

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

JANICE MARGARET DOCKERILL

Applicant

-and-

STEPHEN PAUL CHILCOTT

Respondent

Costs decision taken on the papers

Judgment handed down: 5 December 2022

Before: Richard James McMahon, Esq., Bailiff

Counsel for the Applicant: Advocate S L Brehaut
The Respondent was not represented

Legislation referred to:

The Royal Court Civil Rules, 2007
The Royal Court (Costs and Fees) (Guernsey) Law, 1969

Introduction

1. This judgment is supplementary to the judgment I handed down on 30 May 2022. I will not repeat what I said in that judgment and both judgments, therefore, need to be read together. This judgment deals with the question of the costs of the Applicant's Application dated 22 February 2021. By a further application dated 25 October 2022, the Applicant seeks an order that the Respondent pay the costs of and occasioned by that Application on the recoverable basis, all pursuant to rule 82(1) of the Royal Court Civil Rules, 2007.
2. Brief written submissions from Advocate Brehaut accompanied this costs application, along with a request that I determine the question of costs on the papers.. The Respondent gave his written response dated 27 October 2022. On 1 November 2022, on behalf of the Applicant Advocate Brehaut indicated that there was no need for any reply. However, the Respondent saw fit to correspond further by e-mail, including with Advocate Lavin, culminating in him purporting to provide a further response dated 8 November 2022. Whilst I am not persuaded that he was entitled to do that, I have still taken into account all the material provided by him.
3. I am satisfied that I can properly determine the question of costs without hearing any oral submissions. I had given a provisional indication of what I considered the most appropriate outcome might be towards the end of the previous judgment. At para. 212 I stated:

“Balancing these factors, although I have recognised that I could, if so minded, find that there is scope for some adverse costs order against the Respondent arising from

the manner in which he has resisted the Application, my inclination, always subject to any contrary representations, is to regard the pursuit of this Application as being for the benefit of the Deceased's estate rather than it being a piece of what is often termed "hostile litigation" between the parties."

Both parties have now made their submissions in respect of costs and I am not persuaded that I would be assisted any further in convening them to a hearing.

The parties' contentions

4. In her submissions on behalf of the Applicant, Advocate Brehaut acknowledges that she is seeking to persuade me that some of the costs incurred should be regarded as having arisen from the manner in which the Respondent opposed the Application. The Applicant no longer seeks an order for costs on the indemnity basis, but seeks an order for the whole of her costs on the recoverable basis to be paid by the Respondent, alternatively that 75% of those costs should be ordered to be paid by him. If unsuccessful in obtaining an order for the Respondent to pay any of the costs, the default position should be, as indicated, that the costs incurred by the Applicant should come out of the estate.
5. Advocate Brehaut submits that, although the blessing of the account prepared was not granted, obtaining several declarations from the Court, all of which rejected the submissions made by the Respondent, means that the Applicant should be regarded as having been the successful party. She offers four particular areas where those submissions had previously been made, meaning that the Respondent's repetition of them was unnecessary and so should sound in costs against him.
6. The first example relates to the assertion that he had an ownership interest in the property known as Les Pres de Jerbourg. It is fair of her to point out that this issue had already been explained to the Respondent at an earlier hearing and his remedy, if he were dissatisfied, would have been to have appealed. The second example relates to the repetition that there had somehow been a distribution in specie from a trust, which is argued to be another instance of the Respondent wasting everyone's time in pursuing something that had also previously been explained to him. The Respondent's reliance on various matters relating to the trust of which he is a beneficiary, extending to him referring extensively to the so-called RIVERBOAT reports he had commissioned, also needed to be viewed in the context of the Application being about the estate rather than any trust. This was also an area where the Court had previously explained to the Respondent that he should not roll everything about which he remains concerned into a general complaint about how the Applicant had proceeded once she became the executrix of the Respondent's late father's estate. Within the context of the Application relating to that estate, this was a further example of misdirected effort and so a waste of everyone's time.
7. As a result of the Respondent's unreasonable conduct, the Applicant has been put to wasted effort and expense and so this should be reflected by making an award of costs against the Respondent. Even if the Court were not minded to make a simple award of costs on the recoverable basis, Advocate Brehaut suggested that these wasted aspects when compared with those parts of the proceedings, as reflected in the earlier judgment, could be said to equate to around 75% of the costs that had been incurred. This was put broadly by reference to around 50 of the paragraphs in a judgment running to over 200 paragraphs being directed at the blessing of the account rather than these peripheral issues that should not have needed to be addressed.
8. In his response, the Respondent does not, in my opinion, address any of the arguments that have been raised on behalf of the Applicant as they relate to the costs of the Application. Instead, he focuses on why he says that I got the legal principles about the ownership of Les Pres de Jerbourg wrong. This does not have any bearing on the question as to whether there should be an adverse costs order made against him as a result of how he opposed the Application. If he

is dissatisfied with any particular aspect of the judgment I gave earlier this year, the Respondent's remedy is to appeal to the Court of Appeal and seek to have whatever it is he is dissatisfied with reversed. That might, for example, be a challenge to one or more of the declarations I made.

9. The closest I think the Respondent gets in his written response to addressing the costs application that now falls to be determined is at the beginning of the final section headed "CONCLUSION" on page 11, where he states:

"This latest application is nothing but a shoddy, underhanded and dishonest attempt to steal my property and sidestep any obligation to produce proper accounts"

which I am afraid is a further example of the unnecessarily intemperate language he so often chooses to adopt.

10. The Respondent also refers to other proceedings that have been commenced. One example is that he has been permitted to commence a fresh set of proceedings seeking an account of the estate from the Applicant as the executrix. Those proceedings are, of course, separate from the Application made by the Applicant, since determined, and in respect of which this costs application is made. The Respondent's proceedings will take their own course and, when they are concluded, there may be a costs order in respect of them. Until that time, they have no bearing on the present costs application in separate proceedings. The Respondent also refers to an application he has purported to make dated 10 September 2022. However, as I have caused the Greffe to explain to the Respondent, there is currently no basis on which he can pursue that application until such time as it is properly commenced so, for the purposes of determining the Applicant's current costs application, those proceedings are also of no relevance.
11. In his e-mail correspondence and his further written contentions, the Respondent states that the costs that the Applicant has now racked up with her lawyers have nothing to do with him. He does not regard them as being estate expenses. He does not elaborate on why that is.
12. In these circumstances, I am treating the Respondent as opposing any costs order being made against him and I will regard his latest submissions as even going as far as to oppose any order that the costs the Applicant has incurred are capable of being taken from the estate. I will deal with both aspects of this opposition.

Discussion

13. Whilst I have some sympathy with the position in which the Applicant has found herself, I am not persuaded by her arguments that there should be an order made for the Respondent to pay any of the costs she has incurred in bring her Application. Similarly, I do not regard the opposition that the Respondent has mounted as justifying denying the Applicant her ability to treat the costs she has incurred as being expenses for the benefit of the estate she is administering. There could be arguments both ways but, within the broad discretion available to this Court, I consider that the most appropriate outcome is for the costs to come from the estate. I will explain as briefly as I can why I have reached that conclusion.
14. I start from the premise that the Application made by the Applicant for the account she had caused to be prepared to be blessed was with a view to avoiding ongoing litigation with the Respondent. This was not the type of proceedings where there was going to be a winner or a loser. The intention was to secure some protection for her in her capacity as the executrix of the estate of the Respondent's late father. That is why I gave the indication I did in May that her Application might be considered to be analogous to a trustee seeking a momentous decision to be blessed. In such a case, the starting point is that the trustee is permitted to rely on the

indemnity usually available, although there are instances in which that right to indemnity can be lost. The indemnity extends to costs properly incurred in the execution of the trust, so there are occasions when someone else involved argues that the expenses of the trustee were not reasonably incurred.

15. I am satisfied that the proper starting point for the costs of the Applicant as executrix is that she was acting on behalf of the estate, in the sense of taking a step that was in principle for the benefit of those who would benefit from the estate. By seeking some approval from the Court of the account that had been prepared, she sought to be in a position to finalise the estate. I do not consider her Application to have been made for her own personal benefit although, given the passage of time and as a result of her mother, the original executrix, having died, she would also have a personal interest in ensuring that the assets of the estate would not be further diminished. As such, I am not persuaded that the Application is one where one party was seeking a remedy against another and where, in the usual type of action, there might be a successful party identified.
16. The first issue, therefore, is whether there is any merit in the Respondent arguing that the costs should not be taken from the estate. He puts this as being on the basis that the Applicant has been trying to evade the requirement to produce proper accounts. As I have noted, this was something that the Respondent was pursuing some years ago until his proceedings were struck out. He is once again seeking to obtain such relief against the Applicant, but those proceedings have not yet concluded. The Application was the Applicant's means by which she sought to obtain a blessing of the account that had by then been prepared. If the Application had been successful, then the Respondent's latest proceedings could not have been commenced. The mere fact that the Application was dismissed does not mean that the equivalent of the indemnity available to a trustee should be regarded as having been lost. In my judgment, it is necessary to look more broadly at what was addressed through the Application and the outcome.
17. I agree with Advocate Brehaut that the declarations that were made are of assistance to the Applicant in her capacity as the executrix of the Respondent's late father's estate. As I sought to explain in the earlier judgment, I chose to make them on the basis that doing so would determine a number of issues that had been raised by the Respondent. To that extent, had I not been persuaded that they could properly have been made, I would not have made those declarations and, in those circumstances, I might have been more inclined to consider whether it could be said that bringing the Application had produced no tangible benefit to the estate of the Respondent's late father. However, I am clear that one of the beneficial outcomes of the Application was that it presented the Court with the opportunity to make a series of declarations intended to assist the parties and, for that reason, I am satisfied that the provisional view I expressed that the costs should continue to be taken from the estate, rather than not being expenses properly incurred by the Applicant as the executrix, remains unaffected by the Respondent's attempt to argue otherwise.
18. I am fortified in that conclusion by reference to the principle that generally a personal representative of an estate can seek assistance from the Court. When acting on behalf of the estate in this manner, I take the view that it follows that the personal representative is incurring expense for the benefit of the estate unless it can be shown that the office-holder had some other purpose or conducted the proceedings in such a way that the estate should not have to meet the expenses incurred. Given the manner in which the Respondent would not accept voluntarily that what had been produced was sufficient to enable the Applicant to conclude the administration of the estate, I am satisfied that bringing the Application was a reasonable course of action for her to adopt. Further, although the relief she sought was not granted, the overall effect was that many of the arguments that the Respondent had been deploying for a number of years resulted in the declarations being made so that those arguments could not be repeated again and again. In my opinion, this can properly be said to be of benefit to the estate. Accordingly, I am further satisfied that there is no good reason to deprive the Applicant as

executrix of her ongoing entitlement to take from the estate the costs she incurred in bringing the Application.

19. The next issue, therefore, is whether, there should be some recovery on behalf of the estate of some of the costs that have been incurred because of the manner in which the Respondent conducted his opposition to the relief sought by the Application. Again, although it would be possible to reach such a conclusion, because there is such a wide discretion when it comes to costs, whether derived from the Royal Court (Costs and Fees) (Guernsey) Law, 1969 or the 2007 Rules, I take the view that it is important to step back and have regard to what the Applicant was seeking to achieve and what she has achieved, however one looks at the manner in which the Respondent argued his opposition.

20. I accept that Advocate Brehaut is correct to point out that there were aspects of the Respondent's submissions that did not need to be raised again. However, as I set out in the earlier substantive judgment, permitting him to make those submissions and then dealing with them in a reasoned written judgment serves the purpose of fixing both parties with the findings made, now turned into the declarations given. As such, as between them, these matters are now *res judicata*. I take the view that this should be regarded as being of considerable benefit to the Applicant in her capacity as executrix. Indeed, I am prepared to draw a distinction between her role as office-holder and her position as a beneficiary of the estate, effectively standing in the shoes of her late mother, in that regard. I am not persuaded that she was acting in her own personal interests in bringing the Application, but rather with a view to being able to conclude the administration of the estate. Until she is able to do so, I recognise that her office as executrix is a burdensome one. Accordingly, when I compare the position that she would have been in had I not permitted the Respondent to raise these points, thereby enabling me to deal with them, it is possible that the estate would potentially be facing such claims again which in itself would be a drain on the assets in the estate, unless the outcome of any other proceedings were an award of indemnity costs against the Respondent, thereby producing the effect of largely reimbursing the estate.

21. I further consider that it is relevant to recognise that the Applicant chose to bring her Application rather than being forced to do so. She could have chosen instead to distribute the estate of the Respondent's late father in accordance with the position she had taken, bearing in mind the terms of the 2016 Settlement Agreement, which modified what would be distributed to the Respondent. It is quite possible that the Respondent would not have been satisfied with the manner of the distributions being made and so may have commenced proceedings against the Applicant. Those proceedings may have been typical inter partes litigation, with the potential for costs to be awarded in either direction depending upon the outcome or possibly the Applicant might have been actioned in her representational capacity as executrix, in which case the costs position might similarly have involved consideration of whether the estate would bear her costs. It is difficult to know quite what the Respondent might have done because he has often looked at the Applicant's late mother's involvement (and, of course, the Settlement Agreement was reached whilst the latter was still alive). However, if this had been the situation, the Respondent really ought to be alive to the possibility of facing an adverse costs order before commencing any such proceedings and so can be taken to understand the consequences of doing so. Accordingly, because the Applicant chose to bring her Application, effectively as a means of trying to secure a level of protection for her as an office-holder against facing such proceedings from the Respondent, I find it difficult now to penalise the Respondent for resisting the relief she sought, especially where that relief was not granted. I am satisfied that this was not the type of litigation where either party can really be said to have been successful.

22. When balancing that choice on the part of the Applicant against the manner in which the Respondent conducted his opposition, I appreciate that the Applicant may feel aggrieved that the estate has been put to expense, which has the consequence that both parties will find the total amount available for distribution between them is reduced. However, I take the view that the Applicant must have been aware, in bringing her Application, that the Respondent would

inevitably seek to rehearse every argument he felt he could legitimately deploy to seek to persuade the Court that one or more of his contentions is correct. To that extent, I consider that she was prepared to rely on her indemnity as the executrix if, as I have found, there should be no adverse costs order made. This was a calculated stance for her to take on the basis that I have found her conduct to be reasonable. I am satisfied that she was not adopting a course of action where she was putting at risk her personal money, but rather acting on behalf of the estate she is administering. Through bringing the Application, although the relief sought was not granted, for the benefit of the estate there are certain matters now that have been determined between the parties and that is of real benefit to the estate.

23. Because I am declining to award costs against the Respondent, I do not need to comment on the alternative argument that the extra arguments raised by the Respondent that did not need to be repeated amounted to some 75% of the costs the Applicant incurred. I would, though, comment that the broadbrush approach having regard to what is in the judgment advanced by Advocate Brehaut would not have found favour with me. If there were to have been an adverse costs order against the Respondent, what matters is the additional expense incurred by the Applicant in dealing with those unnecessary arguments. In terms of the submissions that needed to be made on behalf of the Applicant seeking to obtain the relief being sought, those expenses would always have needed to be incurred. The written and oral submissions from Advocate Brehaut commenting on the points raised by the Respondent and the extra time taken at the hearing allowing him to make those submissions orally would not, in my opinion, have amounted to three-quarters of the costs incurred by the Applicant. I would, therefore, if I had been minded to make any award of costs against the Respondent have chosen a lower figure than 75%.
24. As a result, in my judgment, the appropriate outcome is that the Applicant's costs should come from the estate rather than there being any costs award made against the Respondent. It is clear that the estate has benefited from the declarations I made, which bind these parties unless they were to be reversed on any appeal (and I note that the time for appealing has long passed).

Costs

25. Paragraph 2 of this costs application seeks an order that the Respondent should pay the costs occasioned by it. On the basis that the Applicant has not succeeded in obtaining any order for costs against the Respondent, I doubt that this paragraph can properly be pursued by her. However, rather than leave matters to be dealt with on another occasion, and in order to produce some finality in respect of the Applicant's 2021 Application, I will explain why I am treating this application in the same way and making an order that the Applicant's costs should also come from the estate.
26. If viewed in isolation, the Respondent might be able to argue that the Applicant should pay his costs for bringing this further application, especially where it has been dismissed. I take the view that such an order would be unfair on the Applicant because, as I have just explained, the Application she brought was for the benefit of the estate and her conduct of it was not unreasonable. As such, she would not be deprived on the indemnity from the estate to which she is entitled as executrix. Once again, therefore, I am left to consider whether the bringing of this costs application by the Applicant was an unreasonable stance for her to take, which means that any costs awarded would have to be paid by her personally rather than coming from the estate.
27. Although I gave a provisional indication in para. 212 of the previous judgment, I did indicate that it was subject to any further representations. I do not think it was unreasonable for the Applicant to test whether some element of the costs she has incurred should be paid back into the estate by the Respondent as a result of the manner in which he conducted his opposition to the Application. I have repeated that it would be open to me to make such an order, but that in

the exercise of the Court's wide discretion, I am not minded to do so. Accordingly, I would not be able to deprive the Applicant of her ability to rely on using estate monies to meet the expenses she has incurred in pursuing every aspect of the Application, including seeking a reduced costs order against the Respondent from that pleaded at in para. 4 of the Application itself.

Conclusion

28. In all these circumstances, the order I make is that the Applicant is entitled to take the costs she has incurred in relation to her Application from the estate of the Respondent's late father.