



Artemis Trustees Limited and anr v M Sandle and anr
Royal Court
8th January 2018

JUDGMENT
10/2018

Re an application for an adjournment

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Civil No. 1923

IN THE MATTER OF THE C TRUST

BETWEEN:

(1) ARTEMIS TRUSTEES LIMITED

(2) ARTEMIS CORPORATE SERVICES LIMITED

Applicants

And

(1) MARTIN JOHN SANDLE

(2) RODNEY GRAY DENTON (DECEASED)

Respondents

Before: Lieutenant Bailiff Master Peter Haworth

JUDGMENT handed down: 8th January 2018

Introduction

1. On the 2nd June 2017, I handed down judgment (Judgment 1) in relation to the Respondent's application for remuneration and expenses pursuant to their claim for costs and fees from the assets of the Trust dated the 24th December 2015 ("the Fee Claim").
2. On the 11th August 2017, I handed down judgment (Judgment 2) which dealt with the following issues:
 - An application by the First Respondent for an adjournment.
 - The final determination of provisional conclusions reached in Judgment 1.

- Outstanding issues arising from Judgment 1.
3. On the 17th October, 2017, I handed down a further judgment in this matter (Judgment 3) dealing with:
- A further application by the First Respondent for an adjournment of the proceedings.
 - The final determination of invoices 04280 and 05264.
 - Directions relating to the remaining issues in the Fee Claim.
4. At paragraph 19 of Judgment 3, I set out the only outstanding issues arising from the Applicant's application of the 12th July 2017, which required determination. These are:
- 1) The claim by the Applicants for their costs of the Fee Claim. In that regard the issues to be determined are:
 - (a) The joint liability of the Respondents for the cost of the fees claimed.
 - (b) Whether costs be taxed on an indemnity or recoverable basis.
 - (c) The summary bill of costs served in connection with the Fee Claim by the Applicants on the 24th August 2017.
 - 2) Whether, a sum in excess of £1,000,000 held, pursuant to the escrow arrangements contemplated by Schedule 4 to the 25th May Order be released and paid to or at the discretion of the Applicants, pursuant to Schedule 3 of that Order.
 - 3) The application, that the Respondents shall not be entitled to an indemnity from the assets of the Trust in respect of their costs of the Fee Claim, including any such costs as are payable to the Applicants.
5. The Act of Court dated the 17th October 2017, recorded the outstanding issues be determined by written submissions on the 11th December 2017 and in that regard, I made certain directions for the filing of any further written submissions by the First Respondent and the Applicants.

Adjournment

6. On the 22nd November 2017, Rita Sandle (the First Respondent's wife), wrote to the Court in the following terms:

“Dear Sir,

I am writing to let you know that Martin is still not well enough to write to you or attend court.

It has been suggested that you will continue without him and I have to let you know that we do not believe this would be appropriate. In order for justice to be carried out someone must be present to speak on his behalf and as he does not have a lawyer this must be him.

I ask that you delay proceedings until he can resume his defence unless the court can offer the representation to which he is entitled in the Trust Deed and which would allow him to continue forward at this time. His return would be greatly expedited if he were allowed to rest without pressure of proceedings or an imminent return to court. His next meeting with the doctor is on the 29th November 2017.

In support of this request for an adjournment, a copy of a medical report from Dr Alan Wear, a consultant psychiatrist, dated the 30th November 2017 was received by the Court. The report is directed to Dr B Bracegirdle the First Respondent’s general medical practitioner. In summary, the report says this:

“Mr Sandle’s mood remains pessimistic but there is evidence of improvement in concentration. He is starting to show interest in his children and some of his hobbies but work and legal related matters are still some way off.

He has recently injured his back lifting and this has set matters back a little bit.

Martin would be a good candidate for Cognitive Behavioural Therapy. I have today explained the basic principles of this and he is going to contemplate whether he is going to start this shortly.

In the meantime I would like to suggest ...

I will review him after the Christmas break when we will see how we are progressing.”

7. On the 9th December a further e-mail was received from Rita Sandle which provided the results of a bone scan for the First Respondent. The letter from Rita Sandle went on to say the following:

“The choice of painkillers is limited due to the long-term heart medicine Martin is taking and the result is that they make him tired and further impede his ability to react to the court, especially when combined with his exhaustion as already described to you in the letter from Dr Wear.”

8. On the 8th December 2017, an e-mail from the Applicants’ Advocate, stated:

“In short the contents of the letter exhibited by the Respondent do nothing to change the objections set out in the Applicant’s e-mail of the 24th November.

Whilst the contents of the letter do appear to be more positive in terms of the Respondent’s prognosis it is still nevertheless inherently vague as to the Respondent’s actual condition and the expected duration of the Respondent’s infirmity. No clarity has been provided by the Respondent, his lay representative or medical team on these issues which the Applicant would assert is essential when considering a further adjournment on these grounds.

What the Respondent is essentially seeking is an adjournment *ad infinitum* which given the procedural history to date and the current stage of proceedings is manifestly prejudicial to the Applicant and not in the interests of justice.”

9. On the 11th December 2017, in response to that e-mail, Rita Sandle wrote:

“Firstly I should like to point out the letter to which they respond to was from me and not Martin who is still unwell and whom I am protecting from this ongoing lack of empathy.

I would like to reiterate the point that Martin and Rodney (deceased) have been defending this Trust for many years, latterly without representation to which they are entitled and in order to complete the process Martin needs to be given the time to recover. It is unfair to apply the same rules one might to Collas Crill as they are a large firm with many resources and if one of their team fell ill they could easily send in a replacement or substitute.

Justice can only be reached if Martin is allowed to defend himself or if there is a need to resolve this immediately, is given representation. Anything else would be completely unjust.”

10. This is not the first time that the First Respondent has sought an adjournment or further time to comply with Court Orders based on his medical condition. I have determined the question of the First Respondent’s requests for adjournments in both Judgment 2 and 3. At paragraph 20 of Judgment 3, having dismissed the First Respondent’s request for an adjournment I, gave the First Respondent a further four months in which to prepare final written submissions in relation to the outstanding issues in the fee claim. I made it plain that this was his final opportunity to make written representations in relation to the outstanding issues in this case.
11. It seems to me clear from the e-mails received from Rita Sandle that she is expecting this matter to be dealt with orally with representation in person by the First Respondent. This was never my intention which was always to deal with the outstanding matters only by way of written submissions.
12. In relation to the recent medical evidence received from Dr Wear, I incline to the view put forward by the Applicant that the report is vague as to the Respondent’s actual condition and any firm prognosis of the duration of the First Respondent’s complaint. There appears a continued lack of clarity in the reports from Dr Wear which are in any event directed to the First Respondent’s general medical practitioner and not the Court. To my mind the report appears more focused as to the First Respondent’s treatment and not his ability to grapple with the Court process.
13. Paragraph 20 of Judgment 3 makes it plain what was required of the First Respondent, the Court having already given him the indulgence of additional time in which to prepare any further written submissions or obtain representation in relation to the outstanding issues in this case.
14. The substantive issues in the Fee Claim were dealt with in Judgment 1 and 2. What remains for determination are ancillary matters in the main relating to the liability for the costs of the Fee Claim. Balancing the interests of justice of both the Applicants and the Respondent to my mind, mitigates against a further adjournment of these proceedings on the basis of the vague and unfocussed medical evidence provided by the First Respondent. In those circumstances, the application for an adjournment is dismissed.

Outstanding Issues

15. At paragraph 5 of the Act of Court dated the 16th June 2016; I gave either party permission to apply for the costs of the Fee Claim. On the 12th July 2017, the Applicants applied *inter alia* for an order that:

“The Respondent shall pay to the Trust the net sum determined by the court in determination of the Fee Claim including in such account all Cost Orders made in proceedings to date.”

16. In my judgment, two issues arise from that Application. Firstly the general liability for the costs of the Fee Claim and secondly, and depending on my conclusions on the first issue, whether the Second Respondent should be held jointly and severally liable for the Applicant’s costs with the First Respondent or treated separately for the purposes of determining costs.

Liability for Costs

17. The Royal Court Civil Rules 2007 state:

“Rule 82 (1) The Court may, in any action -

(a) Make such order as to the costs of the proceedings, or of any stage or application in the proceedings, as the Court thinks just.”

18. The Applicants submit that Judgment 1 makes clear the Fee Claim has been wholly unsuccessful. The majority of the individual claims listed within the Scott Schedule were either completely withdrawn by the First Respondent at the hearing or were subsequently disallowed in their entirety by the Court. Of the items which were allowed, these were substantially reduced or discounted. The total claimed by the Respondents in the Fee Claim amounted to £2,357,667. A final summary of the account and enquiry shows:

Items	Claimed £	Claimed €	Allowed £	Allowed €
Expenses Paid	£291,292.83	€2,120.00	£112,896.72	€550.00
Expenses Unpaid	£165,393.07	€18,919.01	£15,280.00	€0.00
OCT invoice Sept 2011 (£350,000 has been paid)	£592,360.00		£116,000.00	
Schedule 2, Fee Claim for Old Crown Trust 2011-2015	£1,308,621.56		£55,337.40	

Totals	£2,357,667.46	£299,514.12	€1,570.00
Total Paid out of the Trust	£641,292.83	€2,120.00	
Balance owed to the Trust	£341,778.71	€1,570.00	

19. Accordingly, from the total sum claimed, I have allowed £299,514.12 together with €1,570 Euros. The sum of £641,292.83, together with €2,120 Euros has already been paid to the Respondents and consequently there is a balance owed to the Applicants of £341,778.71, together with €1,570 Euros. To my mind, where a claim brought for in excess of £2.3 million is reduced by 85%, by any measure, amounts to a victory for the Applicants. In those circumstances I have no hesitation in awarding them the costs of the Fee Claim.

Recoverable or Indemnity Costs

20. The general principles for the award of costs are well established. The normal Order in respect of an award of costs is on the recoverable basis. However, Rule 83 of the Royal Court Civil Rules 2007 states:

- “(1) Notwithstanding the provisions of the Royal Court (Costs and Fees) Rules, 2000, or of any other rule of Court or enactment, the Court may, in the circumstances mentioned in paragraph (2), order that costs or security for costs shall be paid on a full or partial indemnity basis.
- (2) The circumstances referred to in paragraph (1) are as follows-
- (a) where, in the special circumstances of the case, it is the opinion of the Court that costs should be ordered otherwise than on the basis provided by the 2000 Rules, or
- (b) where any party has pleaded or otherwise pursued or defended an action, claim or counterclaim unreasonably, scandalously, frivolously or vexatiously, or has otherwise abused the process of the Court.”

21. The Applicants apply for their costs on an indemnity basis or such other basis as the Court deems fit. In support of that application it is said that indemnity costs must follow by virtue of the fact that the majority of individual items within the Scott Schedule were either

completely withdrawn by the First Respondent at the hearing or were subsequently disallowed in their entirety or in part by the Court. The Applicants submitted that by withdrawing many of the items at the hearing itself, the First Respondent caused the Applicants to incur significant unwarranted expense. By insisting and pursuing every element of the Fee Claim, without evidence for some of those items, the Applicants had to spend considerable time and money considering each and every element of the claim. Had the Respondents acted sensibly by realistically appraising their claim and taking the time to properly substantiate each item by evidence or vouchers, it would have been readily apparent to them that much of the Fee Claim was doomed to failure.

22. The Applicants provided me with an example of the problem by reference to the claim for Directors' fees for the years 2011 – 2015, referred to in paragraphs 43-49 of Judgment 1. I actually determined Directors fees in an amount lower for the year 2011 than had actually been offered by the Applicants in the Scott Schedule. The original offer had not been withdrawn by the Applicants and therefore was awarded to the First Respondent for that year. However, in the light of the ruling, the First Respondent conceded that he would not be successful in his claims for years 2012-2015. The Applicants submitted that had the First Respondent taken a pragmatic and sensible approach to the claim earlier in the action, much time and expense would have been avoided. Instead, the Respondents insisted on many elements of the fee claim which simply could not be substantiated by any meaningful yardstick.

Discussion

23. There is a substantial body of authority in relation to the making of indemnity Costs Orders. In *Excelsior Commercial and Industrial Holdings Limited -v- Salisbury Hamer Aston and Johnson (a firm)* [2002] EWCA Civ 879 Lord Justice Waller at paragraph 39, said this:

“The question will always be: Is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs.”

24. Southwell JA in *Hulme -v- Matheson Securities (Channel Islands) Limited* (Judgment No. 2) (1997) 24 GLJ 80 referring to an English Court of Appeal decision in *Disney -v- Plumber* said:

“The power to order taxation on an indemnity basis, not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith or as a personal vendetta or in an improper or

oppressive manner or who cause costs to be incurred irrationally or out of all proportion to what is at stake may also expect to be ordered to pay costs on an indemnity basis if they lose and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jury's diction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be "appropriate".

25. The unfettered discretion of the court to award indemnity costs was recognized in *Investec Trust (Guernsey) Limited & Another -v- Glenalla Properties Limited & Others* Appeal No. 467 1st January 2015 where, Martin JA at paragraph 15 of the judgment summarized the relevant principles:

"The question will always be – is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs recognizing that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation or malicious or vexatious conduct"

26. I have no hesitation in this case in concluding that this is a case which merits an award of indemnity costs against the Respondents for the following reasons:

- 1) Throughout the entirety of the Fee Claim, the First Respondent in particular, conducted himself in an obstructive and unco-operative manner often refusing to adhere to the Court's Orders and directions.
- 2) Many of the items comprising the Fee Claim listed in the Scott Schedule were completely lacking in substantiation.
- 3) Many of the items claimed by the First Respondent were withdrawn at a very late stage of the proceedings.
- 4) Of those items which were substantiated many were substantially reduced to the point where the Respondents only succeeded in little more than 10% of their pleaded claim.
- 5) The First Respondent continued, despite directions made at previous hearings, to lodge substantial quantities of documents up to and during the hearing. Had the First Respondent adhered to the Court Orders and filed the required evidence in time, wasted costs could have been prevented. Furthermore, it is possible that many

elements of the Fee Claim ultimately abandoned by the First Respondent and/or found not to be substantiated, would have been made capable of being adjudicated upon.

27. For all these reasons, the Fee Claim was a claim which took the case ‘out of the norm’ and in my judgment, justifies an award of indemnity costs.

Costs of the Fee Claim

28. At the conclusion of the substantive hearing in relation to this matter, I invited the Applicants’ Advocate to provide the Court with a summary bill of the costs of the Fee Claim on both a recoverable and indemnity basis. The Applicants summary bill of costs was filed in accordance with my directions and shows the total amount of costs claimed by the Applicants on the indemnity basis to be £310,325.50 and upon the recoverable basis, £243,325.50.

29. By Act of Court dated the 10th August 2017, I made directions for the filing and service of written submissions (*inter alia*) in relation to the Applicants summary bill of costs. On the 17th October 2017, I varied that Act of Court and invited submissions from the First Respondent by the 24th November 2017. No submissions in relation to the summary bill of costs have been filed by either the First or Second Respondents.

30. Having concluded that it is appropriate in this case to make an order for indemnity costs, I remind myself of Rule 2(5) and (6) of the Royal Court (Costs and Fees) Rules, 2012 which state:

“(5) Any doubts which a person appointed under Rule 6 to conduct a taxation may have as to whether costs are reasonable in amount or reasonably incurred shall accept in relation to costs awarded on a full or partial indemnity basis be resolved in favour of the paying party.

(6) In relation to costs awarded on a full or partial indemnity basis, all costs shall be allowed except in so far as they are unreasonable in amount or unreasonably incurred; any doubts which a person appointed under Rule 6 to conduct a taxation may have as to whether such costs are reasonable in amount or reasonably incurred shall be resolved in favour of the receiving party.”

31. The Order of LB Marshall QC dated the 16th June, 2016 at paragraph 5 stated:

“5. The costs of the fee claim are reserved to Lieutenant Bailiff Haworth to determine in the course of the assessment.”

32. That being the case, Rule 7 of the Royal Court (Costs and Fees) Rules, 2012 states:

“7(1) The person conducting the taxation shall make such decision in respect of the taxation as he thinks just; and in making his decision, he may, without limitation, take into account the seniority and experience of the Advocate whose costs are to be taxed.

(2) The person conducting the taxation may in his absolute discretion, accept oral or written representations from any of the parties to the proceedings or from any of their Advocates.

(3) The party whose costs are to be taxed shall submit his bill of costs and all necessary papers and vouchers to the person conducting the taxation.”

33. The costs claimed by the Applicants in relation to the Fee Claim are substantial. One way of dealing with the costs of the Fee Claim would be to request the Applicants to provide a detailed bill of costs and thereafter to follow the normal route for a taxation of those costs. To my mind in this case which has gone on for almost 2 years, such a course would only serve to increase costs disproportionately and unnecessarily in my view. Accordingly, I am satisfied that on the basis of the summary bill of costs provided by the Applicants and my knowledge of the case, I have sufficient information to carry out a reasonable assessment of the Applicants costs in any event. I note that there are no submissions from either the First or Second Respondent in relation to the Applicant’s bill. The Fee Claim was a complex matter requiring the Applicants to analyse in considerable detail each and every aspect of the Respondents’ claim, culminating in a Scott Schedule of over 400 pages revised and re-revised on many occasions. The hearing itself lasted for 4 days with further time spent by me dealing with the outstanding claim and issues on the basis of written submissions. The volume of documents in connection with this matter was substantial.

34. Taking all factors into account and bearing in mind for the reasons already given, I have awarded indemnity costs I have formed the view that the amount to be awarded to the Applicants in the Fee Claim shall be:

- Advocates’ Fees - £265,000.00
- Disbursements - £6,789.50

- Costs of preparing summary bill of costs - £2,000.00
- Total: - £273,789.50

Costs in relation to the 19th November Order

35. On the 19th November 2015, Lieutenant Bailiff Marshall QC made the following Order:

- “8. The First Respondent shall pay the Applicants costs incurred in relation to the set-aside application in the final amount of £9,500, but such amount shall not be immediately payable but shall be accounted for in the determination of the Fee Claim or otherwise be made payable upon further Order of the Court.
9. The Respondents shall pay the Applicants costs with a stay application in the amount of:
- (a) Two-thirds (50%) of the Applicants recoverable costs incurred on and from the 19th day of June 2015 until the 29th day of July 2015 inclusive.
 - (b) Two-thirds ($\frac{2}{3}$) of the Applicants recoverable costs incurred on and from the 30th day of July 2015 until the 6th November 2015 inclusive. Such costs to be taxed if not agreed but such amount (when determined) shall not be immediately payable but shall be accounted for in the determination of the Fee Claim or otherwise made payable upon further order of the Court.
10. The remaining one-third ($\frac{1}{3}$) of the Applicants costs from the 19th June 2015 to the 6th November 2015 (and for the avoidance of doubt both parties’ costs thereafter) shall be costs in the Substantive Application.
11. The Respondents shall not, without further order of the Court, be entitled to an indemnity from the Trust in respect of their costs of the Challenge Application including any such costs as are payable to the Applicants; liberty to apply in this regard if so advised.”

36. The costs pursuant to paragraph 9 of the 19th November Order have never been assessed by the Court. The Applicants have provided details of their costs pursuant to the Order. The Applicants’ claim for costs from the 19th June 2015 to the 29th July 2015 totals £9,588.48.

From the 30th July 2015 to the 6th November 2015, their costs total £27,001.68. The total claim for costs pursuant to the 19th November 2015 Order is therefore £46,090.16.

37. The Acts of Court dated the 10th August 2017 and 17th October 2017, gave permission for the First Respondent to serve written submissions in relation to the costs claimed in respect of the 19th November 2015 Order by 4.00 pm on the 24th November 2017. No written submissions have been filed with the Court.

38. I remind myself that costs claimed in relation to the 19th November 2015 Order, are claimed by the Applicants on a recoverable basis. Bearing that in mind I am prepared to allow on a recoverable basis, a sum of £35,000.

Liability of the First and/or Second Respondent for the Applicants' Cost

39. The application of the 12th July 2017 simply sought an Order that the Respondents pay the Applicants' costs of the Fee Claim. Subsequent to the application, an issue arose as to whether the Second Respondent should be held to be jointly and severally liable for the Applicants' costs with the First Respondent, or alternatively, given the facts and circumstances of the Fee Claim, the Respondents should be treated separately for the purposes of their liability for costs.

40. The Respondents issued the Fee Claim on the 24th December 2015. When the Fee Claim was issued, the Respondents were represented by a firm of Advocates and the application was filed on behalf of both Respondents jointly. The Act of Court dated 11th February 2016 provides a direction to the Second Respondent that if he wished to participate within the Fee Claim and simply allow the First Respondent to act for him he may do so.

41. On the 4th March 2016, the Second Respondent wrote to the Court in the following terms:

“I refer to the Court's orders dated 11th February 2016 and hereby confirm the following:

1. I do not wish or intend to appear separately form(*sic*) the First Respondent, either in person or by representation, at any further hearings of these proceedings;
2. I am content to adopt the submissions of the First Respondent as my own; and

3. I am content to abide by any decision which the Court may make in these proceedings.
4. I note that I shall be excused further attendance and the proceedings shall continue as if I had attended and that I can confirm that I formally adopt the evidence and submissions advanced therein by the First Respondent as my own.

I understand that I may revoke the above and appear separately on my own account at any time. I further understand the Court may at any time, if it appears expedient, request me to consider and re-confirm (or otherwise) my position as set out above.”

42. In October 2016, the Applicants were informed that the Second Respondent had passed away. Correspondence ensued between the Applicants’ Advocate and those representing the Second Respondent’s Estate and on the 11th November 2016, the Applicants’ Advocate wrote in the following terms:

“Our clients will be seeking repayment of this sum or such other sum as may be found to be repayable to the Trust from Mr Sandle and Mr Denton’s Estate.”

43. On 8th February 2017, Advocates representing the Estate of the Second Respondent wrote to the Court with regard to the forthcoming assessment hearing and said:

“We also understand that the fees and expenses which will be considered at the assessment hearing fall into two broad categories:

- (1) Paid and unpaid fees which Mr Sandle claims were paid or are due to be paid to him in respect of his professional trustee services, provided in his capacity as a trustee of the Trust (the Fees Claim) and
- (2) Paid and unpaid expenses which are claimed by Mr Sandle and Mr Denton as being incurred in their capacity as trustees of the Trust (the Expenses claim).

It is our position that the Estate has no interest and therefore should have no involvement in the assessment of the sums claimed by Mr Sandle in the Fees Claim on the basis that this aspect of the claim relates solely to Mr Sandle’s professional fees.

However, in the light of the live issues which we understand will fall to be dealt with in respect of the Expenses claim, it is apparent to us, based on our initial analysis, that the Estate does have an interest in the assessment of at least some of the sums claimed in the Expenses claim.”

44. In advance of a directions hearing on the 3rd May 2017, the Advocates, on behalf of the Estate of the Second Respondent, lodged a skeleton argument with submissions regarding the conduct of the assessment hearing. On the 12th May 2017, they wrote to Court stating that the Estate of the Second Respondent would take no active part in the assessment hearing, inviting the Court to have in mind the position of the Estate, taking into account correspondence from the Second Respondent’s doctor and an affidavit from an Advocate who had acted on behalf of the Second Respondent some time previously.

45. Finally, on the 10th August 2017, the Advocates for the Second Respondent wrote to the Court in the following terms:

“1. Mr Rodney Denton passed away in October 2016. Even if Mr Denton had granted a valid power of attorney or other equivalent authorisation such as to allow Mr Sandle to represent him in the assessment proceedings (which is not accepted by the Estate), any such power or authorisation automatically terminated upon Mr Denton’s death. Accordingly, any steps taken by Mr Sandle in the assessment proceedings from this date onwards should not be deemed to have been taken on behalf of Mr Denton or his Estate.

2. Given this lack of any documents in Mr Denton’s possession about these proceedings, the Estate naturally took some time to engage legal counsel and get up to speed. The Applicants and the Court were first notified by a letter from this firm dated 8 February 2017 that, following the passing of Mr Denton in October 2016, the positions of the Estate and Mr Sandle as the First Respondent were entirely separate and should be treated as such. It was made clear in this letter (copy **attached**) and subsequent correspondence that:

(a) the Estate would have no involvement in Mr Sandle’s claim for fees;

(b) it only had a limited interest in the claims relating to paid and unpaid expenses;

- (c) it would not oppose the Applicants' application dated 13 January 2017;
 - (d) although the Estate would appear at the directions hearing on 3 May 2017, it would play only a minimal part as it had no access to documents and therefore could not have any involvement in discussions between the Court, the Applicants and First Respondent regarding preparations for the assessment hearing; and
 - (e) the Estate would not take any positive steps in relation to the preparation for, or participate in the assessment hearing in May 2017. As the Court is aware, the Estate was not represented at the assessment hearing in May 2017.
3. The Applicants nevertheless argue that the Estate should be jointly and severally liable with Mr Sandle for all costs they have incurred in the assessment proceedings, irrespective of when those costs were incurred and in relation to which part of the assessment they apply. It is the Estate's position that this simply cannot be the correct approach.
4. At no point has Mr Sandle represented the Estate. Further, the Estate has made clear that its position is entirely separate from that of Mr Sandle, and would not participate in his claim for fees. Therefore, it is submitted that at the very least any costs incurred by the Applicants in dealing with Mr Sandle's claim for fees should not be borne by the Estate. Furthermore, as explained at paragraph 2 above, the Estate took no part in the assessment hearing in May 2017 and played only a limited role in the prior directions hearing. It is submitted that the Applicants' costs arising from Collas Crill's attendance at those hearings should not be borne by the Estate.
5. The Applicants seek a blanket order for indemnity costs against both of the Respondents, on the basis that they allege the Respondents' conduct and behaviour justifies such an award. However, the Applicants again crucially fail to distinguish the positions of the First and Second Respondents. The Applicants have provided no evidence that the Second Respondent, or importantly from October 2016 the Estate, were complicit in or in any way responsible for such conduct. Any failures to comply with court orders or directions, or for pursuing claims for fees which were ultimately unsuccessful

were solely the responsibility of Mr Sandle. The Estate cannot be blamed for Mr Sandle's actions, over which it had no control. Accordingly, the Estate respectfully submits that this is not an appropriate case to make an award for indemnity costs against the Estate.”

46. The Applicants submit that as co-litigants, the First and Second Respondent were “in it together”. The Second Respondent was content to follow the lead of the First Respondent in framing his claim for fees and expenses. Indeed, no effort was made by the Second Respondent to distance himself from the First Respondent from the date the Fee Claim was issued until the Second Respondent wrote to the Court on the 4th March 2016, stating that he did not wish to appear separately from the First Respondent in the proceedings and was adopting the submissions of the First Respondent in any event. It was submitted by the Applicants that no distinction was made between Respondents in respect of the fee and expenses elements of the Fee Claim. Likewise, from the 4th March 2016 until Carey Olsen assumed representation for the estate of the Second Respondent, the Second Respondent adopted the evidence and submissions of the First Respondent as his own. It was also submitted that the death of the Second Respondent was irrelevant to the issue of liability for costs, in view of the fact that the personal representatives did nothing to inform the Court or otherwise of their intention to distance itself from the Fees Claim. Only after Carey Olsen's involvement was an attempt made to draw a distinction between the “Fees Claim” and the “Expenses Claim” arguing that the Second Respondent only had an interest in the latter while the former was the matter for the First Respondent.

Discussion

47. The general principle is that where there are several defendants, there is joint and several liability for the costs of unsuccessful litigation. In *Stumm -v- Dixon Co & Knight* (1899) 2 QBD 529 Lord Esher MR said:

“In my opinion the true rule is this: when an action is tried against two or more defendants and any defendant separates in his defence and the judgment is against all the law is that each of them is liable for the damages awarded by the judgment and each of them is liable to the Plaintiff for all costs taxed on his behalf as properly incurred by him in the maintenance of his action except as to costs caused to him by

so much of the separate defence of any defendant as is and can only be a defence for that defendant as distinguished from other defendants.”

48. The courts have readily applied that principle. In *Investec Trust (Guernsey) Limited & Others -v- Glenalla Properties & Others* reported 15/2016 the court held that the *Stumm* principle extended to cases where former trustees and an existing trustee acting as co-defendants who although they did not conduct a completely co-ordinated defence but, where the result for which they contended was the same, liability for the costs occasioned by that unsuccessful defence should be awarded on a joint and several basis. Applying the *Stumm* principle to the facts of this case, in my judgment there can be no doubt that the First and Second Respondent were “in it together” from the commencement of the Fee Claim through to March 2016 when, the Second Respondent made over conduct of the proceedings to the First Respondent. He adopted the evidence and submissions advanced by the First Respondent as his own, simply preferring not to appear, either in person or by representation separately.
49. To my mind that situation continued until his death in or about October 2016. The only change occurred after the involvement of Carey Olsen on behalf of his Estate, when they sought to differentiate between the “Fees Claim” and the “Expenses Claim”. Carey Olsen wrote to the Court and provided a skeleton argument in relation to a directions hearing which took place in May. On the one hand they state that whilst the Estate of the Second Respondent had no interest in the “Fees Claim” and the assessment hearing, they exhibit a clear interest in the proceedings at large by the substantive submissions made in relation to the content and form of the assessment process.
50. It seems to me that this distinction came late in the day, two months before the hearing and after considerable expense had been incurred by the Applicants in assessing the entire Fee Claim. Furthermore, at no time did the Second Respondent plead a completely separate claim from that of the First Respondent. What his Advocate appears to have attempted to do, is to jettison one element of the Fee Claim whilst half-heartedly maintaining the other, thus keeping a foot in both camps. To my mind, the cases of both the First and Second Respondent are essentially the same throughout the entire period of the Fees Claim, both First and Second Respondent were, in my judgment, “in it together”. For those reasons liability for the costs of the Fees Claim is joint and several as between the First Respondent and the Estate of the Second Respondent.

Escrow Arrangements

51. The only outstanding issue which remains to be determined arises from paragraph 2 of the Applicants application dated the 12th July 2017, namely:

“Any amount in excess of £1,000,000 that is held pursuant to the Escrow Arrangements as contemplated by Schedule 4 to the 25th May Order to be released therefrom and shall be paid to or at the direction of the Applicants pursuant to item 3 of that Schedule.”

52. In the light of my findings in respect of the Fees Claim, there can be no ‘*fee payment*’ to the Respondents pursuant to paragraph 3 of Schedule 4 to the 25th May 2016 Order. Accordingly there can be no good reason why I should not make the Order sought by the Applicants in connection with the Escrow Arrangements.

Lieutenant Bailiff Master Peter Haworth

Dated this 8th day of January 2018