Costs risks inherent in a will challenge on the ground of undue influence: *Goodwin v Avison* [2021] EWHC 2356 (Ch)

***Goodwin v Avison* [2021] EWHC 2356 (Ch)** provides a salutary reminder as to the costs risks inherent in pursuing a challenge to a will where allegations of undue influence are made.

In ***Goodwin*** the defendants advanced alternative grounds of challenge based on allegations of undue influence, want of knowledge and approval and absence of due execution, although it was found that the allegations of undue influence were central to their case.

Part way through the trial the defendants submitted to a consent order in terms which gave the claimant the relief he sought and, in consequence, much of the evidence on which the allegations of undue influence were founded was not heard. The Court held that this amounted to an acceptance that the evidence was insufficient to raise a case which ought to be determined. The defendants were ordered to pay the claimants' costs of the whole claim.

Background

This was a dispute between certain children and grandchildren of the testator, Thomas Goodwin (referred to in the judgment as **"Tom"**).

The proceedings were commenced by Gary Goodwin (**"Gary"**), the testator's son, seeking pronouncement in solemn form of a will dated 11 July 2017 (**"the 2017 will"**) and pronouncement against an earlier will dated 20 December 2005 (**"the 2005 will"**). The 2017 Will was challenged by Tom's daughter Jacqueline Avison (**"Jacqueline"**) and four of his grandchildren. The estate was believed to be worth between £3 - £4 million.

There were significant differences between the terms of the 2005 Will and the 2017 Will. The earlier will made provision for various members of Tom's family including Gary, but the terms were particularly favourable to certain grandchildren who were the residuary beneficiaries. Under the 2017 Will, which had been prepared with assistance from Gary's former partner Ms Grimes, it was Gary who was the residuary beneficiary.

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In 2018 conflicts between Tom and Gary broke out. Following these disputes Tom informed his solicitor that he would not have executed the 2017 Will had he been aware of its terms. Tom also alleged, in a draft letter prepared for him in 2018, that he had been persuaded by Gary and Ms Grimes to change his will by *"trickery"*. The defendants said that further statements made by Tom to other family members also cast suspicion on the 2017 Will.

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The nature of the claims and the litigation

Jacqueline resisted the validity of the 2017 will on the grounds of: (a) absence of due execution; (b) want of knowledge and approval of the terms of the 2017 will; and (c) undue influence of Gary and Ms Grime. Jacqueline's defence and counterclaim were adopted by the third to fifth defendants. The Judge said at [20] that the case was *"effectively one of an allegation of fraud on the part of the claimant and his then girlfriend (in acting to procure a testator to execute a will, knowing that the testator neither knew or approved of its contents nor would have made such a will had he known such contents and/or that their conduct was such as to overcome his will by asserting undue influence over him)".*

The second defendant, who did not advance a counterclaim, did not admit due execution of the 2017 Will and required it to be proved in solemn form, giving the notice required pursuant to CPR r.57.7(5).

A significant feature of the litigation was the time at which certain evidence came out. Gary made late disclosure of recordings of meetings which he had attended with Tom and a solicitor. A third party disclosure order to obtain solicitors' papers (which were then held by several firms) was only finally resolved on the first day of trial. This evidence was described by the Court as *"really important"* to the determination of the case (at [138]).

Such was the progress of the trial that, part way through, the defendants entered into a consent order as described above and informed the Court that they no longer challenged the 2017 Will. The Judge gave an ex tempore judgment on the claim and gave reasons for the costs order in a separate judgment.

The costs judgment records the Court's finding (based on the evidence that had then been heard) that Tom had known and approved the terms of the 2017 Will. The Court further concluded that Tom was a man of acute business sense who had retained capacity until at least a few weeks before his death; that he had been prone to make promises which he did not keep; and that he did not always tell the truth. Indeed, over the years there were various breakdowns in the relationships between Tom and other members of his family such that Gary intimated, and Jacqueline actually commenced, proprietary estoppel claims against Tom.

Legal principles

The Court summarised the general principles relevant to costs orders in the context of contentious probate claims (at [21] – [24]), including the following matters:

a. The starting point is, as set out in CPR r.44.2(2)(a), that in general costs will follow the event, although the Court may make a different order. This applies in a probate claim as in any other and the notion that the costs of an unsuccessful party will be paid from the estate is wrong.

b. In exercising its discretion on costs the Court will have regard to the matters set out in CPR r.44.2(4) and (5).

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***"...if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation, a case is made for costs to come out of the estate..." Spiers v English* [1907] P.122**

c. In the event that allegations of fraud are made, and the case is lost or withdrawn, this will usually justify an order for costs on the indemnity basis.

In contentious probate claims two principles, which have been formulated on policy grounds, may justify a departure from the usual starting point. The first principle has been enunciated in the following terms:

"if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation, a case is made for costs to come out of the estate (*Spiers v English* [1907] P.122 at p.123)." (Cited in ***Goodwin*** at [25]).

However, the Court noted that a strong case must be made out for the exception to apply, and that the modern tendency has been to narrow the scope of the principle.

As to the second principle, the Court may make no order as to costs if the circumstances lead reasonably to an investigation of the matter (see ***Spiers v English*** at p.123). The key enquiry in this respect is whether the unsuccessful party acted reasonably in pursuing its case.

In circumstances in which there is a challenge to a will both on the ground of undue influence and on the ground of absence of knowledge and approval, a question might arise as to whether a party has acted reasonably in pursuing the latter claim even if the undue influence claim was not well founded. In this regard the Court observed at [43] that it was possible for the Court to make two separate costs orders, but that the likely result was that the person advancing the unsuccessful undue influence claim would have to pay the costs of both issues (***Carapeto v Good* [2012] EWHC 640 (Ch)**).

Where a party runs no positive case, but only requires the will to be proved in solemn form pursuant to CPR r.57.7(5), no costs order will be made save where the court considers that there was no reasonable ground for opposing the will. CPR r.57.7(5) provides:

"(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."

The reasoning of the Court

Notwithstanding that they had submitted to a consent order in terms that the claimant should be granted the relief he sought, the defendants argued that their costs should be paid out of the estate or, alternatively, that there should be no order as to costs.

The Court disagreed. Since the defendants sought to rely on one or other of the probate costs principles described above, the relevant question was:

"not whether the case ultimately failed but whether at the time it commenced and thereafter was persisted in the position was either that the testator (or residuary

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...the relevant question was: "whether there were, at the least, reasonable grounds (within the meaning of the probate costs principles) for opposing the will and requiring the court to investigate."

beneficiary) can be said to have had caused the relevant proceedings or whether there were, at the least, reasonable grounds (within the meaning of the probate costs principles) for opposing the will and requiring the court to investigate." (At [94]).

In short, the defendants failed to establish that either of the principles should be applied for the reasons discussed below.

Due execution

The Defendants' arguments on costs in relation to the case on due execution failed. It was held that the matters which had been relied upon were insufficient to raise even an issue as to due execution. It followed that the defendants' conduct in advancing the case was not reasonable: it could not be reasonable for the defendants to assert that due execution had to be proved and to require expert evidence unless the circumstances justified it.

Undue influence

In relation to the claim based on allegations of undue influence the defendants relied on matters including statements said to have been made by Tom to members of his family. It was contended that Tom had caused the litigation such that the first costs principle should be applied or, at least, that the circumstances had reasonably prompted an investigation of the matter.

As to the first costs principle, the Judge held that, following dicta of Hodson LJ in ***Re Cutcliffe's Estate* [1958] 3 W.L.R. 707**, the allegations of statements made by Tom to others did not give rise to a case for payment of the defendants' costs from the estate. Earlier in the judgment the following passage was cited:

"While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to case where a testator by his words, either written or spoken, has misled other people, and perhaps inspired false hopes in their bosoms that they may benefit after his death." (***Re Cutcliffe's Estate*** at p.19.)

The alleged statements could in principle be of relevance to the question whether the circumstances had led reasonably to an investigation of the undue influence claim. However, since much of the relevant evidence had not been received by the Court, it could not be taken into account.

Nor did the other matters relied upon justify a finding that either Gary or Tom had caused the litigation, or that the circumstances raised sufficient suspicion to justify an investigation.

Knowledge and approval

For similar reasons, none of the matters relied on in relation to the knowledge and approval claim justified an application of either of the probate costs principles. However, even if this was wrong, the Court held (in the context of a discussion as to the costs liability of the second defendant) that:

"put broadly, the whole

...the defendants' conduct in advancing the case was not reasonable: it could not be reasonable for the defendants to assert that due execution had to be proved and to require expert evidence unless the circumstances justified it.

Since the claim was, in substance, founded on allegations of undue influence, the appropriate order was that the defendants should pay the claimant's costs.

case was in reality run on the basis of the allegation of undue influence which in large part depended on the defendant's evidence which was not put before me." (At [133].)

Since the claim was, in substance, founded on allegations of undue influence, the appropriate order was that the defendants should pay the claimant's costs.

...mere formal compliance with the requirements of r.57.7(5) was insufficient to attract costs protection.

Costs liability of the second defendant

Even the second defendant, who attempted to rely on CPR r.57.7(5)(b), did not escape costs liability. Although she had put forward no counterclaim, in essence her case had been a positive one: her witness statement, for example, put forward *"a very positive case indeed"* (at [131]). In these circumstances mere formal compliance with the requirements of r.57.7(5) was insufficient to attract costs protection. Even if that were wrong, there had been no reasonable ground for requiring proof of the will in solemn form.

Late disclosure

It was said on behalf of the defendants that they had been materially disadvantaged by the late disclosure of key evidence and that the Court should take this into account in making a costs order, particularly since the claimant was allegedly at fault.

However, it was held that Gary had not sought to conceal evidence. The really important evidence had been located in the solicitors' papers and this was disclosed late due to the parties' failure to seek a third party disclosure order timeously.

Comment

The case emphasises the need to consider carefully the question whether the evidence supports a plea of undue influence and to keep this question under review as further evidence emerges. There is a risk that an unsuccessful party might ultimately be held liable for the costs of the whole action if that claim fails, even if important and unfavourable evidence comes out late in the progress of the litigation.

It also demonstrates that the costs protection provided pursuant to CPR r.57.7(5) may not be afforded to a party who has in substance advanced a positive case.

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