# Online Case 34
# Murray and Another

*v*

# Bernard

**[2015] 5 Costs LO 567**

*Neutral Citation Number: [2015] EWHC 2395 (Ch)*
*High Court of Justice, Chancery Division*
*2 February 2015*

*Before:*
**Mann J**

## Headnote

The court considered the appropriate costs order where the defendant had unsuccessfully sought to oppose a will. The court held that the claim should be treated in the same way as normal adverse litigation, and the provisions of CPR Part 44 therefore applied, the presumption being that the loser pay the winner's costs. The defendant sought to rebut the presumption on the basis that the claimants had failed to take an opportunity or to accept an offer to mediate.

Held:

Defendant ordered to pay the claimants' costs. The claimants, having expressed their view, had later changed their minds and decided to mediate. The claimants therefore could not be criticized for refusing to mediate. Claimants' costs awarded on the standard basis. Although the challenge to the will should not have been mounted, it was not sufficiently bad to order indemnity costs.

## Cases Cited

None.

## Judgment

1. **Mann J:** The first thing which I am invited to resolve on this hearing to deal with matters consequential on my judgment is whether the claimants should have their costs. This has been significant hostile litigation. It is not litigation which was brought about in any sense by the acts of the testatrix in this case; it was brought about because of Michael's choice to seek to oppose a grant a probate of the will, and he has failed in that litigation. It should, in my view, be treated in the same way as normal adverse litigation. Accordingly, the provisions of CPR 44 apply and the presumption is that the loser should pay the winner's costs.

2. In opposition to that, Mr Bernard says that there should be no order for costs in favour of the claimants because they failed to take an opportunity or to accept an offer to mediate. He is right that an order of Master Teverson dated 3 December 2013 records a refusal, obviously communicated to him, on the part of the claimants to mediate. I am told by Mr Bernard, and I am prepared to accept, that during the course of the hearing the Master pointed out that that was potentially a high risk strategy on the part of the claimants. At any rate, Mr Bernard points to the order and to the Master's remark. However, Mr Bernard does not set out the full story in his submissions.

3. Mr Brown has taken me to what happened next. It appears that after Master Teverson's remarks and Master Teverson's order that the claimants had a change of heart. It is quite clear from the correspondence which took place in the next month, in January 2014, that the claimants accepted that they would mediate. The position is summarised in a statement of compliance provided pursuant to Master Teverson's order signed by Mr Stockley (?) on 29 September 2014. On the second page of that document in a numbered paragraph he sets out that in fact the claimants subsequently indicated they would engage in mediation. The correspondence then shows that the mediation did not happen because Mr Bernard felt he was not ready to mediate. In a

letter of 28 January 2014 he states that he considers that before he can mediate he must comply with the duty imposed by the order of Master Teverson by considering what he describes as in excess of 1,000 pages of medical notes, together with some witness statements and indeed to amend his defence, and he would also need to prepare for mediation.

4. In a response on 29 January 2014 Hodders, on behalf of the claimants, made remarks about mediation which, although not in terms addressing Mr Bernard's purported needs before the mediation, indicate that it is perhaps rather more simple in terms of pre-mediation requirements than Mr Bernard suggested. The correspondence ends with a letter dated 17 February 2014 from Hodders in which they say:

> "The completion of disclosure and witness statements do not affect when mediation can take place as mediation can take place at any stage. As you are no doubt aware, mediation is not a mock trial and a mediator will not decide the points in dispute. However, your response in this regard is of course noted and will be brought to the attention of the court regarding costs." (*Quote unchecked*)

5. It is apparent from this correspondence that the claimants did have second thoughts about mediating and indicated their preparedness to mediate, and the reason that the mediation did not happen is that Mr Bernard himself did not feel himself ready to mediate although he had wished to do so. This is therefore not a case in which it can be said that the claimants failed to mediate. Had the claimants refused to mediate in relation to this matter then that would on the authorities be one thing that I would be entitled to take into account. There are on the authorities circumstances in which the court can modify an order to which a successful party would otherwise be entitled in the light of a refusal to mediate which was found to be unreasonable. However, in the light of the conclusions that I have reached on the correspondence, the prerequisite for such a course simply does not exist. Although the claimants originally refused to mediate they have changed their minds. They are not to be fixed with a once stated but changed intention in relation to mediation. The relevant question is not a game in which the claimants will have one and one opportunity only to mediate for the purposes of the cost rule.

6. The reasons why a party may be penalised for a wrongful refusal to mediate is because parties are not to be encouraged to decline to take opportunities to settle cases. The claimants having expressed their

view, they changed their minds and decided to mediate. Accordingly, they cannot be criticised for refusing to mediate. In the circumstances there seems to be no other reason why Mr Bernard as an unsuccessful party in this litigation should not be under the usual order as to costs, and I shall so order. Mr Bernard will pay the costs of this litigation and I now will receive submissions as to whether they should be assessed by me, which would be unusual in these circumstances, or go to an assessment.

(*Discussion on costs*)

7. Mr Brown seeks an order for costs on the indemnity basis. Mr Brown submits that I should make an order for indemnity costs on the footing that this case is not only worse than normal, it is sufficiently worse than normal as to attract the court's sanction on the basis of the authorities on the point. He also invites me to take into account the criticism that I made of Mr Bernard's case insofar as my judgment criticises certain parts of his case which I said should not have been made.

8. I think this case comes close to crossing the boundary into indemnity costs territory but does not quite cross it. It is a bad case. At the end of the day I obviously do not think that the challenge to the will should have been mounted, but I do not think it is sufficiently bad to order indemnity costs. So costs will assessed on the standard basis.

9. Mr Brown has asked for a payment on account of £45,000. I am told that a recent costs budget, filed but not agreed, estimated the cost of the trial at £62,000 but that was on the basis of a two to three day trial. We have now had five days of trial and an extra half day for dealing with the judgment and consequential matters. Somewhat unusually, I find myself in agreement with counsel's figure for an assessment. The court tends to come in at lower than the claimant counsel's estimate. However, I think it likely that a minimum of £45,000 will be recoverable as costs and I shall make an order for an interim payment in that amount. I will, however, make one particular observation about costs which has occurred to me.

10. At the beginning of the trial, on the first day, Mr Bernard made an application to amend the claim to include a claim for forgery. That application failed. In the costing of this trial and in the fees Mr Brown has claimed a separate brief fee for that exercise. I am not at the moment going to disallow that specifically, but I shall direct that the

costs judge shall pay particular attention to that particular amount and shall consider whether there is an element of double recovery in terms of the brief fee for the first day and/or any refreshers. The nature of the exercise involved is one that is common to many actions. There are many actions in which a trial starts with housekeeping matters, including applications for permission to amend. They are seldom, if ever in my experience, treated as separate proceedings or separate applications for the purposes of claiming costs. They tend to come out in the wash at the end of the day. Had Mr Bernard been successful, and were the costs to be flowing the other way, then there would be a justification for treating the costs relating to the exercise separately, but I am not at the moment satisfied that that exercise requires Mr Brown's solicitors to be able to recover a completely separate brief fee for him for that exercise. The extent to which he should have those costs as part of the costs of the exercise will, as I say, depend on whether there is any double counting as between the £1,500 brief fee claimed and any fee for the trial and/or refreshers. That is something I cannot work out at the moment; I do not propose to spend my time doing so. I shall merely direct that the costs judge pays particular attention to that, so I shall direct that the claimant shall draw the costs judge's attention to the particular point.

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*Rory Brown* appeared on behalf of the claimant.

The defendant appeared in person.