



Neutral Citation Number: [2022] EWHC 3237 (Ch)

Case No: PT-2022-000029

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**PROPERTY TRUSTS AND PROBATE LIST (ChD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL  
Date: 14/12/2022

Before:

**MASTER CLARK**

-----  
Between:

**CLARE ALISON LAIRD**  
(as executor and trustee of the estate of Robert John  
Simcock)

**Claimant**

- and -

- (1) **CATHERINE ANNE LOWDER SIMCOCK**  
(as executor, trustee and beneficiary of the estate of  
Robert John Simcock)  
(2) **CHARLOTTE REBECCA SIMCOCK**  
(3) **ELIZABETH JUNE SIMCOCK**  
(4) **GEMMA LOUISE SIMCOCK**

**Defendants**

-----  
-----  
**Paul Burton** (instructed by **Shakespeare Martineau LLP**) for the **Claimant**  
**Michael O’Sullivan** (instructed by **RWK Goodman**) for the **First Defendant**  
**Rupert Coe** (instructed by **Blythe Liggins LLP**) for the **Second, Third and Fourth**  
**Defendants**

Hearing date: not applicable  
-----

**Approved Judgment**

I direct that this approved judgment, sent to the parties by email at 2pm on 21 December 2022, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

## Master Clark:

1. This judgment follows my judgments dated 26 July 2022 (“the main judgment”) and 4 October 2022 (“the costs judgment”) and adopts the definitions used in those judgments. It contains my conclusions on the 3 outstanding issues identified by the parties:
  - (1) the basis of the detailed assessment of the costs to be paid by the claimant;
  - (2) the quantum of any payment on account of the costs to be paid by the claimant; and
  - (3) whether Catherine is entitled to be paid her costs out of the estate if and insofar as they are not recovered from the claimant.
2. The parties invited me to determine these issues without a hearing and have filed written submissions on them.

## Basis of assessment

3. Both Catherine and the daughters submitted that the costs payable by the claimant should be assessed on the indemnity basis.

## Principles

4. The starting point is that costs on the standard basis is the usual order. The test for whether costs should be assessed on the indemnity basis is set out in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (Costs)* [2002] EWCA Civ 879, [2002] C.P. Rep. 67 at [19]: “whether there has been some conduct or some circumstance which takes the case out of the norm”.
5. This test is, in my judgment, to be applied in the context of CPR 44.2(4) and (5), which in the interests of concision, I do not set out. It is clear from those provisions that the conduct to consider is the conduct of the claim (including compliance with any relevant pre-action protocols). This is also clear from the review of the case law found at para 24.9 to 24.25 of *Cook on Costs 2022*. Thus, to the extent that Catherine and the daughters rely upon the claimant’s conduct as executor and trustee in the events giving rise to the claim, this is not, in my judgment, relevant to the basis of assessment.

## Catherine as a trustee/executor

6. However, Catherine’s claim to her costs being assessed on the indemnity basis has an alternative foundation. The claim was unopposed by her. She was a necessary party to it both as a trustee/executor and as a beneficiary. I have reviewed her evidence<sup>1</sup> in the claim, and her counsel’s skeleton argument for the substantive hearing. The witness statements are not lengthy. They set out the relevant facts in a reasonably neutral way (although they include some criticism of Elizabeth). Her counsel’s skeleton argument is brief and also substantially neutral. If I had ordered the costs of the claim to be paid out of the estate, the usual order (which I would have made) would have been that Catherine’s costs to be assessed on the indemnity basis. Because the claimant’s conduct gave rise for the need for the claim to be made, I have ordered her to pay the

---

<sup>1</sup> her 1<sup>st</sup> witness statement dated 23 February 2022 and her 3<sup>rd</sup> witness statement dated 16 June 2022

costs which otherwise would have been met from the estate. In my judgment, they should be assessed on the same basis.

*The daughters*

7. The daughters rely on what they submit was the claimant's unreasonable conduct both before and after the issue of the claim as justifying costs on the indemnity basis. This can be summarised as follows:
  - (1) the claimant's carelessness in executing the Deed;
  - (2) her initial failure to acknowledge that there had been any sort of error, and maintaining that the Deed's intended effect was that on its face;
  - (3) her delay (said to be unreasonable) of 17 months from the date of the Deed to May 2021, when she first admitted that an error had been made;
  - (4) her refusal to pay the daughters' costs of their solicitors' correspondence from July 2020 to May 2021;
  - (5) her inconsistent positions in correspondence, and at the hearing as to whether assets falling within the deceased's nil rate bands were "tax-bearing assets";
  - (6) the fact, it is said, that the application was speculative and "doomed to fail from the start", because there had been no clerical error of the type required for rectification;
  - (7) the claimant's unwillingness to countenance any other way of resolving the position, such as by revoking the Deed, making capital appointments or applying for rescission;
  - (8) the fact that the claim was brought without any admission by the claimant to negligence or breach of trust;
  - (9) the claimant's omission initially to file any evidence from herself or Catherine;
  - (10) the inadequacy of claimant's initial evidence, so that the court would have dismissed the claim at that point, had it not given her an opportunity to file further evidence;
  - (11) the inconsistency of the claimant's further evidence with her earlier evidence, such that the court commented that it was difficult to see how she could have signed the statement of truth in her first witness statement;
  - (12) the fact that, having previously stated that she would not seek to be indemnified for her costs of the claim from the estate, the claimant sought such an indemnity for the first time in her counsel's skeleton argument for the costs hearing on 18 August 2022 – so that the one day hearing listed was used almost entirely for that issue, increasing the delay and expense to the parties;
  - (13) the fact that the claimant expressed a view that Catherine had a strong claim under the 1975 Act;
  - (14) the adverse effect of absence of the rectification of the Deed on the daughters' financial position and well-being;
  - (15) the fact, it is said, that the claimant only brought the claim for rectification because the daughters threatened to sue her.
8. I have already concluded that the claimant's conduct in the events giving rise to the claim is not relevant to the basis of assessment. As to the other matters relied upon by the daughters, I acknowledge the force of some of the criticisms, particularly that of the claimant's failure to put full and fully accurate evidence before the court initially. However, in my judgment, they do not either individually or cumulatively justify assessment on the indemnity basis: they do not take the case sufficiently out of the norm.

9. Nonetheless, I do consider that in their capacity as beneficiaries, the daughters are also entitled to costs on the indemnity basis. A claim of this type seeking unopposed rectification of a trust document is not in its nature hostile litigation, notwithstanding the animosity that has in fact arisen in this case. In such a claim, the beneficiaries are normally entitled to their costs on the indemnity basis: *Lewin on Trusts* (20<sup>th</sup> edn) paras 48-023, 48-024. Thus, for the same reason that I have concluded that Catherine is entitled to her costs on the indemnity basis, I also consider that the daughters are so entitled.

### **Quantum of costs to be paid on account**

#### *Principles*

10. CPR 44.2(8) provides:

“(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”

11. The principles for an interim payment are discussed in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at paras 14 to 24. The question is what is a “reasonable sum on account of costs”. This will depend on the circumstances and will be an estimate of what the receiving party is likely to recover.

#### *Effect of pending appeal*

12. The claimant submitted that I should not order a payment on account because she has obtained permission to appeal my order dismissing the claim. She raises the possibility that the Court of Appeal may revisit the costs orders, and that the defendants may be unable to repay the costs paid to them.
13. As to this, I note that the claim was unopposed, and the appeal is unopposed. There is no appeal against my order dated 4 October 2022, and if there were, no doubt the defendants would wish to participate in that appeal. In those circumstances, I do not consider that there is a realistic possibility of the Court of Appeal revisiting my order of 4 October 2022, nor therefore that that is a reason for not making an order for interim payment.

#### *Procedural background to quantifying costs*

14. The first hearing in the claim was on 29 April 2022. Following that hearing, on 10 May 2022, I sent directions to the parties stating that my preliminary view was that the evidence was insufficient to show the “clerical error” set out at para 9 of the details of claim, and the claim did not therefore succeed; and giving them an opportunity to file further evidence.
15. The claimant and Catherine (but not the daughters) did file further evidence on 16, 20 and 30 June 2022. On 26 July 2022 I handed down the main judgment without attendance. There was then a further hearing on 18 August 2022 to determine the order consequential upon my judgment, at which the time was insufficient to determine all the issues. I handed down the costs judgment on 4 October 2022. This dealt with liability for costs, and the scope of the costs order. I directed that the outstanding issues should be the subject of written submissions and determined on paper if possible.

### **Catherine's costs**

16. Catherine's costs draftsman has provisionally assessed her costs of and incidental to the claim in the total sum of £108,991.20. She asks for a payment on account of 60% of this sum: £65,394.72.
17. The history of Catherine's claimed costs for the claim is as follows:

<b>Document</b>	<b>Date</b>	<b>Amount £</b>
Statement of costs dated 24 April 2022	29 April 2022 (hearing)	37,156.20
Statement of costs dated 17 August 2022	18 August 2022 (hearing)	87,639.00
Catherine's counsel's written submissions dated 21 October 2022	21 October 2022	108,991.20

18. Keeping in mind that the substantive relief in the claim was unopposed, the escalation so that the costs now claimed are almost triple the costs of the first hearing is concerning. Catherine has not filed a further costs statement for her total claimed costs of £108,991. However, her statement of costs dated 17 August 2022 includes work that is not referable to the rectification claim e.g. correspondence relating to the valuation of the farm; drafting a pre-action letter for a negligence claim to Shakespeare Martineau. The increase in costs of over £21,000 from 18 August 2022 to 21 October 2022, when there was no further hearing also seems, in the absence of any breakdown, very high. In any event, the overall level of costs is, without further explanation, apparently disproportionate and excessive. I am therefore only prepared to order that the claimant make an interim payment of 40% of those costs: £43,596.48.

### **Daughters' costs**

19. The history of the daughters' claimed costs is as follows:

<b>Document</b>	<b>Date</b>	<b>Amount £</b>
Statement of costs dated 28 April 2022	29 April 2022 (hearing)	63,135
Statement of costs dated 17 August 2022	18 August 2022 (hearing)	82,095
Daughters' solicitors' email dated 29 September 2022	29 September 2022	88,851
Daughters' counsel's written submissions dated 21 October 2022	21 October 2022	91,666

20. Again, these costs are on their face very high (although significantly less than Catherine's) and apparently disproportionate (although correspondingly less so than Catherine's). I will therefore order that the claimant make an interim payment of 50% of those costs: £45,833.

### **Catherine's entitlement to recover from the estate any costs not recovered from the claimant.**

21. I have awarded costs to Catherine on the basis on which she would as a trustee/executor be entitled to costs from the estate if I had not ordered the claimant to pay them. There is, in my judgment, no jurisdictional basis, and no basis in principle to provide her with a fuller indemnity, particularly bearing in mind the criticisms I have made above of the level of her costs.