Online Case 42
Nicholls

v

Nicholls

[2018] 6 Costs LO 705

High Court of Justice, Chancery Division,
Birmingham District Registry
19 June 2018

Before:
HHJ Truman

Headnote

In proceedings involving the administration of an estate in which the claimant had been justified in commencing the action, it was appropriate under CPR 46.3 to direct that there be an indemnity for the claimant's costs to be paid out of the estate. The costs of the defendant, who had behaved unreasonably, and whose costs had not been properly incurred, would not have an indemnity from the estate for the whole of his costs. The defendant's actions in relation to chattels and mediation, which he had proposed but the claimant had had taken no active steps to discuss, were not such as to deprive him of a complete indemnity: 50% of his own costs would be payable out of the estate. As to the claimant's costs of the action, taking account of all the factors (including that unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR did not result in an automatic penalty), it was appropriate to order the defendant to pay 50% of those costs. Orders accordingly.

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Cases Cited

Halsey v *Milton Keynes General NHS Trust*; *Steel* v *Joy and Halliday* [2004] 3 Costs LR 393; [2004] EWCA Civ 576; [2004] 1 WLR 3002
Jones v *Longley* [2015] EWHC 3362 (Ch)
PGF II SA v *OMFS Company 1 Ltd* [2013] 6 Costs LR 973; [2013] EWCA Civ 1288
SG v *Hewitt* [2012] 5 Costs LR 937; [2012] EWCA Civ 1053
Thakkar and Another v *Patel and Another* [2017] 2 Costs LR 233; [2017] EWCA Civ 117

Judgment

1. **HHJ Truman:** This matter concerns an unfortunate family dispute. On 27 September 1984, Francis Nicholls, whom I shall refer to as either the mother or the deceased, made her last will and testament. In that will she divided her chattels equally between her two daughters, Angela and Amanda, gave them a legacy of £15,000 each and then divided the residue between all of her children equally, there being in addition, three older boys, Joseph, Paul and Gary.

2. On 1 February 2012, the mother died. Although Mr Paul Nicholls, Mr Joseph Nicholls and Mr Gary Nicholls were originally intended to be the executors under the will, Mr Gary Nicholls did not wish to proceed with being an executor. Following the mother's death, it appeared that during her lifetime the daughter, Angela, had received quite a large amount of money from the mother. The executors were concerned as to whether the mother had been unduly influenced, or indeed had had capacity to make these apparent gifts. They were concerned that Miss Angela Nicholls had perhaps misappropriated those funds.

3. It did appear that in November 2013 they received some advice on the merits of the proposed claim. It further appears that that advice was in the nature of a preliminary advice. From further correspondence in the trial bundles it does appear, for example, that the barrister who advised the executors had not seen all the relevant

documents, including such matters as the mother's medical records. Those medical records did show that the mother had a history of mental health problems. It appeared that she was suffering from dementia and this increasingly caused her difficulties as time went on.

4. However, it further appears that one of the main reasons for considering that there probably was no claim was the fact that the mother had entered into a power of attorney shortly before some of the relevant payments. Under that, which was undertaken with the assistance of solicitors, she would have had to have capacity if it were to be binding and the solicitors had seen her and considered that she had got capacity and had proceeded with the instructions to prepare the power of attorney.

5. Despite the advice not giving any high recommendations and despite the solicitors considering that the costs of obtaining any recovery from Miss Angela Nicholls were perhaps in the region of £30,000 with a possible recovery of £50,000, the executors both considered, at that particular stage, that it was entirely appropriate to proceed with a claim against Miss Angela Nicholls.

6. In April 2016, the executors obtained the grant of probate. The main asset for the estate was the mother's house. This was sold in September 2016 and, at that particular point, some chattels which had been in the house were moved to a storage unit and some chattels were removed by one of the executors, namely the claimant in this action, Mr Paul Nicholls. The items that were removed to a storage unit remained under the control of the other executor, the defendant in this action, Mr Joseph Nicholls. It does appear clear from the papers that only Mr Joseph Nicholls actually had access to the storage unit and if others were to gain access to the chattels, it would have to be occasioned through him.

7. At some point thereafter, the claimant changed his views with regard to whether or not he should pursue any action against his sister, Angela. He consulted with the non-executor beneficiaries and they did not wish to proceed with any claim against Angela. The defendant, however, thought it was proper to carry on with the claim against Angela. There was thus a deadlock between the executors as to the action that the estate should undertake. As the estate could not be administered with that deadlock, the claimant warned that, unless the defendant changed his mind, the claimant would commence proceedings with the court so that the court could give directions as to

what steps the estate should undertake. The claimant also offered to assign the proposed claim against Angela Nicholls to the defendant. The defendant rejected that offer, he remained of the view that it was proper for the estate to pursue Angela.

8. In August 2017, the claimant issued these proceedings. As part of the proceedings he sought a direction that the estate should not pursue a claim against Angela Nicholls. He sought directions with regard to the distribution of the chattels, which had still not been resolved by this stage. He also sought a direction that the defendant be removed as executor. The defendant opposed the proceedings. It is clear from his witness statement that he was still firmly of the view that the estate should pursue a claim against Angela.

9. In December 2017, District Judge Ingram gave directions, which included the claimant obtaining an advice from counsel with regard to the merits of any proposed claim against Angela Nicholls. That advice was received in February 2018. It put the prospects of success at no higher than 30%, having viewed all the relevant evidence, including the medical records, and there were plainly severe concerns about the potential costs risks.

10. The claimant served a witness statement at that particular point in which he advised that he had been told that the costs risks were potentially in excess of £70,000, being a sum well in excess of the possible total recovery from Angela of £50,000. On that basis, and especially bearing in mind the views of the other beneficiaries, he plainly did not consider it appropriate for the estate to proceed with any claim against Angela Nicholls. Having received that advice and witness statement, the defendant reconsidered his position and confirmed that he was prepared not to pursue the claim against Angela Nicholls.

11. There were some further discussions with regard to distribution of the chattels and that took place in February 2018. There were also some further discussions with regard to liability for the storage charges which had been incurred in respect of the chattels and agreement was reached in respect of those. The claimant says that, as a result of the major block on administration having been removed, i.e. that the estate no longer needed to consider pursuing Angela Nicholls, it was no longer necessary for him to seek the removal of the defendant. All that remained in practical terms was to distribute the estate and sort out the question of costs.

12. The only issue therefore before me today relates to the costs of these proceedings. I would stress at the outset that we are only talking about the costs of these proceedings, we are not talking about the costs generally incurred in relation to the administration of the estate. The usual rule on costs is that the losing party pays the winning person's costs. That can be displaced in certain circumstances, but that is the general principle. However, when one is dealing with costs relating to trustees or personal representatives, CPR 46.3 says specifically that:

"(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."

It goes on to say that:

"(2) The general rule is that the 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."

13. The practice direction sets out those matters which the court should consider. 1.1 says:

"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) obtained directions from the court before bringing or defending the proceedings;

(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."

1.2 says:

"The trustee is not to be taken to have acted for a benefit other than that

of the fund by reason that the trustee has defended a claim in which relief is sought against the trustee personally."

14. It seems appropriate to start with the issue of the claimant's costs and whether those should be met out of the estate and whether any of those should be payable by the defendant. The claimant today does seek an order that the defendant should pay his costs and that, insofar as those are not paid by the defendant, he should be entitled to an indemnity from the estate.

15. The matters prayed in aid for the claimant are specifically that the administration of the estate was at a total deadlock due to the disagreement between the executors over whether a claim for alleged misappropriation should be pursued. The claimant says that in addition it was perfectly proper for him to seek directions with regard to the distribution of the chattels. It had obviously been very many years since the mother died and the chattels had still not been finally distributed. There had been correspondence going backwards and forwards, but no final resolution with regard to the chattels had been achieved. At that particular stage the claimant had got no specific control over the distribution of the chattels, because of the fact that they were being held in a storage unit, to which he did not have access. The claimant therefore considered that it was appropriate to request the court's assistance in finalising that particular aspect.

16. He had sought the removal of the defendant because of the fact that the defendant was the only one who wished to pursue the claim for alleged misappropriation when all the other beneficiaries did not and it was thought that the matter could not really progress if the defendant remained of that view and the estate would therefore not be finalised. There were some other small directions, but in practical terms those were unlikely to be controversial, namely that the legacies of £15,000 be paid to Angela and Amanda Nicholls in accordance with the will and that the residue of the estate then be distributed equally between the five children together with any other order necessary to facilitate the conclusion of the administration of the estate, in particular, in relation to the estate accounts. The proceedings did, at that particular stage, ask that the costs of the application be borne by the defendant personally and be deductible from his entitlement within the estate. Alternatively, payable by the estate as an expense in the due course of administration.

17. The claimant says that his issuing of proceedings has been entirely justified by the outcome that has been achieved. The claimant says that as a result of these proceedings the defendant has agreed not to proceed with the claim for alleged misappropriation and, therefore, all the beneficiaries are now in agreement that that aspect need not be pursued. The chattels have finally been distributed, as they were meant to be in accordance with the will, and, therefore, the two stumbling blocks in relation to the administration of the estate have been overcome. The claimant says, in light of that, there has been no need for him to proceed with seeking the removal of the defendant as executor. The estate is very nearly finalised, all that remains, in practical terms, is distribution. He therefore no longer seeks the removal of the defendant, because it is not necessary. The claimant says that he has acted reasonably and appropriately throughout and that he should therefore be entitled to an indemnity for his costs.

18. The defendant agrees with the fundamental principle that trustees are entitled to their costs out of the estate unless recoverable elsewhere, provided those costs are properly incurred. However, he disputes that the costs have been properly incurred by the claimant. First and foremost, he says that the issue of proceedings was premature. There had been some exchange of correspondence between him and solicitors for the claimant, he had written to the solicitors by letter dated 3 August 2017 and had specifically said within that letter:

> "For the estate records can you confirm that the chattels taken by your client in September 2016 have been distributed amicably to the beneficiaries and also, please forward a copy of the inventory that should have been completed as part of the process?" (Quote unchecked)

The defendant says that that letter was not responded to and proceedings were issued only a few days later. He therefore says that the proceedings were premature.

19. The claimant, on the other hand, points to earlier correspondence. At page 471 of the trial bundle there is a letter from the claimant's solicitors to the defendant referring to earlier correspondence and the fact that the defendant has not responded to them. They say to the defendant that he should consider their earlier correspondence and that if he fails to facilitate the request regarding chattels, that their client would be making an application to remove him as executor without further notice.

20. On 6 June 2017, they wrote to the defendant again. They urged him to communicate with them and not ignore their letters and said within that letter:

> "However, should we fail to hear from you within seven days of the date of this letter, then, with much regret, we must assume that you are intent on continuing your ignoring of our client and as such, will make the appropriate application to court in order to conclude the administration of the estate. That application will most likely involve an application to remove you as executor in the event that the court is unable to provide directions to conclude the administration without such removal. Please note that in that event the costs of such action would be sought from you personally." (Quote unchecked)

21. There is then another letter dated 13 June 2017. At that point the defendant has responded to the earlier correspondence. There were a number of proposals put forward by the claimant's solicitors and they said:

> "In the event that we do not receive a positive response from you to the suggested course of action set out above, then with much regret, the previously suggested court application will be issued without further notice to you." (Quote unchecked)

22. There is then a further letter of 29 June 2017. They set out their disappointment with the stance adopted by the defendant and say about receiving certain information, including a key for the place at which the chattels are currently stored. They said within the letter:

> "Should you unreasonably refuse this request again then that too will form an element of the intended application to court." (Quote unchecked)

The defendant therefore had had four letters warning him that if matters were not resolved then an application to the court would be made.

23. The defendant's letter of 3 August 2017 does not actually deal with the important matters that the claimant's solicitors had been raising earlier, in the sense that there was no alteration of his opinion on whether the estate should pursue a claim for alleged misappropriation. There was no provision of a key and, whilst the defendant was seeking some information, that information of itself did

not go to the substantive issues, namely distribution of the chattels that he had control of and whether or not the estate should pursue a claim against Angela Nicholls.

24. The claimant's solicitors, in not answering the defendant's letter of 3 August 2017 before the issue of proceedings, were not, therefore, in my view, acting prematurely. There was nothing within that letter which would have caused them or needed to have caused them to reconsider whether the issue of proceedings was required. What they had, and what they patently were still going to have, was a disagreement between the two executors as to whether or not the estate should pursue a claim for alleged misappropriation and a continuing problem over the distribution of chattels. In my view, therefore, it was entirely appropriate for the claimant to have issued proceedings when he did and he cannot be criticised for that. I consider that it was more than a reasonable and proper step, it was actually a necessary step to enable long-standing issues to be resolved.

25. The next aspect of the defendant's opposition to the claimant having costs from the estate is that he says that the claimant has not actually been entirely successful in this matter. His main basis for saying this is that the claimant is no longer pursuing the defendant's removal as an executor and therefore, by definition, the defendant has been successful in that regard, because he has not been removed as an executor. However, I accept the claimant's submissions on this particular point. Once the major stumbling block of whether or not the estate should pursue a claim for misappropriation had been resolved, there was no need to proceed with any further application to remove the defendant as executor. Similarly, once the issue of chattels and storage had been resolved, there would be no need to pursue any application to remove the defendant as executor.

26. It is therefore not a case that the claimant has been unsuccessful and the defendant has been successful. It is the case that the proceedings have obtained the outcome that the claimant wished to obtain, namely that the issue of whether or not the estate should issue proceedings against Angela Nicholls and the distribution of the chattels has been entirely resolved and therefore no further steps are necessary. To that extent, therefore, I hold that the claimant has not been unsuccessful in these proceedings, the underlying aim of the proceedings has been entirely successful.

27. The third aspect for which the defendant criticises the claimant

is in relation to mediation. By a letter dated 1 February 2018, at page 525 of the bundle, the defendant advised the claimant's solicitors that he was in the process of writing to them putting forward certain proposals for settlement, which he hoped would be met favourably. He said that he had been advised, and he believed, that the case was suitable for mediation. He therefore proposed that a mediation session be arranged in the near future to be attended by the claimant, Angela Nicholls and himself and, if they considered it appropriate, by Amanda Nicholls and Gary Nicholls as well. He noted that the timetable for trial required exchange of evidence by February 9 and he said, with a view to keep costs down, he proposed that that step be delayed for 28 days to March 9, to enable meaningful settlement negotiations to take place. A copy of that letter was also sent to Angela Nicholls' solicitors.

28. On 7 February 2018, the claimant's solicitors emailed the defendant. They said:

> "Firstly, whilst we note and agree generally to the principle of mediation, our view is that any mediation would be benefited from sight of the evidence due to be filed and served on Friday. From our client's perspective the work has been done and the costs incurred, so there is no saving on costs given that your correspondence was only received three days prior to the filing date.
>
> Accordingly, we are not agreeable to your suggested extension. Secondly, whilst we of course appreciate your change in stance, given that you are now in favour of mediation, it would assist us in understanding what your expectation as to settlement might be, not least so we might understand how mediation might best be organised." (Quote unchecked)

29. The defendant wrote back by letter dated 20 February 2018. He said that he had already set out certain without prejudice proposals and awaited a response before mediation to these, but he could confirm that he approached any mediation with an open mind and with a view to achieving settlement if at all possible. He said that:

> "As a point of clarification to your comment that I had a change of stance with regard to mediation, I feel the necessity to correct you and point to the fact that my counsel, Imogen Halstead, on the day of the directions hearing dated 8 December offered mediation on my behalf,

> which was immediately and disappointedly dismissed out of hand by yourselves." (Quote unchecked)

30. The claimant's solicitors wrote back by letter dated 26 February 2018. They said that they did not share the defendant's recollection of matters on December 18:

> "But in any event were an express offer of mediation made by you at that point, it would still have marked a complete change of your previously adopted stance." (Quote unchecked)

I note that, but I am not sure what difference it makes. The whole purpose of mediation is clearly that people should discuss matters. It would make no difference if someone had changed their mind – that would appear to indicate that they were properly considering whether mediation might assist. There was no further correspondence from the claimants' solicitors with regard to the question of mediation.

31. I am advised today that the claimant, as an executor, quite properly went back to the other beneficiaries with regard to the defendant's open proposals as to settlement, which included the proposal that his costs should be met by the estate and the claimant was apparently firmly advised by the other beneficiaries that they would not be agreeable to any settlement under which the defendant's costs were payable by the estate. The claimant therefore, did not consider that mediation would be likely to assist in view of the very firm viewpoint taken by the beneficiaries with regard to that particular aspect.

32. It is clear that the claimant took no active steps to discuss mediation with the defendant thereafter. Counsel for the claimant submits that the claimant is not in the position of an ordinary party, he is not someone who is free to make up his own mind as to what he should or should not do. He is a personal representative and, bearing in mind the difficulties already experienced in the administration of the estate, it was only appropriate for him to listen to the beneficiaries and their views on what should occur. On the face of it, therefore, the claimant himself was not necessarily being unreasonable in not proceeding with mediation, but the beneficiaries might well have been.

33. The purpose of ADR is not necessarily to resolve everything, but also has the function of seeing if the issues can be resolved or narrowed. It is very clear from the documents in this case that once the

parties did actually start talking to each other that substantial movement was obtained and, as mentioned, all issues to-date have been resolved save for the question of costs. There has therefore been no need for a specific trial in this action, because the parties have talked to each other and have been able to resolve everything bar the costs.

34. There were plainly some discussions in December 2017, there was counsel's opinion and the claimant's witness statement in February 2018. The defendant did thereafter reconsider his position. There were further discussions at the pre-trial review and, as a result of those discussions and subsequent offers, everything was resolved except for the costs. On that basis it is plainly not beyond the realms of possibility that much could perhaps have been resolved earlier if people had only taken the time and trouble to talk to each other.

35. Those are my general views with regard to the claimant's costs. I will deliver a formal ruling on what should occur in due course when we have considered the position with regard to the defendant's costs.

36. The defendant is obviously seeking that his costs should be paid out of the estate and this is totally opposed by the claimant and also by the beneficiaries and there is also the question of whether or not the defendant should be paying some of the claimant's costs. I say again that the costs are of these proceedings and not the costs of administrating the estate in general. I note again that initially both executors had considered it appropriate to pursue a claim for alleged misappropriation of funds despite the contents of a preliminary counsel's advice. They had also seen a witness statement from the parties' aunt, which supported Angela Nicholls, and had had advice that because of the deceased having taken out a power of attorney, there were likely to be some difficulties in establishing that she did not have capacity at the relevant time, because she had instructed solicitors to assist her with the power of attorney.

37. Despite all those factors, both executors had still thought it worthwhile to pursue the misappropriation claim. This may have been on the basis that counsel had not got full information when she prepared her advice because, for example, she had not had an opportunity to see the deceased's medical records and thus had not known the full extent of the deceased's mental health difficulties. The facts regarding likely capacity were known from the outset, because of the power of attorney and the solicitors had plainly warned the

executors about that particular issue. The estate solicitors had clearly set out costs risks, but these appeared to put the likely costs at around £30,000, with a possible recovery from Angela at around £50,000. Costs on that basis would not have been disproportionate. It is also clear from the correspondence disclosed in the trial bundles that the estate solicitors were not advising the executors at that point that it would be unwise to pursue a misappropriation claim.

38. No external information came to light between then and the claimant's change of mind. It was just a question of him reconsidering his views and it is plain that he was influenced by the breakdown in his relationship with the defendant. He canvassed the views of the other beneficiaries and they confirmed that they did not wish to pursue a misappropriation claim. As I have said, the claimant says that at this point the defendant should have reconsidered his stance. It had plainly been an appropriate stance before, because both executors were of the same mind, but now, in view of the fact that four out of the five beneficiaries did not wish to proceed, the claimant submits that the defendant should have reconsidered.

39. As part of counsel's submissions, she said that in practical terms the defendant should have gone off and got his own advice on the point or should have been more neutral in relation to his treatment of the application by the claimant. I was taken to the letter at page 479 of the trial bundle, being a letter of 23 June 2017 from the defendant to the claimant's solicitors. In that letter the defendant rejected the offer of assignment of the cause of action relating to the misappropriation. He noted that the claimant seemed to have had a massive change of direction on the recovery of the missing estate monies without explanation or reason and he would appreciate knowing on what grounds there had been this change of stance. The defendant had been made aware of the views of the beneficiaries and he said:

> "With regard to the wishes of the beneficiaries I would point out the fact that two, three or even four wrongs do not make a right and I am basing my actions and intentions at this time on fact, as opposed to your client's attempts to cover up wrongdoings in this instance. It would also be useful if you could provide clear reasons and justifications from beneficiaries Gary and Amanda as to why they are against the reclaiming of the monies, especially as they would benefit significantly if the monies

> were to be successfully recovered, as I believe they should." (Quote unchecked)

40. Counsel for the claimant submits that this particular paragraph indicates the defendant's improper stance with regard to what action the estate should take. She pointed to other correspondence when the defendant clearly did not think that the views of the beneficiaries should influence him. There is the letter at page 474 of 1 June 2017. He said:

> "You will see from the above that all beneficiaries were and are fully aware of the situation as things stand. Your canvassing on this matter is old hat in this respect and I do not see that their views, if changed, should affect the right and proper duties of my role as lead executor." (Quote unchecked)

41. As part of that letter he also said that in practical terms he thought that the claimant was trying to cover up and protect the guilty party. Counsel for the claimant submitted that all of this showed that the defendant thought that his views on his role as executor trumped the views of the beneficiaries. The letter at page 487 of 3 August 2017 set out the fact that the defendant did accept that consideration to the beneficiaries should be given, but went on to say that more importantly the wishes of the deceased, as set out in the will, should first and foremost be the main consideration in the administration process.

42. Counsel for the claimant submitted that this was not showing the proper consideration as to what was to the benefit of the beneficiaries, who ultimately were the ones who would take from the estate. She submitted that if the majority of the beneficiaries, four of them in this particular instance, did not wish to pursue a claim, that is something that should have been given proper consideration by the defendant and the strongly worded letters he sent clearly showed that he was not giving it any proper consideration. In fact, he obviously considered that the wishes of the other beneficiaries were irrelevant, as illuminated by the fact that he said that four wrongs i.e. the four beneficiaries' views, did not make a right. She submitted that the defendant had misunderstood his role. A trust should be administrated for the benefit and the interests of the beneficiaries and it was the

wrong approach for him to say that what he perceived to be the wishes of the deceased should take precedence.

43. Counsel for the claimant pointed to the defendant's witness statement filed in response to the claim in which he made it abundantly clear that it was still his intention to pursue the claim for alleged misappropriation, despite the views of the other beneficiaries and despite the proceedings started by the claimant. She submitted that in this he was pursuing his own agenda and that he did not consider the wishes of the beneficiaries to be important.

44. She submitted that if a trustee acts for an interest other than for the estate, including in his own interests, that shows that his costs have not been properly incurred. She relied on the case of *Jones* v *Longley* [2015] EWHC 3362 (Ch) where the claimant and the first defendant had been appointed as executors of a will. There was a disagreement between them as to what steps should be taken and ultimately the claimant himself was removed as executor rather than the first defendant. That appeared to be on the basis that it was considered by the judge to be preferable for the estate for the first defendant to remain as executor and it was not intended by the court to be a criticism of the claimant himself. At para 20 of the judgment the judge notes:

> "The claimant says he acted reasonably in commencing the claim, because the administration of the estate was deadlocked, a personal representative is not normally allowed to retire and hence the claimant had to seek the removal of the first defendant. He also says that he acted reasonably throughout, and that he has achieved the objective of unblocking the administration of the estate. On the other hand, he says that the first defendant resisted the claimant's claim until the last moment, insisting that the claimant remain an executor with the first defendant and failing to offer any reasonable alternative. He also says that the first defendant's conduct of the litigation was unreasonable, both in seeking to keep both executors as personal representatives, and in producing a large amount of wide-ranging and unfocused material."

45. It is to be noted that in that particular case the first defendant's first response to the claim involved over 2,000 pages and a subsequent response involved a further 100 pages. Part of the dispute related to whether proceedings should be brought against a Hong Kong bank in respect of a sum of around £25,000. It did appear that the costs of

pursuing that claim might be grossly disproportionate. In that instance the judge considered that the claimant had been acting in the estate's best interests in bringing the claim to remove the first defendant, and it did not change matters that the judge had not made the order as asked by the claimant in the claim form. The claimant had been right to say that the administration could not proceed with the two personal representatives in post. The judge plainly did not consider that the first defendant had acted reasonably in the way that he defended the claim.

46. As a result of the first defendant's actions, the judge considered that the claimant could recover his costs from the estate, but that the first defendant should not. The judge held that this was a case where the idea underlying the claim had been vindicated and launching the claim was the right course to take. He set out the fact that his reasons for preferring to remove the claimant rather than the first defendant were exceptional and depended in large part on the fact that there were only three adult beneficiaries interested in the estate, all siblings, and that they wished for the first defendant and not the claimant to continue to act. The judge held that it was right that the first defendant should pay the claimant's costs of the claim on the standard basis if not agreed because of the first defendant's unreasonable behaviour.

47. Counsel for the claimant submitted that it would be wrong for the defendant to be able to actively defend what were reasonable proceedings instituted by the claimant, for the defendant to suddenly drop his defence and then still expect his costs to be paid by the beneficiaries. She submitted that it would be wrong to expect the beneficiaries to pay the costs of an argument that they did not wish to pursue. It would be unjust if they had to do so. One can see exactly why they would feel that, if they were of the view that it was not appropriate to pursue the misappropriation claim. It would seem on the face of it to be rather unfair to expect the defendant's costs (of disputing whether to pursue the misappropriation claim or not) to actually come out of the estate when the other beneficiaries were not in agreement with that course of action in any event and their viewpoint has subsequently been justified.

48. In addition to the question of whether the defendant should have gone off and got his own advice at that particular stage as to the merits of the claim on misappropriation, counsel submitted that he could have said, on receipt of the proceedings, that he would, in effect, abide by the court's decision. He would still have the opportunity to

set out to the court his concerns, but those could have been presented in a more neutral fashion and the court could then have reached a decision on what to do. He did not do that. He actively defended the proceedings and, indeed, said that he was going to start his own proceedings for misappropriation.

49. After counsel for the claimant had completed her submissions and during the course of the defendant's own submissions, after I had raised the question of why the defendant thought it was in the interests of the estate to carry on with the misappropriation claim when the other four beneficiaries did not wish to do so, it transpired that the defendant had apparently taken counsel's advice and it appeared that that advice was from a well-respected and experienced practitioner. I was told in submissions that she had given the prospects of a successful claim as being 50/50.

50. I did say that I did consider that the defendant was in difficulty in raising that particular matter now. I have not seen the instructions given to counsel. I have not seen counsel's advice. I therefore cannot consider whether counsel had been given all the relevant information, nor whether she had advised as to whether any such claim was in the best interests of the estate, taking account of the costs risks and the risks of litigation. I would have expected the defendant to have properly referred to this advice if he considered that it was a relevant factor. I am surprised that it was never mentioned before, not even when the court gave permission to the claimant to seek counsel's advice on the merits of pursuing the claim for alleged misappropriation. In light of the fact that we have not seen this advice nor the instructions and it has not been put forward in evidence at any stage beforehand, I do not consider that I can properly take account today of this apparent instruction of counsel.

51. So, we are therefore still proceeding on the basis that the defendant could have taken advice and could have disclosed any such advice to the other side for there to be further discussions on the appropriate course of action, but that plainly did not occur. The correspondence and the witness evidence merely shows that the defendant was of the view that he was entirely right to pursue a claim for misappropriation and that he did not consider that the views of the beneficiaries overrode that, even though the whole purpose of distribution of an estate is to be for the benefit of the beneficiaries.

52. It is correct to say that the defendant, once he had seen the

claimant's counsel's advice of February 2018 and the claimant's witness statement of February 2018 (in which the claimant advised that he had been told the costs of litigating a misappropriation claim could easily be over £70,000, well in excess of the likely recoverable amount) did then alter his stance. The fact remains that he had been actively defending the claimant seeking a declaration that the misappropriation claim should not be pursued up until that point and, therefore, the claimant's claim has been successful on the issue and the defendant has been unsuccessful with regard to that aspect.

53. As I have said, I am concerned about the fact that the defendant does not appear to have stepped back and considered what was in the best interests of the estate in March 2017 when this was first raised and did not appear to reconsider that in August 2017 when the proceedings were issued. On the face of the documentation that I have in front of me, he did not actually appear to reconsider it until February 2018. As I have said, the fact that the claimant has no longer chosen to pursue the defendant's removal is not a success on the defendant's part, but a reflection of the fact that now that the issue of pursuing the misappropriation claim has been resolved, the removal of the defendant is no longer necessary.

54. On the information that I have before me I do consider that the defendant was being unreasonable in his view over pursuing the misappropriation claim. I have no problem with his viewpoint up until March 2017, when both executors were plainly in agreement. The difficulty arises thereafter. Once he became aware that all of the other four beneficiaries did not want to pursue the claim he should have reconsidered what was in the best interests of the estate. He could have been more neutral in how he dealt with the claimant's application, but instead he chose to very actively defend the same. This is something that I must bear in mind with regard to both the claimant's costs and the defendant's.

55. I should, however, also note that the issue of chattels was a major difficulty in the proceedings. As I indicated at the start of the case, I have read all the papers in the three trial bundles. It did seem to me from reading all those papers that, apart from Mr Gary Nicholls, all the parties had been unhelpful with regard to the distribution of the chattels. There was considerable correspondence from the solicitors for Angela Nicholls with regard to the chattels, but as far as I could tell from the papers, there was never any letter which actually

suggested a date and time when they might be collected. There was clear correspondence where the defendant was trying to get the chattels collected. This appears to have been ignored by Angela Nicholls. It was responded to by Amanda Nicholls, but there was then some confusion, which appeared to have been caused by the defendant writing to an incorrect address (not the address given in Miss Amanda Nicholls' letter to him) and due to that confusion, the suggested date for collection of the chattels was not proceeded with by Miss Amanda Nicholls.

56. There was plainly a point in time when the claimant was not responding to the defendant at all and this lasted for over five months. The defendant says that he had not given the claimant a key to the storage unit at the start of the storage, because only one key had been cut as he thought that the claimant did not want to carry on with his executor duties and that, on the face of it, did not seem to be an unreasonable viewpoint as the claimant was then silent for five months and ignoring him and it was therefore only the defendant who was dealing with the estate.

57. Once the claimant did instruct solicitors, they did ask about the chattels and getting access to the container unit, but unfortunately the defendant did not deal with those requests. As I say, apart from Mr Gary Nicholls, who had no involvement, or any need to have an involvement, with the earlier distribution of the chattels, the question of the chattels, in my view, could have been resolved much earlier if only the parties, or any of them, had suggested to one another a date and time when they might be collected. There does appear to be one date and time suggested other than the date unfortunately missed by Amanda Nicholls, but that is literally the only occasion in what is now the six-year history of this matter. It therefore seems to me that with regard to the issue of the chattels all the parties, apart from Mr Gary Nicholls, have been unreasonable, and I do not see that it would be fair or appropriate for the defendant to bear all the costs in relation to the chattels when more parties than he have been unreasonable.

58. Considering the matter overall, I am entirely satisfied that the claimant is entitled to an indemnity from the estate in respect of his costs. That does not appear to be a viewpoint challenged by the other beneficiaries apart from the defendant. I consider that it was perfectly proper for the claimant to issue proceedings, that those proceedings were not premature and that they were entirely necessary to resolve the

deadlock regarding the alleged misappropriation claim and to finally get the chattels distributed and the question of storage charges resolved. All those matters were resolved by the proceedings and I am satisfied that the claimant is entitled to an indemnity.

59. With regard to the defendant's costs from the estate, I am equally satisfied that the costs that he has incurred in relation to the alleged misappropriation issue were not properly incurred. I find that he should have considered his position in March 2017, once he knew of the beneficiaries' stance, and he should have further considered his position again when proceedings were issued. He should have taken proper account of the views of the other beneficiaries and he should have considered the costs risks etc. He could and should have been more neutral in respect of the claimant's proceedings before the court. Instead, he chose to actively defend.

60. I can well understand that the beneficiaries, in light of the defendant's behaviour on that issue, would be deeply upset if the defendant were entitled to his costs from the estate, when he has, on the face of it, been unreasonable and when I have considered that his costs were not properly incurred. I consider that as the defendant has behaved unreasonably and his costs were not properly incurred, he is not entitled to an indemnity from the estate in respect of the misappropriation issue.

61. As I do not consider that the defendant should have an indemnity in respect of the costs of that issue, I do consider it appropriate to then go on and consider whether or not the defendant should pay some or all of the claimant's costs. I am aware that that is not necessarily the process that has to be followed. There have been cases where an order for costs has been made where it is considered that a person's behaviour has been unreasonable but they have still then been entitled to recover those costs as well as their own from the estate. However, in this particular instance, I consider that this is an appropriate way forward in view of what has occurred.

62. When I consider whether the defendant should pay some of the claimant's costs, I should also consider the fact that mediation did not occur and this was on the basis, apparently, that the beneficiaries were not prepared to consider any settlement where the defendant's costs would come out of the estate. It appears to be more of the case that they were not prepared to consider mediation, full stop, if the

defendant wanted his costs from the estate, rather than consider what matters might be resolved if they had mediation.

63. Counsel for the defendant referred me to two cases, [in] *PGF II SA* v *OMFS* [2013] EWCA Civ 1288 at para 34 it is said:

> "In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the *ADR Handbook*, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless of whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good."

64. At para 51, it is plain that a finding of unreasonable conduct constituted by a refusal to accept an invitation to participate in ADR does not result in an automatic costs penalty, it is simply an aspect of the parties' conduct which needs to be addressed in a wider balancing exercise. It was said that it was plain both from the *Halsey* case itself and from Lady Justice Arden's reference to the wider discretion arising from such conduct in the *Hewitt* case, that the proper response in any particular case may range between the disallowing of the whole or only a modest part of the otherwise successful party's costs.

65. In the case of *Thakkar* v *Patel* [2017] EWCA Civ 117, para 31 says:

> "The message which this court sent out in *PGF II* was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that, in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction. In the present

> case, the costs sanction was severe, but not so severe that this court should intervene. If Lord Justice Briggs agrees, this appeal will be dismissed."

66. I have said that I consider that the claimant's costs were properly incurred and therefore, he is entitled to an indemnity, however, the question of what costs the defendant should pay or what costs the defendant himself is entitled to is affected, in my view, by the view of the claimant, apparently with the blessing of the beneficiaries, that no mediation should be engaged in.

67. I also consider the fact that in relation to the chattels issue, four out of the five beneficiaries had been acting inappropriately in the lead-up to the proceedings and it does appear, from the correspondence that I have seen, that that inappropriate behaviour, on behalf of a number of beneficiaries in this estate, continued after the issue of proceedings. Whilst the defendant did not provide a key when asked, it did seem to me from the correspondence that proper arrangements, other than the attempt by the claimant's solicitors, were not made by the beneficiaries to see about resolution of this matter until after the hearing in December 2017. At that particular point, when the parties finally started to talk to each other, resolution was achieved and, again, I note the fact that the question of storage charges were resolved. There was a pragmatic resolution on the part of the claimant under which the estate accepted some liability for the storage costs. Whilst the claimant might consider that that was a pragmatic solution, because the costs in relation to the storage charges would have been utterly disproportionate if they had gone through to the trial, the fact remains that the resolution was not entirely in the estate's favour, but did carry some benefits to the defendant as well. On the issue of mediation and chattels therefore, it does seem to me that it would be fairer for there to be some sharing by the beneficiaries as a whole of the difficulties occasioned by the various persons' behaviour in these proceedings.

68. Considering all the factors I consider that the appropriate decision is that the defendant should pay 50% of the claimant's costs of this action. I also consider that the defendant's actions in relation to chattels and mediation were not such as should deprive him of an indemnity and I therefore hold that he is entitled to an indemnity from the estate in respect of 50% of his own costs of this particular action.

69. In summary therefore, the claimant is entitled to an indemnity from the estate for all of his costs, and he is also entitled to an order that the defendant should pay 50% of the costs of the action, and the defendant is entitled to an order that there be an indemnity from the estate in respect of 50% of his own costs. That figure obviously does not include the sum that I have directed that he should pay to the claimant in respect of the claimant's costs.

Mrs A Metcalfe (instructed by FBC Manby Bowdler) appeared on behalf of the claimant.

Mr J Miller appeared on behalf of the defendant.