

Claim No. PT-2021-000923

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

[2023] EWHC 3397 (Ch)

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

Friday, 20th October 2023

Before:

CHIEF MASTER SHUMAN

B E T W E E N:

JOANNA CLAIRE DALEY

Claimant

and

SUSAN AMANDA HODGES

Defendant

Mr R Choudhury, counsel, appeared on behalf of the Claimant, Joanna Daley
The Defendant, Susan Mackie, appeared in Person

JUDGMENT
(Approved)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

CHIEF MASTER SHUMAN:

1. This issue concerns costs and whether a proportion of the costs incurred in respect of the substituted personal representative's application for directions should be paid out of the claimant's share in her late mother's estate, as contended for by the defendant and opposed by the claimant. I have already made an order that the substituted personal representatives are entitled to their costs out of the estate, and I have summarily assessed those costs on an indemnity basis, as is usual, at £55,286.60. At that hearing I gave directions as to the steps that the substituted personal representatives are to take and need not take to complete the administration of the estate. At that hearing the defendant raised issues about how the costs had been increased by the behaviour of the claimant. Although the claimant was represented by counsel I listed a further hearing so that the claimant had an opportunity to respond to the issues raised, and that both parties could take me through relevant correspondence, my concern being that I was being given a snapshot of the correspondence.
2. The hearing on this discrete issue on costs took place remotely. The claimant acted through counsel, Mr Choudhury and the defendant acted in-person. She had a friend in the room with her to provide moral support. Mr Choudhury did not take objection to the friend being in the room after it was confirmed why she was there and what her role was. Whilst I am only concerned with costs arising out of the substituted personal representatives application, it is necessary to set out some of the background to this case.

Background

3. The claimant and the defendant are the only children of Ronald and Jill. The claimant is married to Ben. They have two children, Emma and Sarah. The defendant is a divorcee, and she also has two children, Charlotte and Beatrice.
4. Ronald died in January 2020. Jill died on 4 March 2021 leaving a will dated 23 June 2020 ("the will").
5. Clause two of the will appointed the first and second defendants as executors. They were former neighbours and friends of Jill's. They renounced their office and indeed before the claim was issued the first defendant had died. The order of 7 September 2023 removed them as parties.
6. Clause six of the will provided for various pecuniary legacies totalling £71,500, the bulk of which was given to Jill's granddaughters. Clause seven of the will provided that the residue of the estate be divided between the claimant and the defendant in equal shares.
7. I do not know if the claimant and defendant ever had a close relationship, and it certainly does not matter for these purposes. What appears from the evidence is that Jill and Ronald stived to treat their daughters and granddaughters equitably and fairly. I have seen in the voluminous paperwork before me a joint letter written by Jill and Ronald on 24 April 2014 which sets out how they tried to treat both daughters in such a way. That was a letter written to Ben, the claimant's husband. What also appears to be the position is that the relationship between the claimant and the defendant became more strained. This principally concerned a loan of £35,000, that was its original description, made by Jill and Ronald to the defendant in 2014.
8. Some enquiries were made about whether Jill and Ronald could enter into an equity release scheme for a further £50,000. The evidence shows that the claimant demanded a balancing payment, that being in accordance with how Jill and Ronald had always tried to deal with both their daughters.
9. That led, I anticipate, to Jill and Ronald going to solicitors to make a will. They made a will in 2014, although they made a further will in 2015. After Ronald died Jill made a new will

in 2020. This is a relatively modest estate and when one filters down all of the multitude of issues in this case, principally now it appears to concern allegations by the claimant that the defendant had obtained sums from Jill as a result of undue influence and a dispute about chattels, including jewellery, and more specifically who took what after Jill died.

Proceedings

10. After Jill's death there was an impasse between the claimant and the defendant and the claimant brought a claim in October 2021 to appoint substituted personal representatives and to seek an account, as she alleges that the defendant had intermeddled in her mother's estate.
11. On 17 January 2022, Master Teverston made a consent order appointing the substituted personal representatives and leaving the disposal hearing still listed to deal with costs and consequential matters. That came before Master Marsh on 17 February 2022 and he ordered the defendant to pay the claimant's costs on a standard assessment basis. He summarily assessed those in the sum of £31,772 and ordered that if they were not paid by the specified date the costs were to attract interest at the rate of 8% and to be paid out of the defendant's share of the estate.
12. For the purposes of the earlier hearing I read the transcript of that hearing and the judgment. Certainly, Master Marsh on that occasion considered that the defendant's position was unreasonable and he did observe that the tone of the correspondence from her then solicitors was inappropriate. That is to an extent water under the bridge because what I have to focus on is the application that the substituted personal representatives made.
13. Indeed, as I say, they were appointed and they tried to do their best to carry out their duties in the midst of intericine warfare. They were left with absolutely no option but to bring an application to the Court seeking directions. Frances Davis who is one of the substituted personal representatives filed two witness statements in support of the application. She is a solicitor of Progeny Law and Tax, a firm based in Leeds, West Yorkshire.
14. The first statement on 26 May 2023 sets out in detail the background to the case and the issues that the substituted personal representatives were compelled to bring to Court so that they could discharge their duties. She also filed a second witness statement dated 29 August 2023. Not only did the latter update the Court on the most up-to-date position for the purposes of the hearing, but she also dealt head-on with many of the criticisms that were made of the substituted personal representatives by the claimant.
15. The claimant herself filed two witness statements, one dated 28 June 2023 and one dated 7 July 2023. The defendant filed a witness statement dated 1 August 2023. When the matter came before me, although there were various other points, the key issues had been refined down to five points. Firstly, how the substituted personal representatives should deal with the issue of Jill's chattels and how their value should be allocated as between the beneficiaries. By that, I mean the claimant and the defendant. Secondly, whether the rule against double portions applies in relation to Jill's estate, and if so to what extent. Thirdly, how the substituted personal representatives should proceed in relation to monies received by the claimant and the defendant from Jill during her lifetime, and in particular whether they fall to be treated as gifts or loans. Fourthly, whether sums received by the defendant on or around the date of the death of Jill from Jill's bank account should be deducted from her share of the Jill's estate. Fifthly, whether Jill's estate is liable to pay the claimant the sum of £20,000, which was not paid to her under the terms of a deed of variation entered into by Jill relating to the estate of her late mother, Mrs Pocock, who had died in December 2004. The relevant deed of variation was made in 2005.
16. To complicate matters a little, but not much, the defendant assigned her interest in the estate

to a third party. Prior to the hearing in September there was an issue as to whether the third party should be joined as an interested party.

Costs

17. Mr Choudhury argued on behalf of the claimant that the defendant had made no formal application for costs. During the course of the submissions before me, I referred him to the provisions of CPR23.3(2)(b) and that the Court had already dispensed with a formal application notice and indeed given directions for the hearing of the defendant's application.
18. To be fair to Mr Choudhury, he was new counsel instructed in the matter and he did not attend the hearing on 7 September 2023. He did however also raise at the outset of the hearing that the Court had no jurisdiction to make a costs order. He referred me to the order of Master Teverson whereby he appointed, by consent, the substituted personal representatives and provided that their costs be paid out of the estate. Although that is the usual order which is made when substituted personal representatives are appointed to act. Indeed it would be difficult to see why professional substituted personal representatives would act without payment. I gave a short judgment in respect of these submissions and the hearing proceeded.
19. Looking at costs in this matter, there needs to be a principled approach to this. CPR Part 44 provides the framework for how the Court should exercise the wide discretion that it has in respect of costs. CPR44.2 provides that the Court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid.
20. CPR 44.2(3) provides, if the Court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the Court may make a different order.
21. CPR 44.2(4) provides that in deciding what order if any to make about costs, the Court will have regard to all the circumstances including (a), the conduct of all the parties, (b), whether a party has succeeded on part of its case, even if that party has not been wholly successful, and (c), any admissible offer to settle made by a party which is drawn to the Court's attention and which is not an offer to which costs consequences under Part 36 apply.
22. CPR 44.2(5) sets out examples of conduct of the parties and that specifically includes: (a) conduct before as well as during the proceedings, in particular the extent to which the parties followed the Practice Direction, Pre-Action Conduct, or any relevant pre-action protocol; (b), whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and (c), refers to the manner in which a party has pursued or defended its case or a particular allegation or issue.
23. CPR 44.2(6) sets out a non-inclusive list of the orders which the Court may make which includes an that a party must pay (a), a proportion of another party's costs, and (b) a stated amount in respect of another party's costs.
24. The substituted personal representatives applied to Court by notice dated 30 May 2023 seeking directions from the Court in respect of the five principal issues that I have identified. I have already indicated that that application was supported by two witness statements by one of the substituted personal representatives.
25. Looking at this case, how it has been argued and how it is presented to the Court in terms of costs, it would be fair to say that the defendant has not helped herself. She has filed three iterations of her skeleton argument for this hearing. The claimant has filed a skeleton argument responding to the defendant's skeleton argument, and further, a skeleton argument from counsel. I gave the defendant an opportunity to set out her arguments in her skeleton argument, principally by reference to the evidence before the Court and to enable the claimant to have an opportunity to respond.
26. The defendant's arguments were peppered with adjectives, but centrally said that there was

a clear direct relationship between the claimant's actions, the volume of correspondence, the Court hearing. She submitted that the claimant increased the time that the substituted personal representatives had to take in administering the estate, caused delays in the administration and financial costs to the estate.

27. She also contended that she had counted the pages in the bundles and 843 were attributable to the claimant and 252 to the defendant. From that, she extrapolated that of the costs, £53,286.60 should be borne by the claimant and 2,000 by her, although she did go on further to suggest that the maximum that could be attributable to her was £5,265.39. The issue of costs is not so simplistic as to be able to attribute pages in a bundle solely to one side.
28. It is a question of impression having considered all the circumstances of the case, and it does not help the Court to have a calculation from a party who cannot be described as objective. An example of that is, at the hearing on 8 September 2023, the defendant tried to challenge the costs order made by Master Marsh back on 17 February 2022.
29. In the course of argument, I was referred to two cases by the defendant in connection with matrimonial proceedings which made observations which I accept and more general observations about litigation and costs. Counsel for the claimant referred me to *Pegler v McDonald* [2022] EWHC 2069 (Ch), which sets out general principles and emphasised the point that the costs of a trustee or a personal representative are to be reimbursed from the fund or the estate.
30. The response to that is, yes. That order was made back in September. What I was concerned with is whether it was appropriate to make any adjustment of those costs between the claimant and the defendant. I referred the parties to the classification of costs as set out in *Re. Buckton* [1907] 2 Ch 406. It seems to me that this was a hearing concerning hostile costs between the claimant and the defendant only. What I was concerned with was whether there should be any costs order made between the beneficiaries in respect of the substituted personal representatives application, where one beneficiary would ultimately bear a greater proportion of those costs out of their share of the residue.
31. Counsel for the claimant set out all that he could in respect of the claimant. His focus was that there was no agreement between the claimant and the defendant so that the substituted personal representatives had no option but to bring the matter back to Court, I entirely accept that point. The substituted personal representatives in this case have been in an invidious position and they have done the best they can in circumstances which are far from ideal for them.
32. Mr Choudhury then honed in on the fact that the substituted personal representatives had not sought a costs order against the claimant and that really was an end to the matter. He submitted that had they seriously felt there was a reason to do so, because of clear hostility and non-cooperation from the claimant, they would have picked up on that point and sought an adverse costs order against the claimant. Whilst there is some superficial force in that point, it does seem to me that the substituted personal representatives were, as I indicated, in an invidious position.
33. They were also in an invidious position because when they started to act and tried to carry out their role, they were subject to significant criticism, principally but not exclusively from the claimant. She went so far as to make a formal complaint to the SRA against the conduct of the substituted personal representatives.
34. For the purposes of this application in respect of costs, I derive most help from going back and looking at the witness statements of Ms Davis and then see how each party in their own witness statements and positions before the Court sought to argue their respective cases. Probably for the third time of repeating, what is plain is that substituted personal

representatives had to make an application to Court. They had no other option. They have taken proper steps in this case to try to navigate a course through very troubled waters. The parties did not argue at the September hearing that the substituted personal representatives were not entitled to their costs.

35. The substituted personal representatives obtained an opinion from counsel on the issues between the parties. They provided that opinion to the parties, although the claimant required to see the instructions to counsel, which I do not consider to be an unfair request. The point that troubled me in this case back on 7 September 2023 was when the defendant took me to some of the correspondence in this case and the position of the claimant. To be fair to the claimant, I wanted not only the defendant to set out her position in respect of the evidence but for the claimant to have an opportunity to consider that. I am satisfied that both parties having referred me to the witness statements and exhibits in this case, to correspondence and their respective positions have had ample opportunity to tackle this point.
36. The claimant's position was that she would deal with matters at the hearing of the substituted personal representatives application on 7 September 2023, which was listed for 1 day. The defendant had agreed to the substituted personal representatives position on chattels. She had agreed that the double portions rule did not apply. She did not object to the deed of variation point, but she did maintain her position that she had received permission from Peter Hodges, previously the first defendant, in respect of monies taken out of Jill's bank account. There remained between the claimant and the defendant an issue about chattels and an issue about sums received by the defendant during Jill's lifetime.
37. Turning then to the issues, firstly as to chattels. The substituted personal representatives, doing the best that they could, prepared a schedule inviting comments from the parties. The claimant did not engage with this. The defendant did provide information. Whilst it was not full, she considered that she had provided what she could with the limited information that she had, but what the parties did not go on to do was sufficiently set out their respective stances.
38. The position that the substituted personal representatives were in was that the claimant and the defendant were each accusing the other of taking chattels after Jill's death. The outcome is that the substituted personal representatives have assigned any rights to recover those chattels to either the claimant and/or the defendant. It will be a matter for them to argue that out if that is what they are intent on.
39. What I did direct was that the substituted personal representatives were entitled to use the figure of £32,538 as the value of the chattels in respect of the IHT400 because one of the problems in this case is that the substituted personal representatives have been unable to apply for a full grant. They cannot obtain agreement between the parties, and so they had to go back to Court and get a direction.
40. In relation to the double portions point that was argued out before me on 7 September, I think it would be fair to say that was a relatively short point. The claimant did argue that the rule applied, but I accepted the substituted personal representatives' arguments in relation to this. As I have indicated, the defendant had already adopted the substituted personal representatives' arguments on this. In relation to the payments to the defendant, the substituted personal representatives were endeavouring to keep this narrow between the parties, but what I ultimately directed was that the sum of £2,610 that had been received by the defendant should be set off against her entitlement as a residuary beneficiary. The claimant maintained in relation to this that the substituted personal representatives should go further back.
41. That leads into issue four which is whether certain sums should be treated as gifts or loans.

What was accepted between the parties is that they should be treated as gifts and the substituted personal representative has assigned any right to challenge the validity of the gifts on the basis of undue influence to the claimant. If she chooses to do that, that is a matter for her.

42. The defendant argued back in September and indeed in relation to these costs that she wants an end to these proceedings. The problem in relation to undue influence is that there has been no trial on this issue, the Court has not had set out before it the legal case as to what the claimant is arguing, not had an opportunity to hear oral evidence and to make findings of fact. So that remains a potential live issue between the parties. In relation to the fifth issue, the deed of variation, it would be fair to say that the defendant had previously questioned this. However she had accepted the position that the claimant should receive a balancing payment of £20,000, and that was certainly accepted prior to the hearing.

43. There was more to this case than just the five issues for the purposes of the substituted personal representatives application. In fact the claimant had raised a number of other matters, and they are set out specifically in paragraph 43 of her first witness statement. In paragraph 43 she sets out 17 directions or orders that she was seeking from the Court, and I will just give some of those by way of highlights of what she was seeking. For example:

“(5) An order that the substituted personal representatives provide details of the whereabouts and realised value of my mother’s car and the whereabouts and realised value of the chattels remaining at the property.

(6) A ruling on issues of presumed undue influence generally and on assets from my father’s estate being held by my mother as trustee.

(7) A ruling on the questionable decision by the substituted personal representatives to call back into the estate only transfers made by the [...] defendant the day before my mother died. That is the issue about the sum of £2,610.

...

(9) A ruling on the validity of notes for Peter which concerns the will file.

...

(12) A general ruling on payments to Susan allegedly made to help her back on her feet.

...

(15) A direction that the substituted personal representatives step down and be removed as substituted personal representatives of my mother’s estate.”

44. Contrary to Mr Choudhury’s submission that the substituted personal representatives could have raised an issue about costs and the fact that they did not do so should be taken into account, the witness statements of Ms Davis set out in some detail the problems that they experienced in dealing with the claimant and her hostility towards them when it became

- apparent to her that they would not do what she required them to do.
45. However, as I have indicated in this case, the defendant has not helped herself either in the manner in which this has been pursued before the Court. An easy route in this case would be to simply allow for there to be no order, no distribution between the claimant and defendant in terms of additional costs. Certainly, as I have said, the substituted personal representatives had no option but to come to Court, but it does not seem to me to be remotely fair or proper when I consider all the circumstances to simply allow the share to be evenly divided, the share of the costs evenly divided between the two beneficiaries.
 46. It does seem to me that the claimant has contributed to a greater proportion of the issues and the amount of work that the substituted personal representatives had to do for the purposes of bringing the application to Court and coming to Court to determine the directions. Indeed, as I have said, simply providing for the costs to come out of the estate generically would be unfair and would not reflect the conduct of the claimant in increasing costs in respect of this application.
 47. I will make a costs order and I will order that the claimant to pay 65% of the costs out of her share of the estate and 35% will come out of the defendant's share which in very crude terms equates to the claimant paying £35,936 and the third defendant £19,350.
 48. The order I am making is a percentage one. That reflects as best as I can the division between the parties with regard to the manner in which the application was opposed, the additional matters that were raised, specifically the issues in relation to chattels and gifts made by Jill to the defendant which may or may not be subject to further litigation, but that litigation will not be in this Court.
 49. It also reflects the point on double portions and the payments taken from Jill's account around the time of her death and the amount of £20,000 that remains due to the claimant. That is the order that I am making in relation to costs.

End of Judgment

Transcript from a recording by Ubiquis (Acolad UK Ltd)
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiquis.com

Ubiquis (Acolad UK Ltd) hereby certify that the above is an accurate and complete record of
the proceedings or part thereof

This transcript has been approved by the judge.