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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**19/11/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE ESTATE OF BRIDGET GILHOOLY (DECEASED)

Between:

THERESA McGARRY

Plaintiff

and

KEVIN MURPHY
(As the personal representative of Bridget Gilhooly (Deceased))

Defendant

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The Plaintiff, Theresa McGarry, appeared as a Litigant in Person
Mr Gibson (instructed by Tiernans, Solicitors) for the Defendant

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McBRIDE J

Application

[1] By judgment delivered on 6 November 2020 the court dismissed the plaintiff's application to have the deceased's Will dated 21 September 2011 set aside on the grounds that:

(a) The testator lacked testamentary capacity.

(b) The Will was obtained by undue influence of the defendant.

(c) The Will was a forgery.

[2] The question of costs was reserved. I am grateful to Mr Gibson who appeared on behalf of the defendant for his skeleton arguments dated 17 November 2020 and

18 January 2021 and to Mrs McGarry who acted as a litigant in person for her skeleton arguments dated 27 November 2020, 3 February 2021 and 2 March 2021.

Relevant legal principles regarding costs in probate actions

[3] I consider that the following legal principles can be distilled from the relevant authorities:

(a) Costs in probate actions lie at the discretion of the court – See Order 62 of the Rules of the Court of Judicature 1980.

(b) The general rule is that costs follow the event. The notion sometimes entertained that the costs of the unsuccessful parties in probate actions will generally be ordered out of the estate is wrong. Accordingly practitioners when advising those about to launch probate proceedings should advise them that the general rule is that if they are unsuccessful costs are unlikely to be ordered out of the estate.

(c) In probate actions however there are two long established exceptions to the general rule that costs follow the event. The exceptions were set out in *Spiers v English* [1907] P 122 and as noted by Henderson J in *Kostic v Chaplin* [2007] EWHC 2909 at paragraph 4 "these two exceptions remain as valid today as they were before the introduction of the CPR, and they should therefore continue to guide the court in deciding whether it is appropriate to depart from the general rule and to make a "different order"..." Although the CPR does not apply in this jurisdiction considerations relating to policy and fairness do apply. The two probate exceptions set out in *Spiers* are:

(i) If the testator or persons who are interested in the residue have been really the cause of the litigation, by way of exception costs come out of the estate.

This exception applies to cases in which, owing to the confusion in which the testator left his papers it was doubtful whether he intended entirely to revoke an earlier will; or where it was doubtful whether an apparently duly executed document was intended to be testamentary. Consequently if the state of the testator's papers leads to the Will being "surrounded with confusion or uncertainty in law or in fact" costs will come out of the estate - see *Re Thompson (Deceased) (Costs)* [2003] NIFam 4 (Girvan J).

In *Kostic v Chaplin* Henderson J at paragraph [9] considered that the touch stone for the application of this exception was to ask whether the testator's own conduct led to his will being "surrounded with confusion or uncertainty in law or fact" or alternatively to ask "Was the testator in any way responsible for the litigation?" Applying this test

he considered that this exception was not limited to cases in which the state of the deceased's papers had given rise to the litigation but extended to cases in which the conduct of the testator gave rise to concerns about his testamentary capacity. In support of this assertion he relied on *Davies v Gregory* (1873) LR 3 P& D 28 in which Sir James Hannen said that costs must be paid out of the estate where "the testator, by his own conduct and habits and mode of life has given the opponents of the will reasonable ground for questioning his testamentary capacity."

In *Re Cutliffe's Estate* [1959] P 6 Hodson LJ who gave the leading judgment rejected the submission that the testator had himself been responsible for the litigation by making various confusing and inconsistent statements about his testamentary intentions and said the first exception in *Spiers* should not extend to a case where the testator has by his words misled other people or inspired false hopes that they would benefit after his death.

There is therefore some confusion and uncertainty in the jurisprudence concerning the breath of this first probate exception. For my own part I do not consider the first exception extends to cases involving a challenge to testamentary capacity. If I am wrong in this view, given that the trend of more recent authorities has been to encourage a very careful scrutiny of any case in which this exception is said to apply and to narrow rather than extend the circumstances in which it will be held to be engaged, I consider that cases challenging the testator's testamentary capacity would no longer be considered to come within this exception. That however does not mean that in appropriate cases the court may nonetheless order costs out of the estate as costs are always at the discretion of the court and in appropriate cases depending on all the facts the court may make such an order notwithstanding the fact the case does not come within the first probate exception.

This first probate exception also includes cases where the litigation has been caused by the conduct of the principal beneficiaries. Examples of such conduct include a case where a residuary beneficiary would not produce a Will until after administration had been obtained, though called upon to do so. The costs of the administrators in obtaining administration were allowed out of the estate – See *Smith v Smith* [1865] 4 Sw & Tr 3. Another example was where suspicion was raised as the beneficiaries had been active in the preparation of the Will - See *Goodacre v Smith* [1867] LR 3 P& D 23.

(ii) The second probate exception is where the circumstances lead reasonably to an investigation of the matter. In such cases costs will be borne by those who have incurred them rather than being paid from the estate.

The trial Judge will make a merits based assessment based on all the evidence whether there were circumstances of doubt and suspicion which lead reasonably to an investigation of the matter. If so satisfied then usually there is no order as to costs. However, even when circumstances justify an investigation there may come a time when that investigation is no longer justified and costs incurred after that date may be ordered to follow the event in the usual way. This idea of "phased costs" found favour in *Kostic v Chaplin.*

(d) The two probate exceptions are neither "exhaustive nor rigidly prescriptive." They are guidelines and not straightjackets, and their application will depend on the facts of the particular case. They do not fetter the discretion of the court and in its discretion the court can take into account other circumstances. These include the following non exhaustive list of factors:

(i) **Whether the party has succeeded in part of his case**.

The power of the court to order costs where there are a number of claims, some of which are not successful is very flexible. As a general rule failure to establish an allegation of undue influence or fraud will be followed by condemnation in costs and generally the person unsuccessfully making such a claim will be ordered to pay not only the costs of that claim but the costs of the whole action. The authorities, however, are myriad and do not all speak with one voice in this regard. For example, in *Carapeto v Good* [2002] WTLR 1305 the court rejected the charge of undue influence but accepted there was a case for an investigation on knowledge and approval. It ordered the defendants to pay half of the successful propounder of the Will's costs

(ii) **Whether any Calderbank offers have been made.**

Even if an investigation is justified there remains a public interest in encouraging sensible settlements and therefore if a party makes a reasonable offer which the court determines the other party should have accepted the court may condemn that party in costs or reduce the percentage of the costs payable – see *Perrins v Holland* [2010] EWCA Civ 1398.

(iii) **Whether *Larke v Nugus* [2000] WTLR 1033 letters have been sent and whether these have been properly answered**.

In *Larke v Nugus* the court took into account the England and Wales Law Society guidance on disputed wills which stated:

> "Where there is a serious dispute as to the validity of a will, beyond the mere entering of a caveat and the solicitor's knowledge makes them a material witness, then the solicitor should make available a statement of their evidence regarding the execution of the will and the circumstances surrounding it to anyone concerned in the proving or challenging of that will…"

The court declined to make an award of costs against the parties in that probate action, who had unsuccessfully challenged the will, because a solicitor executor had failed to follow that advice. In the leading judgment it was stated, "where there is litigation about a will, every effort should be made by the executors to avoid costly litigation if that can be avoided and when there are circumstances of suspicion attending the execution and making of a will, one of the measures which can be taken is to give full and frank disclosure to those who might have an interest in attacking the will as to how it came to be made."

A number of consequences follow from Larke v Nugus. Firstly, a disappointed beneficiary should not rush headlong into litigation without first ascertaining all the relevant circumstances and obtaining key documents such as the deceased's medical notes and records. Failure by a person seeking to challenge a Will to send a pre-action Larke v Nugus letter to the solicitor who prepared the will and or to make a request for key documents from the executor of the will may have adverse consequences in respect of costs for that person.

Secondly, a refusal by the solicitor preparing the will and or the executor/personal representatives to provide a full response to a Larke v Nugus letter and/or to make disclosure of key documents may have a cost implication for the estate and/or the principal beneficiary and or the solicitor – see *Watton and Watton v Crawford* [2016] NICh 14 (Horner J).

Thirdly, failure by a solicitor to provide a prompt reply and relevant evidence to facilitate early settlement may expose the solicitor to an action by beneficiaries of an estate which has been substantially

reduced by the costs of the probate action, to recover costs of litigation against the solicitor due to his failure to disclose the relevant information at an early stage. In determining the liability of a solicitor in such an action a number of points arise for consideration. Firstly, a *Larke v Nugus* request only applies to a solicitor who prepared a will and where there is a "serious dispute as to the validity of a will beyond the mere entering of a caveat." This phrase has not been defined and therefore a solicitor could possibly defend on the basis that the request was a mere fishing exercise. Secondly, there is a divergence of opinion as to whether *Larke v Nugus* principles apply where the will preparer is not named as executor. In a case where the solicitor is not a named executor he may seek to defend any action on the basis that he could not hand over the information as this would be in breach of his duties of confidentiality and legal advice privilege. As only the executor could have provided this information the request should have been made to the executor and a failure by the solicitor to provide the information does not amount to negligence or a breach of his duty to the beneficiaries. This highlights the importance of directing a request for information and key documents to the correct persons and plaintiffs should ensure that appropriate enquiries are directed to the executors who have the authority to waive privilege. It also highlights that in all cases the court may not make a costs order where the request for information is not answered on the basis that the request was a mere fishing expedition.

(iv) **Costs may be ordered to be assessed on either the standard basis or the indemnity basis.**

The usual order is for assessment on the standard basis but assessment on the indemnity basis may be ordered where the facts of the case or conduct of the parties takes the case away from the norm – see *Craven v Giambrone* [2013] NIQB 61.

Submissions of the Parties

[4] The plaintiff seeks no order as to costs on the basis that:

(a) She issued a Larke v Nugus letter on 7 July 2015. This was not responded to until 15 December 2015 by which time she had already issued proceedings.

(b) The court found that the charge of forgery was a "line ball" decision.

(c) The defendant's solicitors failed to follow the "Golden Rule" when drafting the Will.

(d) The defendant's legal representatives failed to treat her with respect or to engage in negotiations leaving her with no alternative but to proceed with the case.

[5] The defendant seeks an order for costs against the plaintiff on the indemnity basis on the grounds:

(a) The plaintiff was unsuccessful in establishing any of the claims and in pursuit of same was unreasonable in light of:

(i) The fact that there were two medical experts who stated the deceased had capacity and notwithstanding the court's criticism of the solicitor, the court was satisfied that the deceased had capacity.

(ii) The court found that there was not a scintilla of evidence establishing undue influence.

(iii) The expert evidence regarding forgery was inconclusive.

(b) The potential gain to the plaintiff, if successful, was nominal, namely £100 and therefore she was not justified in issuing proceeding.

(c) The defendant denies that he refused to engage with the plaintiff and submits that the plaintiff never made any attempt to resolve the case and there is no evidence of her seeking to do so.

(d) In respect of the Larke v Nugus letter the defence submit that any reply to it would not have stopped the plaintiff pursuing litigation in any event.

Consideration

[6] The court dismissed the plaintiff's claim in its entirety. In all the circumstances of this case I consider it was reasonable for the plaintiff to pursue the challenge in respect of the deceased's capacity. Doubts and suspicions around the deceased's capacity had arisen due to the plaintiff's own observation of the testator and due to the contents of medical notes and records and the fact the deceased was in receipt of domiciliary care and latterly had been diagnosed with dementia. The plaintiff's concerns were exacerbated by the solicitor's conduct and in particular his failure to make any proper and/or adequate enquiries regarding capacity when he was taking instructions for the Will, which was a second Will. In the course of the substantive judgment I made a number of criticisms of the solicitor, particularly his failure to properly assess the deceased's capacity when he took instructions for the Will. As a result I was unable to place any weight upon his evidence in determining the question whether the deceased had capacity. Although there was medical evidence before the court which indicated the deceased had testamentary capacity I consider this did not remove all doubts about capacity as capacity is not just a

medical question but rather involves the court considering other evidence including the evidence of the drafting solicitor and lay witnesses. Frequently such evidence can trump the medical evidence as the evidence of an experienced solicitor or a lay witness can be relied upon by a court, even in the face of contrary medical evidence, to make a finding that the deceased did have capacity to make a Will. Accordingly, I consider the plaintiff was entitled to issue proceedings to have these matters investigated.

[7] In respect of the claim that the Will was forged I held that it had not been proved to the requisite standard that the Will was forged. I did find, however that this was a "line ball" decision. The expert witness, Mr Craythorne, outlined a number of matters which raised suspicion that the Will was a forgery and after careful scrutiny of all the evidence I rejected the claim on the basis of a "line ball" finding. In light of the suspicion and doubt raised in the expert's report I consider that it was reasonable for the plaintiff to pursue the allegation of forgery. I note that the financial gain to the plaintiff if she had successfully challenged the Will would have been a nominal sum of £100. Although this is a small sum the plaintiff was contesting an issue of principle namely forgery. I consider that she was entitled to have a hearing on such an important matter particularly in circumstances where no offer was made to settle the case.

[8] In respect of undue influence I held that there was not a scintilla of evidence to support this plea. Nonetheless, I note that this claim played only a minor part in the proceedings. It involved limited questioning and did not necessitate the calling of any additional witnesses.

[9] Despite the fact there were circumstances giving rise to doubts and suspicions about the validity of the Will the plaintiff must establish that she was not only entitled to issue proceedings but was thereafter entitled to proceed with all these claims to trial.

[10] The plaintiff instructed solicitors on 4 December 2014 and on 7 July 2015 sent a *Larke v Nugus* letter. This remained unanswered. No holding letters or intervening responses were provided by the defendant indicating that the *Larke v Nugus* letter would be responded to. Accordingly, the plaintiff issued proceedings on 6 October 2015 and issued her Statement of Claim on 9 November 2015. It was not until 15 December 2015 that the defendant provided a response to the *Larke v Nugus* letter. Having regard to that response I consider that it was not a satisfactory response and did not rule out the need for further investigation in respect of a number of matters. I consider that the *Larke v Nugus* letter should have been answered before proceedings were issued and accordingly I find that the plaintiff was entitled to issue proceedings. Thereafter, the response provided was inadequate and therefore I consider the plaintiff was entitled to proceed to trial.

[11] During the course of proceedings no offer was made to settle the case by way of Calderbank letter and no negotiations took place between the parties. In these

circumstances I consider that the plaintiff was entitled to proceed to trial for the claims in respect of capacity and forgery to be fully investigated.

[12] In respect of undue influence the position is different. There was no evidence to support this claim. Normally failure to establish undue influence will lead to the unsuccessful party being ordered to pay the costs of the entire action even though claims in respect of capacity and/or forgery are justified. In the present case, I consider that the costs incurred in respect of the undue influence claim would be nominal as this claim did not necessitate the calling of any additional witnesses and did not take up much court time. I do not therefore consider it appropriate to condemn the plaintiff in the costs of the entire action because her plea of undue influence was unsuccessful.

[13] In the present case the plaintiff seeks no order as to costs. In light of the need for investigation into the issues of capacity and forgery and notwithstanding the failure to establish undue influence the court will accede to this request and accordingly I make no order as to costs.