IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS & PROBATE LIST (ChD)
[2019] EWHC 2451 (Ch)

No. PT-2018-000043

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 2 May 2019

IN THE MATTER OF **THE ESTATE OF NORMAN RODMAN (DECEASED)**

Before:

CHIEF MASTER MARSH
(**In Private**)

B E T W E E N :

DAVID ERIC LONG
(As Administrator of the estate of Norman Rodman, deceased)

Claimant

and

(1) LINDA ANN RODMAN
(2) DEBRA FAY RODMAN
(individually and in their capacity as the Administrators of the estate
Of Arline Bette Rodman, deceased)
(3) BARBARA SUSAN RODMAN
(4) ROBERTA RODMAN HANLEY

Defendants

MR A. DE LA ROSA (instructed by Charles Russell Speechlys LLP) appeared on behalf of the Claimant.

THE SECOND DEFENDANT appeared in person.

MR A. MOLD and MR S. ATKINSON (instructed by Macfarlanes LLP) appeared on behalf of the First and Third Defendant.

J U D G M E N T

CHIEF MASTER MARSH:

1 This judgment concerns issues of costs arising from a judgment handed down on 29 March 2019. The consequentials hearing in relation to that judgment was heard yesterday when I received submissions from the parties on the question of costs. For the purposes of this judgment it is unnecessary for me to refer to the background to the claim which is set out fully in my judgment and I adopt where necessary the same shorthand in that judgment. The costs I have to deal with concern two applications. The first application in time was that made by Mr Long under CPR Rule 64 in which he, as administrator of the estate of Norman Rodman (deceased) sought directions from the court. The second application is one made by Linda and Debra Rodman by which they sought an order replacing Mr Long as administrator, asking the court to exercise its powers under s.50 of the Administration of Justice Act 1985.

2 The order made pursuant to the judgment is that Mr Long is to be replaced by Mr Matthew Pintus who was formerly a partner in Macfarlanes. The outcome is not what Linda and Debra sought in their application or, indeed, at the hearing. It was only in the course of making submissions in reply, Mr Mold, appearing for Linda and Debra, suggested that the appointment of Mr Pintus in place of Mr Long acting on his own would be an acceptable outcome. Mr Long's position has been throughout that he opposed the s.50 application in its entirety. His case in summary was that there was no need for him to be replaced at all. In addition, he submitted that Linda and Debra were unsuitable candidates. So far as the s.64 application is concerned, no order has been made. It was in effect superseded by the s.50 application.

3 Orders for costs in relation to these two applications are to be made in accordance with the well understood principles set out in CPR Rule 44.2 and it is unnecessary for me to set out those rules in this judgment. I do, however, have particular regard to four points. (1) The court has a discretion whether costs are payable by one party to another that arises from Rule 44.2(1)(a). Put another way, there is no requirement on the part of the court to make an *inter partes* costs order. (2) The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order; that derives from Rule 44.2(2). (3) The court may have regard to the matters specified in Rule 44.2(4), in particular conduct, success in part and, where appropriate, admissible offers. (4) "Conduct" is defined in Rule 44.2(5) and in that regard the court is entitled to have regard to whether it was reasonable for a party to raise, pursue or contest a particular issue and, importantly, the manner in which a party has pursued or defended its case.

4 Submissions have been made by both parties about the extent to which they have been successful. Consideration of this issue is essential in light of the general rule to which I have referred. It must be borne in mind, however, that an application under s.50 is not conventional *inter partes* litigation. In a s.50 application the court is less concerned about the effect of the claim on the personal position of the parties than it is in having regard to the interests of the estate and the beneficiaries as a whole. To my mind, notions of 'fighting the action through to the finish' and 'denying the plaintiff the prize which the plaintiff fought the action to win' [1]are of rather more limited relevance to a claim of this type than they might be in what I would describe as conventional litigation.

[1] Here I am referring to remarks made by Sir Thomas Bingham MR in *Roach v News Group Newspapers Ltd*.

5 In this case both parties say they have been successful or substantially successful. Plainly, they cannot both be right. The submissions the court has received illustrate, echoing some of the observations made in my judgment, that the pursuit of the s.50 application has been marked by a marked lack of reality on both sides. Mr De La Rosa who appeared for Mr Long referred me to a pre-CPR decision in *Beoco Ltd v Alfa Laval Ltd* [1995] QB 137. It is fair to say that the facts in that case could scarcely be further from the facts I am dealing with in this case. Nevertheless, since it was cited to me, I refer to one of the principles that can be derived from that case, which is adequately summarised in para.3 of the headnote:

> "Where the plaintiff made a late amendment which substantially altered the case the defendant had to meet and without which the action would have failed, the defendant was entitled to the costs of the action down to the date of the amendment".

6. Although *Beoco* is a pre-CPR case, it is right to say that it was cited with approval by Briggs J, as he then was, in *Magical Marking Ltd & Anor v Ware & Kay LLP & Anor* [2013] EWHC 636 (Ch). Mr Mold who appeared for Linda and Debra relies in particular on an approach adopted by the deputy master at first instance and the approach adopted by the deputy judge on appeal in *Griffin v Higgs* [2018] EWHC 2498. That was a claim brought under s.50. The deputy master formed the view that the claimant had been successful and set out six reasons for reaching that conclusion with which the deputy judge agreed. It seems to me, however, that this decision is merely an illustration of the applications of the provisions in CPR Rule 44.2. The application of those principles on the facts of that case which are quite different to those before me is not particularly illuminating.

7. In addition to the award of costs *inter partes*, the court must consider whether Mr Long is entitled to be indemnified from the estate. The general rule is set out at CPR Rule 46.3(2), namely that a personal representative or trustee is entitled to be paid the costs of the proceedings on the indemnity basis out of the estate insofar as they are not recovered from or paid by another person. The rule is is refined in para.1.1 of Practice Direction 46 where it is said that the personal representative is entitled to be indemnified for costs properly incurred and whether costs are properly incurred depends on all the facts of the case, to be assessed by the three criteria that are specified at (a), (b) and (c) in that paragraph. Of particular relevance here is whether the personal representative acted unreasonably in bringing or defending the claim or in the conduct of the proceedings. In considering the application of that principle, Mr Mold referred me again to *Griffin v Higgs* at para.129 where the deputy judge remarked:

> "In my view, *Lewin* is right to say that, if there is a conflict of interest and duty which justifies the trustee's removal, and the trustee unsuccessfully resists removal, the court might normally be expected to deprive the trustee of his indemnity and order him to pay the costs".

8. I would remark, however, that the principal task of the court is to apply the rules as they are set out in CPR 44.2 and 46.3 and Practice Direction 46.1. The exercise is a fact specific one. When the court is considering whether a party has been successful the court should adopt a common sense approach based on a review of each party's case. The position is slightly different with regard to the personal representative's indemnity, because there is a clear starting point under the rule. It is only if the court is satisfied that the personal representative has acted unreasonably that he may be deprived of the right to an indemnity.

9. This judgment deals only with submissions concerning an award of costs and not an assessment of an amount which may or may not be recoverable or an amount which should

be paid on account. It is notable, however, that the parties' costs and, particularly, those of Linda, Barbara and Debra are substantial. Mr Long's costs are put at just under £174,000. The costs of Linda and Barbara (that is, the costs of Macfarlanes LLP) and the costs of Debra who was separately represented for part of the time come to nearly £622,000. On any view, that is a very substantial figure and a rather troubling one. Although it is not right to regard the jurisdiction under s.50 as a summary one, when regard is had to the test the court has to apply, it is difficult to see how, save in the most unusual circumstances, costs of that order will be recoverable, whether by way of an *inter partes* order or by way of indemnity; but it is right to observe that in relative terms Mr Long's costs compare favourably with those of Linda and Barbara.

10. Mr Mold's submissions on costs made on behalf of Linda and Barbara can be summarised fairly in the following way. (1) He says his clients have been successful or at least more successful than Mr Long has been and, as a consequence, Mr Long should pay Linda and Barbara's costs. (2) He points to the fact that Mr Long fought the case from the outset on the basis that there was no justification whatever for removal. (3) There was no offer made by Mr Long to be replaced by another professional person. He submits that had there been an offer, the history of the case shows it would have been rejected.

11. So far as the indemnity is concerned, he says Mr Long should be deprived of his indemnity on the basis of unreasonable conduct and he instances five aspects of conduct which he says are pertinent. (1) Mr Long was in a position of conflict, but this was never recognised by him. (2) Relations between Mr Long and the beneficiaries had completely broken down but there was a failure to recognise that fact, save at the last moment at the hearing. Up to that point it had not been accepted. (3) Mr Long resisted the application for him to be replaced with considerable vigour and Mr Mold relies on the observation made in the judgment that the approach adopted by Mr Long was an odd one. (4) Mr Mold says that Mr Long acted in his own interests. He actively defended the allegations made against him in the course of these s.50 proceedings and, in particular, he continued to seek an inappropriately wide indemnity that included an indemnity in respect of work undertaken by his solicitors. (5) Mr Long did not put forward an alternative administrator to himself.

12. So far as the Part 64 application is concerned, Mr Mold submits that the application was wholly unnecessary. Two of the issues raised by Mr Long, namely the proposed claim to be made in the United States against McDermotts and the tax abatement claim, had, he says, already been agreed and there was no need for court approval. So far as the third issue (the disposal of funds held by Mr Long) that had already been dealt with under a previous order.

13. Mr De La Rosa's submissions on behalf of Mr Long can be summarised in this way. (1) The Rodmans (that is, Linda and Barbara with Debra) ran their application on the basis that Linda and Debra were to replace Mr Long. No other basis was put forward until the last minute and he says they were implacable in pursuing the application on that basis. (2) It was only very late in the day that a limited alternative was put forward; namely, that Mr Pintus could be appointed alongside Linda and Debra and it was only in the course of the reply that the possibility of Mr Pintus being appointed on his own was floated. (3) The court concluded on the basis of the case put forward by Mr Long that Linda and Debra were unsuitable to be appointed. He says that is an issue on which he has been successful. (4) Relying on the approach adopted in *Beoco* and *Magical Marking*, he likens the last minute suggestion that Mr Pintus could act on his own as akin to a last minute amendment and he submits that as a consequence there should be an order for costs against Linda and Barbara and also Debra based on that principle. (5) He says the applicants ratcheted up the temperature in their evidence. There were serious allegations of impropriety and they

adopted an intemperate and ill-judged approach. He relies on the remarks made in the judgment.

14. So far as the indemnity is concerned, Mr De La Rosa submits that there is no basis for depriving Mr Long of it and he submits that Mr Long is entitled to his costs of the Part 64 application. It was a reasonable application to make in light of the position at the time it was made.

15. I also heard briefly from Debra Rodman who at this stage acts in person. The only matter I need to mention that arises from her submissions is that she relied upon what she described as a 'reaching out' by her solicitors on a without prejudice basis. There is probably no difficulty in her referring to the reaching out in a general sense. However, any discussions that took place between the solicitors were conducted on a without prejudice basis and it would not be right for me to have regard to them.

16. I will deal first with the Part 64 application, because, to my mind, this does not create any real difficulty. Mr De La Rosa is right, in my judgment, that the court should consider it in light of the position at the time the application was made. The starting point is that a personal representative is entitled to seek guidance from the court and, in most circumstances where it is sought, the personal representative will be entitled to an indemnity. It seems to me that the court should be slow to discourage such applications, because administrators are entitled to the protection that is afforded by the court's guidance and approval.

17. The matters that were placed before the court in the application had been the subject of extensive correspondence. There was agreement in principle that the claim against McDermotts would be pursued in the United States and there was agreement in principle that the tax abatement claim would be pursued by the Rodman daughters. However, that is some considerable distance, in my judgment, from making the application an unreasonable one. As Mr Long's witness statement made in support of the application clearly demonstrates, there had been a substantial history of difficulty. On many occasions the Rodman sisters had not been in accord. True it is that there was at the time the application was made a marked degree of agreement between them, but there was no reason to suppose that such unusual harmony would continue. Notwithstanding what is said to have been agreed in correspondence, it seems to me that it was entirely proper and reasonable that the application was made. The application was then overtaken in a short period of time by the s.50 application and it served little purpose once that application had been made. It seems to me the right order is not to make an *inter partes* order but to direct that Mr Long is entitled to be indemnified in respect of the costs of the Part 64 application up to the date the s.50 application was made.

18. I turn now to deal with the costs of the s.50 application. It is unnecessary for me in this judgment to repeat the criticisms that were set out in my judgment, but I have them very much in mind. I think it can be fairly said that the manner in which this s.50 application was conducted on both sides was an object lesson in how <u>not</u> to pursue such an application. Who was successful or unsuccessful? The Rodmans' case when it was brought, and right up to the hearing, was that Mr Long should be replaced and, indeed, he was. However, their case was that there were only two parties who would replace him; that is, Linda and Debra. No alternative was put forward.

19. Although the court approaches the exercise of its discretion under s.50 in stages (the first stage for the court being to consider whether Mr Long should be replaced at all) it seems to me that when considering success, or the lack of it, the court need not necessarily regard an

applicant for an order under s.50 as successful merely because an order for replacement was made. The court's determination was that Linda and Debra should not be appointed; and so the case they made right up to the point of submissions in reply was unsuccessful. They are, however, able to say that on that very late case they have been successful.

20. Mr Long has implacably opposed his replacement, whether by Linda and Debra or anyone. Even at the last gasp he was not prepared to accept replacement by Mr Pintus. He has fought the case in every respect. He has, however, been replaced. It is plain to me that he has been unsuccessful in the defence of this claim. It is right to mention, however, that he made a case, which the court accepted, that Linda and Debra are unsuitable to be appointed.

21. Both sides have demonstrated a high degree of inflexibility. The jurisdiction that the court has exercised does not involved a party establishing a cause of action, or the other party defending that cause of action, leading to what can be described as a win/lose outcome. The parties asked the court to exercise a broad discretion. Both parties have adopted unrealistic positions and their approach to the conduct of the application has been criticised in the judgment. Issues of conduct in this case are of very real significance. In the case of the Rodmans it is, I think, fair to observe that the application was sprung on Mr Long at short notice in response to his application under Part 64 and, as I have observed in the judgment, their approach to the evidence was in parts wholly inappropriate. Significantly, this is a case which has been developed by the Rodmans as it has gone along. It was only late in the day that a formal letter of claim was sent to Mr Long crystallising the claims that they say they are proposing to bring and thus crystallising the conflicts of interest and, of course, there was the late proposal that Mr Pintus might be added and, finally, the very, very late proposal that he might be appointed on his own. I would also add that there was very late provision of evidence of fitness to act. Part 57 requires that it is provided with the application.

22. Mr Long has failed to adopt a realistic approach. He chose to fight the application in every respect to the bitter end. That was ill-judged. It was open to him from the outset to accept that in view of the unanimous wishes of the beneficiaries he could step aside. It seems to me that as a fiduciary it was incumbent upon him to take a broad view. This claim was not the occasion for him to defend his position. He should have proposed his replacement with another professional administrator. It is notable that he failed at any time to do that. Instead he dug in and fought the claim in every respect.

23. I conclude that this is a case where both sides have been unsuccessful or, put another way, neither side can claim they have been the successful party. This is particularly clear in the case of Mr Long. The only ways in which Linda and Debra might be able to say they have been successful is in reference to their last minute change of case. I do not find, however, that the approach adopted in *Beoco* and *Magical Marking* would suggest that such a late change of case will automatically lead to an adverse order for costs to be a helpful one. That may be the right approach in ordinary *inter partes* litigation, but that is not the case here. In any event, by the time the case was changed all the costs had been incurred. It seems to me that looked at properly Linda and Debra have failed on the case they pursued. I conclude that the just order in this case is that there should be no order for costs. Even if it is the case that one side or the other is able to say there was an element of success on their side, taking into account the issues of conduct which I have set out in this judgment, it seems to me that no order for costs is the right outcome.

24. So far as the indemnity is concerned, in my judgment, Mr Mold's submissions on this subject make a compelling case for depriving Mr Long of an indemnity. I consider that his conduct was unreasonable in each of the respects I have summarised earlier in this

judgment. Put shortly, he should not have defended this application as he did and it cannot be right in those circumstances that his costs should be met out of the estate.

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