NEW SQUARE Chambers

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Costs Protection under CPR r.57.7(5) when proving Wills in Solemn Form: a Sword or a Shield?

- DATE : Tuesday 31 October 2023
- TIME : 11am - 12pm
- LOCATION : Zoom

SPEAKERS

Dr Sarah Egan

Liam Brooke ***(Rothley Law)***

Chambers RANKED IN UK Bar 2024 New Square Chambers

The LEGAL 500 UNITED KINGDOM LEADING SET 2024

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Facts

- Testator was Ina Lumb who died on 5 August 2020 having made a number of wills during her lifetime.

- Only asset of any value was a house worth c£300k.
- No real residue.
- Ina had two sons, Michael and Stuart.

Facts

- All wills prepared by Ramsdens Solicitors.
- 2014 Will – Hi Fi Equipment left to Stuart and house placed into trust affording Michael the right to live there rent free for life. Thereafter to Michael and Stuart in equal shares. Residue to Michael and Stuart in equal shares.
- 2015 Will – Hi Fi Equipment to Stuart. House to Michael absolutely. Residue to Michael and Stuart in equal shares.
- 2019 Will – Whole estate to Michael. If Michael predeceased Ina, the estate was to be held on Trust for Michael's dog, Jake.

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Pre-Action

- Stuart entered caveat on 16 September 2020
- Larke v Nugus January 2021
- Full response from Ramsdens March 2021 enclosing detailed will files, but no statement from the will writing solicitor due to illness
- November 2021 Ramsdens inform Stuart's solicitors that will writing solicitor has sadly died.
- Feb 2022, Ramsdens serve warning.
- Appearance entered. No Letter of Claim or any other correspondence.

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Pre-Action

- May 2022 we are instructed and send a letter of claim:
  - Point out 2019 and 2015 wills essentially the same outcome
  - Point out Deceased had no dx capacity issues and will files extremely comprehensive and detailed.
  - Point out they have had nearly two years to investigate so time to set out case or remove caveat.
  - Stuart's solicitors respond saying not yet in a position to set out case but asserted there was evidence of lack of capacity/undue influence.

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Proceedings

- Issued claim for grant in solemn form on 22 June 2022.
- Defence filed 8 August 2022 giving notice under CPR 57.7(5)(a) that Stuart was not advancing a positive case.

CPR 57.7(5)

- (a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will.

- (b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will.

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Defendant's Tactics

- Open position of no positive case

Summary Judgment – CPR 24

- The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
- (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

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Summary Judgment Hearing

- Right to cross examine witnesses – PD 57.5.1
- Full day hearing
- Submissions on medical records (which contained very little)
- Submissions as to capacity and knowledge and approval
- 7 grounds relied on by Stuart

Summary Judgment – 7 grounds

1. Prescence of Michael
2. Ina's knowledge of Michael's will
3. Reason for cutting Stuart out "false"
4. Text messages between Michael and Stuart
5. "Toing and Froing"
6. Medical evidence
7. "Something might turn up"

Summary Judgment

- Summary Judgment granted – no real prospect of success on any of 7 grounds
- Costs not awarded to Michael – some of grounds “not unreasonable to run” despite having no real prospect of success
- Judge felt hands were tied by CPR 57.7 and accepted that the outcome was unsatisfactory, not least due to Stuart’s conduct
- Permission to appeal granted.

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"Sarah is a very thorough barrister and goes the extra mile. She has great attention to detail and preparation."

Legal 500 UK Bar 2024

Grounds of Appeal I

- The Appellant sought to appeal the learned Judge's decision on the following grounds [13-14]:

- ***Ground 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.*

- ***Ground 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.*

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Grounds of Appeal II

- ***Ground 3:*** *In entering summary judgment in favour of the Appellant on the basis that the Respondent's grounds for opposing the 2019 Will had no real prospect of success the learned Judge was wrong to conclude that the Respondent had reasonable grounds for challenging the 2019 Will such that he could not make a costs order against the Respondent under CPR57.7(5). Those conclusions are incongruous and incompatible.*

- ***Ground 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 Respondent was unreasonable in pursuing such grounds.*

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Grounds of Appeal III

- ***Ground 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.*

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Issues for the Court

The key issues for the Court were:

- (i) Whether the learned Judge 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;
- (ii) Whether 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;
- (iii) Whether the learned Judge was wrong to conclude that the Respondent had reasonable grounds for challenging the 2019 Will such that he could not make a costs order against the Respondent under CPR 57.7(5) having entered summary judgment in favour of the Appellant on the basis that the Respondent's grounds for opposing the 2019 Will had no real prospect of success;
- (iv) Whether the learned Judge was wrong in any event to conclude that any of the grounds for opposing the 2019 Will were reasonable given that it is clear from his Judgment that each of the grounds were unreasonable and the conduct of the Respondent was unreasonable in pursuing such grounds;
- (v) Whether the learned Judge was wrong not to attach the appropriate weight to the public policy argument when considering whether to awarding costs.

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Grounds of Appeal IV

Ground 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.

- Costs in probate actions are at the discretion of the Court: Section 51 of the Senior Courts Act 1981 as substituted by Section 4 of the Courts and Legal Services Act 1990

- General rule in probate actions: costs follow the event: CPR r.44.3(2)(a)

Grounds of Appeal V

- Exceptions to the rule:

➢ where notice to cross-examine has been given under CPR r.57.7(5):

(a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and, for that purpose, will cross-examine the witnesses who attested the will.

(b) If a defendant gives such a notice, the court will not make an order for costs against him unless it considers that there was no reasonable ground for opposing the will.

➢ Exception where litigation caused by conduct of testator, which led to the Will "being surrounded with confusion or uncertainty in law or fact": *Kostic v. Chaplin* [2007] EWHC 2909 (Ch); [2007] W.T.L.R. at [9].

➢ Exception where the circumstances afford reasonable grounds for investigation into the validity of the Will: *Spiers v. English* [1907] P. 122 at [123]

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Grounds of Appeal VI

Submissions in support of Ground 1 on behalf of the Appellant:

- The Respondent sought to rely on CPR 57.7(5) purely to protect his position on costs whilst seeking to advance a positive case via the back door upon grounds which only became apparent during the course of the hearing.
- There were no reasonable grounds to challenge the 2019 Will.
- The learned Judge identified seven grounds which he found to be unreasonable yet disdained to exercise his discretion under CPR 44.2(4) and (5) to take into account all the circumstances of the case and make a costs order.
- *In Kostic v. Chaplin* at [25] it was held that the conduct of the testator was such as would inevitably lead to a challenge to his testamentary capacity and could be reasonably held to have caused the litigation until a realistic assessment of the testator's capacity could be made out. This was not so in the instant case.
- The learned Judge declined to exercise his discretion under CPR Part 44, even though it led to an "unsatisfactory outcome". This was clearly contrary to the overriding objective.

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Grounds of Appeal VII

Ground 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.

- Court referred to *Elliott v Simmonds* [2016] EWHC 732 and *Elliott v Simmonds* [2016] EWHC 962 (Ch), the facts of which were not dissimilar to the instant case.

- The learned Judge ought to have attached greater weight and given greater consideration to *Elliott* and followed that authority in light of his Judgment and the findings made.

- At [10] of Elliott: "there is little modern case law providing guidance on the construction of the costs rule in CPR r.57.7(5)(b)", *Elliott* being one of the most recent seminal cases on the rule, which ought to have been either applied or distinguished, but was not.

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Grounds of Appeal VIII

Ground 3

In entering summary judgment in favour of the Appellant on the basis that the Respondent's grounds for opposing the 2019 Will had no real prospect of success the learned Judge was wrong to conclude that the Respondent had reasonable grounds for challenging the 2019 Will such that he could not make a costs order against the Respondent under CPR 57.7(5). Those conclusions are incongruous and incompatible.

Ground 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 Respondent was unreasonable in pursuing such grounds.

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Grounds of Appeal IX

- In his Judgment the learned Judge identified that although it had emerged during the course of hearing the Application for Summary Judgment that the Respondent was seeking to rely upon the above seven grounds for opposing the Application, which he had dismissed as being unreasonable, in his view each of those seven grounds had been reasonable arguments to run, which was an incongruous position to adopt.

- The learned Judge was contradictory in his view that whilst the Defendant had no reasonable prospect of successfully defending the Claim, the grounds were reasonable such that he could not order costs.

- The learned Judge applied CPR 57.7 (5) too narrowly to reach his conclusions: Court invited to take a different view on the construction of CPR 57.7(5).

Grounds of Appeal X

Ground 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.

- Robust public policy argument for awarding costs as recognised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch) by Henderson J at [4] and by Edward Murray sitting as a Deputy of the High Court in *Elliott v. Simmonds* [2016] EWHC (Ch) 962 at [14].

- The learned Judge attached no weight and gave no consideration to public policy arguments in his Judgment when determining the appropriate costs order to make.

- Not to award the Appellant his costs risked opening the floodgates to disappointed beneficiaries seeking to frustrate the probate process, despite knowing that they have no genuine prospect of succeeding.

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- Introduction
- Background
- The Judgment
- Analysis of the applicable procedural provisions: CPR r57.7(5) and CPR 24
- Limits to CPR r57.7(5)
- “Reasonable ground”
- Trials and summary judgment
- Approach on appeal
- Summary of main conclusions as to the law and practice
- Conclusion

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- **Analysis of the applicable procedural provisions: CPR r57.7(5) and CPR 24**

At [99]: In my judgment, and drawing these threads together:

(1) CPR r57.7(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 r57.7(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 r57.7(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 the *Spicer* [*v Spicer* [1899] P.38] case).

- **Considered the manner in which CPR r57.7(5)(a) operates and interacts with CPR 57.7(5)(b)**

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- **Limits to CPR r57.7(5):**

- At [109]:

"In my judgment it is clear that although the costs protection of CPR r57.7(5)(b) is stated in terms to be dependent solely upon the relevant notice under CPR r57.7(5)(a) being given, it is inherent that that Defendant must comply with that notice. If he does not and he raises a positive case then, to that extent, he loses the costs protection."

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- At [110]:

"Further, in my judgment, a defendant relying on CPR r57.7(5)(a) cannot, on the face of it, adduce evidence laying grounds to attack the validity of the Will. The only way that he can seek to say that the person propounding the will (which I will now assume to be the claimant and will refer to the propounder as such from here on) has failed to make out his case is in reliance on (a) the evidence put forward by the claimant or (b) evidence of the attesting witnesses (including any evidence elicited in cross-examination)."

"I accept that a defendant can of course put material to a witness in cross-examination. If evidence is adduced by the defendant which goes to any undermining of the validity of the will, then the defendant will, to that extent, not be complying with the terms of any notice under CPR r57.7(5)(a)."

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- At [111]: "In future cases it may be worth consideration as to whether, in a particular case, a defendant should be held strictly to CPR r57.7(5)(a) and not permitted to file any evidence if he wishes to rely upon CPR r57.7(5) but that he (a) be directed to identify in writing the doubts as to the validity of the will that he wishes to raise and (b) to identify and serve in good time any documents that he wishes to put to the attesting witness in cross-examination."

- At [112]: "The next issue as to the limits of the protection of CPR r57.7(5)(b) concerns conduct in the proceedings. […] my initial view is that there might well be circumstances where such conduct fell outside the protection of CPR 57.7(5)(b). For example, if a defendant at the last minute without any acceptable excuse caused an unacceptable adjournment of or delay to the trial or failed to comply with case management directions (such as an order to bring in testamentary documents), I do not see why, on the face of things, that conduct would be immune from an appropriate costs order by reason of CPR r57.7(5)(b)."

Lumb v. Lumb [2023] EWHC 2052 (Ch)

"Reasonable ground"

- At [113]:
- "no reasonable ground for opposing the will" is an objective criterion
- the "reasonable ground" must be one that it was reasonable for the defendant to seek to raise, either in cross-examination and/or in identifying a weakness in the claimant's case to suggest that the claimant has not proved validity
- It follows that the reasonable ground must derive from material that is or will be properly before the court or that can properly be sought to be obtained, with a real prospect of the same, from the attesting witness(es)

- At [114]:
- There must be a reasonable ground to suggest that the claimant has not, on his evidence, proved validity

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- At [116]: What is reasonable may change during the course of the proceedings
- At [117]: The mere fact that a claimant succeeds in proving the will does not necessarily mean that there were no reasonable grounds of opposition
- At [118]: the test for what is a reasonable ground to oppose is not necessarily the same as whether it is proper to "run" a case (that the claimant has failed to prove the will)
- At [119]: "[…] whether there are "reasonable grounds" to oppose has to be measured against the particular facts but also that the standard of what is reasonable has to be set in line with the two factors identified by Henderson J in the *Kostic* case referred to above and the overall procedural and litigation climate at the relevant time."
- At [126]: "In my judgment, "reasonable grounds" must at the least be grounds that raise a real prospect that the will will not be proved. Grounds that are merely arguable such that (for example) their deployment does not give rise to wasted costs sanctions, is not enough."

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

- **Summary of main conclusions as to the law and practice at [130] of Judgment:**

(1) CPR r57.7(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* judgment.

(2) The codification achieved by CPR r57.7(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 r57.7(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 the *Spicer* case).

(4) The giving of a notice under CPR 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 r57.7(5) to adduce any evidence seeking to lay grounds to challenge the validity of the will.

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

(6) Consideration might be given as a matter of case management to requiring a party relying upon CPR r57.7(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 r57.7(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 r57.7(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.

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

(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 r57.7(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 r57.7(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.

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Lumb v. Lumb [2023] EWHC 2052 (Ch)

Conclusion

- HHJ White-Davies K.C. considered the grounds advanced by the Respondent to oppose the 2019 Will in Summary Judgment Application, noting that "due deference must be accorded to the decision of the Judge who is carrying out an evaluative exercise, involving a question of mixed law and fact."

- Held at [147]: "In short, the position is analogous to *Grayan* [*Re Grayan Building Services Ltd* [1995] Ch.241] in that there is 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*, I have been unable to find reasons which would justify the conclusion reached. Further, the Judge appears to have equated mere arguability with reasonableness, which is, in my judgment, the incorrect test.

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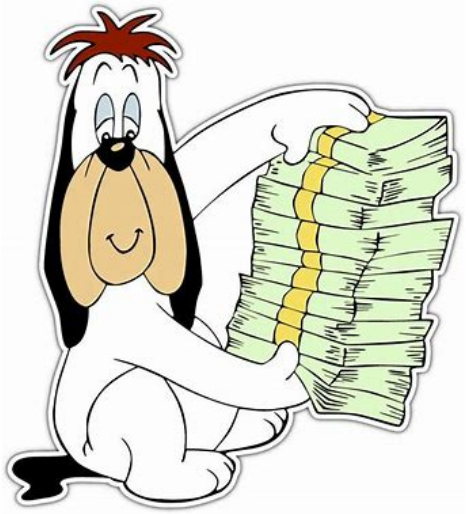
Lumb v. Lumb [2023] EWHC 2052 (Ch)

- The appeal succeeded – Deputy District Judge's costs order set aside.
- The result was that the costs protection of CPR r57.7(5) did not apply.
- Accordingly, the relevant applicable principles were set out in CPR Part 44.
- Order that the costs follow the event and that they should be paid by the Defendant to the Claimant on the standard basis.



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