Case 70
Burgess

v

Penny and Another

[2019] Costs LR 1453

Neutral Citation Number: [2019] EWHC 2034 (Ch)
High Court of Justice, Business and Property Courts, Chancery Division
26 July 2019

Before:
Catherine Newman QC, sitting as a deputy High Court judge

Keywords:
mediation, probate costs

Headnote

In highly contentious probate litigation, consideration of the issues was relevant in determining the just and fair percentage of costs to award. Here, the starting point following such consideration justified an order that the defendants should pay half the claimant's costs and the claimant should pay half the defendants' costs, subject to detailed assessment. However, in probate cases, two special situations operated as an exception to this general rule:

(1) if the testator or persons interested in residue had been the cause of the litigation, in which case costs should come out of the estate and
(2) if circumstances suggested that there should be an investigation, then no order as to costs might be appropriate.

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Here, the litigation had been so contentious that it had left sisters no longer talking to their brother. It had been the former who had not only put the latter to proof of the testator's will, who had also mounted an aggressive claim that the testator had not approved the contents of the will. In addition, the defendants had been unreasonable in their refusal to mediate. Refusing to mediate, because one party could not obtain something which even complete success in the litigation could not guarantee, was unreasonable. Granting the defendants any part of their costs out of the estate would be an encouragement to obduracy. It followed that the costs would not be paid out of the estate. Instead each party would pay their own costs out of their share of their inheritance. Orders accordingly.

Cases Cited

Kostic v *Chaplin and Others* [2008] 2 Costs LR 271; [2007] EWHC 2909 (Ch)
Mitchell v *Gard* (1863) 3 Sw & Tr 275
Spiers v *English* [1907] P 122

Judgment on Costs

1. **Catherine Newman QC:** I refer to the substantive judgment ("the judgment") in this matter [2019] EWHC 1571 (Ch), On 25 June 2019 I heard submissions on costs. This is my judgment on costs.

2. Costs are in my discretion: CPR 44.2(1). The general rule is that costs follow the event, but the court can make a different order: CPR 44.2(2). Where neither party is the clear overall victor the court often makes percentage based orders rather than issue based orders. However, some consideration of the issues is often relevant to determination of the just and fair percentage.

3. The claimant and the defendants agree that any costs awarded should be paid by deduction from the paying party's or parties' share of the estate. None of the parties asked for any payments on account to be ordered.

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4. There were three main issues at the trial. These are set out at paras 1–3 of the judgment. The claimant lost on the first issue and won on the second and third issues.

5. To a certain extent, the evidence on issues 1 and 2 was related. I do not accept the claimant's submission that the only evidence relevant to issue 1 was the evidence of the two witnesses to the will when a number of witnesses were called to support the proposition advanced by the claimant that he would not have cut corners on execution. I emphasise that this is merely an example of how I have reached my assessment that a very large percentage of trial preparation, written witness evidence and oral evidence was directed to issues 1 and 2 and the background which the parties wanted the court to know about and very little to issue 3, which though important, was far less time consuming.

6. This was highly contentious litigation.

7. These factors, set out at paras 3–6 inclusive above, lead me to the preliminary conclusion that the defendants should pay half the claimant's costs and the claimant should pay half the defendants' costs, to be subject to detailed assessment if not agreed; and the ultimate liabilities each way subject to set off so that there is only a net payment. I have not been told the liabilities incurred to the parties' respective solicitors so I cannot simply assume that the result would be equivalent to each side paying its own costs. I take this as my starting point.

8. Next, I turn to consider whether there are any special rules in contentious probate cases which point in a different direction from my starting point.

9. There are two special situations, operating as exceptions to the general rule, to consider in probate cases, derived from the case of *Spiers* v *English* [1907] P 122 but still relevant under the CPR, see *Kostic* v *Chaplin* [2007] EWHC 2909 (Ch):

a. If the testator or persons interested in residue have been the cause of the litigation, costs should come out of the estate and
b. If circumstances suggest that there should be an investigation then no order as to costs may be appropriate.

It seems logical, when applying the first limb of the test, that if the person who has been the cause of the litigation is a person interested in the residue then if the first limb of the *Spiers* exception is being

applied, the test suggests that the costs should be borne out of that person's share.

10. What does it mean to say that costs should come out of the estate if the testator has been the cause of the litigation? In *Kostic* Henderson J as he then was cited *Mitchell* v *Gard* (1863) 3 Sw & Tr 275 and the dictum of Sir James Wilde concerning cases where a testator's papers are "surrounded with confusion or uncertainty in law or fact". Did Freda make confusing or inconsistent statements about her intentions? She did not. The 2013 will was easily found, its terms were clear and the 2012 will had been destroyed. The first part of this limb does not apply here.

11. Does the first limb of the rule apply because the claimant was the cause of the litigation as the defendants contend? To come within the scope of this part of the first limb there must be something more than the fact that the claimant actually began the litigation by applying for a grant of probate. In *Kostic* the judge gave a full explanation of earlier authorities from which I derive the following principles to guide me (they are guidelines and not straitjackets) on these particular facts (that is to say, omitting principles which have no application to these facts):

a. Do the facts warrant an order different from that which would be made if costs simply followed the event?
b. Does one or other of the losing parties deserve to be relieved from being chargeable with costs because they did nothing more than fail in a suit which was justified by good and sufficient grounds for doubt?
c. Were one or more of the parties led reasonably to the bona fide belief that there were good grounds for impeaching the will?
d. Would departing from the general rule encourage fruitless litigation spurred on by a belief that all of the costs will come out of the estate? The courts are increasingly alert to the dangers of encouraging litigation and discouraging settlement of doubtful claims if costs are allowed out of the estate to the unsuccessful party.
e. Less importance is attached today than in the 19th century to the independent duty of the court to investigate the circumstances in which a will was executed and satisfy itself as to its validity.

12. Given that the defendants said that they were both content with

equal division of Freda's estate as a matter of principle and both knew about the 2013 will well before Freda's death, I ask myself why was there any litigation, let alone litigation which has been so contentious, and results from a dispute which, I am told, has left the sisters no longer talking to their brother.

13. Applying the principles I have derived above to the evidence before me, I have concluded that both defendants were uncertain, from an early stage after Freda's death, whether the 2013 will had been "done properly", see para 24 of the judgment. This uncertainty was exacerbated into a reasonable suspicion by the claimant's admission, in the awful telephone call of June 2016 dealt with fully in the judgment, that he had been responsible for changes to the executorship provisions of the 2013 will. The degree of his responsibility was not fully examined at the time of that conversation because the relationship was already acrimonious. The investigations which followed into the recollection (or lack of it) of the two witnesses to the will was entirely reasonable.

14. Nevertheless, High Court litigation to challenge a will the provisions of which all possible beneficiaries profess to be happy with is not obviously reasonable. The defendants went further than is reasonable by not only putting the claimant to proof of due execution and revocation but also mounting an aggressive claim that Freda had no knowledge of or did not approve of the contents of the will. This was at best a speculative claim.

15. The defendants were also unreasonable in their complete refusal to mediate. I have in mind the principles set out at CPR 44.2(24). Argument on these has centred on whether mediation had a reasonable prospect of success. In oral submissions I was told that the defendants wanted the claimant to admit what he had done wrong and that was why did they refused to mediate. But mediation is not just about one side getting what they want. That is a misconception of the purpose of mediation. Mediation should be about attempting to reach a solution which both parties can live with as a better alternative to litigation. A trained mediator would have told the defendants that in litigation they might well not get the admission they were seeking (and indeed they did not). Taking at face value their assertion that they were happy with an equal division of the estate, all parties could have focused on who was to take the grant, and, since the discussion on the eve of Freda's funeral (referred to in detail in the judgment), it was apparent that the

claimant did not want to take the grant on his own if at all, I surmise that he would have been open to such a discussion.

16. Refusal to mediate because one party cannot obtain something which even complete success in the litigation cannot guarantee (the admission the defendants wanted) was, in this case, unreasonable. Granting the defendants any part of their costs out of the estate would be an encouragement to obduracy. None of the parties will be relieved from paying costs out of their own share of their inheritance in due course. I reject their submission that their costs, or any part of their costs, should come out of the net estate. The agreement which the parties have reached that costs will be paid out of the parties' respective shares is first, a timing matter and second, an arithmetic exercise. It will not operate to reduce the net estate.

17. I have also considered the various offers and counter-offers which were made. By the time of the trial the only offer remaining on the table was the claimant's 4 December 2018 Part 36 offer. In money terms he has done better than the 30/35/35% split which he suggested in that offer, but one condition of that offer was that the 2013 will be admitted to probate. That is not going to happen. He wanted all of his costs to be paid by his sisters. That is also not going to happen. So the consequences of a successful Part 36 offer are not in play here.

18. Taking all these matters into account I consider that the initiation of an inquiry into the circumstances surrounding the 2013 will was a reasonable course for the defendants to pursue but the way in which the litigation developed with its challenge to knowledge and approval and the complete refusal to mediate was not. The result, intestacy, achieves, as all parties must have been aware, the same result as the substantive provisions of the 2013 will and the outcome is that the parties have fought over who should administer the estate. In my judgment this merits an adjustment of my starting point and the final order which I will make is that each party must pay its own costs.

Mr TJB Dumont (instructed by SheridanLaw LLP) appeared for the claimant.

Ms Katherine McQuail (instructed by Preston Redman) appeared for the defendants.

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