CLAIM NO. HC 07C03329

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

MR JAMES H. ALLEN QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

IN THE ESTATE OF JOYCE MARY GILL: DECEASED

B E T W E E N

DR. CHRISTINE ANGELA GILL

Claimant

AND

(1) STEPHEN WOODALL

(2) STANLEY ANTHONY LONSDALE

(3) THE ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

Defendants

SECOND JUDGMENT (CLARIFICATION AND COSTS)

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1. This Judgment addresses four matters. The first is one of clarification of paragraphs 551 and 553 of the First Judgment handed down on the 9th of October 2009, the second matter is that of the costs of the parties to this

action, the third is that of payments on account of those costs and the fourth is the cost of the interim injunction application of the claimant.

Clarification of paragraphs 551 and 553

2. Paragraph 551 of the Judgment of the 9th of October 2009 ("the First Judgment"), so far as material reads:-

> "In the Court's Judgment, taking into account all the circumstances of this case, the transfer of the Farm and the farming business including the equipment and the money in the farming account is not disproportionate to the expectation of the Claimant…".

3. Paragraph 553 of the First Judgment, so far as material, reads:-

> "That being so, the relief which the Court would have granted, in the exercise of its equitable jurisdiction would have been an Order transferring the Farm and the farming business, including the agricultural equipment and the money in the farming account, to the Claimant…".

4. Clarification is sought of the meaning of the phrase "farming account" in both paragraph 551 and paragraph 553.

5. The Claimant contends that this phrase means:-

    (1) The Farm Trading Account which, prior to Mr Gill's death, had been held in the joint names of Mr and Mrs Gill, and subsequent to his

death, was held in the name of Joyce Mary Gill, trading as J.A. & J.M. Gill, and numbered 40962562, and;

(2) The Barclays Open Plan Savings no. 1 account, numbered 00755311;

(3) The Barclays Open Plan Savings no. 2 account, numbered 50164216.

6. The Third Defendant contends that the phrase means only the Farm Trading Account numbered 40962562.

7. The monies standing to the credit of the Farm Trading Account and the two Open Plan Savings Accounts held with Barclays Bank PLC formed part of the Claimant's claim.

8. By paragraph 3 of the Amended Particulars of Claim, the Claimant alleged, inter alia, that:-

> "At all material times until her death, Mrs Gill and the Claimant regarded the Trading Account and the Savings Accounts as being assets of the Business. At the date of her death Mrs Gill held £55,230.00 in the (Trading) Account and a total of £158,452.00 in the Savings Accounts".

9. By paragraph 10 of the Amended Particulars of Claim, the Claimant alleged:-

> "If, which is denied, the disputed Will is valid --- an equity has arisen in her favour --- which should be satisfied by an Order that the Farm, the business and the funds in the Trading and Savings Accounts be transferred to her absolutely".

10. By the prayer for relief the Claimant sought, inter alia, a declaration that the Claimant is entitled to the Farm, the funds held in the Trading and Savings Accounts and any assets of the Business in equity and an Order that the First and Second Defendants transferred the Farm and the said funds and assets to the Claimant.

11. By its Amended Defence the Third Defendant admitted that, on the death of Mr Gill, Mrs Gill inherited his interest in the Farm, the Business, and the contents of the Trading Account and the Deposit Account. Otherwise no admissions were made as to paragraphs 2 and 3 of the Amended Particulars of Claim.

12. By paragraph 11 of the Amended Defence the Third Defendant averred that:-

> "In all the circumstances, it was not unconscionable for Mrs Gill not to leave the Claimant the Farm, the Business or the Trading or Savings Accounts"

and by paragraph 12 of the Amended Defence the Third Defendant denied that an equity had arisen in favour of the Claimant.

13. Thus, no positive case was advanced by the Third Defendant in opposition to the claim in respect of the monies standing to the credit of all three accounts.

14. In her witness statement, dated the 8th of May 2008, the Claimant stated:-

(Paragraph 12)"The income my parents received from farming was paid into a current account in their joint names at Barclays Bank. All their

outgoings were paid from this account. This was the only account they had until around 1998";

(Paragraph 69)"My parents' joint account at Barclays remained overdrawn even after they had sold Brookfields in 1987. My parents eventually paid off their overdraft in 1998 --- . In 1998 the farm had some surplus funds for the first time and my father invested £50,000.00 in a Higher Rate Deposit Account in their joint names at Barclays. 1998 was a particularly good year. William did the harvest in 1997 and my parents got the income from the harvest. However, the share farming agreement took effect from the autumn cultivation which meant that for the first time, my parents got the harvest income without having to pay for cultivation";

(Paragraph 85)"After my father's death I arranged for the main farm trading account, which had been in my parents' joint names, to be replaced with an account in the name of "Mrs Joyce Mary Gill trading as J.A. & J.M. Gill---. At some point after my father died, Barclays stopped operating the Higher Rate Deposit Account and I arranged for the funds in that account to be invested in a Barclays Savings Scheme. This scheme involved opening two new savings accounts and a further current account in my mother's name. The funds in the Higher Rate Deposit Account were transferred into one of these savings accounts and I transferred some funds from the farm trading account into the other. The current account for my mother was

opened with £200.00. However, this account was never used and, apart from a small amount of interest, the balance remained the same until my mother's death. The money in the savings accounts was regarded by my mother and me as being no different from the funds in the main trading account. It was all "farm" money which could be invested in the farm in the future---."

15. The Claimant was not cross examined in relation to this part of her evidence in chief and no evidence was led in rebuttal thereof.

16. At paragraph 7 of the First Judgment, the Court noted that the Claimant's case was that she expected to inherit:-

> "--- the assets of the Farming Business, including the money which it generated, ---."

17. The monies standing to the credit of the two Savings Accounts comprised money which the Farming Business carried on by Mr and Mrs Gill had generated.

18. At paragraph 546 of the First Judgment the Court held, inter alia:-

> "The expectation created and encouraged by Mr and Mrs Gill, in particular Mrs Gill, was that the Claimant would inherit the whole Farm which the Court is satisfied included the farming business carried on therefrom and its assets".

19. The funds standing to the credit of the two Savings Accounts were regarded by Mrs Gill and the Claimant as part of the assets of the Farming Business and such is precisely what they were.

20. Mrs Talbot-Rice QC argued that the Court, by its use of the phrase "Farming Account" in paragraphs 551 and 552 of the First Judgment, intended to confine that part of its First Judgment to the Farm Trading Account number 40962567. She submitted that the monies standing to the credit of the number 1 and the number 2 Open Plan Savings Accounts were savings and not trading profit of the Farming Business. She further contended that no assurance was given to the Claimant by either Mr or Mrs Gill in relation to those savings. The construction of the phrase "farming account" for which the Claimant contended was one which did not accord with the substance of the Court's First Judgment.

21. In my judgment when one construes the phrase "farming account" in paragraphs 551 and 553 of the First Judgment, in the context of the Judgment as a whole, the pleaded cases of the Claimant and the Third Defendant and the evidence adduced at the trial of the action, the meaning of that phrase is quite clear. The phrase "farming account" was intended to encompass all three relevant banking accounts, the Farm Trading Account no. 40962567 and the two Barclays Open Plans Savings Accounts numbered 00755311 and 50164216. Each of those three accounts held monies which had been generated by the farming business and they were held in those two accounts for the specific purpose of applying the same in meeting the liabilities of the

farming business if and when the need to do so arose. The monies standing to the credit of the Farm Trading Account and the two Barclays Open Plan Savings Accounts were assets of the farming business and had the Claimant failed in her claim of undue influence the Court would have made an Order transferring those monies to the Claimant.

The Costs of the Parties to the action

The costs of the Claimant and the Third Defendant.

22. The Claimant seeks an Order that her costs of this action be paid by the Third Defendant:-

    (1) On the standard basis prior to the 30th of November 2007;

    (2) On the indemnity basis after that date.

23. The Third Defendant contends that its costs down to the first day of the trial, or at least down to the 22nd of May 2008 should be borne by Mrs Gill's estate. The Third Defendant opposes the Claimant's application for costs and further contends that if the Third Defendant is ordered to pay any part of the Claimant's costs those costs should be assessed on the standard basis and not on an indemnity basis.

24. At the trial the Claimant advanced three separate causes of action they being want of knowledge and approval on the part of Mrs Gill in relation to her will, the undue influence of Mrs Gill by Mr Gill and proprietary estoppel.

25. The validity of Mrs Gill's will was challenged by the Claimant in reliance upon the causes of action of want of knowledge and approval and undue influence.

26. The Claimant failed in her claim based upon the first cause of action but succeeded in her claims based upon the second and third causes of action.

27. Part 44.3 of the Civil Procedure Rules, so far as material, reads:-

(1) The court has discretion as to:-

(a) whether costs are payable by one party to another;

(2) If the court decides to make an order about costs:-

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:-

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or 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 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 his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay:-

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings;

(g) interest on costs from or until a certain date including a date before Judgment;

(7) Where the court would otherwise consider making an order under paragraph (6) (f), it must instead, if practicable, make an order under paragraph (6) (a) or (c).

28. The Claimant failed on her claim of want of knowledge and approval. Substantial evidence, both factual and expert, was adduced by both the Claimant and the Third Defendant in respect of this cause of action. The expert evidence of Professor Howard and of Doctor Royston contained in their detailed and extensive reports dated the 9th of June 2008, the 24th of June 2008, the 1st of July 2008 was supplemented by oral evidence from these two witnesses provided over a total of 3.5 working days from the 10th to the 13th of November 2008 which, in turn, resulted in a supplemental report from Professor Howard dated the 16th of November 2008, a joint report of himself and Dr Royston dated the 1st of December 2008 and their oral evidence provided to the Court on the 6th of February 2009.

29. In addition to the evidence, Counsel and solicitors representing the Claimant and the Third Defendant will, no doubt, have expended substantial time in the preparation of the parties' respective cases in and about this cause of action. There will be some overlap of this cause of action with that of undue influence but I am satisfied the costs attributable to the claim of want of knowledge and approval will be substantial.

30. The action was commenced by a claim form issued the 7th of December 2007 which was accompanied by Particulars of Claim. Two causes of action were relied upon by the Claimant at this time; namely, want of knowledge and approval and proprietary estoppel. For the purposes of the latter cause of action, the Claimant particularised, and relied upon, assurances made to her and to these assurances I shall revert later in this Judgment.

31. By Order made the 22nd of May 2008 the Claimant was granted permission to amend the Particulars of Claim to introduce the cause of action of undue influence and to plead:-

(1) Mrs Gill suffered from agoraphobia and anxiety disorder;

(2) Assurances made to the Claimant by Mrs Gill upon which the Claimant relied to her detriment.

32. Thus, until the 22nd of May 2008, the Claimant's case advanced two causes of action one of which failed at trial. In addition, the second cause of action, namely proprietary estoppel, was amended to introduce assurances made by Mrs Gill to the Claimant upon which the latter relied to her detriment.

33. Having failed in her claim of want of knowledge and approval on the part of Mrs Gill, the question arises whether the Court, in the exercise of its discretion, should reflect that failure by an Order providing for the payment of the Third Defendant's costs of that claim.

34. The claim of want of knowledge and approval is properly described as a probate claim and consequently, there are two exceptions to the general rule that the unsuccessful party will be ordered to pay the costs of the successful party.

35. In Mitchell v Gard [1863] 3 Sw. & Tr 275 Sir James Wilde said that in considering the question of costs in probate cases, the Court will be guided

by the two following rules:-

> "first, if the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent".

36. In Kostic v Chaplin and Others [2007] EWHC 2909 (Ch) Mr Justice Henderson stated that although Sir James Wilde framed the first exception to the general rule in terms of blame and fault it was in his view reasonably clear that Sir James Wilde did not necessarily mean moral fault or culpability but rather the touchstone should be whether it was the testator's own conduct which had led to his will – "being surrounded with confusion or uncertainty in law or fact".

37. Mr Justice Henderson expressed the view that, if that causal test is satisfied, it should not matter for the purposes of the first exception, whether the problem is one relating to the state in which the deceased left his testamentary papers or whether the problem relates to the capacity of the deceased to make a will. Mr Justice Henderson did not read Sir James Wilde's formulation of the second exception as implying that an unsuccessful challenge to (or defence of) a will

on grounds of want of knowledge and approval, lack of due execution or mental incapacity can never come within the scope of the first exception but rather as being intended to provide guidance in cases where, on the facts, the first exception is not engaged.

38. It is to be noted that, in the present case, the Court is concerned with the cost of the Third Defendant's successful opposition to the Claimant's claim of want of knowledge and approval.

39. So far as the Third Defendant's costs are concerned, the primary cause of the issue of want of knowledge and approval between the Third Defendant and the Claimant was the mental condition from which Mrs Gill suffered and for which she had not sought treatment. She was not blameworthy in any moral sense for this state of affairs but it was her mental condition, and the effect thereof upon her ability to know and approve the contents of her will, which resulted in the issue which was pursued by the Claimant and defended by the Third Defendant.

40. In my judgement the first exception to the general rule ought to be applied in this case and the Third Defendant's costs of defending the claim of want and knowledge and approval pursued by the Claimant should be paid out of the estate on the standard basis.

41. The Claimant succeeded in her claims based upon the causes of action of undue influence and proprietary estoppel.

42. That being so, the general rule is that the Third Defendant, being the unsuccessful party, should pay the Claimant's costs thereof.

43. However, the undue influence claim is a probate claim and, consequently, consideration needs to be given to whether the first or second exception to the general rule should be applied by the Court.

44. The Court concluded that Mr Gill exerted such pressure upon Mrs Gill that he coerced her into making the will contrary to her wishes. It was Mr Gill's, and not Mrs Gill's conduct, which led to her will "being surrounded with confusion or uncertainty in law or in fact". Mrs Gill was not at fault and in my judgment the first probate exception to the general rule should not apply.

45. In Mitchell v Gard, Sir James Wilde said:-

> "It is the function of this Court to investigate the execution of a will and the capacity of the maker and, having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question a judicial inquiry is in a manner forced upon it. Those who are instrumental in bringing about and sub serving this inquiry are not wholly in the wrong even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt".

46. The claim based upon the cause of action of undue influence was introduced by the Amended Particulars of Claim in respect of which permission was granted by the Court on the 22nd of May 2008.

47. Once this claim was raised by the Claimant the Third Defendant was justified in investigating the same down to the stage in the action at which a realistic assessment of the merits of that claim ought reasonably to have been made by it.

48. The claim of undue influence, and its chances of success, depended upon both the factual evidence and the expert psychiatric evidence available in support of the claim.

49. In her third witness statement, dated the 8th of May 2008, the Claimant detailed the respective characters of and the relationship between Mr and Mrs Gill; in particular at paragraphs 13 to 23 thereof. In his witness statement of that date Dr Baczowski, at paragraphs 23 to 27 thereof, addressed Mr and Mrs Gill's respective characters and their relationship as did the witness statements of Geoffrey Hansell, dated the 8th of May 2008, Brian Noble, dated the 28th of April 2008, David Adamson, dated the 17th of April 2008, Philip Armstrong, dated the 22nd of April 2008, William Wardman, dated the 8th of May 2008, Trevor Mason, dated the 28th of April 2008 and Willie Gill, dated the 7th of May 2008.

50. Once these witness statements had been served upon the Third Defendant, the factual evidence relevant to the claim of undue influence was available for assessment thereby.

51. By the 13th of May 2008 the Third Defendant had received the statements of the Claimant's witnesses except for those of Ivy Donaldson, Derek Kitching, Dr Walters, The Reverend Linda Shipp and the fourth and fifth witness statements of the Claimant. These six witness statements were all received by the 8th of July 2008. However, they did not address the factual basis of the claim of undue influence. Given that the relevant witness statements of the Claimant's witnesses were received by the 13th of May 2008, a realistic assessment of the factual evidence relied upon in support of the claim of undue influence was capable of being conducted by the Third Defendant within a relatively short period of time of the 22nd of May 2008 which was the date when the claim of undue influence was introduced into the proceedings.

52. In my judgment that realistic assessment was capable of being carried out, and concluded, by the 12th of June 2008 which was two days after a copy of the report of Professor Howard, dated the 9th of June 2008, was provided to the Third Defendant.

53. At paragraph 60 of that report, Professor Howard expressed the opinion:-

> "Because of her agoraphobia and the role that Mr Gill played in protecting her from the precipitants of her anxiety symptoms her relationship with her husband was one of unusual dependence. Mr Gill

accommodated his wife's psychiatric difficulties to an extraordinary degree. Her appreciation of this and of the consequences of his potentially withdrawing his support and accommodation of her would have made it very difficult for Mrs Gill to have expressed a wish to make a Will that differed from one that her husband wanted her to agree to".

54. By the 12th of June 2008 a realistic assessment by the Third Defendant of both the factual and expert psychiatric evidence, to be deployed by the Claimant at the trial of the action, would have resulted in a conclusion that the claim based upon undue influence was not only meritorious but one having a good chance of success. That being so, the Claimant's costs of the claim based upon undue influence from the 22nd of May 2008 to the 12th of June 2008 should, in my judgment, be borne by the Claimant and the Third Defendant's costs of that claim incurred over that period should be borne by the Third Defendant. However, the Claimant's costs of the claim based upon undue influence incurred after the 12th of June 2008 should be borne by the Third Defendant. The basis of the costs of the Claimant payable by the Third Defendant will be addressed later in this Judgment.

55. The Claimant succeeded in her claim based upon the cause of action of proprietary estoppel. This claim is not a probate claim and, consequently, the two probate exceptions to the general rule as to costs do not apply. The result is that the general rule as to costs will apply unless the Court, in the exercise of its discretion, decides to make a different order as to costs having regard to

all the circumstances including those matters identified at Part 44.3 (4) of the Civil Procedure Rules.

56. The Claimant contends that the Third Defendant's conduct prior to and during the action was unreasonable to such a degree that the Third Defendant should pay the Claimant's costs on the indemnity basis from the 1st of December 2007. The Claimant relies upon the matters identified at paragraph 3.8 of her outline submissions dated the 7th of October 2009 as amplified and extended by Miss Angus' oral submissions. The matters identified by Miss Angus are ones which the Court regards as of relevance by reason of the requirement to have regard not only to the conduct of the parties but also to any admissible offer of settlement not being an offer to which costs consequences under Part 36 of the Civil Procedure Rules apply.

57. Miss Angus took the Court through the contents of the bundle of without prejudice, save as to costs, correspondence passing between Mishcon de Reya and Wilsons and the correspondence passing between Wilsons and Freeman Johnson, Mishcon de Reya's predecessors.

58. It is to be noted that by letter dated the 24th of August 2007 Freeman Johnson, acting on behalf of the Claimant, put forward the following offer of settlement of her claim then identified as being under the Inheritance (Provision for Family and Dependants) Act 1975 and/or one based upon the doctrine of

proprietary estoppel:-

1. The sum of £350,000.00 to be paid to the Claimant within 28 days of the receipt of the proceeds of sale of Potto Carr Farm or within one year of the date of the agreement of settlement, whichever is the earlier;
2. Two fields measuring approximately 42 acres adjoining White House Farm be transferred to the Claimant for nil consideration within three months of the agreement of settlement with the reasonable costs of this transfer being borne by the Claimant;
3. The Claimant and the Third Defendant bear their own costs.

59. Wilsons, by letter dated the 1st of October 2007, rejected this offer of the Claimant and they contended that no proper particulars of the Claimant's case based upon estoppel had been provided by her and that she had not adduced any supporting evidence of that case. Wilsons requested the provision of proper particulars of the proprietary estoppel claim and all supporting evidence so that they could advise the Third Defendant further. Wilsons, on behalf of the Third Defendant, also advanced what they described as a final compromise offer of settlement, namely, payment to the Claimant of £50,000.00 plus her reasonable costs.

60. By letter dated the 5th of October 2007 to Wilsons, Freeman Johnson expressly stated that the Claimant would not pursue a separate claim based upon proprietary estoppel but that it would form part of a "quasi claim under

I.P.F.D.A.". The offer of £50,000.00 was rejected and a counter offer was made, namely:-

1. The Farm and associated farming business be transferred absolutely to the Claimant for no consideration;
2. The Claimant would pay the Third Defendant £500,000.00 within 28 days of completion of the transfer;
3. The pecuniary legacy believed to be in the region of £200,000.00 was to be paid to the Claimant within 28 days;
4. The Claimant to pay the reasonable costs of the Third Defendant of and incidental to the settlement agreement to be detailed assessed if not agreed.

61. This offer of the Claimant was rejected by the Third Defendant.

62. By the 27th of November 2007, the Third Defendant had received a draft of the Particulars of Claim. Mrs Talbot Rice QC submitted that, though the Claimant had succeeded in her proprietary estoppel claim, prior to the Particulars of Claim being amended on the 22nd of May 2008, that claim had been based upon assurances allegedly given by Mr Gill, and not assurances given by Mrs Gill, to the Claimant. She contended that the case upon which the Claimant ultimately succeeded had, therefore, not been advanced prior to the 22nd of May 2008.

63. The Court accepts that the proprietary estoppel claim advanced by the

Claimant prior to the 22nd of May 2008 was based, primarily, upon:-

1. Mr Gill's teachings of the Claimant;
2. The Claimant's expectation of inheriting the Farm;
3. Conversations which took place between Mr Gill and the Claimant;
4. Mr Gill's inquiry of the Claimant as to whether Dr Baczowski would make a good farmer;
5. Mr Gill's conversations with the Claimant and Dr Baczowski in relation to White House Farm;
6. Mr Gill's teaching of farming techniques etc. to Dr Baczowski.

64. However, the draft of the Particulars of Claim expressly alleged that the Claimant's expectation of inheriting the Farm, the farming business and any funds in the Trading Account and the Deposit Accounts/Saving Accounts, on the death of the survivor of Mr and Mrs Gill, was created and/or encouraged by Mrs Gill as well as Mr Gill.

65. The particulars advanced in support of that allegation included the following:-

> "After Mr Gill died the Claimant took over the management of the Farm and the Business. After Mr Gill's death Mrs Gill had various conversations with the Claimant where the long term future of the Farm and the Business was discussed (including discussions about the future of the woodlands or diversifying income by letting the farmhouse at the Farm or renovating some of the out buildings). During these conversations Mrs Gill spoke in terms of what the Claimant and Andrew could or would do on the Farm and in terms

which indicated her wish that, after her death, the Farm should be preserved for and enjoyed by future generations of the family. On one occasion Mrs Gill handed the plans of the drainage system for the Farm to the Claimant saying "don't throw those away, you need those, you ought to take them and keep them safe". The Claimant and Andrew (Dr Baczowski) reasonably understood Mrs Gill's said words and conduct as meaning that the Claimant would inherit the Farm and the Business on Mrs Gill's death".

66. In my judgment, by the draft of the Particulars of Claim, the Third Defendant was put on notice of the claim of proprietary estoppel and that the Claimant relied upon the conduct and statements of Mrs Gill, as well as the conduct and statements of Mr Gill, as constituting assurances upon which she relied to her detriment.

67. The service of the draft of the Particulars of Claim upon the Third Defendant did not prompt any offer of settlement by it. In fact, the Third Defendant declined to authorise the First and Second Defendants, the Executors, to delay the sale of the Farm pending determination of the Claimant's claim and such conduct on the part of the Third Defendant resulted in the Claimant seeking interim injunctive relief.

68. Under cover of a letter dated the 17th of December 2007 the Part 7 Claim Form, with Particulars of Claim, in the form of the earlier draft thereof, were served upon the First, Second and Third Defendants.

69. On the 28th of January 2008, the Claimant's solicitors proposed a Consent Order in respect of the Claimant's application for interim injunctive relief and directions up to the trial of the action. One of the directions proposed was for the consideration by the parties of whether the case was capable of resolution by ADR.

70. Though the terms of the Consent Order were agreed by the Third Defendant's solicitors, they informed the Claimant's solicitors, by an email dated the 31st of January 2008, that the Third Defendant was not prepared to mediate the case and had instructed them to move the case rapidly to trial.

71. The trial was fixed to commence on the 15th of July 2008. By letter dated the 13th of June 2008 the Third Defendant made an offer of payment from the estate of Mrs Gill to the Claimant of £650,000.00 together with her costs on the standard basis.

72. By letter dated the 20th of June 2008 the Claimant requested the Third Defendant to reconsider mediation but by its response, dated the 24th of June 2008, the Third Defendant indicated that it would expect any mediation, or meeting, to be devoted to working out the manner in which its offer of £650,000.00 and costs could be achieved.

73. The Claimant rejected the Third Defendant's offer of settlement and, by letter dated the 26th of June 2008, made a counter offer which would have provided the Third Defendant with part of the Farm of value approximately

£850,000.00 and all the money in the various bank accounts falling within the estate. This counter offer was not accepted.

74. On the 24th of July 2008 the trial was adjourned part heard and on the 19th of September 2008 the Claimant asked the Third Defendant to reconsider its position on alternative dispute resolution. By letter dated the 29th of September 2008 the Third Defendant enquired whether the Claimant had a further offer of settlement to propose and by letter dated the 28th of October 2008 the Claimant offered to accept 219.89 acres of land forming part of the estate which would have left the Third Defendant with the remainder of the estate including land which was the subject of an offer from Mr Robinson of £1.06 million. This offer of the Claimant was rejected by the Third Defendant on the 3rd of November 2008.

75. The Court is satisfied that despite the Claimant's repeated attempts to resolve her dispute with the Third Defendant by mediation or some other form of ADR the Third Defendant remained resolute in its opposition thereto which opposition continued after the commencement of the trial. Further, the Third Defendant clearly displayed a lack of enthusiasm in relation to the resolution of the dispute by a negotiated settlement.

76. Prior to and certainly since the introduction of the Civil Procedure reforms, consequent upon Lord Woolf's recommendations, the Court has expected and has sought to encourage parties to adopt ADR in an attempt to avoid lengthy and costly investigations before the Court the procedure of which is

adversarial and formal in nature. It is quite apparent that the Third Defendant was unwilling to adopt the ADR procedure proposed by the Claimant and, in January 2008, was even unwilling to agree a direction for the parties to consider whether the case was capable of resolution by ADR. The attitude and stance adopted by the Third Defendant are inconsistent with the Court's expectation of a willingness to participate in a well established procedure which is proven to result in improved quality of settlements and an increased incidence of settlements. The Claimant demonstrated a willingness to have recourse to mediation in an attempt to resolve the dispute between the parties and she persevered in her attempts to persuade the Third Defendant to adopt such a course but despite those attempts the Third Defendant displayed an attitude thereto which was somewhat unreasonable, out of step with the expectation of the Court and the underlying spirit of the modern procedure thereof.

77. In my judgment the Third Defendant's conduct and attitude in relation to the repeated proposals of the Claimant to adopt ADR is, in the circumstances of this case, sufficient by itself to take the case out of the norm but the appropriateness of indemnity costs in relation to the claim based upon proprietary estoppel is strengthened by the various offers of settlement made by the Claimant which were rejected by the Third Defendant, which offers, if accepted by the Third Defendant, would have resulted in lesser benefit to the Claimant than she has obtained in consequence of the Judgment of this Court secured by her.

78. For these reasons the costs of the Claimant of her claim based upon the cause of action of proprietary estoppel will be paid by the Third Defendant and, if not agreed between the parties, shall be assessed on the indemnity basis. For similar reasons the costs of the Claimant of her claim based upon the cause of action of undue influence incurred by her after the 12th of June 2008, and payable by the Third Defendant, shall be assessed on the indemnity basis if not agreed between the parties.

79. In summary the Order as to the costs as between the Claimant and the Third Defendant is:-

1. The Third Defendant's costs of defending the Claimant's claim based upon want of knowledge and approval shall be paid out of the estate of Mrs Joyce Mary Gill and shall be assessed on the standard basis if not agreed;
2. The Claimant's costs of her claim of undue influence incurred by her down to and including the 12th of June 2008 shall be borne by the Claimant and the Third Defendant's costs thereof incurred by the Third Defendant down to and including that date shall be borne by the Third Defendant;
3. The Claimant's costs of her claim of undue influence incurred by her after the 12th of June 2008 shall be paid by the Third Defendant and shall be assessed on the indemnity basis if not agreed;
4. The whole of the Claimant's costs of and incidental to her claim based upon proprietary estoppel shall be paid by the Third Defendant and shall be assessed on the indemnity basis if not agreed.

80. It is not practicable for this Court to make an Order under Part 44.3 (6) (a) or (c) of the Civil Procedure Rules due to the different bases of assessment and the different periods covered by the Costs Orders.

81. The Claimant seeks £400,000.00 on account of her costs ordered to be paid by the Third Defendant. However, in view of the order as to costs made against the estate of Mrs Gill and the different bases of assessment of the costs ordered to be paid by the estate to the Third Defendant and by the Third Defendant to the Claimant, I consider a payment by the Third Defendant to the Claimant of £100,000.00 on account of the Claimant's costs is the appropriate Order and I make such Order pursuant to Part 44.3 (8) of the Civil Procedure Rules.

The Costs of the First and Second Defendants

82. The Claimant contended that the Third Defendant should pay the costs of the First and Second Defendants on the indemnity basis. The First and Second Defendants estimate their costs, as at the 9th of October 2009, to be some £40,000.00.

83. The Third Defendant contends that the First and Second Defendant's costs should be paid out of the estate of Mrs Gill on the indemnity basis.

84. The starting point is Part 48.4 of the Civil Procedure Rules 1998 which reads:-

(1) This rule applies where -

(a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and

(b) rule 48.3 does not apply.

(2) the general Rule is that he is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate;

(3) where he is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis.

85. Rule 48.3 does not apply in this case.

86. The First and Second Defendants are parties to this action in the capacities of Executors appointed by the Will of Mrs Gill. They were made parties by the Claimant for the purposes of her challenge to the validity of the Will and the pursuit by her of her proprietary estoppel claim. As Executors the First and Second Defendants took probate of Mrs Gill's will which on its face was a valid will.

87. To the extent that the First and Second Defendant acted reasonably and for the benefit of the estate of Mrs Gill, the First and Second Defendants, should, unless the Court orders another person to pay their costs of the action, recover their costs of this action out of the estate.

88. Miss Angus contends that in this case the costs of the First and Second Defendants should not be paid out of Mrs Gill's estate (because if they were this would mean that the Claimant would end up paying them) but should be borne by the Third Defendant, the unsuccessful party to the action. She says this would not only make sense as a matter of logic and fairness but this approach is well established. Miss Angus drew my attention to the decision of Mr Justice Ormerod in the case of Re Howlett [1950] P.177 and its application by Mr Justice Henderson in the Kostic v Chaplin case. However, the decision of Mr Justice Ormerod is authority for the proposition that any additional costs thrown upon an estate by the appointment of Administrators pending suit should be ordered to be paid by the unsuccessful party which is not this case.

89. In this case the dispute was between the Claimant and the Third Defendant in relation to the validity of Mrs Gill's Will and the beneficial ownership of, or a beneficial interest, in her estate. The duty of the First and Second Defendants, as Executors of that estate, was to remain neutral and offer to submit to the Court's determination of the dispute leaving it to the Claimant and the Third Defendant to positively advance their respective cases before the Court. If such a stance was adopted by the First and Second Defendants they will be entitled to an indemnity out of the estate in respect of costs reasonably, necessarily and properly incurred.

90. The First and Second Defendants as Executors took probate of the Will of Mrs Gill. They were Defendants to the action commenced by the Claimant in their capacity as Executors and, by their Acknowledgment of Service of the Claim

Form upon them, expressly, and specifically, gave notice of their intention not to defend the claim. They, thus, gave notice of a position of neutrality and such position was expressly recognised by the Claimant, by her solicitors' letter dated the 4th of June 2008. Mr Hall, acting on behalf of the First and Second Defendants, served and filed a witness statement in which he expressly stated that they intended to maintain a stance of neutrality and impartiality in relation to the dispute between the Claimant and the Third Defendant.

91. That witness statement was prepared and served on behalf of the First and Second Defendants in order to assist the Court, to inform the Court of how the First and Second Defendants perceived their duty to maximise the assets of the estate of Mrs Gill and to notify the Court, and the Third Defendant, that as Executors they would abide by the Court's determination of the application for the interim injunction. In my judgment, the First and Second Defendants acted reasonably, properly and for the benefit of Mrs Gill's estate in so doing.

92. A second witness statement of Mr Hall, dated the 9th of May 2008, was prepared and served in the action by the Third Defendant. That second witness statement addressed the issue of the Claimant's knowledge of the terms of Mrs Gill's Will and was served by the Third Defendant in furtherance of the Third Defendant's defence of the Claimant's action. At the trial Mr Hall was called as a witness for the Third Defendant. His witness statement was adduced in evidence by the Third Defendant and was relied upon by it. In the Court's view the costs of and incidental to that witness statement, and of Mr Hall's attendance at the trial as a witness for the Third Defendant, are

therefore part of the Third Defendant's costs of the action to be dealt with as already indicated and form no part of the First and Second Defendant's costs payable out of Mrs Gill's estate

93. The Claimant brought an application seeking an Order for specific disclosure of the First and Second Defendant's correspondence with the Third Defendant which application was opposed by the First and Second Defendants. The Third Defendant was not a party to that application which was adjourned on the first day of the trial and has not been pursued by the Claimant. It having not been pursued and the application being one for disclosure by the First and Second Defendants, their costs of and incidental thereto should be borne by the estate of Mrs Gill.

94. Those costs of the First and Second Defendants which the Court has ordered to be paid out of the estate of Mrs Gill shall be assessed on the indemnity basis if not agreed.

95. The First and Second Defendants' costs approximate to £40,000.00. They seek a payment of £20,000.00 on account of those costs. The Court having ordered the majority of the First and Second Defendants' costs to be paid by the estate of Mrs Gill on the indemnity basis the application is acceded to and an Order for payment by the estate to the First and Second Defendants of £20,000.00 on account of their costs shall be made.

Costs of the Interim Injunction Application

96. There is one final matter the Court is required to address and that is the costs of the Claimant's application for an interim injunction.

97. A consideration by the Court of the open correspondence bundle A1, commencing with the letter dated the 16th of October 2007 from Mishcon de Reya to Wilsons and concluding with the email from Mark Keenan of Mishcon de Reya to Lucy Gill of Wilsons, timed at 11.57 am on the 12th of December 2007, together with a consideration of the contents of Trial Bundle A reveals:-

    (1) By letter dated the 30th of October 2007 the Claimant's solicitors put the Third Defendant's solicitors on notice of:-

        (a) A strong probability that the Will of Mrs Gill was invalid;

        (b) Even if the Will was not invalid, it was very likely that the Claimant had an interest in the Farm under the doctrine of proprietary estoppel;

    and sought an undertaking from the Third Defendant not to enter into a binding contract to sell the Farm before the 30th of November 2007 and that, thereafter, to give the Claimant's solicitors 7 days notice in writing before so doing;

    (2) By letter dated the 2nd of November 2007 Messrs. Wilsons stated that the Third Defendant wished the sale of the Farm to proceed and if the Claimant applied for an injunction preventing the sale the Third

Defendant would cross apply for an order sanctioning the immediate sale of the property by the Executors;

(3) On the 5th of December 2007, the Third Defendant declined to agree a postponement of the sale of the Farm beyond the 19th of December 2007 and this prompted the issue by the Claimant of a Notice of Application for interim injunctive relief on the 7th of December 2007;

(4) Service of the Notice of Application for interim injunctive relief, together with evidence in support thereof, was effected by the Claimant on the 7th of December 2007;

(5) On the 11th of December 2007 the Third Defendant, via Wilsons, expressed a willingness for the Executors to give an undertaking not to dispose of the Farm pending a hearing of the Claimant's application with a time estimate of half a day on the basis of the Claimant providing a cross undertaking in damages;

(6) The agreement of the Third Defendant to a Consent Order which was made by Mr Justice Blackburn on the 13th of December 2007 followed by a Consent Order made by Mr Justice Lewison dated the 11th of February 2008.

98. In addition thereto, by the 27th of November 2007 the Third Defendant had been served with a draft of the Particulars of Claim, and at the time thereof, no offer of purchase of the Farm had been accepted. Despite such the Third Defendant was not prepared to agree to the Executors providing the undertaking sought by the Claimant.

99. The application of the Claimant for interim injunctive relief resulted from, and was necessitated by, the Third Defendant's refusal to provide the Executors with its agreement to the sale of the Farm being postponed and its desire for the Executors to proceed with the sale thereof.

100. For these reasons, the Claimant's and the First and Second Defendant's costs of and incidental to the application for interim injunctive relief should be paid by the Third Defendant and the Court makes such Order. In addition those costs shall be assessed on the standard basis if not agreed.

101. Counsel should attempt to agree the Form of Order as to costs. If they are unable to agree the same, I shall hear submissions in relation thereto immediately after the Judgment is handed down.

JAMES H. ALLEN Q.C.

Deputy High Court Judge.

7th January 2010.