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Probate costs: those who have shewn good cause?

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Costs in Probate Litigation: the application of the common law exceptions to CPR Part 44, and the relevance of Part 36 offers

1. It is a common misconception that legal costs arising from probate litigation are automatically ordered out of the deceased's Estate. The general rules in CPR Part 44 apply as they do in all civil litigation; the Court has a wide-ranging discretion when awarding costs. However, there are exceptions, preserved at common law, which affect probate costs consideration.

2. In *Leonard v Leonard* [2024] EWHC 979 (ChD), Smith J considered these exceptions and their relationship with CPR Part 36. The judgment demonstrates the importance of appropriately pitching Part 36 offers so that they are viewed as genuine attempts to settle. Conversely, it makes clear that a party seeking to show that Part 36 consequences would be unjust will face a high hurdle.

LEONARD v LEONARD [2024] EWHC 321 (CHD) & [2024] EWHC 979 (CHD)

3. The substantive dispute concerned testamentary capacity. There were two Wills, the later of which was executed in 2015. It was common ground that Mr Leonard had dementia at the time of executing that Will, but the medical evidence was inconclusive as to his testamentary capacity at the time. The court found that Mr Leonard lacked testamentary capacity. The 2015 Will was pronounced against, and an early will from 2007 was entered to probate. Whilst the substantive judgment has been the subject of significant commentary, the later costs judgment is equally interesting.

4. The initial hearing had involved both the probate dispute and a dispute relating to intervivos gifts. The latter was conceded and the costs disputes focussed on the probate dispute only. The successful Claimant sought an issue-based order [CPR r44.2(6)(f)] against the

Defendant and also relied on a Part 36 offer made some three years earlier. The Defendant sought a percentage-based order [CPR r44.2(6)(a)], but claimed that the common law exceptions should apply. The Defendant also submitted that the Part 36 offer had not been a genuine attempt to settle.

The two principal common law exceptions

5. The common law exceptions in probate disputes require "good cause to be shewn why costs should not follow the event" [*Mitchell v Gard* (1863) 3 SW&TR 275.] They were helpfully crystallised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch):

   1) Was the litigation caused by the testator or a beneficiary? If so, the court may order the unsuccessful party's costs to be ordered out of the estate ('the first exception');

   2) Did the circumstances, including the knowledge and means of knowledge of the opposing party, lead reasonably to an investigation of the matter? If so, the court may make no order as to costs ('the second exception')[1].

6. It should be highlighted that even where these exceptions apply:

   > *"the point may be reached where the litigation becomes ordinary hostile litigation, from which point the normal rule entitling the successful party to an order for costs comes into effect."* [*Waters v Smee* [2008] EWHC 2902 (Ch)]

7. Smith J considered the justifications and approach to the two common law exceptions. They are effectively public interest considerations, aimed at discouraging litigation which is without merit on the basis that costs will be subsumed by others, but also ensuring that Wills which raise doubt do not stand just because of the costs risks in opposing them. The exceptions require a positive case on behalf of the party asserting them.

The Relevance of the Part 36 Offer

8. Parties will commonly take advantage of part 36 in probate litigation. It can provide meaningful compromise and early resolution. There was no dispute in *Leonard* that the Claimant had beaten their offer. CPR r36.17 requires that, where a Part 36 offer has been beaten, the court has to find that it is unjust to apply the usual consequences. This requires an analysis of the terms, timing, disclosure, party conduct, and whether it is a genuine

[1] Although not relevant in this case, if Defendants insist on a Will being proved in solemn form, the mere act of cross-examination to achieve that will not result in a costs order unless there was no reasonable ground to oppose the Will.

attempt at settlement. The strength and nature of Part 36 cannot be watered down. A Defendant claiming that the consequences are unjust faces a formidable obstacle.

9. Smith J observed that r36.17(5), which requires the court to take account of all the circumstances of the case, could bring the second common law exception into consideration. The Defendant in *Leonard* did not pursue this argument, but the knowledge of the opposing party in pursuing the litigation is undoubtedly a relevant factor.

10. Whether an offer is a genuine attempt at settlement turns on the facts. Merely because an offer is of little advantage to the other side, does not mean it is not genuine, especially where there are strong prospects of success. There must be some give and take or compromise. If the offer does not show any compromise, then it is questionable whether it is a genuine offer to settle as there is no real incentive. Whilst substantial cost savings of not going to trial or being relieved of the requirement of going through a trial is sufficient in itself to be a factor

    "Parties to cases of this sort should be under no illusions as to the emotional and financial toll they extract and the considerable ordeal for both sides of contesting the matter to a final judgment". [Smith J @ [492]]

What was decided in respect of the costs before the end of the relevant Part 36 period?

11. Smith J considered the principles relating to the first exception:

    a. There is no need to show moral fault or culpability when deciding whether the testator has been the cause of the litigation: it is to be whether their own conduct results in uncertainty, for example, vague or uncertain language;

    b. The disappointment of potential beneficiaries is not a relevant factor; and

    c. The knowledge of the unsuccessful proponents of the Will who may have a mistaken view as to capacity will not justify the first exception (*Twist v Tye* [1902] P32).

12. There had been a period of delay between the creation and finalisation of the 2015 Will, during which the deceased had lost capacity. The Defendant relied on this delay as conduct by the deceased. Smith J took the view that the 2015 Will was a joint venture between the deceased and his wife. They were both involved in the details of the Will, and his wife was privy to the deceased's medical state. The actions of the family were inextricably linked to the execution of the Will, as they observed the deceased's cognitive

abilities and formed an impression as to his mental state. It was not possible to detach the surrounding circumstances. The first exception did not apply. It was not the deceased's conduct which caused the litigation.

13. The second exception required an analysis of the Claimant's conduct to the extent of what issues they are pursuing. The nature of this knowledge may differ at different stages of the litigation, and the exception may be applied at one stage, but not others. Smith J in *Leonard* was not satisfied that this exception can never be engaged other than in exceptional circumstances where a Will is invalid due to testamentary capacity. There is also no distinction to be drawn between successful and unsuccessful proponents of Wills – they are entitled to propound a Will of which they are the executor. If it later turns out that the belief is mistaken, that is not a fault which would engage the second exception.

14. The Defendants were aware of the deceased's mental condition during his lifetime. The Will was prepared professionally. No concern was expressed as to the deceased's capacity, and the Defendants were entitled to put some reliance on that. They were entitled to investigate the circumstances upon the challenge to the 2015 Will. Accordingly, Smith J decided that the second exception applied up until the date of a mediation on 21.3.2021. Following the mediation, where the issues had become clear, the claim became ordinary hostile litigation. Accordingly, each party would bear its costs up to the mediation. From that date, the Defendant would pay costs on the standard basis, subject to the determination of the Part 36 issue.

Was the Part 36 offer a genuine attempt at settlement?

15. The offer contained three terms:

   i. The 2007 Will be admitted to Probate;

   ii. The 2007 Will be varied so as to provide for an additional cash legacy of £2000 to each of the defendants (excluding the second defendant executor, who played a neutral role); and

   iii. Two of the Defendants would not be liable to repay to Jack's estate the lifetime gifts made to them in 2013 and 2014 respectively.

16. The Defendant contended that it was purely tactical; the issue of the lifetime gifts had no reasonable prospects of success so was not a concession and the offer of £2,000 each was paltry.

17. Smith J disagreed. The offer was not total capitulation. It involved the giving up of payment of gifts by the Defendants, which was a genuine concession by the Claimants at the time. If accepted it would have resulted in a substantial costs saving (approximately £1.5 million) as well as the avoiding of distressing proceedings. The full Part 36 consequences applied from the date the offer should have been accepted [4.10.2021].

An issue-based costs order or a percentage-based costs order?

18. It was not possible in this case to clearly split the costs associated with the Gift Dispute and the Probate Dispute. The Defendant suggested a 60/40 split, although both parties agreed that there was considerable overlap between the two disputes. The Claimant submitted that the costs spent on the Gifts Dispute were de minimis at no more than £10,000 in any event. The Court determined that an issues based-costs order was appropriate.

Conclusion

19. This costs judgment is important reading for those dealing with and advising clients on probate claims, where there can sometimes be too much reliance on the common law exceptions. These must be considered carefully at each stage of the claim to establish the position and, in particular, whether the case has moved away from the exceptions and into ordinary litigation with its dangers for the parties. It is important to establish both that the parties are not incurring unnecessary costs and also that the Estate (and therefore the beneficiaries) does not significantly suffer. It is also important to remember that there is a high hurdle to clear in demonstrating that Part 36 consequences are unjust, and equally to be conscious that Part 36 offers are pitched in such a way as to provide a verifiable benefit for the other side.

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