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Case No: PT-2023-BRS-000109

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 14 January 2025

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

DEBRA ELLEN PACKER

Claimant

- and -

LYNN ANN PACKER

Defendant

Michael Selway (instructed by **Bailhache Law Ltd**) for the **Claimant**
Andrei Vasilescu (instructed by **direct access**) for the **Defendant**

Hearing dates: 8 January 2025

This judgment was handed down remotely at 10:30 am on 14 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. On 8 January 2025, I held a pre-trial review in this matter, which is listed for trial before me in Bristol from 12 to 14 February 2025. The claimant is the widow of the late Stephen George Packer, who died from cancer on 5 July 2022 (“the deceased”). She says that he died intestate. The defendant is the sister of the deceased. She says that he made two wills before he died, one in 2017 and one in 2022, by which she was appointed executrix, and which cannot now be found. In this claim, the claimant now seeks an order that letters of administration be issued to her. The defendant defends that claim, and requests that the court instead uphold the 2022 will.

The claimant’s application

2. At the pre-trial review, I dealt with an application made by the claimant by notice dated 23 December 2024 for an order permitting the claimant to amend her Reply so as to remove an allegation that the defendant fraudulently created the 2022 will (and an earlier will in 2017). At the hearing, the defendant consented to the application, and accordingly I made the order as sought. However, there was no agreement about the costs of the application.
3. At the outset of the hearing the claimant sought an order that the costs should be reserved and dealt with by the trial judge after the trial. By the end of the submissions of Mr Selway, counsel for the claimant, that position had changed, and the claimant was now applying for her costs of the application, or at least for no order as to costs. On the other side, the defendant, by her counsel Mr Vasilescu, said that she should have her costs of the application, and a proportion of the costs of the whole claim so far, to represent costs spent in responding to the fraud allegation, and therefore thrown away by this amendment. I will return to the submissions later.

Background facts

4. The background facts appear to be as follows. The claimant and the deceased were married in 2006. The mother of the deceased and the defendant, Joan Packer (“Joan”), died on 30 June 2020. She left her estate by will to the deceased and defendant in equal shares. After the deceased’s death in 2022 there was a dispute between the claimant and the defendant as to what happened to the deceased’s share of his mother’s estate. The defendant entered a caveat against the *deceased’s* estate in the Probate Registry on 12 July 2022. In August 2022 the claimant’s solicitor wrote to the defendant to ask for a copy of any alleged will of the deceased or details of solicitors holding one. The claimant says that there was no substantive response until August 2023, and that only then did she become aware of the two draft wills of 2017 and 2022.
5. On 11 January 2023, the claimant, claiming to act on behalf of the deceased’s estate, brought proceedings against the defendant in relation to its share of Joan’s estate. However, these proceedings were struck out by DJ Wales on 23

May 2023, on the basis that the claimant had no standing because she was not the deceased's personal representative. In June 2023, the claimant accordingly applied for letters of administration to the deceased's estate, so that she would have standing to make the claim on behalf of the deceased's estate. She entered a warning to the defendant's caveat, and the defendant entered an appearance to the warning on 20 July 2023.

6. There are in fact currently two further sets of proceedings on foot between the parties. First, in September 2023, the defendant started proceedings in the First Tier Tribunal (Property Chamber), in which she seeks to set aside the transfer of the former matrimonial home from the deceased's sole name into the joint names of the deceased and the claimant on the basis of fraud. I am not concerned with these proceedings.
7. Secondly, the claim form in this claim was issued by solicitors on 1 September 2023, with particulars of claim attached, settled by counsel (not Mr Selway). The claimant made a statement of testamentary scripts dated 29 August 2023, saying that she was unaware of any such scripts, though she was aware of "copies of two alleged Wills ... in the possession of the Defendant".
8. In this claim, the defendant is a litigant in person. Her defence was filed on 15 October 2023. Paragraph 5 of the defence alleges that the claimant encouraged the deceased to make a will and asked the defendant to assist him on several occasions. It goes on to allege that the defendant assisted the deceased with a draft will in 2017, and then, in 2022, "the Deceased asked the Defendant again to assist him in making his final Will".
9. The claimant filed a reply on 8 November 2023, again settled by counsel (not Mr Selway). By paragraph 7, the claimant pleaded in relation to paragraph 5 of the defence. In paragraph 7(c), she said:

"It is denied the defendant assisted the deceased to make a will in 2017 or in 2022:

 - (i) There has been a complete absence of information or evidence from the Defendant relating to the creation of the Alleged Wills. It is difficult to pin down the Defendant's shifting position. As information trickles in (if indeed it does) the Claimant will have to amend her pleadings to respond as and when the Defendant provides such information.
 - (ii) It is the claimant's position that the Alleged Wills have been fraudulently created by the Defendant".
10. On 21 June 2024 the defendant made an affidavit of testamentary scripts, which refers to (i) a photograph of a will in 2017 prior to attestation, the whereabouts of the attested version being not known to her, and (ii) a copy of the draft of a will made by the deceased in 2022, but the whereabouts of the attested version again being unknown to her. It appears that it was only following the making of this affidavit that the electronic metadata relating to the two draft wills were produced to the claimant. Based on that metadata, the

claimant now accepts that the two documents concerned were indeed made at the times alleged by the defendant. Accordingly, the claimant further accepts that she no longer has a proper basis for making the allegation in her reply that the two documents had been “fraudulently created” by the defendant. She also properly accepts that the present application, to amend her reply by removing that allegation, could have been made earlier than December 2024, having first been mooted in August 2024.

11. Be that as it may, the present application seeks to amend paragraph 7(c) of the reply so that, instead of the version set out above, it reads as follows:

“The Defendant is put to proof as to any assistance provided to the Deceased to make a will. However, the Claimant denies the Deceased executed a valid Will”.

That effectively withdraws the allegation of fraudulent creation. There are also consequential amendments sought to be made to other paragraphs of the reply, but I need not set those out specifically. As I have said, the defendant consented to the application, and accordingly I made the order as sought. Only the question of costs remains.

Costs

The law

12. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). If the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order, and if so what, the court will have regard to all the circumstances, including “the conduct of all the parties” and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court’s attention: CPR rule 44.2(4). For these purposes, the “conduct of the parties” includes conduct before and during the proceedings, whether it was reasonable for a party to pursue a particular allegation, and the manner in which a party has advanced its case, amongst other things: CPR rule 44.2(5).

Submissions

13. As I have said, initially, the claimant asked for the costs of the application to be reserved to the trial judge following trial. Mr Selway said that this was for two reasons. First of all, it was reasonable for the claimant to plead and maintain the allegation of fraud until the metadata was produced, which demonstrated that the documents concerned were actually made at the times alleged by the defendant. He relied on the fact that the relevant documents were produced only in August 2023, and the metadata only a year later in the summer of 2024. He said that this was conduct which could properly be taken into account by the court in considering what if any order to make about costs. Secondly, he said that the costs which the defendant could have incurred

would be minimal and that it was not feasible to assess those costs at this stage. Therefore, they should be reserved to the trial judge.

14. However, the claimant's position shifted during the argument. Perhaps this was in part as a result of questions from the bench as to what new information was going to become available by the end of the trial which would affect the question of what costs order should be made in respect of this application, and therefore required that costs should be reserved until a later stage. Ultimately, the claimant accepted that there was no need to reserve the costs, but instead asked for her costs of the application, or at least no order as to costs, in any event. This was, firstly, on the basis that the defendant should have consented to the application after it was sent to her in draft on 14 December, and not waited until the hearing, and, secondly, in fact the conduct of the defendant meant that it was reasonable for the allegations to be made and that either the claimant should have her costs, or at least that there should be no order as to costs.
15. For the defendant, Mr Vasilescu said that the defendant had had to deal with the application, and that costs should follow the event. He referred me to paragraph 17.3.10 of volume 1 of *Civil Procedure*. First of all, he referred to the general rule set out in that paragraph as follows:

“Applicants who obtain permission to amend are typically ordered to pay the other parties’ costs of and caused by the application,”

for which *Taylor v Burton* [2014] EWCA Civ 21 is cited as authority.
16. I note in passing that, in that case, Rimer LJ (with whom Ryder LJ agreed) said

“30. Mr Butler reminded us that the general rule is that those who obtain permission to amend are ordered to pay the other parties' costs of and occasioned by the amendment. He referred us to paragraph 17.3.10 in the notes to Volume 1 of *Civil Procedure*, which records that such orders are 'often' made; and to paragraph 8.5 of The Costs Practice Direction, which records that such orders are 'commonly' made. Both references reflect judicial practice with which anyone with experience of contentious litigation will be familiar.”
17. However, here the defendant claimed, not only the immediate costs of dealing with the application, but also at least a proportion of the costs already expended by the defendant in meeting the allegation of fraud which had now been withdrawn. For this purpose, he referred to a passage later in the same paragraph, discussing the decision in *Begum v Birmingham City Council* [2015] EWCA Civ 386. That was a case in which the claim had originally been pleaded in negligence and misrepresentation. However, before trial, it was amended to allege breach of statutory duty as well. The claimant succeeded at trial, but only in relation to the amended claim. The trial judge decided to award the costs prior to amendment to the defendants. The Court of Appeal reversed this part of the decision, because in its view the case which

the defendants had to meet was essentially the same before and after the amendment.

Discussion

Authorities

18. I have to say that I do not find *Begum v Birmingham City Council* a particularly helpful decision for my purposes, turning as it does on the particular facts of the case. Apart from anything else, it was a decision by the trial judge, at the end of the trial, as to who should pay the costs of the whole trial. It was not (as this case is) an interlocutory decision taken in relation to the costs of an amendment which had been made during the pre-trial phase of the proceedings. So the question whether the costs of such an amendment should also carry with them a proportion of the costs previously expended was not in issue, and was not considered.

19. There is another decision which I should perhaps mention at this point. This is *Beoco Ltd v Alfa Laval Co Ltd* [1995] QB 137, a pre-CPR case. I mention it because it was cited in *Begum v Birmingham City Council*, but also because it is referred to in *Civil Procedure* paragraph 17.3.10. It too concerned the decision by the trial judge, at the end of the trial, as to who should pay the costs of the whole trial. In that case, Stuart-Smith LJ, with whom Balcombe and Peter Gibson LJJ agreed, said this (at page 154B):

“As a general rule, where a Plaintiff makes a late amendment as here, which substantially alters the case the Defendant has to meet and without which the action will fail, the Defendant is entitled to the costs of the action down to the date of the amendment. There may, of course, be special reasons why this general rule should not be applied.”

20. It is right to note that, in *Begum v Birmingham City Council*, Bean LJ said:

“36. *Beoco* is frequently cited, but it is not authority for the proposition that in all cases where an amendment to a claim makes the difference between failure and success, the claimant must pay the defendant’s costs up to the moment of the amendment. It all depends on the case.”

Yet that does not mean that what Stuart-Smith LJ said was wrong. It merely emphasises the importance of looking at the particular facts of the case, to see whether it is appropriate to apply what Stuart-Smith LJ called “the general rule”.

Jurisdiction and discretion

21. Be that as it may, the real problem for the defendant in the present case is that this simply is not a case where the claim has gone to trial, the facts have been found, and one side or the other has won, and seeks the costs of the whole proceedings. In circumstances such as the present, the court is in no position to know whether the amendment will make any difference to the result of the claim or not. There is also the question whether the court has any jurisdiction

at this stage to make an order affecting the costs of anything except the application itself, because that is the only thing which has been decided. The claim itself certainly has not been decided, although the claimant has in effect abandoned an allegation formerly contained in it. One might perhaps have thought that the court's jurisdiction was restricted to dealing with the costs of and occasioned by the application (to include the costs of making any consequential amendments to statements of case). After all, it would be open to the parties, if they so wished, at the conclusion of the trial, and when the judge was invited to deal with the costs of the proceedings as a whole, to make submissions on the effect of this amendment upon those costs.

22. The question of jurisdiction was in fact briefly raised in the decision of Morgan J in *AB v Goldsmith Williams* [2015] EWHC 1559 (Ch). Following permission given by the judge to the claimants to remove an allegation from their claim, the defendants argued that the costs of the action hitherto, in relation to that particular allegation, should be paid by the claimants to the defendant in any event. The factual position was therefore analogous to the present, unlike that in *Begum* and *Beoco*.

23. As to the defendant's argument, Morgan J said:

“21. ... We are very far from the end of this action. We do not know today how it will turn out. We do not know if the defendants will be completely successful on all points, in which case one imagines they would be in a strong position to get their costs, including the costs of points that were raised and abandoned on the way. Alternatively, the claimants may succeed to a substantial extent or in its entirety, in which case they would be in a strong position to ask for their costs of the action but that may be met by the point being taken by the defendant that the claimant, although it has achieved substantial success overall, has failed with some of its arguments or it has run points which it pleaded and then abandoned, so that a part of its costs should be withheld on that account.

22. It seems to me that since those issues potentially arise at a later time in this litigation, it would not be right to take the decision at this point to make an order for costs in any event by reference to one of the issues which was raised and is no longer being pursued. I am sure I have jurisdiction to make such an order but it is a matter for my discretion whether it is appropriate to do so, in particular at this stage, because if I do not do it at this stage it can be done later. There are of course cases and cases. It may be that in a different case, where there was a very dominant issue that was abandoned leaving a rump of less important issues, that the court might, as soon as the issue was abandoned, wish to deal with the costs there and then. But that is not this case.”

24. So there Morgan J squarely addressed the question of jurisdiction, and held that it existed. He did not refer to its source, but I proceed on the basis that it was the Senior Courts Act 1981, section 51(1), which relevantly provides that

“the costs of and incidental to all proceedings in ... the High Court ... shall be in the discretion of the court.”

If that is correct, the judge must have assumed that “proceedings” was not confined to a particular application, but covered an application made within a claim, as part of the claim itself. The judge took full account of the uncertainties of the litigation, and, in the exercise of his discretion, refused to make the order sought as to costs.

25. However, that was not the approach taken by Pepperall J in *R G Carter Projects Ltd v CUA Property Ltd* [2020] EWHC 3417 (TCC). In that case, the original claim was for damages of £14,225,768 for alleged misrepresentations, with an alternative claim for extensions of time pursuant to a building contract and declaratory relief as to the proper sum due on its final account. On amendment, the misrepresentation claim was abandoned, along with part of the extensions claim, and the amount sought by declaration was reduced. The claim became one for £1,852,338.57, or about 13% of the original.
26. The claimant accepted that it should pay the defendant’s costs of and occasioned by the amendment. The defendant sought an order that the claimant should pay 80% of its costs to date, alternatively that it should pay the costs of the abandoned issues, so as to compensate for the considerable wasted work undertaken in investigating and defending the now abandoned heads of claim. The judge said this:

“10. In many instances, an order for the costs of and caused by (or, as we used to say, occasioned by) an amendment or (as PD17 puts it) the costs of and arising from the amendment, will meet the justice of the case. There will, however, be cases where the amendment abandons a particular cause of action that the defendant has spent a significant sum defending. Even in such cases, sometimes the amended statement of case will still pursue other causes of action arising out of the same facts, or the amendment will essentially just put a new label on previously pleaded facts such that the earlier costs have not been entirely wasted: see, for example, *Begum v Birmingham City Council* [2015] EWCA Civ 386, [2015] HLR 33.

11. Yet in other cases, the cause of action is simply abandoned and substantial costs will have been wasted. An award of costs on the conventional basis would, in such cases, cover the defendant’s costs of amending his Defence to delete the now redundant answer to the abandoned plea, but would not recompense such defendant for the costs of investigating the original case or of pleading the first Defence. On such facts, the usual order would not be just and the appropriate order will often be to award the defendant not just the costs of and caused by the amendment, but also the costs in respect of the abandoned cause of action.

12. Accordingly, in my judgment the just order in this case is that RG Carter should pay both:

- 12.1 the costs of and caused by the amendment; and

12.2 the costs of the abandoned claims in misrepresentation and for an extension of time for the alleged change in the height of the roof.”

27. So the judge’s approach was to look at the question of costs of an application to remove an allegation as if it were the discontinuance of a part of a claim. Such a discontinuance would normally carry with it an obligation to pay the defendant’s costs of that part, although in such a case the costs ordered to be paid are not normally assessed (or paid) until the conclusion of the case: see CPR rule 38.6(2).
28. In *Skatteforvaltningen v Solo Capital Partners LLP* [2022] EWHC 2969 (Comm), [3], Foxton J quoted paragraphs [10]-[11] of Pepperall J’s judgment, and continued:
- “4. It has also been said by Mr Justice Marcus Smith in *Genius Sports Technologies Limited v Soft Construct (Malta) Ltd* [2022] Cost LR 825 at [14] that orders for assessment and payment of costs along the way when an issue which has been raised is abandoned will be rare.
5. The reality is that each case is going to turn on its own particular facts and I think it can fairly be said that the circumstances of this litigation are so singular that the benefit to be gained from general statements of principle is rather less than might otherwise be the case.
6. One point which Mr Justice Marcus Smith did make when explaining why such orders are rare was because ‘the process of identifying in the course of proceedings what costs relate to which deletions will be time consuming, cumbersome and generally speaking unjust’ ([14(c)]). However, the extent to which that is the case will depend both upon the nature of the issue abandoned and also on the nature of the costs order which the court decides to make.
7. It has also been said that trial judges will often be best placed to determine the incidents of costs following an abandoned issue and I was referred in SKAT’s skeleton argument to the decision in *AB v Goldsmith Williams* [2015] EWHC 1559 (Ch) [21]-[22] which contains an observation to that effect. Once again, the force with which that observation applies will vary from case to case. I should note that judges hearing interim applications very often think the trial judge is best placed to decide a whole range of points. Trial judges who then come to those points many years on, when they are at best a footnote in the ancient history of the case, are not always persuaded of the wisdom of the earlier choice ... ”
29. There is therefore a tension between the approach taken by Morgan J on the one hand, and that taken by Pepperall J on the other, with Foxton J taking something of a middle course. I prefer the approach of Morgan J. In my judgment the court normally should not, on an application to amend a claim, make an order attempting to deal with the costs already incurred generally in that claim, *unless* it is reasonably clear that those costs would in any event be

awarded in the same way at the conclusion of the litigation: *cf McDonald v Horn* [1995] 1 All ER 961, 969, 971-72, CA. And, in the present case, I am far from clear that it is so. Further, in my judgment, even if the approach of Peppercorn J were applied to this case, it would not lead to an order for payment of costs as if on a discontinuance of a part of the claim. This is because the substance of the claim made still remains the same, that is, that the deceased did not make a will executed in accordance with the Wills Act 1837, and that he died intestate.

30. But, in any event, even were it otherwise, in the present case I do not consider that I have enough information to be able to form a view as to *what proportion* of the costs so far expended could properly be allocated to responding to the allegation now removed from the reply. There is no evidence from the defendant as to how much of the time that she has spent on the litigation was due to this. She has simply speculated, without any supporting material, that it was between 50% and 70% of the total so far. In the circumstances of this case, that seems very high to me. I could not safely rely upon such a speculation. For all these reasons, I decline to order the claimant at this stage to pay any proportion of the earlier costs to the defendant. But the point will remain available to her at the conclusion of this case.

The costs of this application

31. In the meantime, I deal with the costs of and occasioned by the application as follows. First, I can see no reason not to make an order as to costs. Second, the defendant is the successful party, in that the claimant has sensibly abandoned an allegation which she could not properly make. The application of the general rule would lead to an order being made for the claimant to pay the defendant's costs of and occasioned by the application. Is there good reason to make a different order? The claimant says that there is. She refers to the reasonableness of her decision to allege fraud in the absence of the metadata relating to the two documents concerned. She refers also to the fact that the defendant did not immediately consent to the application after it was sent to her in draft on 14 December 2024, but waited until earlier this week.
32. As to the first of these, in my judgment, the claimant's conduct in alleging fraud against the defendant in the creation of the two documents was not reasonable in all the circumstances now before the court. Fraud is a serious matter. It must be specifically set out in the particulars of claim: CPR Part 16 PD para 8.2(1). And the Chancery Guide relevantly provides:

“4.8 Paragraph 8.2 of PD 16 requires the claimant specifically to set out any allegation of fraud relied on. Parties must ensure that they state:

- full particulars of any allegation of fraud, dishonesty, malice or illegality; and
- where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.

4.9 A party should not make allegations of fraud or dishonesty unless there is credible material to support the contentions made ... ”

33. By the time that the claim was issued, the claimant had copies of the two documents concerned. Since the claimant considered that the difference between advancing a claim based on fraud and one based on some other, lesser degree of culpability was obtaining possession of the metadata, then the claimant should have refrained from making the allegation of fraud in the reply until the metadata had been examined. So far as I can see, there was no other reason for making such an allegation at that stage, such as a need to avoid limitation periods, and thus no prejudice to the claimant in not making it immediately.
34. But, even if it had been reasonable for the claimant to advance the fraud allegation, that would not mean that there was a good reason to depart from the general costs rule. The fact is that, during litigation, the parties’ positions change as more information is acquired. A party who alleges fraud and then realises that it is no longer a tenable allegation should of course apply to amend the relevant statement of case. But it is not a reward for “reasonable” pleading to excuse the amending party from the general rule of paying the costs of and occasioned by the application to amend.
35. As to the second point, there are circumstances in which a defendant can be criticised for not immediately consenting to an application to amend the statement of case which effectively withdraws an important allegation. In my judgment, this is not one of those circumstances. The application was sent to her in draft on 14 December, and issued on 23 December 2024, just before Christmas. The application was for permission to amend a number of paragraphs of the reply, although some were consequential amendments. The amendment to paragraph 7(c) did not simply remove the words. It also added some to make a different allegation.
36. The defendant is a litigant in person. She can hardly be criticised for wishing to take legal advice before deciding what to do about the application. That legal advice could not easily be obtained on just before Christmas, nor probably very easily between Christmas and New Year. I am frankly not surprised that it has taken until the beginning of this week for direct access counsel to be instructed, to look at the application and to give advice to the defendant which could be acted upon. The claimant very properly admits that the application could have been issued sooner. In my judgment, the claimant has only herself or her advisers to blame for leaving it so late.

Conclusion

37. In my judgment, there is no good reason for not applying the general rule for the costs of and occasioned by the application. They must be paid by the claimant to the defendant on the standard basis. Those costs will not, however, include any proportion of the costs already incurred in the litigation by the defendant in responding to the allegation of fraud which has now been abandoned. That is a question which will have to be dealt with, if at all, at the end of the trial when the judge is considering costs of the whole proceedings.

38. The defendant has served a statement of costs for summary assessment, which I assume is confined to the work done on this application, and does not include any proportion of earlier costs. If that is confirmed, then I will deal with the summary assessment of these costs on paper. I invite the claimant to submit points of challenge in writing by 4 PM on Monday, 13 January 2025, and the defendant to submit points of response in writing by 4 PM on Tuesday, 14 January 2025. I will then deal with the assessment as soon as I can thereafter.