

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY TRUSTS AND PROBATE LIST

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

BEFORE:

MASTER MARSH (Sitting in Retirement)

BETWEEN:

SAMUEL ARTHUR JONES

Claimant

- and -

**(1) NEAL TRACEY
(2) STEPEHN ROBERT BIRT
(3) LINDA MARIA CANO
(4) THE BRITISH POLIO FELLOWSHIP
(5) CHRISTOPHER STROTTEN
(6) CRYSTAL LOCKETT**

Defendants

**JUDGMENT on costs
following written submissions**

12 September 2023

1. This is my judgment on costs following the delivery of judgment in the claim on 14 July 2023 after a trial.¹ Directions were given for the claimant and the third defendant to file written submissions and reply submissions in relation to costs.
2. An issue has arisen out of the third defendant's submissions which refer to a letter dated 7 June 2023 from her solicitors, EA Neary, to the claimant's solicitors, Russell-Cooke LLP. The letter is marked 'without prejudice'. Russell Cooke objected to the court considering that letter on the basis that it remained subject to without prejudice privilege, unlike other letters that were relied upon by the parties which are either open or marked 'without prejudice save as to costs'. The claimant was unwilling to agree to waiver of the privilege.
3. EA Neary said in a letter dated 9 August 2023:
 - (1) They were not able to explain why the letter dated 7 June 2023 had been marked 'without prejudice'.
 - (2) There was no reason for the letter to have been marked either 'without prejudice' or 'without prejudice save as to costs' given its contents.
 - (3) The writer of the letter did not appreciate the difference between the two markings.
 - (4) If the letter was privileged, it was open to them (in fact their client) to waive the privilege.
 - (5) The letter was not, despite its marking, in fact, a without prejudice communication because the letter did not contain an offer to settle and was not written in an attempt to settle the claim.
4. I determined that in order to decide whether the letter dated 7 June 2023 was properly to be regarded as 'without prejudice' it was necessary for me to see it. It has now been filed and I have looked at it in the context of the other relevant communications between the parties.

Relevant correspondence

5. Prior to the commencement of proceedings Russell Cook sent a letter of claim dated 20 March 2021. It was a carefully drafted letter that set out the claimant's case in full. It accords closely with the approach adopted by the court in its judgment. The third defendant was in a position having received that letter to decide whether to concede the claim and agree to remove her caution, to put the claimant to proof without actively contending there was an intestacy or pursuing her own claim for a grant or counterclaiming in proceedings brought by the claimant.
6. EA Neary replied to the letter of claim on 15 April 2021 disputing the claimant's entitlement to a grant based upon the copy will. They said that without seeing the evidence the claimant relied upon to rebut the presumption of revocation, they were unable to advise their client as to the strength of the claim. However, the letter goes on actively to engage with the merits of the proposed claim. In my judgment the third defendant had sufficient information at that stage to form a view about the approach she wished to adopt.
7. On 13 May 2021 Russell Cooke sent two letters to EA Neary, one marked as being an offer made pursuant to CPR Part 36 and the other marked 'without prejudice save as to costs'. The substance of the Part 36 letter was that the claimant would pay the third defendant £5,000 within 14 days of acceptance of the offer on the basis that the third

¹ [2023] EWHC 2242 (Ch)

defendant would take steps to remove her caveat and support the claimant's application to admit a copy of the will to probate. The letter drew attention to the consequence of failing to accept a Part 36 offer. On the same day Russell Cooke sent a further letter which was marked 'without prejudice save as to costs' and 'subject to contract'. It contained an offer that was essentially the same as the Part 36 offer.

8. EA Neary replied on 21 May 2021 in a letter marked 'without prejudice save as to costs' "to your without prejudice letter of 13th May 2021" without making it clear which letter was being replied to. They said the third defendant remained unable to advise the third defendant about the offer without receiving what was described as a substantive response to their letter dated 15 April 2021. An open letter from Russell Cooke was sent on 27 May 2021 in reply to the letter dated 15 April 2021.
9. There the correspondence rested without the third defendant providing a full response to the offers. The claim was issued on 26 October 2021. The third defendant opted to pursue a counterclaim for a grant based upon an intestacy.
10. After the CCMC was held and a trial date for the claim had been fixed, Russell Cooke wrote an open letter on 27 April 2023 saying their client was willing to engage with alternative dispute resolution without moving the trial date which had been fixed for 10 July 2023. EA Neary replied on 3 May 2023 saying:

"We confirm that our client is willing to engage with alternative dispute resolution without moving the trial listed for 10th July 2023.
We look forward to hearing from you."
11. I observe that both parties had not been specific about the form of ADR that was proposed. Although it is common to conflate ADR with mediation it is not right to do so because ADR encompasses a range of approaches including Chancery FDR, ENE and conventional negotiations at a round-table meeting, or otherwise, as well as mediation. In any event, Russell Cooke sent a further letter marked 'without prejudice save as to costs' on 24 May 2023. The letter was sent by email at 12.17. The claimant offered to settle the claim on the basis that the third defendant withdrew her caveat and agreed to a grant and paid a sum said to be 80% of claimant's costs to date. The benefit of the offer had it been accepted was that the third defendant would avoid the consequences that arise under CPR rule 36.17.
12. At 13.32 the same day, without referring to Russell Cooke's letter, EA Neary sent an open email saying:

"We confirm we agree to attending an Alternative Dispute Resolution meeting but have not heard from you in regard to the arrangements."
13. It is not clear whether EA Neary's email was intended to be reply to Russell Cooke's letter. No mention is made of it. The timing of the two communications would suggest that it was. In any event the position would have become entirely clear to the third defendant when Russell Cooke sent an open email at 17.12 on 24 May 2023. They pointed out that there had been no previous reference to an ADR "meeting" and urged the third defendant to consider the offer that had been sent earlier that day.

Letter dated 7 June 2023
14. The only subsequent communication that may be relevant is the disputed letter dated 7 June 2023.
15. I have concluded that the letter dated 7 June 2023 was not in fact sent on a without prejudice basis despite being marked as such and it is open to the third defendant to reply upon it. I have reached that conclusion because:
 - (1) The starting point for the court is the manner in which the letter is drafted. It will normally be the case that the writer of a letter can be taken to have intended to mark a letter in a particular way or otherwise to have intended

to write an open letter. However, if it is clear from the context that a letter was intended to be open, or without prejudice or without prejudice as to costs, it will be treated as such.

- (2) In some cases the true nature of the letter will be obvious such as a letter that falls within a chain of communications of a particular type. Commonly a letter which is not marked 'without prejudice' that falls within a chain of communications in the context of settlement negotiations will be treated as being without prejudice unless the opposite intention is obvious. The converse may also be true.
- (3) It seems to me that the true nature of the communication must be established objectively without regard to evidence of subjective intention and the right approach is to consider how a reasonably minded recipient would regard the letter.
- (4) In this case EA Neary appear to be saying both that they are unable to explain the marking on the letter and that it was an error because the writer did not understand the difference between without prejudice and without prejudice save as to costs. These submissions are inconsistent but both are inadmissible.
- (5) The letter of 7 June 2023 is in reply to an open letter which raised the possibility of alternative dispute resolution. The reply refers to EA Neary's open email dated 3 May 2023 and forms part of a chain of communications dealing with the possibility of some form of ADR. All those communications were open and obviously intended to be open. Communications between parties about the possibility of, for example, participating in a mediation do not need to be 'without prejudice' and it will usually be preferable for both parties to be able to rely upon such communications. They are more likely to be open than without prejudice.
- (6) The letter does not contain an offer and does not relate to communications about a specific offer. It relates to the use of ADR. It seems to me that it was plainly not a letter that was intended to be 'without prejudice' and this would have been obvious to the reasonably minded recipient. It is right therefore that I have regard to it.

16. EA Neary's letter dated 7 June 2023 says:

"We refer to your letter dated 27th April 2023 with regard to your client offering to engage with alternative dispute resolution without moving the trial date. We sent an email on 3rd May 2023 that our client was in agreement to attending alternative dispute resolution.

We understand there are several forms resolving issues before a final hearing but would invite you clarify why your client was unwilling to attend mediation given that we agreed not to move the trial date. Further the offer was some two months before the final hearing." [sic]

17. Russell Cooke did not answer this letter. EA Neary did not respond to the offer made on 24 May 2023.

Costs

18. I have in mind the provisions of CPR rule 44.2(4) and (5).

19. The claimant submits that having been wholly successful at trial an order for costs should be made in his favour. Furthermore, the claimant relies upon the Part 36 offer made well before the claim was issued and submits that the outcome of the claim is at least as advantageous to him as the proposal in the Part 36 offer. Consequently it is said that the court, if it considers it is just to do so, should award (i) costs for the

period after the relevant period expired on the indemnity basis, (ii) interest on costs at a rate not exceeding 10% above base rate and (iii) an additional sum up to a maximum of £75,000 applying the prescribed percentage of 10% of the costs awarded by the court.

20. The claimant submitted that the court should treat the letter dated 7 June 2023 as without prejudice and pay no regard to it. If a contrary view was reached, as has proved to be the case, the claimant asked for an opportunity to make further submissions. However, in light of the conclusions I have reached it is unnecessary to invite the claimant to provide further submissions.
21. The third defendant relies heavily upon what is said to be a material conduct issue namely the apparent refusal by the claimant to mediate. It is said a failure to respond to an offer to mediate should be treated as a refusal to mediate. The third defendant cites a number of well-known authorities, including *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 Dyson LJ at [16] and *PGF II SA v OMFS Co 1 Limited* [2013] EWCA Civ 1288 Briggs LJ at [30], [42] and [51]. As a consequence, it is said the claimant should be deprived of a proportion of his costs.
22. The third defendant also submits that the court should have no regard to the Part 36 offer and should not apply the consequences of failure to accept the offer. It is said that the Part 36 offer was of no effect for two reasons:
 - (1) CPR 36.14(1) provides that if a Part 36 offer is accepted the claim will be stayed. It is said that prior to the issue of the claim there was no claim to stay and an essential step was an application to the Probate Registry to deal with the application for a grant.
 - (2) In the period after issue of the claim the third defendant third defendant relies upon paragraph 6 of Practice Direction 57 which deals with the ways in which a probate claim may be disposed of after the parties have agreed to settle the claim. Notably neither Part 57 nor PD 57 state that the parties may not rely upon offers made under Part 36 despite explicit disapplication of other provisions of the CPR such as the provisions of Part 38 (see CPR rule 57.11).
23. As I observed in the judgment delivered at the end of the trial, probate claims are not entirely on all fours with mainstream litigation in which the interests of the parties are predominant. However, I can see no basis for concluding that Part 36 does not apply to probate claims for the following reasons:
 - (1) CPR rule 57.11 (1) and (2) make provisions for the disposal of a probate claim leading to a grant of probate. The claim may be discontinued or dismissed. Paragraph 6 of PD57 provide further guidance about how a probate claim may be resolved after the parties have agreed to settle. It is right that a probate claim cannot simply be stayed because it would leave the estate in limbo. There must either be a discontinuance or dismissal of the claim and/or counterclaim or a grant in solemn form or under section 49 of the Administration of Justice Act 1985.
 - (2) It is right that the provisions of CPR rule 36.14(1) provide that if a Part 36 offer is accepted the claim will be stayed. Under rule 36.14(2) if the offer relates to the whole of the claim the stay will be upon the terms of the offer and under rule (5) the court has power to enforce the terms that have been agreed. It is also right that before proceedings are issued there is no claim to stay. However, it cannot seriously be suggested that the acceptance of a pre-issue Part 36 offer is outside the provisions of Part 36. Although Part 36 primarily functions in money claims it is capable of operating in other

claims and it would be wrong to give its terms a narrow reading that limit its effect when the CPR encourages parties to use its provisions to resolve claims. In that sense probate claims are no different to other litigation before the courts. There is however a difference in the steps that must be taken upon terms having been agreed.

- (3) The provisions of Part 36 and Part 57 need to be read together. One is providing a mechanism for making offers that have specified interest and costs consequences. The other is seeking to ensure that an estate can be administered. Those aims are not inconsistent.
- (4) After issue of the claim, acceptance of a Part 36 offer will have the effect of staying the claim in a limited way. Neither party will be entitled to pursue the claim to a trial. But the court is not deprived of all powers to ensure that there is a proper disposal of the probate claim by a grant being made or the claim being dismissed.
- (5) It has not been suggested in any authority drawn to my attention that a probate claim cannot be subject to valid Part 36 offers and there is a good reason for that. In fact, it has been assumed in at least one reported decision that Part 36 applies in a probate claim: see the decision of HHJ Behrens sitting as a High Court judge in *Ritchie v Joslin* [2011] 1 Costs L.O. 9.

Failure to engage in mediation

24. I propose to consider first whether the third defendant is right to suggest there was conduct by the claimant that would warrant a reduction to the costs he will recover and then to consider what effect, if any, Part 36 has on the position. To some extent there is an overlap between these areas because for example if there is relevant conduct on the part of the claimant, it may be relevant to whether it is unjust to apply the consequences set out in CPR rule 36.17(4).
25. The third defendant relies heavily on the letter dated 7th June 2023 and the previous communications about ADR. It seems to me there are a number of factors in play with regards to conduct including:
 - (1) The claimant had made offers to settle well before the claim was issued to which there was no substantive response.
 - (2) It was essential there was a grant in respect of the estate either under an intestacy or under the 2013 will. The claim was not entirely on all fours with a claim for a money sum or damages. The options for settlement were rather more limited than in such a case.
 - (3) The third defendant's conduct of the claim was very unsatisfactory including (1) filing her acknowledgement of service and defence and counterclaim late, (2) failed to provide a Disclosure Review Document or a certificate of compliance for disclosure, (3) failed to provide signed witness statements until the trial (4) made a very late application to adjourn the trial based upon unsatisfactory medical evidence, (5) made the application for third party disclosure very late (6) applied to serve witness summaries in a manner that was poorly framed and misguided. I have in mind however that the production of the Verisona Law file, albeit very late was of assistance to the claimant despite the application being pressed by the third defendant.
 - (4) It was the claimant who raised first the question of ADR on 27 April 2023. This was followed by a further offer that would have had significant benefits to the third defendant had it been accepted. Critically the third

defendant chose not to engage with the offer and was unspecific about the form of ADR she proposed. The letter of 7 June 2023 adds little because the third defendant decided to refer back to ADR on the day the offer made on 24 May 2023 expired without having responded to the offer. The claimant was entitled to know what view the third defendant took of the offer before committing himself to a form of ADR.

- (5) The merits of the claim were weighted heavily in favour of the claimant. The third defendant knew of the basis upon which the claim was made from the claimant's letter before claim and the follow-up letter from Russell Cooke and had a clear idea of the evidence that was relied upon from the first defendant's letter to the Probate Registry dated 30 December 2018. The third defendant had no positive evidence to rely upon of any weight or value. Instead of leaving it to the claimant to prove his claim, she actively opposed it and by doing so took her chances albeit she had no positive case.
26. Nevertheless, the claimant's failure to engage more positively with ADR and in particular mediation, ENE or Chancery FDR in April 2023 without providing any explanation is surprising.
27. I have concluded that the claimant's conduct was not such as to warrant a deduction from his costs. In reaching that conclusion I have in mind in particular (a) the fact that the claimant made most of the running in relation to settlement (b) the third defendant's behaviour in her conduct of the claim and (c) the strong merits of the claim which either were known or should have been known to the third defendant and (d) the late stage at which the third defendant expressed a willingness to engage in ADR. Although the claimant did not explain his position in April and May 2023 it would not have been unreasonable to have concluded that the additional cost of mediation was not warranted. I do not consider that on the facts of this case it can be said that silence on the part of the claimant amounted to a refusal to undertake mediation (or some other form of ADR).

Part 36

28. I turn to the effects of the Part 36 offer. I must first consider whether it is unjust to make the orders referred to at CPR rule 36.17(4) by considering all the circumstances of the case including the factors mentioned in CPR rule 36.17(5). The burden is on the third defendant to show that it is unjust.
29. Taking the factors in turn:
 - (1) The terms of the Part 36 offer were realistic and accorded with the merits of the claim. The claim was strong. The third defendant would have been better off had she accepted the offer.
 - (2) The offer was made well before the claim was issued. As I have pointed out the third defendant had various options open to her. She chose to actively oppose the claim and counterclaim for a grant based upon an intestacy.
 - (3) The third defendant had sufficient information when the offer was made to decide what course of action to adopt. The third defendant had seen the letter from the first defendant (who did not benefit under the will) to the Probate Registry and was aware of the case he made and the claimant's case. Interestingly the third defendant was slow to follow up enquiries and made her application for a third party disclosure order very late on. The Verisona Law file when it was produced strongly supported the claimant's case.

- (4) The claimant provided a response to EA Neary's reply to the offer. There is no sense in which the claimant withheld information. He was not an executor under the will and in no better position than the claimant to obtain documents.
- (5) The offer was a genuine attempt to settle the claim without proceedings being issued.

30. I do not consider it is unjust to apply the effects of CPR rule 36.17.

31. I accept the claimant's submissions that the appropriate order is that the third defendant should pay:

- (1) the claimant's costs of and incidental to the claim on the standard basis until the expiry of the Relevant Period and on the indemnity basis to the date of the court's order consequent upon this judgment;
- (2) interest on those costs at 4% above base rate from the date they were incurred to the date of payment;
- (3) an additional sum of 10% of the assessed costs.

32. I invite the claimant to file an order which reflects this decision.