Neutral Citation Number: [2024] EWHC 979 (Ch)

Case No: PT-2021-000730

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CHANCERY DIVISION)

IN THE ESTATE OF DR JACK LAWRENCE LEONARD, DECEASED (PROBATE)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/04/2024

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

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Between :

(1) JONATHAN HENRY LEONARD
(2) ANDREW GORDON LEONARD
(3) SARA ELIZABETH LEONARD
(4) MEGAN JANE LEONARD

Claimants

- and -

(1) MARGARET ROSE LEONARD
(by her litigation friend Sharon Thompsett)
(2) ZEDRA TRUST COMPANY (UK) LIMITED
(3) MARK LESLIE SMITH
(4) ELIZABETH LESLIE
(5) CHARLOTTE DENISON
(6) MICHAEL TURNER
(7) MELISSA WARD

Defendants

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Ms Constance McDonnell KC and Mr George Vare (instructed by **Birketts LLP**) for the **Claimants**
Mr Thomas Dumont KC and Mr Edward Hicks (instructed by **Ashtons Legal LLP**) for the **Defendants**

Hearing date: 15 April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 April, 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Joanna Smith:

Introduction

1. Further to handing down my judgment following the trial in this matter - [2024] EWHC 321 (Ch) ("**the Main Judgment**") - I must now deal with a dispute between the parties over costs. Although I was intending to give an *ex tempore* judgment at the hearing, this ultimately proved impossible owing to the number of new authorities referred to by the parties during the hearing together with their confirmation, at my request, that they would carry out a search after the hearing for further, potentially relevant authority.

2. The need for additional authority arose in connection with argument over the applicability of common law exceptions (in probate cases only) to the general rule under CPR 44.2 that costs should follow the event. I am most grateful to the parties for their efforts in identifying a substantial number of additional recent authorities (primarily within the last 20 years) in which the court has been invited to apply the probate exceptions to the general rule on costs. I am also grateful for their short notes provided after the hearing which were designed to assist me in navigating these authorities.

3. In this judgment I shall use the same definitions as were used in the Main Judgment and I shall assume familiarity with that judgment.

4. In summary, in the Main Judgment, I found in favour of the Claimants' case. I pronounced in favour of the 2007 Will and against the force and validity of the 2015 Will, finding that Jack lacked testamentary capacity in respect of the 2015 Will and further that the Defendants had not discharged the burden of establishing that he knew and approved of the 2015 Will. I shall refer to this for present purposes as "**the Probate Dispute**".

5. In an Order made on 21 February 2024, I also dismissed a claim brought by Sara, in her capacity as a co-executor of the 2007 Will, to set aside two gifts made by Jack to Margaret and Charlotte respectively in 2013 and 2014 ("**the Gifts Dispute**"). Following a joint statement made by the experts on 29 October 2023 in which the experts agreed that Jack "probably had the requisite mental capacity" to make both gifts, the Defendants served a Notice to Admit Facts dated 2 November 2023 and Sara conceded that she could no longer pursue the Gifts Dispute. Save that the court heard evidence in relation to the making of the gifts and that they formed part of the factual chronology to which my attention was drawn by both parties in connection with the determination of the Probate Dispute, the Gifts Dispute did not feature at the trial.

6. The parties are agreed that the Defendants[1] should recover their costs on a standard basis in respect of the Gifts Dispute (and I shall make an order to that effect). Ms McDonnell has also confirmed that Sara will not seek an indemnity out of the estate in respect of costs and expenses incurred by her in pursuing the Gifts Dispute and the order shall record this confirmation. There the agreement between the parties as to the consequences that should flow from the Main Judgment ends.

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[1] All references to "the Defendants" in this judgment are to the First and Third to Seventh Defendants, save where the contrary appears.

7. The Claimants contend that they are the successful parties in connection with the Probate Dispute and that, in accordance with the normal rule, the Defendants should pay their costs. They seek to take advantage of a Part 36 Offer made on 13 September 2021 ("**the Part 36 Offer**") submitting that, from after 4 October 2021 (i.e. 21 days after the Part 36 Offer was made), the consequences set out in CPR 36.17(4) must apply, namely indemnity costs, an enhanced rate of interest on those costs, and a further amount calculated under CPR 36.17(4)(d)(ii). Prior to that date, the Claimants seek an order for costs on the standard basis.

8. The Defendants accept that the Claimants have beaten the Part 36 Offer, but they contend that it would be unjust for the court to order that the consequences of CPR 36.17 should apply in this case, whether in part or at all, because they say that the Part 36 Offer was not a genuine attempt at settlement. If they are right about this, then they make additional arguments as to the approach that the court should take to costs pursuant to CPR 44.2, including in particular, that the court should have regard to common law exceptions specific to probate actions that vary the general rule that costs should follow the event. They make similar arguments in connection with the period prior to 4 October 2021, in any event.

9. As for the approach to be taken to the apportionment of costs between the Probate Dispute and the Gift Dispute, the Claimants seek an issue-based order pursuant to CPR 44.2(6)(f), while the Defendants seek a percentage-based order under CPR 44.2(6)(a).

The Legal Framework

CPR 44.2 and the common law exceptions applicable to probate proceedings

10. It is common ground that the framework governing the exercise of the court's discretion is to be found in the CPR. The general rule (pursuant to CPR 44.2(2)(a)) is that the unsuccessful party will be ordered to pay the costs of the successful party, albeit that (pursuant to CPR 44.2(2)(b)) the court may make a different order.

11. Pursuant to CPR 44.2(4) and 44.2(5):

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice

> Direction - Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim".

12. There is no question that the general rule applies to contentious probate cases and the question is always whether there is sufficient reason for departing from the general rule. However, it is common ground that, in probate cases only, it is also necessary to consider whether the court should be guided in the exercise of its discretion by two long-established common law exceptions which have survived the introduction of the CPR. These exceptions were summarised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch) and *Perrins v Holland* [2009] EWHC 2556 (Ch).

13. The exceptions "allow good cause to be shewn why costs should not follow the event"[2] and require the court to ask[3]:

    i) whether the litigation was caused by the testator or a beneficiary. If so, the court may order the unsuccessful party's costs to be ordered out of the estate;

    ii) whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter. If so, the court may make no order as to costs.

14. I shall return to the specific circumstances in which the exceptions apply later in this judgment, but for present purposes I draw the following propositions (which I did not understand to be controversial) from the cases as to the rationale for, and general approach to be taken to, the exceptions:

    i) the exceptions as formulated were "designed to strike a balance between two principles of high public importance", the first being that "parties should not be tempted into fruitless litigation by the knowledge that their costs will be defrayed by others", and the other being that "doubtful wills should not pass easily into proof by reason of the cost of opposing them" (*Kostic* at [10]);

    ii) since the advent of the CPR, the exercise of the Court's discretion is governed by the CPR, but "the considerations of policy and fairness which underlie the two exceptions remain as valid today as they were before the introduction of the CPR" (*Kostic* at [4]);

    iii) the exceptions are intended as "guidelines, not straitjackets, and their application will depend on the facts of the particular case" (*Kostic* at [6]);

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[2] *Spiers v English* [1907] P 122, at 123.

[3] See the quotation from *Mitchell v Gard* (1863) 3 Sw.&Tr. 275 cited in *Kostic v Chaplin* at [8] and the quotation from *Spiers v English* [1907] P 122, 123 cited in *Perrins v Holland* at [7].

iv) a positive case premised on one or both of the exceptions must be made out before the court will depart from the general rule (see *Kostic* at [6] and *Perrins v Holland* at [3]). It is necessary to make out a "very strong case on [the] facts" if an unsuccessful litigant is to get his or her costs out of the estate (under the first exception) (see *Re Plant Deceased* [1926] P 139 per Scrutton LJ at 152; cited in *Kostic* at [17]);

v) in respect of the first exception, "the trend of more recent authorities has been to encourage a careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged" (*Kostic* at [21]). This narrowing of the scope of the first exception (reiterated by Henderson LJ in *Royal National Institution for Deaf People v Turner* [2017] EWCA Civ 385 at [17]) is a function of the fact that, firstly, nowadays less importance is attached to the independent powers of the court to investigate the circumstances in which a will was executed than was the case in Victorian times; and secondly, the courts are increasingly alert to the dangers of encouraging litigation and discouraging the settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party (*Kostic* at [21]);

vi) however, the same narrowing of scope does not apply to the second exception because "there is …still a public interest that where reasonable suspicions are raised about the validity of wills they should be proved in solemn form" (see *Perrins v Holland* at [17]);

vii) even where one or both of the probate exceptions applies, the point may be reached where the litigation becomes ordinary hostile litigation, from which point the normal rule entitling the successful party to an order for costs comes into effect (see *Walters v Smee* [2008] EWHC 2902 (Ch) per HHJ Purle QC at [8]).

CPR Part 36

15. CPR 36.17 is concerned with the costs consequences following judgment where there is a valid Part 36 Offer. The rule applies where, upon judgment being entered "judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer" (CPR 36.17(1)(b)). It is common ground in this case that the judgment is "at least as advantageous" to the Claimants as the Part 36 Offer such that they will be entitled to the costs consequences set out in CPR 36.17(4) subject only to the Defendants satisfying the court that it would be "unjust" to make such an order.

16. In considering whether it would be unjust to make an order under CPR 36.17(4), the court must take into account:

> "(5)…all the circumstances of the case including –
>
> (a) the terms of any Part 36 offer;

> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings".

17. The Court's jurisdiction under CPR 36.17 was reviewed in detail by Mellor J in *Lamport v Jones* [2023] EWHC 667 (Ch) at [78]-[82], where he set out relevant extracts from various authorities including *Mcphilemy v The Times Newspapers No.2* [2001] EWCA Civ 933 at [28]; *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) at [13]; *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365 at [38] and *Re Lehman Brothers International* [2022] EWHC 3366 (Ch) at [46]-[49].

18. I need not set out Mellor J's detailed analysis in full in this judgment, albeit I have it firmly in mind. Of particular relevance to the arguments before this Court are the following propositions which can be extracted from the authorities to which he referred:

i) the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the unsuccessful party should pay the costs would be unjust (*Smith* at [13(a)]);

ii) in exercising its discretion the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done (*Webb* at [38]);

iii) the burden on a defendant who has failed to beat a claimant's Part 36 offer to show injustice is "a formidable obstacle" to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined" (*Smith* at [13(d)]);

iv) the discretion under CPR 36.17 is more circumscribed than the broad discretion under CPR part 44, but in exercising it, the Court must have regard to the objective of the provisions of CPR 36.17(4), including its "carrot and stick" function (*Re Lehman Brothers* at [49]).

19. The Defendants rely specifically (and exclusively) on CPR 36.17(5)(e) in advancing the argument that it would be unjust to apply the consequences set out in CPR 36.17(4) to an award of costs in connection with the Probate Dispute.

20. It is common ground that the two probate exceptions to which I have referred cannot override the effects of CPR 36.17(4). Furthermore, Mr Dumont did not seek to persuade me that the exceptions could be used to support an argument to the effect that the enhanced consequences of CPR 36.17(4) are unjust. In the circumstances, I do not propose to consider them further in that context.

21. As an aside, however, I observe that under CPR 36.17(5) the court is required to take account of "all the circumstances of the case" and it is possible to envisage circumstances in which the facts which are said to engage (at least) the second exception might also be pertinent to the question of injustice under CPR 36.17(5) – not by way of an exception, but merely because they are relevant to the different enquiry under CPR 36.17. However the Defendants have not sought to advance such a case here and so I need address that possibility no further.

22. I was shown various authorities on the question of when a settlement offer is a "genuine" offer to settle and Mr Dumont reminded me that CPR 36.17(5)(e) was added to CPR 36.17(5) with effect from April 2015 to deal with the problem of claimants making very high settlement offers with a view to placing the defendant at risk of indemnity costs but with no genuine intention of trying to achieve a settlement.

23. From the authorities to which I was referred, I draw the following propositions, which did not appear to be controversial:

i) the concept of settlement must involve "an element of give and take". It cannot require total capitulation by the other party, but must contain some genuine element of concession to which a significant value can be attached in the context of the litigation. Thus a settlement offer "which was all take and no give would…be a contradiction in terms" (see *AB v CD* [2011] EWHC 602 (Ch) per Henderson J at [22]). Although dating from prior to the introduction of CPR 36.17(5)(e), this "elegant explanation of what is meant by an offer" has subsequently been endorsed in *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC) per Edwards-Stuart J at [28];

ii) that a Part 36 Offer may be tactical is not the touchstone. All Part 36 offers are tactical in the sense that they are designed to take advantage of the incentives provided by Part 36 (see *Wharton v Bancroft* [2012] EWHC 91 (Ch) per Norris J at [22]);

iii) that the policy of the Part 36 regime is plainly to encourage the settlement of disputes without recourse to litigation (see *Shah v Shah* [2021] Costs LR 881 per Collins Rice J at [7]) provides an alternative perspective on the question of whether a settlement offer is genuine; the question being whether it has a "meaningful impact upon the chances of avoiding a trial or further consuming curial resources towards trial" (*Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd* [2023] Costs LR 989 per Stephen Houseman KC, sitting as a judge of the High Court, at [17]);

iv) that a Part 36 offer is made at a stage when there is a substantial saving to be made in costs for both parties in avoiding a trial may be a relevant factor (*Shah v Shah* at [55] and [58]);

v) the burden of proof or persuasion under CPR 36.17(5)(e) rests with the offeree. The cases are consistent in confirming that the test of injustice sets a high bar or "formidable obstacle" to an offeree seeking to suggest that an offer is not genuine (*Yieldpoint* at [15]);

vi) the mere fact that a claimant makes a very high offer, i.e. an offer involving a small or negligible discount against the gross value of the claim, is not determinative. A high offer may be vindicated where the claim itself is obviously very strong and could be characterised as such at the time the offer was made. Thus in *Rawbank SA v Travelex Banknotes Ltd* [2020] Costs LR 781, Zacaroli J held that a 99.7% offer was a genuine offer of settlement, because from the claimant's perspective, "there was no realistic possibility of failure" (at [29]-[30]). As the Judge pointed out, "[t]he critical question is not a mathematical one – the proportion of the discount – but whether it is possible to infer from the size of the discount that there is no genuine attempt to settle the proceedings". A similar approach was adopted in *Omya UK Ltd v Andrews Excavations Ltd* [2022] Costs LR 1295 at [19]-[20], where the court found a settlement offer involving a discount of 1.15% to be genuine, noting that it was relevant that the defence advanced "lacked credibility";

vii) ultimately, the decided cases in this area establish that every case will turn on its own facts and that the trial judge must adopt a "broad brush" evaluative approach, informed by her own assessment as to the strength of the claim at the time of the offer (*Yieldpoint* at [18]). The approach is necessarily objective and needs to be conducted "free from the hindsight gifted by a trial and its known outcome, so far as possible" (*Yieldpoint* at [21]).

Costs of the Probate Dispute prior to 4 October 2021

24. My starting point is that, as the Claimants submit, they are the successful parties and that the general rule is that costs will follow the event. The Defendants accept this analysis but contend that both common law exceptions apply such that a fair exercise of the Court's discretion in this case would involve it making a different order. In particular, the Defendants submit that I should order that:

i) (applying the first exception) the costs of the Probate Dispute should come out of the Estate until around the time of a mediation which took place between the parties on 10 March 2021;

ii) (applying the second exception) thereafter, and on the basis that it was reasonable to investigate the validity of the 2015 Will, there should be no order as to costs until the exchange of the formal and updated expert reports in the summer of 2023;

iii) thereafter the Claimants should have their costs of the Probate Dispute on the standard basis.

25. I begin therefore, by setting to one side for these purposes the Part 36 Offer and focussing on whether, as a matter of principle, the Defendants are right to say that the probate exceptions apply.

26. I did not understand there to be any real disagreement between the parties as to the scope of the two exceptions. The parties both referred me to *Kostic* as the most convenient case in which to find a detailed analysis of the exceptions.

27. Where the question is whether the testator himself has been the cause of the litigation (as in this case), there is no requirement under the first exception to show moral fault or culpability on his part, but rather "the touchstone should be whether it was the testator's own conduct which has led to his will 'being surrounded with confusion or uncertainty in law or fact'" (*Kostic* at [9]). This may arise, for example, in circumstances where a testator has left his testamentary papers in a state of confusion, where the will cannot be found, or where the testator has used language which is difficult to understand and where he or his solicitor has created the difficulty (*Kostic* at [9] and [18]). However, the first exception does 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 (*Re Cutcliffe's Estate* [1959] P. 6 and *Kostic* at [18]). Notwithstanding the trend towards narrowing the circumstances in which the first exception may apply, it is common ground that it may arise in a case involving a challenge to testamentary capacity (*Kostic* at [20]-[21]). The parties' search of the authorities did uncover the Northern Ireland case of *Re Gilhooly* [2021] NiCh 21 which at [3(c)(i)] held the opposite, but I am of no doubt that the parties are correct that those paragraphs in *Kostic* represent the law in England and Wales.

28. A relevant enquiry in the context of the first exception will be the state of knowledge of the unsuccessful proponents of the will (*Kostic* at [13]-[15]). Thus where, as in *Twist v Tye* [1902] P 92, the unsuccessful proponents of a will "had had ample opportunity of forming an opinion as to her testamentary capacity", the court held that the case did not fall within the first exception. Although the proponents had not acted improperly "they had taken a view about the testatrix which turned out to be mistaken" (*Kostic* at [15]).

29. The second exception arises where, even though the testator has not been to blame for what has occurred, "if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question…the execution of the will or the capacity of the testator…the losing party may properly be relieved from the costs of his successful opponent" (*Kostic* at [8] citing *Mitchell v Gard*). The reasonableness of the conduct of the unsuccessful proponent of the will is important (see *Goodwin v Avison* [2021] EWHC 2356 (Ch) at [39]). Thus, where the unsuccessful proponents of a will have "taken a view and acted upon it, in circumstances where they stood to benefit if the will was upheld", there is nothing to warrant a departure from the general rule that costs should follow the event (*Kostic* at [15] citing *Twist v Tye*). The second exception is not an all-or-nothing principle – "[i]t may be that an investigation was justified at the outset but that as the case progressed the issues became clearer and, from some point later on, the normal rule that costs follow the event should apply" (*Boult v Rees* [2023] EWHC 972 (Ch) per Zacaroli J at [2]).

30. There was some debate between the parties both at the hearing and in their subsequent notes, as to the extent to which the application of the exceptions was "unusual" as the Claimants submit, or "a matter of routine" as the Defendants submit. But I consider this to be a somewhat arid debate which is of no real practical assistance. The question for me is whether one or both of the exceptions applies on the facts of this

case. I am not persuaded by the Claimants' submissions that the second exception can never be engaged, save in very exceptional circumstances, in a case where a will has been held invalid on grounds of want of knowledge and approval or capacity. The research carried out by the parties has established that there are cases in which it has been applied when a will has been held to be invalid on other grounds and I can see no good reason for disapplying the exception to all cases involving a finding of invalidity on grounds of want of knowledge and approval or capacity. I bear in mind that, as I have already said, the second exception is not the subject of an accepted "narrowing" of scope.

31. Furthermore, I agree with the Defendants that there is no principled reason to draw a distinction between unsuccessful challengers of a will and unsuccessful proponents and I can detect no such reason in the cases[4]. In *Smith v Springford* [2007] EWHC 3446 (Ch) at [24], Norris J made it clear that "[w]hilst it is true that an Executor is not obliged to propound a will…it is nonetheless the case that an Executor is *prima facie* entitled to propound the will in which he is named as Executor".

32. If an analysis of the authorities identified by the parties after the hearing tells me anything, it is that every case must be considered on its own facts. For obvious reasons, therefore, many of those authorities are not referred to in this judgment.

33. *Kostic* involved a dispute over testamentary capacity, specifically in the context of the testator suffering from a serious and untreated mental illness which took the form of a delusional disorder. These delusions were found at trial to have affected the disposition of his estate in various testamentary documents, including two wills dating from 1988 and 1989 in which he had left his entire estate to the Conservative Party Association ("**the CPA**"). The sole beneficiary of the testator's estate under earlier, uncontested, wills was his only son. Henderson J held that the testator lacked testamentary capacity and pronounced against the 1989 Will, the 1988 Will and a 1984 Codicil.

34. Ms McDonnell took me to various passages in the main judgment ([2007] EWHC 2298 (Ch)) following the trial (including [222]) with a view to showing me that there was a connection between the provisions of the wills under challenge and the delusional disorder from which the testator was suffering. I did not understand Mr Dumont to disagree with her analysis.

35. At the consequentials hearing following judgment, Henderson J ordered that some of the costs of the CPA, the unsuccessful propounder of the 1988 and 1989 wills, should be paid out of the estate (pursuant to the first exception) on the basis that "in the highly unusual circumstances" of the case, the testator's conduct was properly to be regarded as the primary cause of the issue between the CPA and the testator's son over whether he had testamentary capacity ([23]).

36. The judge observed that, while there was no basis to blame the testator in any moral sense, nevertheless "his delusions were so far-reaching, and manifested at times in such strange behaviour, and such bizarre correspondence, that a challenge to his testamentary capacity after his death was all but inevitable". Absent medical evidence and in circumstances where the testator's behaviour was unimpaired in many every-

[4] Although, to my mind it would be perverse for an unsuccessful beneficiary of an invalid will to argue that he or she was the cause of the invalidity such that the first exception permits costs out of the estate.

day contexts, he held that the CPA was accordingly "fully justified in investigating the issue of [the testator's] testamentary capacity" down to the stage at which a realistic assessment of the merits of the claim could first be made (at [25]). This conclusion was justified by the lack of knowledge on the part of the CPA as to the testator's mental capacity during his lifetime and the absence of anything that would have put it on enquiry (at [26]-[27]).

37. The judge fixed the cut-off date for payment of the CPA's costs out of the estate at an early stage in the litigation (the date of a Consent Order for disclosure, expert evidence and listing of the case for trial) by which time the nature of the son's case and the evidence in support of it had been explained to the CPA and it had had an adequate opportunity to consider its position, to gather information and to decide whether or not to contest the proceedings (at [28]). From then he made no order as to costs (pursuant to the second exception) until the time of exchange of expert reports, expressing the view that the "investigative phase" of the case continued until that date (at [32]). Thereafter, he considered that the CPA had made a commercial decision (or "taken a stand") to fight the case such that the costs should follow the event from the exchange of expert reports onwards in the usual way (at [27] and [32]). As Briggs J said in *Re Lehman Brothers International (Europe) (in administration)* [2010] EWHC 3044 (Ch) at [10] this was the point at which "the battle lines had been drawn".

38. With reference to the decision in *Kostic*, the Defendants submit that Jack was the cause of the litigation in that the litigation arose from a dispute in connection with his capacity where the position was "far from clear cut". They say that once a challenge to the 2015 Will was made, they were fully justified in investigating the issue of Jack's testamentary capacity. They pray in aid (in their written skeleton) the following points:

i) that the 2015 Will was professionally prepared and that, other than Margaret, none of the other Defendants was involved in the process or had any first-hand knowledge;

ii) that none of the professionals in the form of Ms Wells, Ms Bultitude and Mr Mutsuddi expressed any concerns around Jack's capacity such that considerable weight could reasonably be attached to their evidence;

iii) that there was significant evidence from witnesses and on the contemporaneous documents that Jack was able to manage his day-to-day affairs, including up to the time of execution of the 2015 Will;

iv) that the medical evidence was far from conclusive and that the Defendants had the advantage of a favourable report from Dr Series. The Defendants point out that Jack's testamentary capacity was not assessed during his lifetime and that there was material indicating that his condition had returned "to baseline" following his admission to hospital in July 2015;

v) that it is clear that Jack knew what his estate comprised and was well aware of the claims on his bounty (limbs 2 and 3 of *Banks v Goodfellow*);

vi) Jack "would probably have understood the 'big picture'…this is after all, what he wanted" (Main Judgment at [455]).

39. To my mind, these points focus almost exclusively on the issue of whether there were reasonable grounds for the Defendants to investigate the issue of capacity – in other words the second exception. Although they address, in part, the knowledge and means of knowledge of the Defendants (a relevant consideration in the context of the first exception), they do not address the primary question of whether Jack was the cause of the litigation.

40. On his feet, Mr Dumont submitted that Jack had wanted to leave his estate to Margaret, that he had been dissuaded of this by Ms Wells (amongst other things owing to the potential for litigation) and that thereafter he had agreed to the trust structure proposed by Ms Wells. Mr Dumont submitted that at this stage (in about November 2014) Jack knew what he wanted to do and had capacity to do it, but that over the course of approximately a year's worth of delay in finalising the 2015 Will, he lost that capacity. I understood this submission to be made in support of the application of the first exception.

41. In my judgment, this is not a case in which the first exception is engaged.

42. As I have already said, none of the points on which the Defendants rely in their skeleton argument supports a finding that Jack's conduct caused the litigation, much less do they establish "a very strong case on the facts".

43. I consider that the facts of *Kostic* are quite plainly distinguishable. As Ms McDonnell submitted, that case concerned "highly unusual circumstances" making a challenge to capacity "all but inevitable". That could not be said to be the case here where, very far from showing behaviour which made a challenge inevitable, the form of Jack's dementia meant that he experienced periods of confusion together with periods of improved function, including having "better days" and "worse days".

44. Is the fact that there was a delay in finalising the 2015 Will enough to find that Jack was the cause of the litigation? To my mind, it is not. The fact of the delay cannot be seen in isolation but must be considered against the background of Margaret's involvement throughout that period.

45. As I have found in the Main Judgment, the preparation of new wills was a joint endeavour for Jack and Margaret. They attended meetings with Ms Wells together. Margaret and her family were beneficiaries of Jack's will and there can be little doubt that she was intimately involved in discussing its provisions with Jack. Indeed, the evidence at trial (Main Judgment at [303]) established that Jack would only agree to the trust structures proposed by Ms Wells if Margaret "was happy that she was going to be OK following his death".

46. Not only was Margaret privy to the making of the 2015 Will, but it is reasonable to infer that she was privy to information about his medical condition following his admission to hospital in July 2015. She had described Jack as being very confused and unsteady on his feet shortly prior to his admission. She had seen the error made by Jack in his 2 July 2015 document. She was present at the 1 August 2015 lunch with Mr Marks and Dr Zach and the 24 August 2015 lunch with Gordon and Tessa Roberts together with the meetings with Robert Behrens in Edinburgh in that same month, about which I have made findings as to the outward manifestations of Jack's condition. For the first time, Margaret took over Jack's correspondence with Ms

Wells on 14 August 2015, albeit without telling Ms Wells about Jack's admission to hospital. Margaret knew, even if she chose to put it down to "old age", that Jack was suffering at times from confusion and memory difficulties.

47. Accordingly, Margaret was in a position to take a view as to Jack's mental capacity, even if that view was mistaken. Furthermore, her children (who saw Jack regularly) and her grandchildren (a number of whom also saw Jack from time to time, and one of whom was present in the house when Jack signed the 2015 Will, together with her husband who witnessed the execution) were in a position to take a view as to his cognitive abilities and gave evidence as to his condition at trial in support of a will from which they stood to benefit. To adapt the words of Henderson LJ in *Royal National Institution for the Deaf People v Turner* at [16], they cannot realistically insulate themselves from Margaret's involvement.

48. In the circumstances, I reject the suggestion that it is reasonable to regard Jack as having been the cause of the litigation, or that it would be a fair or reasonable exercise of my discretion to apply the first exception. Upon close scrutiny there is no basis to broaden the scope of the first exception to cover the facts of this case. In my judgment it must be strictly applied. I bear in mind the dangers of encouraging litigation and discouraging settlement of doubtful claims if costs are allowed out of the estate to the unsuccessful party.

49. In passing I should add that Ms McDonnell also submitted that a significant cause of the litigation was not Jack's condition but rather the conduct of Ms Wells, a submission with which I have considerable sympathy in light of the findings in the Main Judgment, which I need not repeat here. At the hearing, Mr Dumont did not respond to this submission, whether to oppose it or (conversely) to suggest that the conduct of a solicitor, or other professional providing advice and assistance in connection with a will, is <u>also</u> the conduct of the testator (see, for example, *Kostic* at [18]) such that it might be capable of being relevant in the context of the first exception. In their note provided following the hearing, the Defendants acknowledged that "failings of the draftsman…can be material to the first exception", but did not make any positive submissions on the point. Even had they done so, the Will File was available to all parties from an early stage and the fact that Ms Wells had not thought to apply the "Golden Rule", notwithstanding Jack's age, was clear from a reading of the file. In the absence of any substantive submissions whatever on this point from the Defendants, I confine myself purely to deciding against the first exception for the reasons I have given. However, I can see no reason to suppose that different submissions concerning the conduct of Ms Wells would have produced a different result.

50. As for the second exception, as explained above, this is not a case in which the proponents of the 2015 Will in the form of the Defendants had no means of assessing Jack's mental condition during his lifetime. Unlike *Kostic*, this is not a case in which there was "nothing" which might have put the Defendants "on enquiry".

51. However, the Defendants are right that this was a will which had been prepared by a professional; that there was no evidence in the will file that Ms Wells had ever expressed any clear concern that Jack lacked testamentary capacity and that there was a considerable amount of contemporaneous documentary evidence which would have been available to the Defendants to show that Jack was able to manage his day to day

affairs[5]. The medical records from shortly prior to his death (once obtained) established a degree of cognitive decline but provided no clear diagnosis.

52. Accordingly, I accept, on balance, that the circumstances were such as to justify a period of investigation on the part of the Defendants once alerted to the possibility of a claim. The fact that Margaret (an executor of the 2015 Will) lost capacity to litigate in about February 2020 appears to me to be of significance in this context when one considers the chronology.

53. The Irwin Mitchell Will file appears to have been available to both parties in 2019 (in the context of a rather different dispute about the execution of the 2015 Will). Margaret prepared a witness statement at around this time but it has never been disclosed and I cannot infer that it dealt in detail with the issue of Jack's capacity. As I have said, Margaret lost capacity in about February 2020. Jack's medical records were obtained in May 2020 but were inconclusive.

54. On 10 July 2020, the Claimants sent a very lengthy and detailed letter of claim to the Defendants, enclosing Sara's statement of 18 June 2020 and statements from Mr Marks and Dr Zach. It also contained a detailed analysis of the Will File. Between August and December 2020, the experts each produced a first report and Dr Warner produced a supplementary report. Draft Particulars of Claim were sent to the Defendants in February 2021 and they obtained an Addendum report from Dr Series in early March 2021. On the 10 March 2021 the parties attended the mediation, from which I infer that both sides considered themselves to have enough information about the case to engage in meaningful settlement negotiations.

55. Thereafter, between April 2021 and July 2021, the parties exchanged Calderbank offers, with the Defendants sending a "final" Calderbank offer on 13 August 2021. On the same date, the Defendants rejected a request by the Claimants for disclosure of the Barclays documents. The Claim Form and Particulars of Claim were served in August 2021, the Defence and Counterclaim in October 2021 and the Reply and Defence to Counterclaim in December 2021.

56. In my judgment, the second exception is engaged in the period up to and including the mediation. During this period, I am persuaded that the Defendants were reasonably to be regarded as undertaking an investigative phase following receipt of the letter of claim at a time when they could not take advantage of Margaret's detailed knowledge owing to her loss of capacity. Although her children and grandchildren had varying degrees of knowledge about Jack's condition, it is reasonable to take the view that they required time to consider whether they wished to take a stand on the validity of the 2015 Will. At this point, the Will File could have been reviewed specifically by reference to the detailed observations made by the Claimants' solicitors in their letter of claim together with a review of the evidence accompanying that letter and (later) the expert evidence from the Claimants (dated 20 August 2020). Acting reasonably, and sensibly, the Defendants obtained their own expert evidence on 30 October 2020. Further supplementary reports were exchanged between experts in December 2020 and March 2021.

[5] I am not convinced of any of the other points identified by the Defendants which appear to me to focus on the evidence that was available at trial, not whether it was reasonable to conduct an investigation at the outset of the litigation.

57. Accordingly, by the date of the mediation, I consider that the Defendants were plainly in a position to take a view as to the general nature and strength of the Claimants' case, a view which no doubt enabled them to make Calderbank offers following the mediation and to take the decision to make a "final" (detailed) Calderbank offer of August 2021, saying they were not willing to negotiate further. Far from continuing to wish to investigate the position, the Defendants decided that disclosure from Barclays was not necessary and opposed the Claimants' request for such disclosure.

58. In the circumstances of this case, I consider that the conduct of the Defendants after the mediation must be seen for what it is – the conduct of litigants in ordinary hostile litigation who were sufficiently informed that they were able to take a clear-eyed view on the merits. They had a favourable report and supplemental report from Dr Series and they took a stand on the basis of the views he had expressed in circumstances where they stood to benefit if the 2015 Will was upheld.

59. I reject the Defendants' case that "the investigation phase" of the case continued after that date. While it is true that full disclosure had not been made, the Defendants already had key documents to enable them to evaluate the merits of the claim, including the Will File, the medical records, statements from the Claimants and expert reports. They also had access to all of Jack's own documents. To suggest that they continued to "investigate" until the exchange of the third set of expert reports in the summer of 2023, just a few months before trial, is, to my mind, entirely unrealistic.

60. All things being equal, my decision as to the application of the second exception would lead to a finding that each side should bear its own costs up to and including the date of the mediation. However, pursuant to CPR 44.2(4) and (5), I must next go on to consider whether there are any additional factors which must be weighed in the balance against such a finding.

61. In my judgment, there are not. Although the Claimants have raised issues in respect of the Defendants' conduct later in the proceedings, none of those issues applies to their conduct in the period prior to the mediation and no admissible offers were made in that period. Accordingly, I will make an order that each party will bear its own costs up to and including the mediation.

62. Between the mediation and 4 October 2021 (the date on which the 21 day period for acceptance of the Part 36 Offer expired), the Defendants must pay the Claimants' costs on the standard basis. In circumstances where the exceptions do not apply, I understood that to be uncontroversial. The Defendants relied on various Calderbank offers in their skeleton from early 2021, describing them as "material", but not explaining how the court was to treat these offers in conjunction with their primary submission which appeared to acknowledge that once the exceptions were held not to apply, the Claimants were entitled to their costs on the standard basis.

63. In so far as the Defendants were intending to suggest that these offers should mitigate against the award of costs to the Claimants in the period prior to 4 October 2021, I reject such submission. The offers were not made as Part 36 offers and even the Defendants could put their case no higher in written submissions than that it was "far from clear" whether the outcome at trial had beaten these offers. Mr Dumont placed no reliance on them whatsoever in his oral submissions and I accept Ms McDonnell's

submission that they were in fact significantly more disadvantageous to the Claimants than the result they achieved at trial.

64. In light of the decision I have made below on the dispute over the Part 36 Offer, there is no need for me to consider further any of the other issues of conduct raised by the Claimants in relation to later periods in the litigation.

Costs of the Probate Dispute after 4 October 2021

65. The Part 36 Offer offered to settle the proceedings on the following terms:

i) The 2007 Will be admitted to Probate;

ii) The 2007 Will be varied so as to provide for an additional cash legacy of £2000 to each of Margaret, Mark, Liz, Charlotte, Michael and Melissa (a total of £12,000); and

iii) Neither Margaret nor Charlotte would be liable to repay to Jack's estate the lifetime gifts made to them in 2013 and 2014 respectively.

66. As I have already said, the Defendants' case that it would be unjust for the Part 36 Offer to carry the consequences set forth in CPR 36.17(4) is dependent solely upon the submission that it was not a genuine offer.

67. In support of this proposition, the Defendants submit that the Part 36 Offer was purely tactical – that it was a cynical attempt to take advantage of the Part 36 regime by offering a paltry sum of £12,000 to the Defendants (amounting to about 1.9% of the value of the Probate Dispute) and by offering to give up the claims in the Gifts Dispute which never had any prospect of success and should not have been brought.

68. The corollary of this submission, as Mr Dumont made clear, is that the claims made in the Gifts Dispute were tantamount to an abuse, that they were included in the claim without any evidence to support them and that they should not have been verified in the Particulars of Claim by a statement of truth. In short, in Mr Dumont's words, those claims were only ever intended as a make-weight in order that they could be used as a negotiating chip in a settlement.

69. This is a serious allegation to make and it is no doubt hoped that it will surmount the formidable obstacle of establishing injustice. It is not an allegation that should be made without very good reason. In my judgment there is no such very good reason in this case.

70. As the Claimants submit, the question of whether the Part 36 Offer was a genuine offer of settlement must be determined as at the time it was made. That the Gifts Dispute was subsequently abandoned and that adverse findings were made in the Main Judgment on the basis of the evidence that was then available to the Court is nothing to the point. At times, the Defendants appear to have forgotten the need to apply an objective approach free from the hindsight afforded by the outcome of the trial. By way of example, the Defendants sought to rely in their written submissions upon evidence of Jack's capacity in the form of a witness statement from Mr Rana Mutsuddi, but his witness statement was not provided until 13 June 2023 and cannot

possibly be relevant to the question of whether the Part 36 Offer was a genuine offer of settlement in September 2021.

71. A letter of claim outlining the details of the Gifts Dispute was sent to the Defendants on 1 July 2021. The letter records that the gifts were "queried by Heath Square Private Client in their letter to Co-Op Legal Services dated 10 March 2020". It also notes that the Claimants had the benefit of the first report of Dr Warner opining that "on the balance of probabilities, [Jack] did not have testamentary capacity **from February 2014** onwards" (**emphasis added**).

72. The letter of claim pointed out that the transfers to Charlotte (in February 2014) "sit squarely at a point of time at which Jack did not have testamentary capacity". It was on this basis that the assertion was also made that Jack did not have capacity to make a gift of the magnitude of £150,000 to Charlotte. In respect of the £500,000 gift given to Margaret by Jack in 2013, the letter refers to evidence (recorded in the Main Judgment) that, on Jack's own account, he had begun to experience difficulties in his cognitive abilities in 2013. The letter also indicates that, with a view to investigating the matter further, the Claimants wished to ask Barclays for disclosure of its files relating to Jack's financial dealings from January 2013 onwards. Finally it invites the Defendants, when responding, to "provide any documentary evidence your clients have pertaining to the gifts to Charlotte and Margaret".

73. In the event, the Defendants refused to consent to disclosure from Barclays, making it clear that they would oppose any application for disclosure. Under cover of their response of 13 August 2021, the Defendants provided a witness statement from Charlotte apparently making clear the strength of her familial ties to Jack. They did not assert that the claims in respect of the gifts to Margaret and Charlotte were abusive and liable to be struck out, but noted instead that the claims were "entirely unconvincing" – perhaps not the response that one would expect to an abusive claim. At no stage did the Defendants make an application to strike out the claims in the Gifts Dispute.

74. The Gifts Dispute was subsequently included in the Particulars of Claim settled by Ms McDonnell and verified by a statement of truth from the Claimants' solicitor on 17 August 2021. Although I found in the Main Judgment that Charlotte's evidence on the 2014 Gift was compelling, there was no reason for the Claimants to take the view that her evidence would inevitably determine the Gifts Dispute. Indeed the witness statement from Charlotte that was available to the Court was dated 13 June 2023.

75. At the time of the Particulars of Claim, the Claimants had Dr Warner's report identifying a probable lack of testamentary capacity from 2014 onwards, which in turn was premised primarily upon his reading of Jack's medical records, the Will File and the witness statements of Mr Marks and Sara. The latter identified the early manifestation of Jack's symptoms as occurring in 2011 and placed significant emphasis on his condition at her wedding in 2013. Dr Warner confirmed that the changes described by Sara in that statement were "compatible with dementia causing frontal lobe dysfunction from December 2011 onwards".

76. Whilst I held in the Main Judgment that the witness evidence did not, on balance, support any real mental decline on Jack's part in early 2013, I was privy to a substantial amount of additional evidence at that point, including the Barclays

documents (finally disclosed shortly before trial). In light of that evidence the experts had belatedly agreed that Jack probably had the mental capacity to make the gift to Margaret in 2013. It is true, as the Defendants point out, that I described Sara's evidence in relation to her observations of her father's condition in 2011 and 2012 (on which Dr Warner relied in his report) as "insubstantial", but that was a multi-faceted assessment I was able to make at trial having regard to all of the available evidence (including, by way of example, an email sent by Jack after an incident in December 2011). It is not an assessment that could sensibly have been made by the Claimants at the time of the Part 36 Offer.

77. The Defendants also make the point that in the Main Judgment I found that Mr Behrens was unable to say that he had any concerns about Jack's capacity prior to August 2013, observing that it was "unclear how he could properly have provided his consent to a claim being made against Margaret in respect of the 2013 Transfer". However, the court is not privy to privileged information about the circumstances in which Mr Behrens gave his consent and, in my judgment, that he provided an unsatisfactory explanation at trial does not render the claim in relation to the 2013 Transfer abusive. Even if it did, the same criticism cannot be made in relation to the 2014 Transfer to Charlotte. Once again, I decided that Jack plainly did have capacity at the time of the 2014 Gift to Charlotte by reference to a detailed analysis of the evidence available at trial, but that analysis was not available to the Claimants at the time of making the Part 36 Offer.

78. Finally, the Defendants submitted that the very early without prejudice correspondence from April to August 2021 showed the Claimants placing "no real weight" on the claims in the Gifts Dispute and conceding those claims in that correspondence. However, taking by way of example, the Claimants' solicitors' letter of 28 April 2021, I note that it expressly records that the Claimants intended to pursue a claim in respect of the gifts, including by means of the provision of a letter of claim. Just as in the Part 36 Offer, the offer not to challenge the £650,000 gifts made in that letter was again being treated as a valuable concession in light of a genuine claim that the Claimants intended to advance in the event that they could not achieve settlement.

79. In all the circumstances I consider that the Claimants' offer to give up their claim to repayment of the gifts to Charlotte and to Margaret was a genuine concession, which represented a real attempt to settle the claim. It was not a request for total capitulation on the part of the Defendants. There was a real value to the offer which also had, in my judgment, a meaningful impact on the chances of avoiding a trial. Bearing in mind that it was made at an early stage in the proceedings (CPR 36.17(5)(b)), had the Part 36 Offer been accepted it would most certainly have resulted in a very significant saving in costs – estimated at something in the region of £1.5 million. Furthermore there is no suggestion that the Defendants did not have access to sufficient information at the time of the Part 36 Offer to enable them to evaluate it (CPR 36.17(5)(c)) – another feature which supports the finding I have already made as to the "investigation phase" being over well before the date of the Part 36 Offer. At no time did the Defendants suggest that the Part 36 Offer was defective and at no time previously have they asserted that it was not a genuine offer of settlement.

80. In light of this conclusion, there is no need for me to go on to determine whether the offer of £12,000 would by itself have been enough to amount to a genuine offer had I concluded that the offer in respect to the Gifts Dispute was abusive. Neither party

focussed their attention on this point, at least during their oral submissions. I accept Ms McDonnell's submission that the Part 36 Offer was always intended as a composite offer and I treat it as such. As a composite offer, I find it exhibited the required degree of give and take to make it a genuine offer.

81. The consequences of Part 36 in this case are punishing to the Defendants but it is a separate question whether they are unjust (see *Shah v Shah* at [62]) and I cannot be guided by any sympathy I may feel for the losing parties. The Defendants have failed to establish any injustice by reason of the application of the enhanced consequences set out in CPR 36.17(4) and accordingly I find that those consequences apply from 4 October 2021 onwards.

The remaining issue arising in respect of the Gifts Dispute

82. Although it is common ground that Sara should pay the Defendants' costs of the Gift Dispute on the standard basis and that Sara will not be indemnified for those costs from Jack's estate, the parties disagree as to whether my orders as to costs should be reflected by an issue-based order under CPR 44.2(6)(f) (as the Claimants submit) or by a percentage-based order under CPR 44.2(6)(a) (as the Defendants contend). The Defendants point to the significant value of the claim in the Gifts Dispute and propose a broad brush split of 60% for the Probate Dispute and 40% for the Gift Dispute. I observe in passing that, as Ms McDonnell pointed out, if the Defendants really considered the Gifts Dispute to be abusive, it is unclear why they would have spent so much money on it.

83. Pursuant to CPR 44.2(7), before the Court considers making an issue-based order under 44.2(6)(f) it must consider whether it is practicable to make an order under paragraphs (6)(a) or (c) instead. In my judgment, however, it is not practicable to make an order under either of these sub-paragraphs. This is essentially because (i) this is not a situation in which I can sensibly find that all of the costs from or until a certain date are concerned with the Gifts Dispute only; and (ii) the parties have provided me with no evidence from which I am able fairly and sensibly to determine the appropriate split between the Probate Dispute and the Gifts Dispute.

84. There is agreement that there was a considerable overlap between these two issues at trial and I confess that in light of that overlap I consider that the split proposed by the Defendants is very likely to be unrealistic. As the Claimants submit, the evidence relating to the gifts would have had to have been considered by the experts and by the Court in the context of the chronology of events leading up to the signing of the 2015 Will.

85. Ms McDonnell told the Court on instructions that the amount of time spent on the Gifts Dispute was *de minimis*, suggesting that on the Claimants' side no more than £10,000 has been spent in dealing with that claim alone. Absent evidence, however, and given the enormous disparity between the Claimants' estimate and the Defendants' proposed split, I do not consider it to be safe to do anything other than make an issue-based order. I asked Mr Dumont how the Defendants' proposed split had been arrived at and was informed that the starting position had been that the Gifts Dispute and the Probate Dispute were worth roughly the same amount of money such that the starting split should be 50/50, but that a small discount had been applied against that starting point. I should make clear that, ordinarily, I do not consider the

value of a claim to play any part in determining the amount of money that has actually been expended in advancing, or defending it in legal proceedings.

86. Accordingly I shall make an issue-based order as requested by the Claimants.

Costs on Account

87. It is common ground that the Defendants should make an interim payment to the Claimants on account of their costs pursuant to CPR 44.2(8).

88. It is also common ground that a 90% payment on account is appropriate in respect of budgeted costs and a 70% payment on account is appropriate in respect of non-budgeted costs. I leave it to the parties to determine the precise figure having regard to the other decisions I have made in this judgment.

The Order

89. I now invite the parties to provide me with an Agreed Order reflecting my decisions. In summary, those decisions are:

    i) that the Third Claimant pay the First and Third to Seventh Defendants' costs of the Gifts Dispute on the standard basis;

    ii) as to the Probate Claim:

        a) that there be no order as to costs up to and including 10 March 2021;

        b) that the First and Third to Seventh Defendants pay the Claimants' costs on the standard basis from 11 March 2021 up to and including 4 October 2021; and

        c) that thereafter the First and Third to Seventh Defendants are subject to the costs consequences of CPR 36.17(4) from 5 October 2021 onwards.

90. Paragraphs 7 and 8 of the Claimants' draft Order deal with the costs in respect of the Second Defendant. I was not informed by the Defendants at the hearing that these paragraphs were in dispute and neither party made any submissions about them. If they are controversial, then I invite the parties to indicate on the proposed Agreed Order the nature of the disagreement and I shall determine it when I finalise the Order.

91. At the end of the hearing, the Claimants drew my attention to the procedure invoked by Briggs J in *Key v Key* [2010] EWHC 769 (Ch) of his own initiative whereby he ordered that the solicitors who had been found wanting in their preparation of the testator's will be joined to the proceedings for the purposes of determining whether they should be liable for the costs.

92. In light of my judgment, the parties have invited me to include a provision in the Order to the effect that any party wishing to apply to the Court to join Irwin Mitchell to these proceedings for the purposes of making a non-party costs application against that firm should do so within three weeks of the Order. I confirm that I am content to make such an order and invite the parties to include it in their proposed Agreed Order.