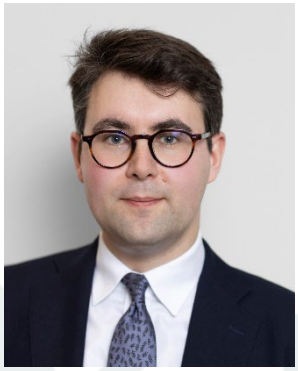
Private Client eBriefing

Lumb v Lumb: fitting together the costs rules in probate disputes with the general ethos of the CPR

Article by Benjamin Slingo, 30th October 2023



Lumb v Lumb [2023] EWHC 2052 (Ch) was an appeal on costs which sheds interesting light on how general rules of the CPR fit together with special provisions governing probate disputes. On a related note, it offers a case study of how the modern ethos of deterring dubious litigation can interact with legal principles of an earlier vintage. There were various other points of interest in the case, but I focus here on this theme.

Mrs Lumb had two sons, Stuart and Michael. In her penultimate will she left her house and its contents to Michael—save for a hi-fi, which she awarded to Stuart. The residue of the estate was to go to Michael and Stuart in equal shares. In her final will, Mrs Lumb left substantially the whole estate to Michael. If he predeceased her, it was to be held on trust by a friend of Michael's, for the benefit of Michael's dog, Jake. (By this time Stuart had already received the hi-fi.) At the time of Mrs Lumb's death the residue of the estate, aside from the house and its contents, had no or minimal value.

The month after his mother's death Stuart entered a caveat. Lengthy correspondence about the last will ensued, and almost two years later Michael sought a pronouncement in solemn form in favour of the last will (alternatively the penultimate one). Stuart defended the claim by giving notice under r. 57.7(5)(a) of the CPR.

That provision says: "*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.*"

It is complemented by r. 57.7(5)(b), which adds: "*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.*"

Michael applied for summary judgment, and DDJ Whitehead granted it on the grounds that Stuart's opposition to the will stood no real prospect of success at trial. Yet the judge refused to make a costs order against Stuart, since he did not consider that there was no reasonable ground for opposing the will. The judge explained that he thought the outcome unsatisfactory, since Stuart had failed clearly to set out the issues he was raising ahead of the hearing. But for r. 57.7(5)(b), that conduct would have warranted an adverse costs order.

Michael appealed on the costs point, and succeeded. In allowing the appeal, the judge, HHJ Davis-White KC, considered the relationship between historic probate practice and the modern litigation ethos on several fronts.

First, he analysed the origins of r. 57.7(5) and the current status of the principles from which it had grown. He noted that there were three special principles relevant to costs in probate disputes, laid down in Victorian cases but lately considered by Henderson J (as he then was) in *Kostic v Chaplin* [2007] EWHC 2909 (Ch).

The first principle is that if the testator or someone interested in the residue of the estate is really the cause of the litigation, costs should come out of the estate. The second principle is that if this cannot be said, but circumstances nevertheless lead reasonably to an investigation of the dispute, then each party may be left to bear its own costs. The third principle is the one now enshrined in r. 57.7(5), and overlaps substantially with the second.

Quoting from *Mitchell v Gard* (1860) Henderson J had said that these principles as to costs were "*designed to strike a balance between two principles of high public importance, the first being that 'parties should not be tempted into a 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'.*"[1] HHJ Davis-White KC quoted Henderson J's reasoning in turn, and said that r. 57.7(5) "*represents the rule makers' judgment as to where to draw the line*" between these rival considerations of policy.

[1] [10] of *Kostic*, quoted at [94] of *Lumb*.

Commenting further on the first principle, the recovery of costs from the estate, Henderson J had noted that the courts apply it more narrowly nowadays. He cited two factors to explain why. "*First, less importance is attached today than it was in Victorian times to the independent duty of the court to investigate the circumstances in which a will was executed and to satisfy itself as to its validity. Secondly, the courts are increasingly alert to the dangers of encouraging litigation, and discouraging settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party.*"[2] What emerges here is the tension between traditional probate practice and the ethos of the CPR.

In ***Lumb***, HHJ Davis-White KC went a step further, and applied Henderson J's factors to the interpretation of the third probate costs principle, even though it is enshrined in the CPR themselves as r. 57.7(5)(b). As he put it, "*the courts are increasingly concerned to avoid encouraging litigation, and discouraging settlement, by a removal of the usual 'costs follow the event rule'*".[3] In effect, the general ethos of the CPR should shape how the particular provisions at r. 57.7(5) are construed. In particular, the test for what is a reasonable ground for opposing a will under r. 57.7(5)(b) "*has to be measured against … the overall procedural and litigation climate at the relevant time*".[4]

Second, HHJ Davis-White KC took up the misgiving DDJ Whitehead had expressed about his own decision. Where general principles of case management would prompt an adverse costs order, does r. 57.5(5)(b) protect the defendant? HHJ Davis-White KC tentatively suggested not: "*I did not hear argument on the point, but my initial view is that there might well be circumstances where such conduct fell outside the protection of CPR 57.7(5)(b). For example, if a defendant at the last minute without any acceptable excuse caused an unacceptable adjournment of or delay to the trial or failed to comply with case management directions (such as an order to bring in testamentary documents), I do not see why, on the face of things, that conduct would be immune from an appropriate costs order by reason of CPR r57.7(5)(b). In such a context the costs ordered would not be simply part of an overall assessment of conduct in the course of determining the costs of*

[2] [21] of *Kostic*, quoted at [95] of *Lumb*.
[3] *Lumb*, [99].
[4] *Lumb*, [119].

proceedings subject to CPR r57.7(5) but a specific costs order dealing with specific conduct."[5]

Third, HHJ Davis-White KC addressed a simple and beguiling argument on the appellant's side. DDJ Whitehead had granted summary judgment. He had accordingly held that the challenge to the will had no real prospect of success. How could he also hold that there had been a "*reasonable ground*" for opposition? CPR r. 24.3 and r. 57.7(5)(b) here seemed to collide. Did they not set out essentially the same test, and should not an order for summary judgment thus dictate the result on the costs issue?

HHJ Davis-White KC found that the position was in fact more nuanced, but that a more stringent approach was needed to r. 57.7(5)(b) than DDJ Whitehead had followed. The key to the puzzle was that the notice under r. 57.7(5) made the summary judgment hearing a somewhat unusual one. It featured not only written evidence, filed in advance, but also actual cross-examination of the witnesses who attested the will (or, in *Lumb*, the one surviving witness). It followed that situation could change over the course of the hearing, so far as the reasonableness of opposition was concerned. What were reasonable grounds for concern at the outset could be allayed by the cross-examination, leaving no real prospect of successful opposition at the end of the hearing. As such, "*it is not correct automatically to equate summary judgment*" with the test in r. 57.7(5)(b).[6] To this extent, the general rules of the CPR did not straightforwardly dictate the application of rules applying to probate disputes.

The judge added, nevertheless, that "*[i]f from the start of the proceedings there was no real prospect of the claimant failing to prove validity of the will on the evidence the claimant filed, and if the cross-examination of the attesting witnesses itself went nowhere and could not be expected to go anywhere and the result is that there is no real prospect of validity not being proved then it seems to me highly likely, if not inevitable, that there were no reasonable grounds of opposition to the validity of the will.*"[7] HHJ Davis-White KC found that the case before him fell into this second category. He explained that "*it is important to note that none of the seven grounds advanced*" by Stuart "*were altered or impacted upon by the cross-examination of Ms Watson*", who had witnessed the will.[8]

[5] *Lumb*, [112].
[6] *Lumb*, [126].
[7] *Lumb*, [125].
[8] *Lumb*, [136].

To sum up, while the special regime in r. 57.7(5) cannot be entirely dissolved into the general ethos of the CPR, it constitutes less of an exception that the first-instance judge in ***Lumb*** imagined.

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