file and information in answer to specific questions in what is usually referred to as a "*Larke v Nugus* request" being a reference to the decision in *Larke v Nugus* (1979) 123 SJ 337; (2000) WTLR 1033). The precise will (and its terms) which Ramsdens asserted was the deceased's last will was not then known to Stuart. The letter also asserted (among other things) that there had been a progressive deterioration in the deceased's memory in the last 5 to 6 years of her life, that she had often confused the two brothers and that Stuart knew no reason why he should be excluded from her will and that any will doing this would be invalid for want of capacity, failing which (want of) knowledge and approval.

19. Following a chasing email from Chadwick Lawrence LLP, Ms Watson, as assistant to Ms Snowdon, explained, in an email dated 15 February 2021, that the matter had been passed to her colleague on Ms Snowdon's absence from the office.

20. By email dated 26 February 2021, Ramsdens explained that Ms Snowdon was away from the office due to illness, but they would endeavour to reply substantively to the 18 January letter as soon as possible.

21. By letter dated 9 March 2021, Ramsdens sent their substantive reply to the letter of 18 January 2021. It was explained that due to illness it had not been possible to obtain a statement from Ms Snowdon, but the will file was enclosed. The drafting of the 2014 and 2015 Wills by Ramsdens was explained (and that they were prepared by a Ms Nuttall who no longer worked for Ramsdens).

22. On 17 November 2021, Chadwick Lawrence chased by email as whether Ms Snowdon could now make a statement, but it was explained that she had died "a few months ago".

23. Michael sought to warn off the caveat. However, an appearance was entered on 18 February 2022 by Stuart. The reason for the caveat was cited as being that the 2019

Will was believed to be invalid for want of capacity or knowledge or approval of the testatrix.

24. By letter dated 17 May 2022, Shoosmiths LLP, acting for Michael, responded to the acknowledgement. The letter pointed out (among other things) that:

(1) on Stuart's case both the 2015 Will and the 2019 Will would have to be found to be invalid because Stuart was claiming to be interested in the estate as beneficiary under the 2014 Will;

(2) there was in reality no residue, the only difference between the 2015 and 2019 Will as regarded Stuart was therefore an absence of an entitlement in respect of a (non-existent) residue;

(3) no evidence nor letter of claim had ever been provided/sent by or on behalf of Stuart;

(4) a further copy of Ramdsens' wills writing files was enclosed;

(5) as regards knowledge and approval, the detailed attendance notes showed a very clear understanding of the contents of the 2015 and 2019 Wills. Given due execution, there was a presumption of knowledge and approval of the contents. Further, given they were executed in front of a solicitor, following a detailed discussion of the contents, any knowledge and approval claim would, in their view, be doomed to fail;

(6) As regards capacity, clearest evidence of mental incapacity was required where, as here, a will had been prepared by a competent and experienced solicitor who had formed the opinion that the client knew what they were doing in executing the will. Such evidence of incapacity had not been produced and did not exist;

(7) It was possible that Stuart had spent the last two years amassing evidence. If that was the case Chadwick Lawrence LLP was invited to present such evidence to Shoosmiths LLP, along with a letter of claim, without further delay.

25. The letter ended by giving notice that proceedings would be issued and served if Shoosmiths LLP did not hear from Chadwick Lawrence LLP within 14 days confirming that the caveat would be removed by consent.

26. By email dated 1 June 2022, Chadwick Lawrence LLP asserted that there was evidence that the Deceased lacked capacity and/or was unduly influenced and/or her will did not reflect her interests. Stuart was said to be investigating the matter and health records of the deceased were expected by the end of June 2022. Reference was made to a gift to a dog being wholly "out of character" and Stuart and his aunt and uncle, David and Elizabeth Wilson were said to have had concerns about the influence asserted over the deceased by Michael.

(c) the Proceedings

27. By part 7 claim form issued on 22 June 2022, Michael sought pronouncement in solemn form in favour of the 2019 Will, alternatively the 2015 Will and further or other relief.

28. By witness statement dated 11 June 2022, Michael had made a witness statement regarding knowledge of testamentary documents and exhibiting the 2014, 2015 and 2019 Wills as well as copies of the relevant Will writing files maintained by Ramsdens.

29. On 8 August 2022, the following documents were filed: an acknowledgement of service, a defence and a witness statement regarding testamentary documents signed by Stuart and dated 5 August 2008.

30. The Defence gave notice under CPR r57.7(5)(a). It additionally asserted that Stuart and Michael were brothers, dealt in summary with their respective position as executors/beneficiaries under the 2014 and 2019 Wills, the date of the deceased's death and that she had made each of the 2014, 2015 and 2019 Wills. As such, it advanced no positive case challenging the validity of the 2019 or 2015 Wills.

31. The witness statement of Stuart dated 5 August 2022 under the guise of providing factual material in fact strayed into the area of laying an evidential foundation for challenging the 2019 Will on the grounds of incapacity and/or absence of knowledge and approval. It did this by referring to his mother not liking dogs in general and Jake in particular, referring to surprise expressed by David and Elizabeth Wilson that his mother should have allowed a dog into her home (Michael was at the relevant time living with her) and adverted to her memory beginning to deteriorate and her becoming more forgetful and that he had no reason to think she would treat her two sons differently.

32. By application dated 7 September 2022, Michael applied for summary judgment, but only in respect of the 2019 Will. This was supported by his second witness statement dated 7 September 2022. That witness statement, amongst other things, dealt with the caveats and the inter-parties correspondence. Having noted the citation of CPR 57.5(5)(a) in the defence, the witness statement recited in paragraph17 that:

> "*17. I understand that the Defendant is not making any positive case that the 2019 Will is invalid. <u>He is not putting forward any evidence</u>. He is simply making me 'jump through hoops'. This is the same tactic he has been using to stall the administration for nearly two years." (emphasis supplied).*

33. The witness statement referred to a statement of Ms Watson, which I shall come onto, and exhibited various documents.

34. The statement of Ms Watson was a witness statement dated 7 September 2022. In it, amongst other things, she confirmed the death of Ms Snowdon, and, in effect, an attendance note made by Ms Snowdon of a meeting with the deceased on 25 January 2019.

35. By email dated 22 September 2022, Chadwick Lawrence LLP wrote asserting that their client was not adducing evidence and not running a positive case. However, various assertions were put forward. These included points that the aunt and uncle, as well as Stuart, had been concerned by the "control" over the deceased that Michael had been exercising; that the 2019 Will was completely "out of character" and referring to the Deceased's frailty forgetfulness and conduct. Given what was said to be an absence of explanation as to the departure for parity between the brothers and the deceased's

frailty, forgetfulness and conduct, cross-examination of the surviving attesting witness was said to be "not unreasonable".

36. An email of 17 October 2022 from Chadwick Lawrence maintained that Stuart was advancing no positive case and made the point that the defence did not refer to such facts as would give rise to a defence as that would be to raise a positive case. Suspicious circumstances were said to arise from the facts that (a) the gift over for the benefit of the dog was out of character and a considerable departure from earlier wills; (b) Ms Watson stated that Ms Snowdon took the deceased through the 2019 Will line by line but does not comment on the reasons given for such significant departures; (c) no attempt was made to ascertain or record the failure to make similar or any other provision for Stuart and (d) there was no evidence that the deceased had fallen out with either of her two sons.

37. On 4 October 2022, the court sent out a hearing notice of a hearing on 25 October 2022 at which the court would consider directions for the summary judgment application and/or whether any CCMC in the proceedings as a whole should take place and any directions in relation thereto.

38. On 18 October 2022, Stuart filed his second witness statement, also dated 18 October 2022. The statement was said to be made as "supplementary" to his earlier witness statement and in opposition to the application for summary judgment. This witness statement clearly went beyond setting out general matters of fact and sought clearly to raise a positive case regarding incapacity. The witness statement exhibited medical records of the deceased, obtained by his solicitors on 2 September 2022. It recited in terms a number of points from those records indicating confusion, memory impairment and the like. It also referred in terms to the concerns that his solicitors had raised, on his behalf, regarding the validity of both the 2019 and 2015 wills and exhibited relevant correspondence (from 1 June 2022 to 29 September 2022).

39. On 25 October 2022, the court hearing took place. The order recites (among other things) that no positive case was raised by Stuart and that he relied upon CPR r57.7(5) but that cross-examination would be permitted pursuant to PD 57 paragraph 5.2(2). Directions were given for the listing of the summary judgment application including lodging of bundles and so forth.

40. On 30 November 2022, Stuart made a third witness statement. That was not in the appeal bundle because permission to rely on it on the summary judgment application was refused. At my request I was provided, after the hearing before me, with a copy by Mr Hill. First, it went into a long history of his contact with his mother and that he had not known she was in hospital at some point and had not therefore visited her there. This was apparently directed at showing to be false a statement by his mother that he did not visit her as recorded in the attendance note of Ms Snowdon which I shall deal with in more detail below. It also gave evidence about his mother's having become "more forgetful" and being unable to retain recent information/knowledge/memories. Again, on its face these matters raised a positive case.

41. On 7 December 2022, Stuart made a fourth witness statement. In summary, that witness statement said little in substance but exhibited texted messages between Michael and Stuart.

(d) The summary judgment hearing

42. The summary judgment hearing, including the cross-examination of Ms Watson, took place on 13 December 2022.

43. The Judge refused permission to rely on the third witness statement of Stuart but permitted reliance on the fourth witness statement on the ground that it: "*simply provided some documentary evidence of things that were said in the "second statement*" of Stuart.

44. The Judge was referred to the Will Writing File maintained by Ramsdens regarding at the least, the 2019 Will. He was also referred to extracts from the Deceased's medical records. The basis upon which these documents were put before the Judge was not immediately clear to me. They were not exhibited formally to any witness statement as far as I can see. It is one thing if they were put before the court either by the claimant or, solely so that they could be put to the attesting witness by way of cross-examination, by the defendant. It is quite another thing, if they were relied upon outside that cross-examination for the purposes of establishing doubt about capacity and/or absence of knowledge and approval. I will go on to deal with some of the detail in those documents in the context of the judgment.

45. I note that an agreed note put before me refers to an application by Mr Hill to "adduce" the supplementary bundle comprised of selected medical records (and the third and fourth witness statements of Stuart), but the subsequent ruling is not set out in the note. However, given the Judge considered the extracts of the medical records put before him, as referred to in his judgment, I assume that the documents were let into evidence by the Judge on the application of Stuart.

46. I also assume, in Stuart's favour, that the attendance notes and Will Writing File was relied upon by Michael (as well as Stuart).

47. As regards the cross-examination of Ms Watson, the appeal bundle contained no note of the same but an agreed note of it was provided to me after the hearing before me. That note reveals that the cross-examination was quite short and largely comprised the putting of the attendance notes of meetings on 10 January and 25 January 2019 and her confirming that she remembered the case quite well. Her evidence simply confirmed the attendance notes (which was not unsurprising). The Judge's summary of Ms Watson's oral evidence set out in his judgment appears quite comprehensive and to cover the substance of the evidence that she gave.

(e) the Will Writing File

48. At this point I should describe the attendance notes and the Will writing file so far as it concerns the 2019 Will.

49. By letter dated 13 November 2018, Ms Snowdon, having had a meeting with the deceased, sent a six-page client care letter explaining matters such as the firm's terms and conditions and the like. It also recorded the deceased's instructions in three paragraphs. The first was to appoint her son Michael to be sole executor and trustee and to leave her entire estate to him if he survives her. The second was to appoint David and Elizabeth Wilson as executors and trustees if Michael did not survive her.

50. The third paragraph and the text immediately after it (clearly dealing with a situation where Michael predeceased the deceased) was as follows:

> "*3. You wish to leave your estate in accordance with Michael's wishes for his own estate, that is, it is to be held in trust for the benefit of Michael's dog Jake for his lifetime. I understand from speaking with Michael when at your home that if Jake survives him, his friend Vance Pearson will look after Jake. In view of this, please let me know if you would like Vance to be the substitute executor and trustee of your will; if so, he would be responsible for looking after the trust fund for Jake. However, you may feel it preferable to retain David and Elizabeth as your trustees to look after the trust for Jake (and pay out monies as and when needed/requested for Jake by Vance) because they do not have an interest in the trust and so can be objective whereas Vance could be considered to have an indirect interest and so may not be as objective.*
>
> *Please also note that if Jake dies before you or Michael or there are any funds left on Jake's death, your will should specify the beneficiary or beneficiaries to whom your estate (or the remaining balance of it after Jake's death) should be paid. Please therefore consider this issue and let me know the person(s)/organisation(s) you would like to leave any balance to so that can include this in your Will."*

51. As regards what was clearly envisaged as being a potential Inheritance Act claim, she went onto to say, under the heading Our Advice and Next Steps":

> "*As discussed, when we met, I understand that you also have a son called Stuart and Michael himself has a son named Harry, your grandson. You have instructed me that you do not wish to include Stuart and/or Michael in your Will and that you have fallen out with Stuart because he did not visit you when you were poorly in hospital (despite him working there) and has not been in touch with you generally since Christmas 2017.*
>
> *I explained to you that leaving your entire estate to Michael or for the benefit of his dog Jake (i.e., if Michael dies before you) may very well leave your estate vulnerable to challenge on the basis that Stuart and/or Harry feel they have not been adequately provided for. I therefore advised you to write a letter setting out the reasoning behind your wishes so that this could be used as evidence in the event of a claim against your estate. I advise that whilst such a letter would not necessarily defeat a claim against your estate, it would be beneficial as evidence of your wishes if such a claim were made and had to be determined by a Judge.*"

The reference to "and/or Michael" in the second sentence appears to be a typo for "and/or Harry".

52. Under the heading "conclusion", the letter ends by saying:

> "*I enclose a copy of the draft Will I have prepared in accordance with your instructions, for your consideration. Please telephone my Assistant to confirm that the draft is approved, or advise me of any amendments you require to be*

> *made. I will then ask you to arrange an appointment to execute the final document which I will prepare in readiness for signature."*

53. The draft will, as regards Jake, Michael's dog, provided the trustees were to hold the residue (and interest) on trust to apply it for Jake's benefit and thereafter "*for [to be confirmed]*."

54. By attendance note dated 7 December 2018, charged at one unit (6 minutes), Ms Snowdon recorded:

> *"LS attending Ina Lumb who was calling to clarify her instructions. Her home, contents and car (her residuary estate) are to pass to Michael and if he predeceases they are to go Jake to be looked after by Vance who will be his Trustee or any other dog that Michael may have at the date of his death and failing whom or on the expiry of such trust the estate is to be payable to Vance himself."*

She recorded that she had thanked Mrs Lumb and confirmed that she would prepare a revised draft will and send it to her.

55. The revised draft was sent under cover of a letter dated 14 December 2018.

56. A meeting took place on 10 January 2019. Ms Watson went along as a potential attesting witness. It appears that there was much discussion and thought about the gift over in the event that Michael predeceased Mrs Lumb. In Ms Watson's note the position can be identified from the following passages:

> "*Mrs Lumb was adamant that if anything happened to her everything would go to Michael, which she confirmed was essentially her property as she does not have any savings. Mrs Lumb was then at a loss as to what to do as she believed the whole value of the property going to Jake or Vance was too much….*
>
> *…she confirmed that she did not want Jake or Vance to receive her full estate and LS explained she could leave them a fixed amount or a percentage of her estate such as 50%, 25% etc. Mrs Lumb asked what LYS would do and she confirmed that she could not tell her what to do, it had to be her own decision. Eventually Mrs Lumb come to the decision that she believed £50,000 was sufficient for Jake and then eventually Vance but was still unable to conclude her instructions. LS agreed with Mrs Lumb that she would write out to her with an update of the progress made and the instructions Mrs Lumb has provided and confirmed that we would wait to hear from Mrs Lumb as to her final instructions."*

57. As regards capacity, Ms Watson's note ends:

> *"In respect of Mrs Lumb, it appears that she does have full capacity. You can see her taking in what you are saying and processing the information to assist her making a decision, however it seems that she is conflicted as she does not want to upset Michael. Mrs Lumb appears a bit random in her conversation at times but*

> *that appeared to be more through the thoughts she was having in connection with her Will and having someone to talk to for a change.*
>
> *In my opinion there was no doubt as to Mrs Lumb's capacity."*

58. A number of points come out of the more detailed note of Ms Snowdon.

59. First, as regards leaving the estate to Michael if he survived Mrs Lumb:

> "*it seems that she is still of the view that Michael should receive her entire estate (which more or less concurs with her current will until the new one is signed because in that will she gave only half of the residue and hi-fi equipment to Stuart and there effectively is no residue and the hi-fi equipment has already been dealt with). She was of the opinion that perhaps some of the residue in the event of Michael predeceasing her should go to Stuart but it was difficult to keep her focused because she admitted herself she likes to have company with partly focused on chatting about the history with herself and her family and other various matters rather than remaining focused on the matter in hand."*

60. As regards Harry, Michael's son, although Mrs Lumb gave consideration to the possibility of some of the money to go into trust to be used for Jake, the dog, then being passed to Stuart on the ending of that purpose, she did not want any of it to go to Harry:

> "[she] *did suggest giving some to Stuart (but not her grandson Harry because she feels that Michael should deal with any benefit to him*)".

61. As regards the balance after the death of the dog:

> *"She is to some extent keen to discuss what she should do with the balance of the residuary estate with Michael but his view when she asked him was simply that Vance deserved the entire amount that was left after Jake or any other dog died because he had been like a son to her. She did privately say that he had grown up with Michael and she did feel that he was somewhat of a surrogate son as it were but she did not wish Vance to receive the entire amount and did suggest giving some to Stuart (but not her grandson Harry because she feels that Michael should deal with any benefit to him) but did not seem able to ultimately make a decision and as mentioned I did not wish her to do so on the spot or in a hurry as it were."*

62. The position as left therefore was that Mrs Lumb would have some time to think about the matter further.

63. As regards capacity, Ms Snowdon recorded:

> "*I have no doubt that she has capacity albeit she does have some slight memory issues but I believe this is more a lack of focus due to her nature rather than anything more sinister in terms of capacity. Effectively she does like to chat and*

> *is equally keen to do this as well as finalise her will. She is however keen to finalise her will and confirmed she wanted to finish it and get it signed."*

64. By letter dated 16 January 2019, Ms Snowdon set out very clearly:

> "the *position in writing to assist* [Mrs Lumb] *in considering matters and coming to a decision*."

65. The letter records what Mrs Lumb must have been considering at the meeting on 10 January, namely that in the event of Michael predeceasing her, some £50,000 would go to into a trust for the benefit of Jake with thereafter a gift over to Vance but that that would leave her to decide who was to receive everything but the £50,000 and this was the main issue requiring a decision by her in order to enable the will to be completed.

66. On 22 January 2019, Ms Snowdon recorded in an attendance note that Mrs Lumb had rung her about leaving her house to Michael during her lifetime. Ms Snowdon's immediate advice was to confirm they had spoken about this at an earlier meeting and decided it would not be a good idea. However, she said she would bring more information when they met to finalise the will.

67. The attendance note of the meeting on 25 January at which the 2019 Will was executed and attested was prepared by Ms Snowdon. Key points include:

(1) Although in the house, Michael was mainly upstairs and was not present at the meeting "*until such time as we had essentially concluded matters*".

(2) Ms Snowdon "*went through the terms of Mrs Lumb's will with her and she confirmed that she was happy with everything*". "We went through the will clause by clause and in approval it was executed".

(3) There was then a minuted discussion about the possibility of the lifetime transfer of the house to Michael, Ms Snowdon left correspondence dealing with this for Mrs Lumb to read and consider.

(4) The meeting (and possibly the dictating of the note) took up 5 units (30 minutes).

68. As I have said, it is unclear to me how the will writing file came to be put before the Judge. I shall assume that it was put before the Judge by or with the agreement of Michael.

The Judgment

69. Having seen the agreed note of cross-examination, I can say that, as regards the oral evidence of Ms Watson, the judgment does not merely summarise the key points but in reality sets out the entire substance of her relevant evidence.

70. In considering CPR 24 and summary judgment, the Judge considered that the "real prospect of success" test had been subject to gloss by the courts so that it meant more than merely arguable and that the relevant case had to have a "realistic argument", carrying "some degree of conviction rather than being fanciful". "All the defendant

needs to do today, to defeat this application, is establish a real doubt as to the capacity of Margaret Lumb, which thereby raises a realistIc prospect that at trial Mrs Lumb's capacity might be found to have been lacIing."

71. On capacity, he cited Briggs J in *Key v Ke*y [2010] EWHC 408 (Ch):

> "i*) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.*
> *ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.*
> *iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity."*

72. However, he also referred to a passage in *Theobald on Wills* which he considered was consistent with the Briggs J passage that I have cited from *Key v Key:*

> "*The true and modern analysis is simply to say the court will address the question of capacity as an evaluation of all the evidence available to the court."*

73. He then turned to the seven grounds which were said by Mr Hill to bring capacity into doubt. These had been trailed in his Skeleton Argument for the hearing. Although the Judge tended to refer just to capacity, it is clear the Judge had well in mind the potential issues of absence of knowledge and approval (which, for example he referred to in terms, when dealing with the first ground).

74. Ground 1: presence of Michael: the first ground was the presence of Michael which, it was said by Mr Hill, should have "rung alarm bells". Among other things, the Judge pointed out Michael's absence during key parts of the relevant meetings and the fact that Michael lived in the same house so his presence was not surprising. Matters raised might be relevant to undue influence but that could not be raised as it had not been pleaded. Ultimately, the Judge decided that the matters raised under this ground might have been significant if there had been a substantial change between the 2015 Will and the 2019 Will. However, there was no such change. Under the 2015 Will Stuart got the hi-fi equipment and as a longstop the residuary estate but the likelihood is he would have got little or nothing of any financial value anyway. Although there may have been animosity between the brothers, the Judge considered that there was "no runnable argument" requiring consideration at trial that he had somehow undermined Mrs Lumb's testamentary capacity.

75. Ground 2: Mrs Lumb's absence of knowledge of Michael's will: Mrs Lumb had in mind the possibility that Michael might predecease her. In those circumstances she wanted her will to reflect whatever was in Michael's will (so that the effect would be the same as if she had passed her property to Michael in his lifetime and he had then dealt with it under his will). She did not know the details of Michael's will and that information had to be sought and obtained. The Judge could not see the relevance of this to any issue of capacity. The general principle was entirely sensible and rational. The fact that Mrs Lumb may not have known the detail of Michael's will does not undermine that rationality and that she might not know the detail is of no great surprise.

The Judge could not see what concern this matter raised but, in any event, decided that it raised no relevant doubts.

76. Ground 3: Reason for cutting Stuart out of the will: It was said that the reason recorded in correspondence: namely that Stuart had not visited his mother in hospital in 2018 or subsequently was false. However, the Judge considered this to be irrelevant given the small change in effect on Stuart between the 2015 Will and the 2019 Will (as discussed by him under Ground 1).

77. Ground 4: Text messages between Stuart and Michael: these were said to show that Stuart was engaged with his mother. The Judge considered they took matters no further forward as they post-dated the events in question when his mother had said there was a lack of engagement and the ground of lack of engagement was in any event not a relevant matter to cutting Stuart out of the will and that had in effect happened under the 2015 Will before the events in question (see Ground 3).

78. Ground 5: toing and froing over the will It was submitted by Mr Hill that there was a discrepancy between a long meeting on 10 January 2018, when Mrs Lumb needed further time to make up her mind about the longstop position (i.e. the position if Michael predeceased her), and a "perfunctory" 6 minute phone call on 5 January when she reverted to her original decision. The Judge could see no such inconsistency. Mrs Lumb was advised to think things over. She evidently did. She then communicated her decision.

79. Ground 6: extracts from medical records of Mrs Lumb. The Judge considered the relevant extracts and concluded that there was very limited evidence of potential capacity issues and that that evidence was very weak with mere hints of memory loss and perhaps confusion that came and went. Against that were the very detailed notes of the three meetings with Mrs Lumb in which complex issues concerning the will were discussed and in which the experienced solicitor had no concerns at all and had considered the point as she recorded it in her file note. The strong evidence, in the Judge's view, pointed away from lack of capacity.

80. Ground 7: something might turn up. In this respect fuller medical notes and the possibility of Michael giving evidence were canvassed. The Judge considered that Stuart had picked the best bits of the medical evidence and that they did not demonstrate a potential issue of capacity in the overall circumstances. It was also suggested that Michael might give evidence and be tripped up in cross-examination by the trial Judge. The Judge considered this to be too tenuous a basis upon which to found a defence with a realistic prospect of success.

81. Mr Hill confirmed to me that he does not challenge the decision nor reasoning of the Judge in respect of the summary judgment decision, which summary judgment he does not challenge.

82. Turning to costs, the Judge identified that the seven grounds I have discussed were, for the purpose of CPR r57.7(5)(b), relied upon by Mr Hill as being reasonable grounds for opposing the 2019 Will.

83. The Judge had sympathy with the argument that, because he had dismissed the grounds on a summary basis as having no real prospect of success on a trial, the grounds could

not be reasonable grounds to run. However, he noted that CPR r57.7 uses the phrase "reasonable ground" rather than being grounds giving rise to a "real prospect of successfully defending" in CPR r24 and it was not apparent to him that they were one and the same. Further, he noted that the case law "raises the bar" higher by glossing the test in CPR r57.7. There could, he thought, be a reasonable but unrealistic defence.

84. He did not believe the "attacks made on the will" were unreasonable and accordingly could not make an order for costs against Stuart.

85. He thought that the outcome was unsatisfactory because he regarded the manner in which the issues had been raised as a "bit unreasonable" on the basis the Claimant had been "doing his utmost" to try and find out what the issues were before the hearing whereas many of the reasons only became clear in the course of the hearing. Normally, the Judge said, that sort of conduct would have been the subject of an adverse costs order.

Analysis of the applicable procedural provisions

86. Before turning to the grounds of appeal, it is helpful to analyse both CPR r57.7(5) and CPR 24.

87. The provisions of what is now CPR r57.7(5) go back to an amendment made to the then rules of court in July 1898. The then Rules of the Supreme Court, Order XX1, r18 was then changed by the deletion of the words in italics as set out below:

> "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, *and the Defendant shall be subject to the same liabilities in respect of costs, as he would have been under similar circumstances, according to the practice of the Court of Probate, before the Principal Act came into operation".*

And the substitution, in their place, of the following words:

> "and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall he of other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will."[1]

88. It appears that the consequence of this change is as set out in the headnote to *Davies v Jones* [1899] P. 161:

> "*The general rule, that in cases tried with a jury costs follow the event, as, also, the exception engrafted on this rule by the Probate rule protecting a defendant from being ordered to pay costs where he has duly delivered a notice of his intention to call no witnesses, and merely requiring the will to be proved in solemn form, have been superseded by Order xxi., r. 18, as now amended. (1)The effect of that rule as amended is that, whether he has asked for a jury or not, a*

[1] See *Spicer v Spicer* [1898] P. 38, footnote at pg. 39.

> *defendant who duly gives notice under the rule is not to be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will."*

89. As put by the President of the Probate Divorce and Admiralty Division in that case:

> *"Before the amendment in that rule was made, I daresay it may have been the case that, where a jury had been called for-at least if it was the defendant's jury-the defendant was liable to be condemned in costs, notwithstanding any notice given with the defence that the defendant only intended to cross-examine the witnesses to be called in support of the will, and this constituted an exception in the general rule that a defendant who gave such a notice was not liable to pay costs. But, in my view, the general rule, as well as the exception, were swept away by Order XXL, r. 18, as amended, which was intended to establish a new, and, in my judgment, a complete rule of practice, namely, that a defendant giving the notice of intention only to cross-examine is not to be liable to pay the costs of the other side, " unless the judge shall be of opinion that there was no reasonable ground for opposing the will." I think this rule governs the matter whether there be a jury or not, and whatever be the verdict of the jury."*

90. It appears therefore that the rule has its roots in Probate practice as to costs and must be regarded as a codification (and amendment) of the relevant probate exception to the rule that costs follow the event in the case of a defendant simply putting the claimant to proof.

91. It is of interest that the Sir F.H. Jeune P, in *Spicer v Spicer* [1899] P.38, a case decided some four months or so earlier, expressed some uncertainty as to the basis for the rule:

> "*I must confess that I never could understand what was the reason of the old rule; I suppose it must have had a historical origin. I never was able to understand why defendants in probate suits should not be called upon to make up their minds either to admit or dispute the will, without being allowed a skirmish at no risk of paying costs and at expense to the estate."*

As I understand the comment, it was directed at the probate exception to the costs follow the event rule, where a defendant gave notice he would only cross-examine the attesting witnesses, and not to the exception to that exception, where a jury trial was sought. The comment also shows the linkage between the codified costs rule and the other two costs principles in probate actions to which I now turn.

92. What is now CPR r57.7(5) can therefore be seen as one of the three special costs rules or principles applying in probate proceedings. The other two are not codified in the rules of court but are well established (indeed the first one was also considered in the *Spicer* case). The other two rules or principles were identified in *Spiers v English* [1907] P. 122 at by Sir Gorell Barnes, P:

> (1) *"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." (*The "First Probate Costs Principle")

(2) "*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." (*the "Second Probate Costs Principle")

93. In *Kostic v Chaplin* [2007] EWHC 2909 (Ch), Henderson J (as he then was) traced the iteration of the principles back to *Mitchell v Gard* (1863) 3 Sw. & Tr. 275. He recorded that, in considering these principles, Sir James Wilde said in that case, at pg. 277-8:

> "*The basis of all rules on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.*
>
> *But if the testator be not in fault, and those benefited by the will not to blame, to whom is the litigation to be attributed? In the litigation entertained by other Courts, this question is in general easily solved by the presumption that the losing party must needs be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial enquiry is in a manner forced upon it. Those who are instrumental in bringing about and subserving this enquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.*
>
> *From these considerations, the court deduces the two following rules for its future guidance: first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question whether the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent*."

94. At paragraph 10 of his judgment in *Kostic*, Henderson J also noted:

> "*10. I would also point out that at 279 the judge noted the difficulty of extracting any general rule from the earlier case law, and said that his two rules were designed to strike a balance between two principles of high public importance, the first being that "parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by*

> *others", and the other being that "doubtful wills should not pass easily into proof by reason of the cost of opposing them*".

95. As regards the First Probate Costs Principle, Henderson J also noted that the judicial approach to its application had altered over time:

> *"[21]… However, it is I think fair to say that the trend of the more recent authorities has been to encourage a very careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged. There are at least two factors which have in my judgment contributed to this change of emphasis. First, less importance is attached today than it was in Victorian times to the independent duty of the court to investigate the circumstances in which a will was executed and to satisfy itself as to its validity. Secondly, the courts are increasingly alert to the dangers of encouraging litigation, and discouraging settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party."*

96. As regards the first factor referred to by Henderson J, the inquisitorial, or investigative, duty of the court is still mentioned in, e.g., the Chancery Guide (2022 edition para 23.4). However, the court may often determine whether to pronounce in solemn form upon written evidence if the parties agree to the grant, and without further investigation of oral evidence (see CPR PD 57 para 6.1.(1)) or on the written papers (with cross-examination only of the attesting witness, if CPR 57.7(5)(a) applies) on a summary judgment application (see CPR PD 57 para 5.1) and may direct a trial on written evidence in circumstances where no acknowledgement or defence has been filed (see CPR r57.10).

97. Henderson J also explained, in the *Kostic* case, how the continued application of the old probate principles was accommodated by the new CPR and especially CPR Part 44:

> "*4. The costs of a contentious probate action, like those of any other civil claim, are within the discretion of the court, and CPR Parts 43 and 44 will apply. The general rule, enshrined in CPR 44.3(2)(a), is that the unsuccessful party will be ordered to pay the costs of the successful party, or in other words that costs follow the event. However, sub−paragraph (2)(b) provides that the court may make a different order, and it was common ground before me that in contentious probate claims there are two long−established exceptions to the general rule which have survived the introduction of the CPR and are still valid. Miss Montgomery did, however, reserve the right to argue in a higher court that the exceptions have now been replaced by the provisions of the CPR. For what it is worth, my own view is that the position is indeed now governed by the CPR, but the considerations of policy and fairness which underlie the two exceptions remain as valid today as they were before the introduction of the CPR, and they should therefore continue to guide the court in deciding whether it is appropriate to depart from the general rule and to make a "different order" pursuant to sub−paragraph (2)(b)."*

98. That particular problem does not arise with regard to CPR r57.7(5) as that is a rule which, in effect, overrides the general discretion under CPR Part 44.

99. In my judgment, and drawing these threads together:

(1) CPR r57.7(5) reflects one of a number of probate principles as to costs which principle has been codified. The overall justification for all three probate costs rules/principles is the same and is summarised by Henderson J in paragraph [10] of the *Kostic* judgment.

(2) The codification achieved by CPR r57.7(5) represents the rule makers' judgment as to where to draw the line between the competing policy considerations identified at paragraph [10] of the *Kostic* judgment.

(3) However, in interpreting and applying CPR r57.7(5)(b), the courts should take account of the two factors mentioned by Henderson J in *Kostic* at paragraph [21], namely (a) that the inquisitorial role of the court in probate cases is much less than it once was and (b) that the courts are increasingly concerned to avoid encouraging litigation, and discouraging settlement, by a removal of the usual "costs follow the event rule" (being a concern in any case identified by Sir F.H. Jeune P in the *Spicer* case).

100. The next point to consider is the manner in which CPR r57.7(5)(a) operates and interacts with CPR 57.7(5)(b).

101. CPR r57.7 (3) and (4) requires a positive pleading with particulars if a party wishes to raise a positive case that (a) a will was not duly executed; (b) at the time of execution of the will the testator lacked testamentary capacity or (c) at the time of execution of the will the testator did not know and approve of its contents or (d) the execution of the will was procured by undue influence or fraud.

102. However, as an alternative, the defendant can give notice in his defence, pursuant to CPR 57.7(5)(a), that he or she raises no positive case but requires the claimant to prove the will in solemn form. In that event, the defendant is entitled to cross-examine (only) the attesting witnesses.

103. To prove a will in solemn form the burden of proof is on the claimant seeking the relevant order. In essence the legal burden of proof lies on the Claimant to establish (a) due execution; (b) testamentary capacity to make the will at the time of execution; (c) knowledge and approval of the will's contents at the time of execution.

104. In this case due execution has never been in issue. I would however note that if the will is duly executed on its face there is a presumption that it was properly executed. The strength of the presumption depends upon the particular wording used in the will. Obviously, in such circumstances cross-examination of the attesting witnesses may reveal that the will was not duly executed.

105. As regards testamentary capacity, although the legal burden of proof is on the propounder of the will, in reality the propounder is assisted by the presumption that where a Will is duly executed and appears rational on its face, then the court will presume capacity. An evidential burden then lies on the objector to raise a real doubt about capacity (see *Ledger v Wootton* [2007] EWHC 90 (Ch)).

106. As regards knowledge and approval, for present purposes it suffices to set out the summary in *Tristram and Coote's Probate Practice*:

> "*[34.70] The burden of proof of the testator's knowledge and approval lies on the party setting up the will (Barry v Butlin (1838) 2 Moo PCC 480 at 482; Cleare and Forster v Cleare (1869) LR 1 P & D 655), and the burden is discharged prima facie by proof of capacity and due execution (Barry v Butlin; Cleare v Cleare); but where this prima facie presumption is met by the cross-examination of the witnesses, the party propounding must prove affirmatively that the testator knew and approved of the contents (Cleare and Forster v Cleare); Atter v Atkinson (1869) LR 1 P & D 665). Where a will is prepared in suspicious circumstances the onus is cast upon the person propounding it to remove such suspicion, and to prove that the testator knew and approved of its contents (Tyrrell v Painton [1894] P 151 at 157, CA, followed in Re Scott, Huggett v Reichman (1966) 110 Sol Jo 852)…."*

107. In addition, at paragraph 34.69:

> *"[34.69]…… The requirement of knowledge and approval is a shorthand reference to the need for evidence to rebut suspicious circumstances (per Sir Andrew Morritt C in Perrins v Holland [2010] EWCA Civ 840, [2011] Ch 270). Normally, proof of instructions and reading over the document will suffice. The fact that a will has been prepared by a solicitor and read over to a testator raises a very strong evidential presumption that it represents the testator's intentions at the time the will is executed (Gill v Woodall at [14]). It can be rebutted but only by the clearest evidence. That is the approach that was adopted by the Court of Appeal in Fuller v Strum [2001] EWCA Civ 1879, [2002] 2 All ER 87, [2002] 1 WLR 1097, and in Perrins v Holland [2011] Ch 270 (Gill v Woodall at [15])…."*

108. Cross-examination of an attesting witness is most likely to be directed at the issue of due execution. However, it is not confined to such topic and can extend to e.g., matters going to the issue of capacity and knowledge and approval.

Limits to CPR r57.7(5)

109. In my judgment it is clear that although the costs protection of CPR r57.7(5)(b) is stated in terms to be dependent solely upon the relevant notice under CPR r57.7(5)(a) being given, it is inherent that that Defendant must comply with that notice. If he does not and he raises a positive case then, to that extent, he loses the costs protection.

110. Further, in my judgment, a defendant relying on CPR r57.7(5)(a) cannot, on the face of it, adduce evidence laying grounds to attack the validity of the Will. The only way that he can seek to say that the person propounding the will (which I will now assume to be the claimant and will refer to the propounder as such from here on) has failed to make out his case is in reliance on (a) the evidence put forward by the claimant or (b) evidence of the attesting witnesses (including any evidence elicited in cross-examination). I accept that a defendant can of course put material to a witness in cross-examination. If evidence is adduced by the defendant which goes to any undermining of the validity of

the will, then the defendant will, to that extent, not be complying with the terms of any notice under CPR r57.7(5)(a).

111. In this case, there may have been confusion as to whether evidence elicited by the defendant was being put into evidence as part of a case raised by him or whether it was to be relied upon in cross-examination. In future cases it may be worth consideration as to whether, in a particular case, a defendant should be held strictly to CPR r57.7(5)(a) and not permitted to file any evidence if he wishes to rely upon CPR r57.7(5) but that he (a) be directed to identify in writing the doubts as to the validity of the will that he wishes to raise and (b) to identify and serve in good time any documents that he wishes to put to the attesting witness in cross-examination. I note that in *Davies v Jones* the relevant grounds of opposition or concern were pleaded as well as what would now be a CPR r57.7(5)(a) statement.

112. The next issue as to the limits of the protection of CPR r57.7(5)(b) concerns conduct in the proceedings. In this case the Judge considered that there was relevant conduct of the Defendant in the proceedings which would otherwise have caused him to make a costs order against the Defendant. Ms Egan did not seek to argue that the Judge was incorrect in assuming that CPR 57.7(5)(b) prevented, in an appropriate case, a costs order being made against a Defendant who had served the relevant notice under sub-paragraph (a) of that rule, but nevertheless conducted himself in manner deserving a costs order to be made against him as regards one or more case management matters. I did not hear argument on the point, but my initial view is that there might well be circumstances where such conduct fell outside the protection of CPR 57.7(5)(b). For example, if a defendant at the last minute without any acceptable excuse caused an unacceptable adjournment of or delay to the trial or failed to comply with case management directions (such as an order to bring in testamentary documents), I do not see why, on the face of things, that conduct would be immune from an appropriate costs order by reason of CPR r57.7(5)(b). In such a context the costs ordered would not be simply part of an overall assessment of conduct in the course of determining the costs of proceedings subject to CPR r57.7(5) but a specific costs order dealing with specific conduct.

"**Reasonable ground"**

113. As regards "no reasonable ground for opposing the will", this is an objective criterion. The defendant under CPR r57.7(5)(a) does not technically oppose the will but rather puts the claimant to proof of its validity. However, it seems to me that the "reasonable ground" must be one that it was reasonable for the defendant to seek to raise, either in cross-examination and/or in identifying a weakness in the claimant's case to suggest that the claimant has not proved validity. It follows that the reasonable ground must derive from material that is or will be properly before the court or that can properly be sought to be obtained, with a real prospect of the same, from the attesting witness(es). Thus, for example, I do not think that in this case the defendant could have relied upon Mrs Lumb not liking animals or it being "out of character" for her to donate property on trust for an animal (unless, possibly, that was put to the attesting witness in cross-examination).

114. There must be a reasonable ground to suggest that the claimant has not, on his evidence, proved validity. Thus, it is not sufficient to say, for example, that something may turn

up in cross-examination of the attesting witness and that, in any and all cases, until there has been such cross-examination there will be a reasonable ground to oppose the will because something might turn up in such cross-examination. Thus, in *Spicer v Spicer*, costs were awarded against a defendant who was held not to be entitled to the costs protection of the then equivalent of CPPRr57.7(45)(b). The judgment concluded:

> "… *his* [the defendants' counsel's] *cross-examination of the attesting witnesses was a mere repetition of the examination-in-chief. It was as good as it was possible for it to be, but it amounted to nothing, and it did not suggest either defective execution, testamentary incapacity, or undue influence. The case is an example of the precise abuse which the new rule was intended to prevent. The costs of the plaintiffs must be paid by the defendants*."

115. In this case, this description can, in my judgment, be given to the cross-examination of Ms Watson in this case, with the substitution of a reference to a mere repetition of the evidence in her witness statement in place of the reference to examination-in-chief (as is now usual, there was no examination-in-chief to speak of).

116. I also accept that what is reasonable may change during the course of the proceedings. It may be reasonable to raise a doubt or uncertainty in the claimant's case as to validity but, once certain information is later provided e.g., once cross-examination of an attesting witness is complete, not reasonable to continue in this course (see e.g., *Elliott v Simmonds* at paragraph [17]).

117. I also accept that the mere fact that a claimant succeeds in proving the will does not necessarily mean that there were no reasonable grounds of opposition. In *Davies v Jones* [1899] P.161 the jury found for the persons propounding the will (the plaintiffs) and the validity of the will was pronounced in solemn form. The solicitor who had drawn the will and been present at its execution had died. One of the attesting witnesses was dead. The only living witness was a person whose recollection was extremely vague: she had been interviewed by the plaintiffs' solicitor prior to the proceedings, and did not remember having written her name on the document, neither did she remember having done so when she had seen the defendant. These meetings had apparently occurred prior to the trial. In those circumstances the Judge applied the relevant costs protection rule, commenting:

> "*It does not at all follow that, because a defendant fails, there was no reasonable ground."*

118. It also seems to me that the test for what is a reasonable ground to oppose is not necessarily the same as whether it is proper to "run" a case (that the claimant has failed to prove the will). Thus, for example, when considering wasted costs orders against legal representatives, the issue will be whether the legal representative acted improperly, unreasonably or negligently but that issue, in say a probate action, will be potentially different to the issue of whether there were reasonable grounds under CPR r57.7(5)(b). Even if there were no "reasonable grounds" within the latter provision, it does not automatically follow that a legal representative in raising the grounds in question would be acting in a manner falling within the wasted costs regime.

119. Finally, it seems to me that whether there are "reasonable grounds" to oppose has to be measured against the particular facts but also that the standard of what is reasonable has

to be set in line with the two factors identified by Henderson J in the *Kosac* case referred to above and the overall procedural and litigation climate at the relevant time. Thus, by way of example, the ability to take advantage of the *Larke v Nugus* regime and the duties of parties to further the overriding interest will be taken into account, where relevant, in determining whether there were "reasonable grounds" to oppose the will.

120. As regards burden of proof it seems to me that the burden of proof is on the claimant (or the propounder) to establish that there was no reasonable ground for opposing the will (which was the approach of Mr Edward Murray in *Elliott v Simmonds*). However, I also consider that there will be a burden on the defendant to identify what the grounds were and, on a costs' application, an evidential burden to raise a case that they were reasonable.

Trials and summary judgment

121. On many trials to prove a will where the Claimant is simply put to prove under CPR r57.7(5), the Claimant will adduce written evidence and the only cross-examination will be of the attesting witnesses. Where the Defendant cross-examines the attesting witnesses, and despite the court's notionally inquisitorial role, it is unlikely that the court will engage in its own separate cross-examination of the attesting witnesses. As regards other written witness evidence, the court is unlikely to insist on witnesses being called to be cross-examined by the court. Either the court will be satisfied on the balance of probabilities that the Will is proved as valid or it will not be.

122. It follows that, in practice, where there is no positive case raised in defence but a defendant relies on CPR r57.7(5), there is likely to be different practical difference between a trial and an application for summary judgment with the attesting witnesses being cross-examined on either basis.

123. The tests for a judgment are technically different: at a trial the court is solely concerned with whether or not on the balance of probabilities the case is proven or not. On a summary judgment application, the court is concerned with whether or not there is a real prospect that the will in question will not be proved to be valid on the current evidence. If the court were to decide that, on the evidence before it, there was a real prospect that the claimant would not prove the will to be valid then it would refuse the claimant summary judgment. Unless it was clear that the claim had no prospect of success, the claim would go to trial and the claimant might have the option of adducing further evidence.

124. I should add that, as regards the summary judgment test, it seems to me that the Judge in this case was wrong to say that the courts have added a gloss to rule CPR r24 in the manner he suggested. In effect, CPR r24.2, in focussing on a "real prospect" rather than mere arguability, is not a result of judicial gloss to the language of CPR r24 but of the changed wording from RSC Order 14 to that in CPR Part 24, which adopts the test formerly applied in the context of setting aside a default judgment which had been regularly entered.

125. If a Judge determines that there is no real prospect that a will will not be proved, it will still be necessary to ascertain under CPR r57.7(5) whether there were reasonable grounds of opposition to the will. In many cases the focus will be on whether there were proper and reasonable grounds for cross-examination of the attesting witness. In

my judgment, this is because if the written evidence in favour of validity, itself raised a real doubt that the will was valid, summary judgment in favour of the validity of the will can only have come about because the cross-examination of the attesting witness(es) will have allayed any concerns or suspicions (as it did after the trial in *Davies v Jones*). If, however, cross-examination did not allay any concerns or suspicions and judgment in favour of validity nevertheless follows, then it follows that on the evidence filed by the claimant the court was not satisfied that there was any real prospect on that written evidence that the claimant would fail to prove validity. If from the start of the proceedings there was no real prospect of the claimant failing to prove validity of the will on the evidence the claimant filed, and if the cross-examination of the attesting witnesses itself went nowhere and could not be expected to go anywhere and the result is that there is no real prospect of validity not being proved then it seems to me highly likely, if not inevitable, that there were no reasonable grounds of opposition to the validity of the will. I consider that *Elliott v Simmons* fits with this analysis.

126. I accept that it is not correct automatically to equate summary judgment in favour of validity, on the basis of no real prospect of validity of the will not being proved, with there being no reasonable grounds of opposition. However, it semes to me that the Judge erred in not explaining why, on the facts before him and given his findings, he considered that there were reasonable grounds of opposition (or put in the language of CPR r57.7(5), there were not no reasonable grounds). In my judgment, if there was never a real prospect that the claimant would fail to prove the Will, then there were no reasonable grounds of opposition for the purposes of CPR r57.7(5). In my judgment, "reasonable grounds" must at the least be grounds that raise a real prospect that the will will not be proved. Grounds that are merely arguable such that (for example) their deployment does not give rise to wasted costs sanctions, is not enough.

Approach on appeal

127. On an appeal against a Judge's decision that there were reasonable grounds to oppose a will, due deference must be accorded to the decision of the Judge who is carrying out an evaluative exercise, involving a question of mixed law and fact.

128. However, by analogy with what Hoffmann LJ said in *Re Grayan Building Services Ltd* [1995] Ch.241 about the test for conduct making a director "unfit" under section 6 of the Company Directors Disqualification Act 1986 and an appellate court's responsibilities on an appeal from a determination in this respect (citing Mr Jules Sher QC sitting as a deputy Judge of the Chancery Division in *In re Hitco 2000 Ltd.* [1995] B.C.C. 161):

> "*Plainly the appellate court would be very slow indeed to disturb such a conclusion as to fitness or unfitness. In many, perhaps most, cases, the conclusion will have been so very much assisted and influenced by the oral evidence and demeanour of the director and other witnesses that the appellate court would be in nowhere near as good a position to form a judgment as to fitness or unfitness than was the trial judge. But there may be cases where there is little or no dispute as to the primary facts and the appellate court is in as good a position as the trial judge to form a judgment as to fitness. In such cases the appellate court should*

> *not shrink from its responsibility to do so and, if satisfied that the trial judge was wrong, to say so."*

129. In many cases, in the context of CPR r57.7(5), the appeal court will be in as good a position as the trial judge given the main evidence will be on paper and the only oral evidence will be the cross-examination of attesting witnesses.

Summary of main conclusions as to the law and practice

130. My main conclusions are therefore as follows:

(1) CPR r57.7(5) reflects one of a number of probate principles as to costs which principle has been codified. The overall justification for all three probate costs rules/principles is the same and is summarised by Henderson J in paragraph [10] of the *Kostic* judgment.

(2) The codification achieved by CPR r57.7(5) represents the rule makers' judgment as to where to draw the line between the competing policy considerations identified at paragraph [10] of the *Kostic* judgment.

(3) However, in interpreting and applying CPR r57.7(5)(b), the courts should take account of the two factors mentioned by Henderson J in *Kostic* at paragraph [21], namely (a) that the inquisitorial role of the court in probate cases is much less than it once was and (b) that the courts are increasingly concerned to avoid encouraging litigation, and discouraging settlement, by a removal of the usual "costs follow the event rule" (being a concern in any case identified by Sir F.H. Jeune P in the *Spicer* case).

(4) The giving of a notice under CPR 57.7(5)(a) and compliance with that notice are pre-requisites to the costs protection under CPR r57.7(5)(b).

(5) Normally it will not be right for a party relying upon CPR r57.7(5) to adduce any evidence seeking to lay grounds to challenge the validity of the will.

(6) Consideration might be given as a matter of case management to requiring a party relying upon CPR r57.7(5) (a) to identify prior to a relevant trial or summary judgment hearing what reasonable grounds he relies upon as suggesting that the propounder of the will cannot or may not be able to prove the same and (b) to provide copies of relevant documents to be relied upon in cross-examining any attesting witness(es).

(7) There must be a link between what are said to be the reasonable grounds to oppose the will and the grounds in fact put forward and relied upon.

(8) The burden of proof under CPR r57.7(5)(b) is on the propounder of the will to show there were no reasonable grounds of opposition. However the person relying on the costs protection of that provision will need to identify what are said to be reasonable grounds and will have an evidential burden in relation to the same.

(9) The mere grant of judgment (after a trial conducted on the basis of the defence relying on CPR r57.7(5)) or summary judgment in favour of validity of a will cannot be equated necessarily and automatically with there having been no reasonable grounds of opposition.

(10) However, where in proceedings resulting in a summary judgment in favour of validity, there was at no time any real prospect that the claimant would fail to establish validity, then there can have been no reasonable grounds to oppose. If the grounds do not and could never have survived a summary judgment test then they are not reasonable within CPR r57.7(5).

(11) On an appeal, the appeal court will accord due deference to the decision of the Judge who decides the issue of whether or not there were "no reasonable grounds of opposition". In reaching that decision, the Judge carries out an evaluative exercise, involving a question of mixed law and fact.

(12) "*But there may be cases where there is little or no dispute as to the primary facts and the appellate court is in as good a position as the trial judge to form a judgment….. In such cases the appellate court should not shrink from its responsibility to do so and, if satisfied that the trial judge was wrong, to say so."*

(13) In many cases in the context of a determination as to whether there were no reasonable grounds of opposition under CPR r57.7(5), especially where it is made in a summary judgment context, the appeal court will be in as good as position to reach a judgment as the Judge at first instance.

Grounds of Appeal in this case

131. The grounds of appeal are as follows:

> "*1. The learned judge was wrong to state that he was prevented from making a costs order by CPR 57.7(5) and was wrong not to exercise his discretion to make a costs order under CPR 44.2 in circumstances where he also stated that not making a costs order led to an unfair outcome.*
> *2. Further the learned judge was wrong not to follow the authorities of Elliott v Simmonds [2016] EWHC 962 (Ch) and Elliott v Simmonds [2016] EWHC 732 (Ch) the facts and circumstances of which are analogous to the instant case when determining the appropriate costs order.*
> *3. In entering summary judgment in favour of the Claimant on the basis that the Defendant's grounds for opposing the 2019 Will had no real prospect of success the learned judge was wrong to conclude that the Defendant had reasonable grounds for challenging the 2019 Will such that he could not make a costs order against the Defendant under CPR 57.7(5). Those conclusions are incongruous and incompatible.*
> *4. The learned judge was wrong in any event to conclude that any of the grounds for opposing the 2019 Will were reasonable. It was clear from his Judgment that each of the grounds were unreasonable and the conduct of the Defendant was unreasonable in pursuing such grounds.*
> *5. The learned judge was wrong not to attach the appropriate weight to the public policy argument for awarding costs in a case such as this, which risks opening the floodgates to disappointed beneficiaries seeking to frustrate the probate*

> *process, despite knowing that they have no genuine prospect of succeeding, without attendant costs consequences*."

132. As regards the first ground of appeal, it seems to me that "unfairness" is not a ground for overriding what the rules provide. In oral submission, Ms Egan made clear that this was not the thrust of the ground. Rather, that the Judge had incorrectly applied CPR 57.7(5) to the facts of this case and that the point about unfair outcome only arose as a point thereafter in determining (as a matter of discretion) what the correct order should be.

133. As regards ground 2, it is necessary to consider the *Elliott v Simmonds* case. Again, in submissions it was clarified that what was being said was that the approach in that case should have been followed. I deal with the factual similarities between that case and this (but the divergent judgments) when considering the grounds of opposition raised by Mr Hill to the 2019 Will.

134. Grounds 3, 4 and 5 are at their base arguments that the Judge was simply wrong and (in the case of Ground 5) did not apply the correct test.

135. I start with the propositions that the decision of the Judge being an evaluative decision in the sense that it involves a mixed question of fact and law, is one that deserves the respect of an appellate court and is not to be too lightly interfered with by an appellate court. However, by analogy with what Hoffmann LJ said in *Re Grayan Building Services Ltd* [1995] Ch.241 about the test for conduct making a director "unfit" under section 6 of the Company Directors Disqualification Act 1986 and an appellate court's responsibilities on an appeal from a determination in this respect (citing Mr Jules Sher QC sitting as a deputy Judge of the Chancery Division in *In re Hitco 2000 Ltd.* [1995] B.C.C. 161):

> "*Plainly the appellate court would be very slow indeed to disturb such a conclusion as to fitness or unfitness. In many, perhaps most, cases, the conclusion will have been so very much assisted and influenced by the oral evidence and demeanour of the director and other witnesses that the appellate court would be in nowhere near as good a position to form a judgment as to fitness or unfitness than was the trial judge. But there may be cases where there is little or no dispute as to the primary facts and the appellate court is in as good a position as the trial judge to form a judgment as to fitness. In such cases the appellate court should not shrink from its responsibility to do so and, if satisfied that the trial judge was wrong, to say so."*

136. First, I consider there is force in the appellant's general point that there is an incongruity in finding that (for the reasons set out) there was no real prospect of any of the grounds raised preventing the Claimant proving the 2019 Will and nevertheless holding that the grounds amounted to reasonable grounds of opposition. In this respect it is important to note that none of the seven grounds advanced were altered or impacted upon by the cross-examination of Ms Watson. If there is, and never was, a real prospect of a ground of opposition preventing proof of a will then how can it be said the ground is a "reasonable ground of opposition"? In my view, it cannot be said. As I have also said,

I accept that the mere fact that the claim fails does not automatically mean that any issues or grounds of opposition raised are unreasonable. I also accept that, as I have also said, the position may change during the course of proceedings (as in *Davies v Jones*).

137. In this case the cross-examination of the attesting witness, as in *Spicer v Spicer*, did not go anywhere and there was no real prospect that it would. The attendance notes at the time were extremely detailed. Some of the individual grounds raised were not matters that an attesting witness could deal with (and indeed were not put to her), and others were answered by the detailed attendance notes. Any hope that the attendance notes might be demonstrated to be false itself had no reasonable grounds and was not in any event pursued in cross-examination. In short, even before cross-examination, the points raised were not going to go anywhere.

138. As regards ground 1 of opposition (Michael's involvement), the Judge decided that there was nothing in the point looking at the attendance notes and comparing the 2015 and 2019 Wills. That was the position throughout.

139. As regards ground 2 of opposition (the deceased wishing, in the event of Michael predeceasing her, to leave her property in the same way that he would have left the property by his will had he not predeceased her, but at some point not knowing the detail of his will and what the detailed consequence would be) was identified by the Judge as being a scenario that was entirely sensible and comprehensible and which of itself raised no issues concerning capacity or knowledge and approval. Further of course, that scenario had changed by the time the 2019 Will had been made in that the deceased had found out the position under Michael's will and considered very carefully the gift over (or stop gap as it was referred to) in the event of Michael predeceasing her. This ground was clearly unreasonable.

140. As regards ground 3 of opposition, a reason apparently given by the testatrix at an earlier stage for cutting Stuart out of the will, that issue was not determined or explored further with the attesting witness who doubtless would not have been able to give any relevant evidence about it. Whether the deceased was right or wrong, the Judge decided that Stuart had already been "cut out" by the 2015 Will. Under that will he was only prospectively entitled to residue but there was none. Again, it is difficult to see how this was a reasonable ground of opposition to the validity of the 2019 Will. As has been pointed out in other cases, it is up to a testator as to how they leave their estate by will. Indeed, the situation is similar to that in *Elliott v Simmons* where it was suggested (which has echoes with the correspondence in this case) that there was no apparent reason why the testator should have wished to extinguish a legacy in favour of a Mr Simmonds and the response given by the Judge was that that did not go clearly to testamentary capacity and was not an issue on which the attesting witness would have been likely to provide any material evidence. In this case this point was not put to the attesting witness.

141. As regards ground 4 of opposition (text messages between Stuart and Michael), my initial reaction is that raising this issue moved the case from one putting the propounding party to proof to one of raising a positive case, by putting forward positive evidence, that in some way Mrs Lumb lacked capacity. As such it went outside the costs protection of CPR r57.7(5). In any event, the Judge said this really was a re-run

of ground 3 and the same answer applied. Further, of course, the evidence was of marginal relevance because it did not deal with the position in 2018 (when Mrs Lumb reported to her solicitor that Stuart had not visited her in hospital), but to a period after that. Again, this was clearly not a reasonable ground.

142. Ground 5 (toing and froing) again was not a reasonable ground of opposition. The position was clearly explained on the attendance notes. Those attendance notes did not on their face and in this respect raise any concerns as to testamentary capacity or knowledge and approval. Cross-examination of the attesting witness did not focus on this issue in any meaningful way.

143. Ground 6 (the medical records) were apparently put in at the behest of Stuart. If so, I regard this as raising a positive case and going beyond simply putting the claimant to proof. As such, the raising of this matter did not attract the costs protection of CPR r57.7(5). In any event, the ground was not a reasonable ground of opposition: the attendance notes clearly demonstrated capacity without any concerns and the medical notes, as held by the Judge, either did not raise a relevant concern or only a very weak concern (weak in terms both of testamentary capacity/knowledge or approval objectively but also as regards the state of the testator's mind at the time of execution of the 2019 Will). Any such weak concerns were in any event completely answered by the attendance notes. Further, and not surprisingly, they were not put to the attesting witness in cross-examination.

144. Ground 7 (something might turn up) was flawed as there was no reasonable ground to think anything more would turn up and putting a propounder to strict proof of a will on this basis is not, in my judgment, to raise a reasonable ground of opposition.

145. The Judge's judgment fails to identify why he thought that each of the seven grounds were reasonable grounds within the meaning of CPR r55.7(5). He had sympathy with the view that if the grounds had no real prospect of success then they could not be reasonable grounds but seems to have decided that the tests of CPR Part 24 and CPR r57.7(5)were not the same (which is correct) but did not explain in the circumstances why he considered that the grounds of opposition, which never had any real prospect of success, or, put another way, which did not undermine the claimant's case for validity so that such case could be said to have a real prospect of failing, were reasonable grounds to raise. This being so in circumstances where (a) at all times the Defendant had (or could have obtained)[2] the material to know that the real prospect of success test would not be met; (b) which cross-examination of the attesting witness did not affect and where there could have been no real prospect that it would and (c) where there is no real indication that the ground raised gave any real pause for thought and which, as I have analysed, was, in each case, akin to hopeless.

146. The Judge was clearly unhappy with the conclusion that he reached regarding the application of CPR r57.7(5) and in my judgment he was wholly right to be.

[2] It was suggested that the Will Writing Files had not been properly copied when handed over (due to the double-sided nature of some of the sheets). However, Mr Hill accepted that although he identified this issue close to trial, the error was capable of being detected much earlier and if it had been full copies would have been provided timeously.

147. In short, the position is analogous to *Grayan* in that there is a mismatch between the primary findings of fact and primary evaluation of the grounds of opposition and the conclusion drawn that the grounds were nevertheless reasonable grounds of opposition. Like Henry LJ in *Grayan*, I have been unable to find reasons which would justify the conclusion reached. Further, the Judge appears to have equated mere arguability with reasonableness, which is, in my judgment, the incorrect test.

Conclusion

148. The appeal succeeds and the Deputy District Judge's costs order is set aside.

149. The result is that the costs protection of CPR r57.7(5) does not apply. Accordingly, the relevant applicable principles are set out in CPR Part 44. It seems to me that I have sufficient material before me to take the costs decision afresh and should do so. As matters stand, I would order that the costs follow the event and that they should be paid by the Defendant to the Claimant on the standard basis. In this respect I do not need to rely upon any conduct as found by the Judge as supporting that ground, though I note that no respondent's appeal or notice was lodged in this respect.

150. I also do not need to consider the issue that arose in *Elliott v Simmonds* regarding the time at which the defendant gained the relevant information as it was all available to him prior to proceedings being instituted. The medical records were available later but took the grounds of opposition no further.

151. Had the opposition not been raised the Claimant would have been able to prove the will in common form in the usual way and would not have had to prove the will in solemn form. There is no room for an argument that proof in solemn form would have been necessary in any event, so that some costs should be excluded from the costs order.

152. The costs would ordinarily be summarily assessed. I would also direct that the question of summary assessment or detailed assessment with a payment on account be remitted to the Deputy District Judge. I will however hear further argument on these points if any party wishes to raise them.

153. The parties should seek to agree a form of order to give effect to this judgment. If one cannot be agreed by the time that the judgment is handed down then I will direct that a short remote hearing of no longer than an hour is fixed to deal with the form of order, to be listed to come on as soon as possible with skeleton arguments being lodged and exchanged no later than 10am of the day before such hearing. I adjourn all consequential matters until the earlier of my making an order, on an agreed minute being lodged with the court, and the further hearing envisaged by this paragraph. I also extend the time for appealing so that he 21 days runs from the earliest of the dates of the two events just identified.