



Neutral Citation Number: [2024] EWHC 2143 (Ch)

Case No: PT-2022-000316

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/9/2024

Before:

MASTER CLARK

Between:

(1) FOLDS FARM TRUSTEES LIMITED
(2) CUTTS TRUSTEES LIMITED
(as trustees of the Susan Mary Cutts Will Trust and the
Oliver Alfred Sidney Cutts Discretionary Will Trust)

Claimants

- and -

(1) OLIVER ALISTER SYDNEY CUTTS
(2) VICTORIA DELVILLE-CUTTS
(3) CHARLOTTE SPRINGALL
(4) CECILIA DELVILLE-LINDSAY
(5) CLOUDIA KINSVILLE-HEYNE

Defendants

Josh Lewison (instructed by **Wilson Solicitors LLP**) for the **Claimants**
Daniel Burton (instructed by **Russell-Cooke LLP**) for the **First Defendant**
The **Second Defendant** in person
Harry Samuels (instructed by **Mishcon de Reya LLP**) for the **Third Defendant**
Julian Reed (instructed by **Leonard Solicitors LLP**) for the **Fourth Defendant**
The **Fifth Defendant** not attending

Hearing date: 12 June 2024

Approved Judgment

This judgment was handed down remotely at 10:00am on 13 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Master Clark:

1. This is my judgment on costs following my judgment dated 15 January 2024 (“the main judgment”), in which I decided to approve the trustees’ decision (“the Decision”) to appoint the Farm to the first defendant, Alister Cutts. This judgment uses the defined terms in the main judgment.

Costs - legal principles

2. The legal principles as to costs are well established, and were largely common ground. Because two of the defendants are litigants in person, I set them out in greater detail than would otherwise be necessary.
3. Section 51 of the Senior Courts Act 1981 provides in part that, subject to rules of court, the costs of and incidental to all proceedings in the High Court are in the discretion of the court; and that the court has full power to determine by whom and to what extent the costs are to be paid.
4. Rule 44.2(1) of the Civil Procedure Rules 1998 (“the CPR”) provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Rule 44.2(2) provides if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order. However, this general rule is subject to the special rules applicable to trusts and estate litigation.
5. Trustees’ entitlement to costs is governed by section 31(1) of the Trustee Act 2000, which provides:

“A trustee—
(a) is entitled to be reimbursed from the trust funds, or
(b) may pay out of the trust funds,
expenses properly incurred by him when acting on behalf of the trust.”
6. The effect of s.31(1) is to codify the law as it then stood: *Price v Saundry* [2019] EWCA Civ 2261 at [22].

7. This is supplemented by rule 46.3 of the CPR, which provides:

- “(1) This rule applies where
- (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
 - (b) rule 44.5 does not apply.
- (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.
- (3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis.”

8. This is, in turn, supplemented by paragraph 1 of the Practice Direction to Part 46 of the CPR, which, so far as relevant, provides:

“Awards of costs in favour of a trustee or personal representative: rule 46.3

1.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative (‘the trustee’) –

- (a) [...];
- (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee’s own; and
- (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.

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

10. The CPR contain no special provision as to beneficiaries’ entitlement to costs.

11. Within this context, the incidence of beneficiaries’ costs following an application for the court’s approval of a trustees’ decision is to be determined by analogy with the 3 categories set out in *Re Buckton* [1907] 2 Ch 406. These can be summarised, so far as relevant to this claim, as follows:

Category 1:

Proceedings brought by the trustee to have the guidance of the court as to a question arising in the administration of the trust: the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it.

Category 2:

Proceedings brought by someone other than the trustee, but raising the same kind of point as in the first category, and which would have justified an application by the trustee. Such proceedings differ in form but not substance from the first category, and similar considerations apply as to costs.

Category 3:

Proceedings in which the application is made by someone other than the trustee, and have the character of a hostile claim to a beneficial interest in or entitlement to the trust fund. This category differs from the first two categories, in that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for a similar reason: the general principles as to costs of hostile litigation apply, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation.

See *Lewin on Trusts* (20th edn) at §48-033

12. The *Buckton* categories are not intended to be exhaustive: *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 at [75].
13. Most applications for approval or “blessing” of a trustees’ decision will fall within *Buckton* category 1 if brought by trustees in their capacity as such “for the guidance or proper protection of the trustees in the administration of the trust”: see *Lewin*, §48-052. The result is a presumption that the trustees and the beneficiaries are to have their costs out of the estate.
14. However, the beneficiaries’ entitlement to costs is by analogy to the trustees’ right of indemnity under CPR 46.3, so they are subject to the same requirement of reasonableness as trustees: *Lewin* §48.041.
15. The threshold required to rebut the presumption was considered in *National Westminster Bank plc v Lucas* [2014] EWCA Civ 1632, in which Sales LJ (as he was) said at §112:

“... opposition by a beneficiary to a proposed course of action by a trustee or personal representative is not, without more, sufficient to justify a departure from the general rule that the costs of all necessary parties to a *Buckton* class 1 or class 2 application should be borne by the trust fund or estate. Strong opposition is often encountered, in my experience, in applications for directions by, for example, the trustees of pension funds particularly where the proposed course of action will either cast additional financial burdens on the employer or reduce the fund available to a particular class of member. Nobody has ever suggested that the often

lengthy proceedings which this leads to should give rise to adverse orders for costs of the kind made in this case.”

16. However, where unreasonable conduct by a beneficiary is responsible for generating substantial costs on the part of a trustee or personal representative as regards an application to the court, it is appropriate that the burden of those costs should be borne by that beneficiary, and not fall on the trust or estate and thus the beneficiaries as a whole: *Green v Astor* [2013] EWHC 1857 (Ch), [2013] 6 Costs LO 911 at [54]. In that case, a trustee sought the approval of the court of an agreement partitioning with a co-claimant the costs of a claim against a Swiss-based third party. The trustee had had favourable advice from a Swiss lawyer, which advice she shared with the beneficiaries and to which all the beneficiaries except one consented. The judge described the opposing beneficiary’s conduct of the litigation as doing much to escalate the costs; the trustees as having faced sustained hostility and opposition; and the claim as having far more the character of hostile litigation than category 1 of *Buckton*. For that reason, he ordered the costs to be paid by the opposing beneficiary.

Trustees’ costs

17. It was common ground that the trustees’ costs were properly incurred by them in acting on behalf of the trust, and those costs should be paid from the fund and assessed on the indemnity basis, if not agreed by the defendants (personally and in their representative capacity).
18. The trustees did not seek an order that their costs be paid by any other party, although they did submit that the opposing beneficiaries’ costs should not be paid from the trust fund.

Alister’s costs

19. Alister supported the trustees in the claim. He filed evidence although he was not cross-examined; and his counsel briefly cross-examined Mr Gooch.
20. On 1 March 2024, Alister made an open offer in respect of costs:
 - (1) to pay to the trustees £15,000, being 25% of their costs of the reasonably estimated costs of an uncontested blessing application (such costs being estimated at £60,000);
 - (2) to bear his own costs and not seek them from the trust fund.This offer was expressed to remain open for 21 days from the date of the letter i.e. until 22 March 2024.
21. At the hearing however, his counsel submitted that Alister should be paid his costs from the trust fund in the usual way, and as a non-hostile beneficiary on the indemnity basis.

22. The trust fund as it currently stands consists almost entirely of the illiquid asset, the Farm (valued by the trustees' valuer, Savills in January 2023 at £6.8 million), subject to a secured debt of £400,000. On the appointment of the Farm to Alister, the trustees will receive £4.2 million, from which they will discharge the secured debt, leaving (before costs) about £3.8 million.
23. Alister's counsel's submissions were premised on the basis that Alister's costs should be paid from the cash fund held by the trust following the appointment of the Farm to him. The effect of this would be that payment of his costs would have no impact at all on the part of the trust fund received by him. In my judgment, this would be wrong in principle, particularly where the "gift element" of the appointment is about £2.4 million. In my judgment, the appropriate costs order in respect of Alister is in the terms offered by him:
 - (1) Alastair to pay £15,000 to the trustees in respect of their costs;
 - (2) Alastair to bear his own costs up to and including 22 March 2024.
24. As to Alister's costs after the expiry date of his offer, since the offer was not accepted, the appropriate order, in my judgment, is for those costs to be paid from the trust fund.

Opposing beneficiaries' costs

Effect of CPR Practice Direction 3E – Cost Capping

25. CPR PD 3E is entitled "Costs Capping" and provides in Section II:

**"SECTION II – COSTS CAPPING IN RELATION TO TRUST FUNDS
Costs capping orders in relation to trust funds**

- 5.1 In this Section, 'trust fund' means property which is the subject of a trust, and includes the estate of a deceased person.
- 5.2 This Section contains additional provisions to enable –
 - (a) the parties to consider whether to apply for; and
 - (b) the court to consider whether to make of its own initiative, a costs capping order in proceedings relating to trust funds.
- 5.3 This Section supplements rules 3.19 to 3.21 and Section I of this Practice Direction.
- 5.4 Any party to such proceedings who intends to apply for an order for the payment of costs out of the trust fund must file and serve on all other parties written notice of that intention together with a budget of the costs likely to be incurred by that party.
- 5.5 The documents mentioned in paragraph 5.4 must be filed and served –
 - (a) in a Part 7 claim, with the first statement of case; and

- (b) in a Part 8 claim, with the evidence (or, if a defendant does not intend to serve and file evidence, with the acknowledgement of service).

5.6 When proceedings first come before the court for directions the court may make a costs capping order of its own initiative whether or not any party has applied for such an order.”

26. The trustees were the only parties to comply with the Practice Direction by filing a budget. Their counsel submitted that this was a factor which should affect the all the beneficiaries’ entitlement to recover their costs from the trust fund.
27. As to this, first, there is no sanction imposed by the practice direction, unlike the position in respect of costs budgets, where an express sanction is imposed. Secondly, this requirement is imposed in the context of costs capping; and its purpose is to enable the court to consider whether to make a costs capping order. It does not have a wider purpose. In this case, the court considered whether to make a costs capping order on two occasions: on 16 November 2022 before Deputy Master Glover and on 17 May 2023 before Deputy Master Hansen. Neither the trustees nor the court raised the question of making a costs capping order in respect of the beneficiaries’ costs, although it was and is common ground that this is a *Buckton* category 1 case. Now that the occasion for making such an order has passed, I do not consider that the fact that a budget was not filed at the time required by the Practice Direction is a relevant factor in my determination of costs.

Beneficiaries’ costs

Victoria

28. Victoria, who acts in person, has not filed a costs schedule or any written document setting out her costs of the claim. She submitted that the appropriate order for all the beneficiaries was no order as to costs. I will make no order as to Victoria’s costs.

Charlotte

29. Charlotte’s position was that her costs should be paid out of the trust fund, and assessed on the indemnity basis; and that in addition to bearing his own costs, Alister should be ordered to make a contribution to the trust fund of 50% of the total litigation costs paid out of the trusts in relation to this claim.

Amount of Charlotte’s costs

30. Charlotte’s costs up and including the trial total £195,050, comprising:
- (1) Gunnercooke's fees of £117,378 (including VAT);
 - (2) Graham Stott's trial brief fee of £30,000 (including VAT);
 - (3) Expert fees of £23,972; and
 - (4) Counsel (Richard Dew)'s fee of £23,700 (including VAT).

31. To this must be added Charlotte's costs of the consequential hearing on 12 June 2024 of her new solicitors, Mishcon de Reya, in the sum of £27,972.84.

Costs order to be made in respect of Charlotte's costs

32. As set out above, Charlotte's opposition to the approval of the Decision would not be sufficient to deprive her of her indemnity from the fund unless it was unreasonable.
33. To assess the reasonableness of her opposition, the starting point is the issues in the claim (set out at paragraph 72 of the main judgment):
 - (1) whether the Decision was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause(s) could properly have arrived at, and, in particular,
 - (i) whether there were any relevant matters which the trustees had failed to take into account;
 - (ii) whether there were any irrelevant matters which the trustees had wrongly taken into account;
 - (iii) whether the Decision was one which a rational trustee could have come to;
 - (2) whether the Decision was vitiated by any conflict of interest on the part of any of the trustees.
34. The substance of Charlotte's objections was that Alister was, by the appointment, treated more favourably than his sisters. However, both the nature of a discretionary trust, and the express terms of the trusts in this case entitled the trustees to treat the beneficiaries unequally. In addition, the court's role was not to evaluate the relevant factors, or assess the weight that should have been given to them by the trustees. Charlotte succeeded in showing one relevant factor that was not taken into account (the incidence of the costs of the claim), but this was not sufficient to vitiate the Decision.
35. In my judgment, the way in which Charlotte opposed the Decision was unreasonable in the following respects:
 - (1) A significant proportion of her objections were based on the trustees having failed *properly* to consider certain relevant factors. She was thereby asking the court to evaluate those factors (and the trustees' evaluation of them), when the court's only proper concern was whether the trustees had taken them into account.
 - (2) Virtually all of the points taken by her could have been made by reference to written material which either was or could have been (if disclosure had been sought) before the court, without the need to cross-examine the directors of the trustees.

- (3) Her criticisms as to the complete written records of the trustee not having been disclosed was misplaced, when it had been open to her to seek disclosure at the directions stage, and she had not done so.
 - (4) Charlotte relied on Alister's threats to make various legal challenges if the Farm were not transferred to him, when the evidence showed that legal threats to the trustees came from all sides; and I held that there was no basis for concluding that the trustees had been affected by a desire to avoid possession proceedings against Alister.
 - (5) At trial, Charlotte sought to rely upon Alister's receipt of farm subsidies without this being pre-figured in any detail in her evidence, and without disclosure being sought in support of it. This challenge was unsupported by either factual or expert evidence, and without the court being referred to any of the relevant statutory provisions as to entitlement to these subsidies. Notwithstanding this, Mr Gooch was cross-examined at length on farm subsidies.
 - (6) Charlotte's objection that the overage provisions required more detailed drafting was raised initially by the court, and was not a point of principle – it was a point that could have been raised and resolved in correspondence with the trustees.
 - (7) Charlotte's arguments and cross-examination to the effect that the trustees were biased in their dealings with Alister (including as to the stuffed fish incident) were described in my judgment as "falling far short" of what was required and unarguable.
36. In my judgment, Charlotte's conduct of the litigation was sufficiently unreasonable to justify depriving her of her costs to the extent that they increased those costs above that which should reasonably have been incurred by her. Determining the proportion of the reduction is inevitably a broad brush exercise. In my judgment, 80% of Charlotte's costs should be paid from the trust fund. I am concerned however, by the hardship to her from bearing 20% of her own costs. I will therefore direct that those costs are to be borne by the trust fund in the first instance, but deducted from any appointment or distribution made by the trustees to her.

Cecilia

37. Cecilia's position was that her costs should be paid from the trust fund on the basis that her position was neutral, and "firmed up" having heard the evidence at trial.

Amount of Cecilia's costs

38. As at the costs hearing, Cecilia's costs totalled £99,977.80, comprising solicitors' costs of £58,003.20 and counsel's fees (and other disbursements) of £41,973.60.

Costs order to be made in respect of Cecilia's costs

39. Cecilia's position in her acknowledgment of service was:

“The fourth defendant does not oppose the appointment of Folds Farm to the first defendant for £4.2 million supplemented by an agreement to hold Folds Farm subject to accrued gains and subject to an overage agreement in the event it is sold outside the family. However, the fourth defendant will contest the proposed distribution and other terms as outlined in the statement of Nicholas Gooch as inadequate. The fourth defendant will require a revised proposal for distribution and overage on a fair and equitable basis.”

40. In her witness statement dated 24 May 2022, she reiterated her position that the Farm should be sold to Alister, or, if he could not raise the funds, to a third party at open market rates. She did however take issue with the amount of overage proposed (10%), stating that it should be 30% with each sister receiving 10% of the overage payment.
41. An initial point to note is that the trustees were only seeking the court's approval of the Decision i.e. the decision to appoint the Farm to Alister, and not of any later distributions by them of the funds thereby obtained. As to the amount of the overage, this is a relatively confined point, and in the main judgment, I declined to give detailed directions as to the overage arrangements, this being a matter for the trustees' discretion.
42. At trial however, Cecilia's position shifted. As recorded in the main judgment (at [76]), Cecilia's counsel adopted Charlotte's submissions, and made a further 11 points directed at challenging the Decision. Her counsel also extensively (and unnecessarily) cross-examined Mr Gooch and Mr Cutts on the same topics as Charlotte's counsel. Her conduct of the trial was not consistent with her acknowledgment of service or witness statement, and cannot be described as neutral: the reality is that at trial Cecilia opposed the claim on myriad grounds, all of which were rejected. I consider that her opposition to the claim was unreasonable for the same reasons as set out above in respect of Charlotte's opposition, and went beyond vigorous reasonable opposition.
43. The appropriate course to take in respect of Cecilia's costs is, in my judgment, the course taken in respect of Charlotte's costs: Cecilia will be entitled to 80% of her costs from the estate, with the remaining 20% to be borne by the trust fund in the first instance, but deducted from any appointment or distribution made by the trustees to her.