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LUMB V LUMB [2023]: SUCCESSFUL APPEAL ON COSTS WHERE NO REASONABLE GROUNDS TO CHALLENGE WILL UNDER CPR R. 57.7(5)

By Dr. Sarah Egan

Executive Summary

The Appellant succeeded in his Appeal where no order was made for costs following a successful summary judgment application to pronounce the Will of his late mother in solemn form, where the Respondent had sought to rely on the costs protection of CPR r.57.7(5) by giving notice that was not raising a positive case and was seeking to cross-examine the attesting witness.

The Judgment provides helpful guidance on the application of CPR r.57.7(5) and the interpretation of "reasonable ground" for the purposes of CPR r.57.7(5)(b).

Background

This was an Appeal against the decision of Deputy District Judge Whitehead dated the 13th of December 2022, whereby he made no order as to costs but granted permission to the Appellant to appeal following a successful summary judgment application by the Claimant, seeking pronouncement in solemn form in favour of the validity of the Will of his mother, Ina Margaret Lumb (Deceased) and ancillary orders. The learned Judge found that the usual costs rule, that is that costs follow the event, did not apply because it was displaced by CPR r.57.7(5)(b) under which the Court would not make an order for costs against the Defendant unless it considered that there was no reasonable ground for opposing the Will since he had given notice in his Defence that he did not raise any positive case and sought to cross-examine the attesting witness in accordance with CPR r. 57.7(5)(a).

Seven separate grounds had been put forward on behalf of the Defendant as to why summary judgment should not be granted, which the Claimant had contended was akin to asserting a positive case such that the Defendant could not rely on the costs protection of CPR r.57.7(5). Although he decided that none of these grounds had a reasonable prospect of success, the Judge considered that the same were "reasonable arguments to run" and that under CPR r. 57.7(5)(b) he was required to make no order for costs against the Defendant even though he considered that this was "a rather unsatisfactory outcome". In the granting permission to appeal the Judge recorded that he regarded CPR 57.7(5) as containing clear wording which however "*yielded an unfair result in this instance*". He considered that an appeal Judge might, taking policy considerations into account, construe the rule differently or decide that the Defendant did not have reasonable grounds for opposing the will.

The Appeal

The Law and Practice

HHJ Davis-White K.C. sitting as a Judge of the Chancery Division, analysed the applicable procedural provisions, CPR r. 57.7(5) and CPR 24 and considered the pertinent authorities. He considered the limits to CPR r. 57.7(5) before proceeding to examine what was meant by a "reasonable ground" for opposing the

Will and the comparing the tests for judgment in trials and summary judgment applications. HHJ Davis-White K.C. summarised his conclusions as to the law and practice at [130] as follows:

(1) CPR r.57.7(5) reflects one of a number of probate principles as to costs which principle has been codified. The overall justification for all three probate costs rules/principles is the same and is summarised by Henderson J in paragraph [10] of the *Kostic v Chaplin* [2007] EWHC 2909 (Ch) judgment.

(2) The codification achieved by CPR r.57.7(5) represents the rule makers' judgment as to where to draw the line between the competing policy considerations identified at paragraph [10] of the *Kostic* judgment.

(3) However, in interpreting and applying CPR r.57.7(5)(b), the courts should take account of the two factors mentioned by Henderson J in Kostic at paragraph [21], namely (a) that the inquisitorial role of the court in probate cases is much less than it once was and (b) that the courts are increasingly concerned to avoid encouraging litigation, and discouraging settlement, by a removal of the usual "costs follow the event rule" (being a concern in any case identified by Sir F.H. Jeune P in *Spicer v Spicer* [1899] P.38).

(4) The giving of a notice under CPR r.57.7(5)(a) and compliance with that notice are pre-requisites to the costs protection under CPR r57.7(5)(b).

(5) Normally it will not be right for a party relying upon CPR r.57.7(5) to adduce any evidence seeking to lay grounds to challenge the validity of the will.

(6) Consideration might be given as a matter of case management to requiring a party relying upon CPR r.57.7(5) (a) to identify prior to a relevant trial or summary judgment hearing what reasonable grounds he relies upon as suggesting that the propounder of the will cannot or may not be able to prove the same and (b) to provide copies of relevant documents to be relied upon in cross-examining any attesting witness(es).

(7) There must be a link between what are said to be the reasonable grounds to oppose the will and the grounds in fact put forward and relied upon.

(8) The burden of proof under CPR r.57.7(5)(b) is on the propounder of the will to show there were no reasonable grounds of opposition. However, the person relying on the costs protection of that provision will need to identify what are said to be reasonable grounds and will have an evidential burden in relation to the same.

(9) The mere grant of judgment (after a trial conducted on the basis of the defence relying on CPR r.57.7(5)) or summary judgment in favour of validity of a will cannot be equated necessarily and automatically with there having been no reasonable grounds of opposition.

(10) However, where in proceedings resulting in a summary judgment in favour of validity, there was at no time any real prospect that the claimant would fail to establish validity, then there can have been no reasonable grounds to oppose. If the grounds do not and could never have survived a summary judgment test then they are not reasonable within CPR r.57.7(5).

(11) On an appeal, the appeal court will accord due deference to the decision of the Judge who decides the issue of whether or not there were "no reasonable grounds of opposition". In reaching that decision, the Judge carries out an evaluative exercise, involving a question of mixed law and fact.

(12) "But there may be cases where there is little or no dispute as to the primary facts and the appellate court is in as good a position as the trial judge to form a judgment..... In such cases the appellate

court should not shrink from its responsibility to do so and, if satisfied that the trial judge was wrong, to say so."

(13) In many cases in the context of a determination as to whether there were no reasonable grounds of opposition under CPR r.57.7(5), especially where it is made in a summary judgment context, the appeal court will be in as good as position to reach a judgment as the Judge at first instance.

The Grounds of Appeal

HHJ Davis-White K.C. set out the Grounds of Appeal at [131]:

1. *The learned judge was wrong to state that he was prevented from making a costs order by CPR 57.7(5) and was wrong not to exercise his discretion to make a costs order under CPR 44.2 in circumstances where he also stated that not making a costs order led to an unfair outcome.*
2. *Further the learned judge was wrong not to follow the authorities of Elliott v Simmonds [2016] EWHC 962 (Ch) and Elliott v Simmonds [2016] EWHC 732 (Ch) the facts and circumstances of which are analogous to the instant case when determining the appropriate costs order.*
3. *In entering summary judgment in favour of the Claimant on the basis that the Defendant's grounds for opposing the 2019 Will had no real prospect of success the learned judge was wrong to conclude that the Defendant had reasonable grounds for challenging the 2019 Will such that he could not make a costs order against the Defendant under CPR 57.7(5). Those conclusions are incongruous and incompatible.*
4. *The learned judge was wrong in any event to conclude that any of the grounds for opposing the 2019 Will were reasonable. It was clear from his Judgment that each of the grounds were unreasonable and the conduct of the Defendant was unreasonable in pursuing such grounds.*
5. *The learned judge was wrong not to attach the appropriate weight to the public policy argument for awarding costs in a case such as this, which risks opening the floodgates to disappointed beneficiaries seeking to frustrate the probate process, despite knowing that they have no genuine prospect of succeeding, without attendant costs consequences."*

HHJ Davis-White K.C. considered there was force in the Appellant's general point that there was an incongruity in finding that there was no real prospect of any of the grounds raised preventing the Claimant proving the 2019 Will and nevertheless holding that the grounds amounted to reasonable grounds of opposition. In this respect, it was important to note that none of the seven grounds of opposition advanced were altered or impacted upon by the cross-examination of the attesting witness. He questioned that if there is, and never was, a real prospect of a ground of opposition preventing proof of a will then how could it be said the ground is a "reasonable ground of opposition"? In his view, it could not be said.

HHJ Davis-White K.C. went on to find all seven of the grounds advanced by the Defendant were unreasonable. He observed that the Judge's judgment failed to identify why he thought that each of the seven grounds were reasonable grounds within the meaning of CPR r.55.7(5). HHJ Davis-White K.C found that the position was analogous to that in *Re Grayan* Building Services Ltd [1995] Ch.241 in that there was a mismatch between the primary findings of fact and primary evaluation of the grounds of opposition and the conclusion drawn that the grounds were nevertheless reasonable grounds of opposition. Like Henry LJ in *Grayan*, HHJ Davis-White K.C. had been unable to find reasons which would justify the conclusion reached. Further, he found that the Judge appeared to have equated mere arguability with reasonableness, which was, in his judgment, the incorrect test.

Held:

HHJ Davis-White K.C. concluded that the Appeal succeeded and the costs order of the Deputy District Judge was set aside. The result was that the costs protection of CPR r.57.7(5) did not apply. Accordingly, the relevant applicable principles were set out in CPR Part 44. He had sufficient material before him to take the costs decision afresh and should do so. He ordered that the costs follow the event and that they should be paid by the Defendant to the Claimant on the standard basis.

HHJ Davis-White K.C. also found that had the opposition not been raised the Claimant would have been able to prove the Will in common form in the usual way and would not have had to prove the Will in solemn form. There was no room for an argument that proof in solemn form would have been necessary in any event, so that some costs should be excluded from the costs order.

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