Neutral Citation Number: [2016] EWHC 962 (Ch)

Case No: HC-2014-000538

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 April 2016

Before :

EDWARD MURRAY
(sitting as a Deputy Judge of the Chancery Division)

Between :

BERNICE ELLIOTT	**Claimant**
- and -	
(1) RUTH SIMMONDS	**Defendants**
(2) ALAN TULIP	
(EXECUTOR OF THE ESTATE OF KENNETH WILLIAM JORDAN DECEASED)	

Mr Oliver Hilton (instructed by **Gardner Leader**) for the **Claimant**
Mr James Weale (instructed by **Woodford Stauffer**) for the **First Defendant**
Ms Zoë Barton (instructed by **Melia Mumford**) for the **Second Defendant**

Hearing date: 7 April 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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EDWARD MURRAY
(sitting as a Deputy Judge of the Chancery Division)

Edward Murray (sitting as a Deputy Judge of the Chancery Division) :

1. On 7 April 2016 I handed down my judgment, in which I gave my reasons for pronouncing for the force and validity of the will dated 1 February 2012 of Mr Kenneth William Jordan in solemn form of law and for ordering that a caveat entered by Ms Ruth Simmonds in respect of Mr Jordan's estate cease to have effect. I then heard argument on the question of costs. For various reasons, I decided to reserve my judgment, which I now set out below.

2. The normal rule of costs is that costs follow the event. The court has, however, the discretion to make a different order, taking into account, for example, the conduct of the parties. In a contentious probate claim there are also specific exceptions to the normal rule arising under case law and under the Civil Procedure Rules, which may fall to be considered, depending, of course, on the facts of the case. CPR 44.2 provides guidance on the court's discretion as to costs.

3. At the hearing of the costs application, I had before me a witness statement dated 30 March 2016 of Ms Tara McInnes, a solicitor at Gardner Leader LLP, solicitors for the claimant, including various appended documents. I also had a witness statement dated 5 April 2016 of Ms Verity Stauffer, a solicitor at Woodford Stauffer, solicitors for the first defendant, including various appended documents. I have had careful regard to the witness statements of Ms McInnes and Ms Stauffer to the extent that those witness statements are relevant to the issues I am required to address.

4. I was also provided with a copy of a bundle prepared on behalf of the first defendant in relation to her intended claim under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act") against the estate of Mr Jordan, including a witness statement dated 5 April 2016 of Ms Simmonds and its various appended documents. Little reference was made to it, however, during the hearing before me in relation to costs, and I found nothing in it of particular relevance to the issues I am required to determine. This is perhaps not surprising, given that it was prepared for a different purpose. Some items of correspondence between solicitors were also handed up during the hearing.

5. In her defence Ms Simmonds gave notice under CPR 57.7(5)(a) that she did not raise any positive case, but she insisted on the will being proved in solemn form and for that purpose she invoked her right to cross-examine the attesting witnesses. CPR 57.7(5)(b) provides that if such a notice is given by a defendant, "the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will." The principal issue for me to resolve, therefore, in relation to the costs of these proceedings is whether the first defendant had no reasonable ground for opposing the will. I proceed on the basis that it is for the claimant to satisfy the court that there was no such reasonable ground.

6. If the first defendant had a reasonable ground for opposing the will, then no order for costs should be made, and each party bears his or her own costs. In

relation to the second defendant, if I make no order for costs, then, as made clear by CPR 44.10(1)(b), this will not affect any entitlement he has to recover his costs of the proceedings out of the estate of Mr Jordan.

7. The rule in CPR 57.7(5), including the provision as to costs, is a longstanding rule in probate actions, substantially in its current form since July 1898: see *Spicer v Spicer* [1899] P 38, 39. In *Spicer v Spicer*, Jeune P found that cross-examination of the attesting witnesses by defendant's counsel "amounted to nothing, and it did not suggest either defective execution, testamentary capacity, or undue influence." The defendants were therefore not protected by the exception to the normal costs rule, and the court ordered the defendants to pay the costs of the plaintiffs.

8. It does not follow that because I have upheld the will, it must be the case that there was no reasonable ground for opposing it: *Davies v Jones* [1899] P 161, 164 (per Jeune P). In *Davies v Jones* the defendant relied on the version then in force of the rule now in CPR 57.7(5). The solicitor who drafted the will and was present at its execution was dead, as was one of the attesting witnesses. The other attesting witness was "a person whose uneducated recollection is extremely vague". The court concluded that it was not unreasonable under those circumstances to call that witness for cross-examination, and therefore did not order the defendant to pay the costs of the action. In this case, the solicitor who drafted the will was an attesting witness and was available. His recollection was not vague, much less "extremely vague" or "uneducated", and his recollection was supported by other evidence, as discussed in my judgment. This case is, therefore, clearly distinguishable from *Davies v Jones*.

9. The claimant's position is that the first defendant did not have a reasonable ground for opposing the will, and therefore the normal costs rule should apply. The court should order that the first defendant pay the costs of both the claimant and the second defendant. Otherwise, the claimant will in effect bear the burden of the second defendant's costs to the extent of his entitlement to recover those costs out of Mr Jordan's estate.

10. There is little modern case law providing guidance on the construction of the costs rule in CPR 57.7(5)(b). There are, however, recent cases interpreting the exceptions to the normal costs rule that arise in probate actions where a positive case has been raised. These exceptions were set out by Barnes P in *Spiers v English* [1907] P 122, 123:

> "In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them."

11. Barnes P characterises these as principles "which, if not exhaustive, are the two great principles upon which the Court acts" when determining whether the facts of a probate action warrant a departure from the normal rule that costs should follow the event.

12. Mr Hilton for the claimant drew my attention to the case of *Wylde v Culver* [2006] 1 WLR 2674 (Ch), where at [35] George Bompas QC, sitting as a deputy judge of the Chancery Division, made reference to the costs rule in CPR 57.7(5)(b), but in the context of a probate action where a positive case was raised by the claimant challenging the validity of a will. According to the deputy judge:

> "In my judgment, a reasonable but nevertheless ultimately mistaken belief in a state of affairs which if not mistaken would lead to a will being pronounced against does amount to a reasonable ground for opposing a will."

13. He went on to say at [36] that this principle is not limited to cases such as the present one where a notice has been given under CPR 57.7(5), but is of general application. This is, of course, consistent with the observation of Jeune P in *Davies v Jones* to which I referred in para 8, but does not take that aspect of the matter much further. But the thrust of Mr Hilton's submission, I take it, was that *Wylde v Culver* provides support for the view that the second principle in *Spiers v English*, applicable in a positive case, and the costs rule in CPR 57.7(5)(b), applicable in a passive case, may be viewed as in effect the same rule, viewed from two different perspectives. This, in turn, means, according to Mr Hilton, that I should have regard to the decision of Mr Justice Henderson in *Kostic v Chaplin* [2008] 2 Costs LR 271, where he provides guidance on the application of the second *Spiers v English* principle to the facts of that case.

14. I do not consider that it is necessary for me to express a view as to whether or not Mr Hilton's submission is formally correct. It is sufficient to start with the clear language of CPR 57.7(5)(b) and apply it to the facts of this case, bearing in mind the principles of policy and fairness underlying the costs regime and in light of the court's discretion as to costs set out in CPR 44.2.

15. Having carefully considered the matter, I conclude that the first defendant did not have a reasonable ground for opposing the will. Mr Weale for the first defendant made a number of arguments to support his contention that there were reasonable grounds, but in my view they do not stand up for the follow reasons:

    i) Mr Weale submitted that there was no apparent reason why Mr Jordan should have wished to extinguish the legacy in favour of Ms Simmonds. That was, however, a matter for Mr Jordan. It does not clearly go to the issue of testamentary capacity and it is not an issue on which Mr Mumford would have been likely to provide any material assistance. It certainly did not justify his being called for cross-examination.

ii) Mr Weale further submitted that the reference in Mr Tony Roe's attendance note dated 4 January 2012 to Mr Jordan's statement during a conversation that day that he had not executed the 2010 Will was a sufficient ground to call Mr Mumford for cross-examination. I dealt with this issue in para 64(iv)-(v) of my judgment. For the reasons given there, Mr Roe's note that on a single occasion Mr Jordan failed to recall that he had executed the 2010 Will is far from a sufficient ground to call Mr Mumford for cross-examination.

iii) Mr Weale spent a significant proportion of his time in cross-examination exploring Mr Mumford's practice in relation to attendance notes and specifically his failure to have prepared a detailed attendance note of the instructions he received from Mr Mumford in relation to the 2012 Will. Mr Mumford's failure to do so was regrettable, but for the reasons I gave in para 68 of my judgment, namely, the simplicity of the 2012 Will and the ample supporting evidence of the substance of the instructions available to the first defendant following disclosure, it should have been clear that there was little to be gained from summoning Mr Mumford for cross-examination on that point.

iv) Finally, Mr Weale submitted that the medical records included in Bundle X merited exploration with Mr Mumford, particularly in light of the lack of certainty as to the date on which Mr Jordan gave his instructions to Mr Mumford in relation to the 2012 Will. I dealt with this issue in para 64(vi)-(vii) of my judgment. It is hard to see how cross-examination of Mr Mumford on those records would yield any useful insight and, indeed, in my view nothing of significance emerged from cross-examination other than the speculative admission by Mr Mumford to which I referred in para 64(vii).

16. I have concluded that none of the individual arguments raises a reasonable ground on which to oppose the will. I have also considered and rejected the conclusion that somehow, taken together, they raise a reasonable ground.

17. I do accept Mr Weale's submission that, if I am minded to make an order for costs against the first defendant, then I should order costs only from the date on which she, with her advisers, had sufficient material on which to form a view about whether there was any reasonable ground to oppose the will. This is consistent with the principle that "the judge in a probate action is concerned in an inquisitorial capacity to seek the truth as to what is indeed the testator's true last testament and accordingly is not bound by the manoeuvres of the parties": *Killick v Pountney* [2000] WTLR 41, 71 (Ch) (per James Munby QC). This principle, in broad terms, underlies the costs rule in CPR 57.7(5)(b). Once, however, the defendant is in a position, following disclosure, to make a proper assessment of the reasonableness or otherwise of opposing the will, he or she should be at risk for costs incurred from that date.

18. Mr Weale suggests that the appropriate date would be in April 2014. In response, Mr Hilton submitted that the first defendant had sufficient evidence

on which to form a view by April 2013. This may be true, but in any event based on the evidence of Ms McInnes, I am satisfied that the first defendant had sufficient evidence on which to form a view by 3 June 2013, when Gardner Leader LLP provided to Woodford Stauffer copies of the witness statement of Mr Mumford, plus attachments, a copy of the 2010 Will, notes and records of Mr Jordan's general practitioner and notes and records from the Sunrise nursing home. The first defendant may have already been in possession of most, if not all, of that material by then. Some additional items were provided subsequently. In addition, the first defendant continued to seek medical records, but it is not necessary for me to set out the history of those efforts. In the end, those efforts did not bear fruit, as the first defendant did not advance a positive case in opposition to the will. I consider that it is fair that she should be at risk for the claimant's costs from 3 June 2013 and will make the order for those costs to be assessed on the standard basis from 3 June 2013.

19. As far as the second defendant's costs are concerned, I have sympathy with the concern of the claimant that she will ultimately bear those costs by reduction of the estate, unless I make an order against the first defendant in respect of the second defendant's costs. On the other hand, the second defendant has been, appropriately, neutral in these proceedings, but has nonetheless been forced to incur significant costs as a result of the way matters have proceeded since the first defendant first intimated her opposition to the 2012 Will. Ms Barton on behalf of the second defendant, referring to CPR 44.10(1)(b), requested that I make no order in relation to the second defendant's costs. Although it was not the claimant's first position, the claimant did not oppose this request. Accordingly, I will make no order in relation to the second defendant's costs.

20. In reaching this decision, I have not considered any other conduct of the parties to be relevant. As far as efforts seeking to settle matters amicably prior to trial are concerned, I have proceeded on the basis that all parties acted reasonably, and I make no further comment on that.

21. As contemplated by CPR 44.2(8), I will order that the first defendant pay a reasonable sum on account of costs. Having regard to the claimant's cost budget dated 21 March 2016, it seems to me that the appropriate figure is £65,000, unless the parties are able to agree on another figure. I am happy to have further submissions on this, if necessary, and to deal with this in writing.

22. Mr Weale had proposed that, if I were to make an order for costs against the first defendant, that it be provided in the order that it was not to be enforced until after a final decision was reached on the first defendant's claim under the 1975 Act, subject to the first defendant's undertaking to issue her claim within seven days of the making of the order. My understanding was that the claimant did not resist this proposal.

23. I would be grateful if counsel would agree a minute of order to give effect to my judgment in relation to the 2012 Will and the caveat and to this ruling.