Neutral Citation Number: [2021] EWHC 2356 (Ch)

Case No: PT-2019-LDS-000066

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Leeds Combined Court Centre
1 Oxford Row Leeds LS1 3BY

Date: 23/08/2021

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

GARY THOMAS GOODWIN	**Claimant**
- and -	
(1) JACQUELINE CAROL AVISON	
(2) NICOLA LEA SMITH	
(3) EVE MARIE MOXON	
(4) KELLY LOUSE TRAVIS	
(5) CALLUM REECE HEALEY	**Defendants**

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Mr James Fryer-Spedding (instructed by **Gunnercooke LLP**) for the **claimant**
Mr Aidan Briggs (instructed by **Lupton Fawcett LLP**) for the **1st, 2nd, 3rd and 5th defendants**
Mr Stuart Roberts (instructed by way of direct access) for the 4th defendant

Hearing dates: 12 August 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

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HH Judge Davis-White QC :

1. This is my judgement setting out the reasons for the making of a costs order on 17 August 2021 as regards the incidence of costs in this case. This followed the defendants having consented to the relief sought by the claimant part way through the trial and, on the basis of the evidence that I had then heard, my determination that the evidence justified that relief.

2. These proceedings were commenced by the claimant, Gary Thomas Goodwin, by claim form issued on 27 May 2019. By the proceedings he sought pronouncement in solemn form in favour of a will dated 11 July 2017 of the deceased Thomas Goodwin (the "2017 will"), and pronouncement against an earlier will of the deceased dated 20 December 2005. Gary is the son of Thomas Goodwin.

3. The precise value of the estate is uncertain, but it is probably somewhere between £3-4 million or so.

4. The original defendants were the first two defendants, who are mother and daughter, being respectively one of the daughters and one of the grandchildren of Thomas Goodwin.

5. The original defence and counterclaim of the 1st defendant resisted the validity of the 2017 will on the following grounds: (a) absence of due execution; (b) the testator did not know and approve the terms of the 2017 will and (3) the will was procured by the undue influence of the claimant and his then girlfriend, Claire Grime. The counterclaim was for an order declaring against the validity of the 2017 will and in favour of a will dated 20 December 2005 (the "2005 will").

6. The defence of the second defendant was to not admit due execution and to require the 2017 Will to be proved in solemn form relying on CPR 57.7(5). The defence contained the notice referred to by that rule and stated that the 2nd defendant would cross-examine the attesting witnesses of the 2017 will.

7. The third to fifth defendants were later joined to the proceedings pursuant to CPR 19.8A, having acknowledged service of the claim form. They are the remaining children of the 2nd defendant. Service of defences by those persons was dispensed with on the basis of their stated intention to adopt the defence and counterclaim of their mother, the 1st defendant.

8. Other persons were bound into the proceedings pursuant to CPR r19.8A.

9. Initially all the defendants were represented by the same firm of solicitors, Lupton Fawcett LLP.

10. A report dated 19 March 2019 was obtained from an handwriting expert, Ms Ellen Radley, appointed jointly by the parties. Following receipt of that report, the defendants (through their solicitors, by letter dated 20 May 2020) notified the claimant's solicitors that the 2nd defendant accepted that the 2017 will was properly executed in accordance with s9 of the Wills Act and that the attesting witnesses were no longer required to attend trial to be cross-examined. As regards the first defendant's defence, it was accepted that she (and the same applied to each of the other defendants adopting her

defence) was no longer denying valid execution and did not require proof in solemn form of the will on this point.

11. However, the fourth defendant subsequently decided to act in person. She gave notice of this in about August 2020. At the PTR, on application, I permitted her to withdraw the admission regarding due execution made on her behalf by her former solicitors and to maintain a defence that the 2017 will had not been validly executed (as she had intimated she would be seeking to do back in August 2020).

12. It can thus be seen that the position of the 1st, 3rd and 5th defendants differed from the respective positions of each of the 2nd defendant and the 4th defendant. However, when the trial was aborted part way through and on the basis of the then evidence, each of the defendants consented to the order put before me.

13. The agreed issues for determination at the trial were:

    (1) "Is the 2017 Will valid? In particular:

        (a) Was it duly attested for the purposes of section 9(1)(c) and (d) of the Wills Act 1837?

        (b) Did the deceased know and approve of its contents?

        (c) Was the Will procured by the undue influence of the claimant and his then girlfriend, Claire Grime?

    (2) If valid, does the 2017 Will revoke the 2005 will, relied upon by the defendants?

    (3) If the 2017 Will is not valid, then is the 2005 will effective?

14. The trial in this matter, following one day's pre-reading, started on Tuesday 3 August 2021. It was due to conclude, including the delivery of closing submissions, on the afternoon of Tuesday, 10 August 2021. The second issue above did not feature in the skeleton arguments or in oral expansion thereon. A regards the third issue, it seemed to be accepted that if the 2017 will was invalid then the 2005 will would be valid, but I did not get to the point of hearing any cross-examination of the defendants' witnesses on this point.

15. Some of the first day of the trial was taken up with an outstanding application for third party disclosure against a firm of solicitors, Excello Law, which I shall explain further later in this Judgment. Unfortunately, the trial estimate was a significant underestimate. Sitting early and late was insufficient to bring the trial back to the original trial timetable. By Friday 6 August 2021, I had heard the evidence on behalf of the claimant, being evidence from the claimant himself, his former girlfriend Ms Claire Grime and the two attesting witnesses to the 2017 Will, Neil Shaw and Ann Richardson. Under the trial timetable presented to me at the start of the trial, that evidence should have been concluded sometime in the afternoon of Wednesday 4 August 2021, and the evidence of the first defendant should also have been started.

16. On Monday, 9 August 2021, (under a revised timetable changing the order of witnesses) I started to hear oral evidence from Mr Ben Jenkins of Excello Law, called by the defendants (other than the 4th defendant). That evidence was anticipated to take much longer than originally timetabled due to disclosure of documents following my ruling on Monday 3 August 2021. Mr Jenkins had acted for the deceased on various matters in 2017 (though not with regard to the making of a will or advising as to the 2017 will). Disclosure of his files (by now with other firms of solicitors, following his moving firms and a take-over of the firm he used to work for) and his giving of evidence had been held up by issues of legal professional privilege owed to the deceased. By the end of the court sitting on 9 August 2021, Mr Jenkins had given his evidence in chief and been cross-examined by counsel for the claimant, Mr Fryer-Spedding. Mr Roberts, counsel for the fourth defendant, had still to cross examine him.

17. On the morning of Tuesday, 10 August 2021, I was informed that the defendants no longer challenged the 2017 Will. A consent order was agreed giving effect to that position and put before me. I was, however, invited to give judgment based on the evidence that I had heard. It was (rightly) not suggested that the consent order was something that I could simply make without myself being satisfied that the order sought was appropriately made on the evidence that I had heard. I gave a short *ex tempore* judgement, summarising my reasons and pronouncing in favour of the 2017 Will, and against the 2005 Will. The question of costs was adjourned to Thursday 12 August 2021. At that hearing I heard submissions regarding the incidence of costs but there was not time to hear submissions regarding the quantum of any on account payment(s). That question was further adjourned to 17 August. On that occasion I indicated the order that I was making regarding incidence and said that I would give my reasons later. I also heard argument regarding the making of an order for an interim payment on account and made an order in respect of that. This judgment sets out my reasons solely with regard to the incidence of costs. The costs order that I made, as regarding incidence, was that the defendants should pay the claimant's costs of the proceedings.

18. The representation before me at the costs hearings was as at the trial: Mr Fryer-Spedding for the claimant, Mr Briggs for the 1st, 2nd, 3rd and 5th defendants and Mr Roberts for the 4th defendant. I am grateful to them for their written and oral submissions.

19. The nature of the submissions before me is such that it will be necessary for me to review the evidence in more detail than is ideal, or indeed usual, in a costs judgment. The need for such detail arises, first, from the nature of the defendants' submissions regarding costs. Those submissions are, in summary, that the position facing them before the trial commenced was such that their case that the 2017 Will was not valid, was perfectly reasonable and that either their costs should be paid out of the estate of the deceased or, alternatively, that there should be no order as to costs. The second reason that this judgment has to review the evidence in more detail is because, necessarily, my earlier *ex tempore* judgment pronouncing for the 2017 will was short and did not address all the detail raised by the questions now facing me. In broad terms, that question is as to the reasonableness of the conduct of the defendants in opposing the validity of the 2017 will on the grounds that they did.

20. Standing back from the detail, it might be thought somewhat surprising in circumstances where (1) a case is effectively withdrawn or abandoned by defendants

and (2) that case is effectively one of an allegation of fraud on the part of the claimant and his then girlfriend (in acting to procure a testator to execute a will, knowing that the testator neither knew or approved of its contents nor would have made such a will had he known such contents and/or that their conduct was such as to overcome his will by asserting undue influence over him), that the defendants should have their costs paid from the estate or not have to pay the claimant's legal costs in vindicating the will. This, however, was the submission of the defendants. I therefore turn to the relevant law.

The Law

21. I have been referred to a number of authorities. In my judgement, the following general principles can be derived from those cases and the relevant provisions of the CPR:

(1) The starting point is, and has for some considerable time been, that the court has a discretion as to whether costs are payable by one party to another or from the testator's estate (see CPR r44.2(1); *Mitchell and Mitchell-v-Gard and Kingwell (1863) 3 Sw & Tr 275).*

(2) That discretion is not unfettered but to be exercised in accordance with principles laid down by the court. As such Sir J. P. Wilde put it in the High Court of Admiralty in the *Mitchell* case, after pointing out that absolute rules in this area are not possible:

> "*But, where it is not possible, something may yet be done. By acknowledged method and general classification, the suitor may in some measure be enabled to estimate the prospect before him, and foresee the penalties under which he launches into litigation. To this extent it is the duty of the Court, so far as may be, to assist him*".

(3) The principles are, as it has been said in other cases as regards guidelines, guidelines rather than tram lines or strait jackets. Put another way, they are to apply to a wide range of different factual situations and are open-textured in the sense that their application in any case depends upon an evaluative judgment taking into account, in most cases, a number of relevant circumstances some of which may point one way and some another. As Sir J. P. Wilde (the later Lord Penzance) put it in the *Mitchell* case:

> *"It is hardly in the nature of discretion that its exercise should be adjusted by exact rule. No positive regulation could be established that would bear the strain put upon it by the justice or hardship of particular instances."*

Indeed, more recently Jackson LJ has pointed out that the need to consider all the relevant circumstances, now set out expressly in the CPR results in a position where "*the individual provisions of* [what is now, CPR 44.2(4)] *tend to pull in different directions*."

(4) The starting principle, now set out in CPR 44.2(2)(a), is that the unsuccessful party will be ordered to pay the costs of the successful party, or, in other words, that costs follow the event. However, the court may make a different order. This applies to the costs of a contentious probate claim, like those of any other claim. However, the

notion that the costs of an unsuccessful party will generally be ordered to be paid out of the estate in a probate claim is wrong (*Kostic v Chaplin* [2007] EWHC 2909 (Ch) at para [4]); *Theobald on Wills* 10th Edn 2021 para 15-001).

(5) The starting principle, of costs following the event, but also that, as a generality, such starting point may readily be departed from is at least in part to reflect the point that if applied too robustly, "*the application of the "follow the event principle" can encourage litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points that they take*" (per Lord Woolf MR in *AEI Rediffusion Music Limited v Phonographic Performance Ltd* [1999] 1 WLR 1507).

(6) In exercising the discretion to make (or not) any order about costs the Court is required to have regard to all relevant circumstances (CPR 44.2(4) and (5)) 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; and*
> *(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."*

(7) For these purposes, the conduct of the parties includes (CPR 44.2(5)):

> *"(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.*"

(8) Cases which allege fraud and which are lost or withdrawn will usually result not just in an adverse order for costs but an order for costs on the indemnity basis:

> "*[16]….. The general provision in relation to cases in which allegations of fraud are made is that, if they proceed to trial and if the case fails, then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. Of course the court retains a complete discretion in the matter and there may well be factors which indicate that notwithstanding the failure of the claim in fraud indemnity costs are not appropriate, but the general approach of the court is to adopt the course that I have indicated.*
> *[17] The underlying rationale of that approach is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because, in effect, the defendant has no choice but to come to court to defend his position.*
> *[18] In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is in my judgment appropriate for the court to approach*

the question of costs in the same way." (per David Richards J in Clutterbuck v HSBC plc [2015] EWHC 3233 (Ch)).

(9) Indeed, where the withdrawal of fraud allegations deprives the defendant of an opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result:

> "*[53] …I consider that the approach in Clutterbuck is sound. Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail*." (per Rose J in *PJSC Aeroflot v Leeds* [2018] EWHC 1735 (Ch)).

22. In the case of contentious probate claims regarding the validity of a will, the testator whose will is in issue is not a party and is unable to give evidence. Potential beneficiaries to his estate may have very limited knowledge of the circumstances in which a will is said to have been made. Justice has therefore resulted in the formulation of two principles that can apply in that context and which may lead to a departure from the starting point that costs follow the event. These principles, which can result in a different costs order to one based on costs following the event, are of long pedigree and the considerations of policy and fairness which underlie them remain as valid today as they were before the introduction of the CPR (*Kostic v Chaplin* [2007] EWHC 2909 (Ch)).

23. As with other costs principles, these two principles are guidelines not strait jackets (*Kostic* paragraph [6]).

24. The underlying policy basis of these relevant costs principles (the "probate costs principles") is the striking of a balance between two principles of "high public importance" namely that "parties should not be tempted into a fruitless litigation by the knowledge that their costs will be defrayed by others" on the one hand and that "doubtful wills should not pass easily into proof by reason of the cost of opposing them" (Mitchell at pg. 279)

25. The application of the first probate costs principle points to, and will result in, an order that costs are awarded to the unsuccessful party out of the estate. The first probate costs principle is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation, a case is made for costs to come out of the estate (*Spiers v English* [1907] P.122 at 123).

26. The rationale underlying the first probate costs principle was stated by Sir J. P Wilde in the *Mitchell* case as follows:

> "*The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question, who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred?*

> *If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.*
> *If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his improper conduct has induced a litigation which the Court considers reasonable, it is not unjust that the estate should bear the costs of the litigation which his conduct has caused."*

27. In looking at the "cause" of the litigation, it is not necessary to identify moral fault or culpability, at least so far as conduct of the testator is concerned which has the relevant causal effect.

28. If it is the testator's own conduct which has led to the will "being surrounded with confusion or uncertainty in law of fact" it should not matter whether the problem relates to "the state in which the testator left his testamentary papers (for example where a will cannot be found, or where there is a question whether a will has been revoked) or whether the problem relates to the capacity of the deceased to make a will" (*Kostic* at [9]) or to execution of the will (*re Cutcliffe's Estate* [1959] P. 6 at pg.20).

29. The first probate costs principle is capable of applying to a situation in which undue influence or fraud are alleged but fail. Thus, in the *Mitchell* case costs were paid out of the estate where a challenge to a will failed but where the person to whom the bulk of the residuary estate had been bequeathed had drawn the will and:

    > "*been guilty of improper conduct in the transaction, and particularly so, in knowingly omitting from the will legacies which he knew the testatrix had ordered and still desired but which escaped her memory at the time the will was executed. This conduct, and the suspicions which flowed from it, gave the next of kin* [who unsuccessfully challenged the will] *a fair and reasonable ground for litigation*."

30. In *Re Cutcliffe's Estate* Hodson LJ envisaged that an unsuccessful case of undue influence might fall within the first costs probate principle but on the facts of that case:

    > "*Unless there is some case of undue influence made out* against [the residuary legatee]*, or some reasonable ground for making out such a case, there is nothing in the Judge's findings as to her conduct which would make it right to say that this litigation was the fault of the residuary legatee."*

31. A strong case has to be made out:

    > "*I should be reluctant to do anything to create the idea that unsuccessful litigants might get their costs out of the estate, without making a very strong case on* [the] *facts. The lure of "costs out of the estate" is responsible for much unnecessary litigation"* (per Scrutton LJ n *Re Plant (deceased)* [1926] P 139.

32. Indeed:

    > "*…the trend of more recent authorities has been to encourage a very careful scrutiny of the 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. There are at least two factors which in my judgment contributed to this change of*

emphasis. 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" (*Kostic* at paragraph [22]).

33. The first probate costs principle is limited in extent. That limitation was expressed in *Re Cutcliffe's Estate* as follows:

"*While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to case where a testator by his words, either written or spoken, has misled other people, and perhaps inspired false hopes in their bosoms that they may benefit after his death. It does not seem to me that the judges who, in the past, have laid down the practice that costs should be allowed out of the estate where the fault of the testator has led to the litigation, had in mind such a situation as that.*"

34. This statement of principle was in relation to the following facts in the case. In that case, on his return from hospital, the testator had called for his solicitor on 19 January 1954. The solicitor had made an attendance note of the meeting. At that stage the testator had fallen out with his step-daughter. He had made a will in favour of the daughter of tenants who lived in an upstairs first-floor flat and who had been looking after him. He told the solicitor that, while he, the testator, had been in hospital, his relations, "a lot of blasted scoundrels", had been pestering him both in hospital and since he had been at home, and that he was determined that they would get nothing from him. He was re-assured when the solicitor explained that the will that he had made left everything to the daughter of the upstairs occupants, Mr and Mrs Veness. He smiled and nodded and asked if he could rely upon it because it was what he wanted and he was worried about what his relatives had been doing. He also expressed concern that they might set aside the will. On January 31 at about 7:30pm the testator saw his stepdaughter and two other ladies known to them both. They brought a typewritten will, revoking his earlier wills and appointed the stepdaughter executrix and sole beneficiary. The new will was signed and attested in the testator's bedroom. The Judge rejected the evidence of Mrs Veness that while standing outside the bedroom door she had heard a crescendo of the words "Sign, sign, sign". Two hours after the execution of the will, the testator signed in his own handwriting a dated and timed document certifying that he had not signed any document on that date which he wished to be valid and in accordance with his wishes.

35. The Judge pronounced for the will in favour of the stepdaughter. He found that the case of undue influence was not made out. In particular, the "sign, sign, sign" incident had not occurred and not been heard. He found the testator knew and approved of the terms of the will in favour of the stepdaughter.

36. It was submitted that "*because the testator gave a statement to the solicitor on January 19 and left behind him this rather remarkable document of January 31, he was himself responsible for inviting litigation about his estate*." This was rejected by Hodson LJ in the passage cited in paragraph 33 above. Morris LJ seems to have

decided the case on a slightly different point, which I explain further below. Ormerod LJ agreed with both judges.

37. The approach of Hodson LJ regarding the first probate costs principle was followed by Norris J in *Wharton v Bancroft* [2012] EWHC 91 (Ch).

38. The second probate costs principle points to there being no order for costs, but the parties bearing their own costs. The principle was stated in the *Spiers v English* case as follows:

> "*if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them.*"

39. In the second probate costs principle as stated above, it is the "reasonably" that has to be stressed. Thus, Sir James Hannen in the earlier case of *Davies v Gregory* (1873) LR 3 P&D 28 said

> *"Where the facts show that neither the testator nor the persons interested in the residue have been to blame, but where the opponents of the will have been led reasonably to the bona fide belief that there was good ground for impeaching the will, there will be no order as to costs. Of course the opponents must have taken all proper steps to inform themselves as to the facts of the case, but if, having done so, they bona fide believe in the existence of a state of things which, if it did exist, would justify litigation, then, although no blame should attach to the testator or to the executors and persons interested in the residue, each party must bear his own costs."*

40. On the face of it, claims which are brought alleging undue influence or fraud, such as would, if made out, involve pronouncement against the will procured in such manner, are capable of falling not only within the first probate costs principle but also the second probate costs principle (see *Mitchell*).

41. However, cases of undue influence or fraud "differ largely in the degree of probability or suspicion to be demanded for their justification" (see *Mitchell*). This is because, in general, fraud and/or undue influence is unlikely. This of course has to be read subject to the light that has been cast on this area by cases such as *Re B (Children)* [2009] AC 11 esp at [5]-[15] and at [62]-[73] and *Bank St Petersburg PJSC & Anor v Arkhangelsky* [2020] EWCA Civ 408. Thus, first, the burden of proof in fraud cases remains the civil standard. Secondly, the likelihood of fraud in a particular case will depend upon the relevant surroundings facts and circumstances (see the discussion about the animal outside the lions' cage in Regent's Park zoo).

42. Further, if a failed case of fraud/undue influence is found not to fall within either of the two probate costs principles that I am considering, that does not automatically mean that a failed case challenging knowledge and approval by the testator of the will cannot fall within either of those principles. In *Re Cutcliffe's Estate,* Hodson LJ noted that the Judge had considered that the undue influence claim had not been brought on reasonable grounds but on unfounded evidence. The party failing in that claim had to pay the costs of the propounder of the will. However, the Judge had recognised that the case was one where the suspicion of the court was aroused and that knowledge and approval had to be established. Hodson LJ considered that

> "*the document of January 31 and the conversation on January 19 are not in themselves evidence of undue influence against the stepdaughter; but, in my judgment, they are relevant in considering whether the testator knew and approved of the contents of his will dated January 31. They would come under the heading of circumstances which are likely to arouse suspicion in ascertaining facts relating to the execution of the will.*"

43. Where suspicion of the court is properly raised such that knowledge and approval of the testator to the will becomes a live issue, but an undue influence/fraud claim fails and is held not to have been reasonably brought it is possible for the court to make separate costs orders regarding the two issues (see e.g. *Carapeto v Good* [2012] EWHC 640 (Ch)). However, the usual order is likely to be that the person propounding the failed fraud/undue influence case will end up having to pay the costs on both issues. Hodson LJ (with whom Ormerod LJ agreed) put the point as follows in the *re Cutcliffes Estate* case:

> "*It seems to me a strong thing, which I should be slow to listen to, to maintain that people who give evidence which the judge finds to have been wholly false, who have lost their case, and who have had the costs given against them, should be heard to say that an order for costs should be made either wholly or in part in their favour on the ground that the court in exercising its discretion in these cases is in the habit of exercising it along certain lines and in accordance with certain principles. The discretion of the court is always there, and the rules on which that discretion is exercised are there for the assistance of those who have to advise litigants before they embark on litigation, so that they may have some idea of the risks they run as to costs. It must surely be obvious to anyone who has studied the history of litigation in the Probate Division, notwithstanding the exceptions which are to be found in the books, that where pleas of undue influence and pleas of fraud are made, the probability, at any rate, if they are unsuccessfully made, is that the people who make such charges and fail will be condemned in the costs not only of that charge but of the whole action.*
>
> *The evidence in this case was the evidence of the Venesses, and it was directed not only to the question of want of knowledge and approval but also to that of undue influence. A great deal of evidence was directed to both those matters. It was not one of those cases where the defendants merely put the plaintiff to proof that the deceased knew and approved of the contents of the will. They took on themselves the task of proving, if they could, that not only was that onus not discharged but that the will itself was brought into existence by the undue influence of the plaintiff. That they wholly failed to prove. Having failed, and having failed because they were disbelieved, it seems to me inevitable that an order for costs would be made against them. I think that the order was rightly made and that this appeal should he dismissed.*"

44. Morris LJ, with whom Ormerod LJ also agreed, also decided the case on the basis that substantially the case was fought on the undue influence case that had failed and therefore the Judge was not wrong to order the defendants to pay all the costs:

> *"The judge said that there was a lot to be said for the proposition that it was the testator who was responsible. But he did not proceed to decide that matter for this reason: It was put to the judge that the case laid been fought substantially on the evidence of the Venesses, and that their evidence went very considerably to*

> *the issue of undue influence. That issue failed completely and it failed because the judge rejected their evidence and, indeed, called it unfounded evidence. Therefore, the judge took the view that, substantially, the case was fought on the evidence of those witnesses and on the issue of undue influence, and that the evidence of the Venesses had on many vital matters been positively rejected. I think that the judge, having that in mind and not forgetting the other considerations that had been put to him, came to the conclusion that the right order in the exercise of his discretion was that the costs should be paid by the defendants. I do not feel that I can say that the judge erred in coming to that conclusion."*

45. I should also note that the test of "reasonableness" in bringing the claim (or opposing a will) is not automatically met where the relevant claim or defence survives the strike out test.

46. In addition to the two probate costs principles that I have identified, there is a specific provision for costs in probate proceedings in CPR r57.7(5) which provides:
"*57.7(5)*
   (a) A defendant may give notice in his defence that he does not raise any positive case, but insists on the will being proved in solemn form and for that purpose, will cross-examine the witnesses who attested the will.
   (b) *If a defendant gives such a notice, the court will no make an order for costs against him unless it considers that there was no reasonable ground for opposing the will*".

47. In this case the 2nd defendant seeks to rely upon this rule. In *Wharton v Bancroft* [2012] EWHC 91 (Ch), Norris J suggested that CPR r57.7(5) covers the situation where the defendant does not run a positive case whereas the second costs principle applies in circumstances where the defendant does run a positive case. It may be that both situations boil down to the same question (but with the incidence of the burden of proof being different), that is that where the court finds there was a reasonable ground for opposing the will there will be no costs order against the defendant whereas if the court finds that there was no reasonable ground for opposing the will then the no order as to costs rule/principle will not apply.

48. Finally I should mention that the normal consequences of withdrawing or discontinuing a claim is that there will be a costs order against the person withdrawing (CPR r.38.6). Because of the special nature of probate proceedings, the court controls the question of whether discontinuance is permitted and on what terms, including what, if any, costs order should follow (see CPR r57.11). Nevertheless, subject to the probate costs principles that I have considered, it seems to me that the starting point will usually be that the party seeking to discontinue should pay the costs. In this case, the defendants did not withdraw their defence and, where made, counterclaim. Nevertheless, in submitting to a consent order in favour of the claimant's case that the 2017 will is valid and that therefore the 2005 will is not valid, their position was very close to a discontinuance.

Summary of the facts

49. For convenience, and intending no disrespect, I refer to a number of persons by their first name or nickname, as they were referred to before me.

50. The following findings are based upon the evidence that I heard. There were various witness statements on behalf of the defendants which were not in evidence before me as the relevant persons did not give oral evidence. Later, and to a limited extent, I deal with points raised in those witness statements which are relied upon by one or more defendants as material relevant to the costs principles that I have set out above.

51. The deceased testator ("Tom") was a Yorkshireman. He was also, at least in his later years, a farmer. He was born on 22 January 1935. When he died in November 2018, he had three children, Jacqueline (the 1st defendant) born in 1959, Gillian, born in 1961 and Gary (the claimant), born in 1964. He married his second wife, Valerie, on 21 January 1989.

52. There was much debate as to whether Tom was unable to read and write. I find that he had a limited ability to read and write. For present purposes, it is sufficient to say that he would not readily be able to read and understand business letters (or wills) and that he relied upon others assisting him by reading such things to him or writing letters on his behalf. There was much dispute between the parties and much cross-examination as to precisely how illiterate Tom was. The claimant's position as to this was also said to be a factor justifying opposition to the will. I disagree.

53. In my judgment on the claim, I described Tom as "wily" and someone who would often say one thing to one person and another thing to another person. He made promises that he did not keep. I am satisfied that he made various promises to Gary during his lifetime that Gary would receive a property, owned through a limited company, namely, Pear Tree Farm (or at least the farmhouse if not some ancillary farming buildings including barns). Those promises were not kept. Before Tom died, Gary had intimated that he would be bringing a claim based on proprietary estoppel in that respect. Similarly, at an earlier stage Jacqueline brought a proprietary estoppel claim against Tom (and his company) before his death. That resulted in a Tomlin order under which she was to receive a lump sum payment of £250,000. At a still earlier stage, Gillian had also brought proceedings against Tom.

54. I am also satisfied that Tom had a tendency to tell people things that they wanted to hear. I am also satisfied that he did not always tell the truth. He had a tendency to blame his falling out with members of his family as being down to their greed or the greed of persons connected to them.

55. I am also satisfied that Tom had an acute mind and that he had a keen business sense and was interested in, and had an understanding of, money and financial matters. That was confirmed by the oral evidence that I heard from Claire Grime (a former girlfriend of Gary and involved in drafting Tom's 2017 will) and from a neighbour, Mr Naylor. I am also satisfied that he was a man who knew his own mind and that he was not overawed by or in any way subject to the undue influence of anybody, certainly at the time of his execution of the 2017 will. That is demonstrated clearly by, among other things, the recordings of various meetings with solicitors taken by Gary when he and his father were present. Mr Naylor gave evidence that Tom was frightened of Gary, but that is belied by the evidence that I heard. It is also noticeable that although Nicola in her witness evidence refers to Valerie being frightened of Tom she does not say the same in relation to her grandfather.

56. I am also satisfied that at least as late as a matter of weeks before his death Tom retained full mental capacity and understood and was able to explain the history of his family relations, his assets and his wishes in relation to his assets as shown by the files from his last firm of solicitors, Switalskis, who prepared a draft will for him in October 2018. Tom died before executing that will.

57. Finally, as I have mentioned, Tom fell out with various family members at different times (sometimes on more than one occasion). The breakdowns in relationship often seemed bitter and protracted. Tom would use strong language about persons he had fallen out with. On Tom's side these family breakdowns would often be characterised by a position taken by Tom that he would not give that person any of his property, whether inter vivos or by will on his death.

58. Each of Tom's children also had children. When he died Tom had ten grandchildren. Most of those grandchildren also had children. For present purposes, the only great grandchild of Tom that I need mention is Bailey, who is the son of Kelly Travis. The children of Tom's three children are as set out below.

Jacqueline	Gillian	Gary
(1) Eve Moxon	(1) Gavin Holliday	(1) Gregory Goodwin
(2) Nicola Smith	(2) Geoffrey Holliday	(2) Jarrad Goodwin
(3) Kelly Travis		(3) Blue Goodwin
(4) Callum Healey		(4) Jordan Goodwin

59. In 1967 Tom bought a scrapyard in Barnsley. Jacqueline worked with him for many years from a young age and closely assisted Tom in running his business (and later businesses) in handling business correspondence, keeping the books and so on. For many years, Gary assisted Tom in the running of the scrapyard and later took over its running. It was later sold by Tom, who gave no prior warning to Gary. This was in about 2005. Thereafter Gary was largely out of favour. A constant theme (even when Gary later came back into favour) was that Tom did not want to leave Gary property which might be taken by Gary's "fancy women" or that he felt Gary would be irresponsible over. Tom felt he had given Gary properties in the past which had been dissipated in a way that Tom did not approve of. Concern as to his children (and his wife) passing "his" property to other persons (their partners or, in the case of his wife, her son) seems to have been a fairly constant theme for Tom, at least in 2017-2018.

60. In 1997, through a limited company Goodwin Farms Limited (the "Company") Tom acquired Santingley Grange Farm, Wintersett, Wakefield and Pear Tree Farm also at Wintersett. Tom continued to farm these farms until his death. Even into his early '80's, for example in 2017, he was still farming this land and actively carrying bales of hay. He did have some illnesses and was not as hale and hearty in his '80s as he had been in, for example, his '20s. Nevertheless, as a generality and for his age, he was in his 80s in good health and I am satisfied that he was mentally agile and able to hold his own in 2017. That is demonstrated by the recordings in evidence before me. In particular, it is notable that whenever Gary suggested that Tom had agreed that he, Gary, would receive Pear Tree Farm, Tom quickly interrupted (on a number of occasions) that it was the farmhouse only and not the other buildings. This confirms

he was not scared by Gary and that his will over what should happen to his property was not in any way overborne or subject to undue influence by Gary (or anyone else).

61. In 2000, Tom made a will through solicitors, Mills Kemp & Brown (the "2000 Will"). The executors and trustees were his three children. Gary was left Tom's Rolls Royce. As regards the scrap business, that was left on trust for sale with power to postpone the sale and until such sale the trustees were to carry on the business. The income (and after sale) proceeds of sale were to be held for Gary. Pear Tree Farmhouse was left to Gillian and The Bungalow at Pear Tree Farm was left to Jacqueline. His apartment in Tenerife was left to the three children. The residue was left on trust with the income to go to his wife, Valerie, and on her death or cohabitation with another, then on trust for his grand children.

62. Jacqueline moved into the Bungalow at Pear Tree Farm. Tom later transferred this Bungalow to her as a gift. Jacqueline then sold the Bungalow to Nicola, it is said at an undervalue. When he would not transfer Pear Tree Farm to Gillian, who was then running a logging business from there, and when she found out about the gift of the bungalow to Jacqueline, there was a major falling out between Tom and Gillian. She brought legal proceedings against Tom, lost them and had to vacate Pear Tree Farm. The scrap metal business, as I have said, was disposed of in about 2005 and there was a falling out also with Gary at about this time

63. In 2005, Tom made a new will. Again, this was made through Mills Kemp & Brown ("MKB"). The executors and trustees were Jacqueline, her daughter, Nicola, and Tom's accountant, Neil Bretton. Gary was gifted the Rolls Royce. The apartment in Tenerife was now gifted to Jacqueline. All Tom's personal chattels were gifted to his wife Valerie. His shares in Goodwin Farms were to be held on trust for sale but the trustees were to use reasonable endeavours to ensure that the farmhouse at SantingleySantingley Grange was not sold during Valerie's lifetime, until she remarried or started co-habiting with another, and was to provide a home for her rent free with all outgoings paid by the estate. Charged upon the shares in the company (or their proceeds) was an annuity for Valerie during her lifetime until she co-habited with another. Subject to that the proceeds were to be held for Nicola absolutely. The residue was to be held for some of Tom's grandchildren, namely the four children of Gary and the three children of Jacqueline (other than Nicola, who as said, had the benefit of the shares in the company which owned the farms and the farming business).

64. For a large part of the period after 2005, Gary, as I understand it, worked offshore and was often away for periods at a time. At various times he says he invested comparatively large sums in the farmhouse at Pear Tree farm, which he lived in, and also in relation to the creation of a possible farm shop in outbuildings at the same location which were renovated. Tom also said that he invested large sums in Pear Tree Farm.

65. Meanwhile, from about 2011-12, Jacqueline was largely managing and developing a caravan park on part of the farm. She also lived in a lodge on the site which was later the subject of threatened criminal enforcement proceedings by the local planning authority, Wakefield Metropolitan District Council.

66. In 2016, four relevant things occurred. First, Gary and Claire Grime started going out together from about September. Claire Grime was a senior police officer working with the National Law Enforcement Agency with a high level of security vetting. She had been with the Greater Manchester Police for some 32 years working up to the rank of Detective Constable. Secondly, there was something of a reconciliation between Tom and Gary. Thirdly, Gary came to the conclusion, implemented in the following year, that he did not want to work offshore anymore but wanted to work on the farm. Fourthly, Jacqueline instructed solicitors who began to threaten (initially implicitly, later explicitly) legal proceedings against Tom for a claim by way of proprietary estoppel and making claims against the company in debt. The first letter that I have identified in this respect is dated 14 December 2016. As I understand it, this too reflects a breakdown in relations between Jacqueline and Tom which dated back to 2015 (see letter of 25 March 2017 from Jacqueline to Tom where she refers to an agreed "settlement after our working relationship of 42 years standing broke down"). She also refers to instructions having been given by Tom to seek the signing by her of a lease or tenancy of the caravan site.

67. The battle lines drawn are clearly shown by the ensuing correspondence after December 2016. A later letter from her solicitors dated 7 April 2017 spells out that the claim was that over £130,000 had been invested by her in the caravan site upon Tom's understanding and promise made to her that that land would be transferred to her. Indeed, the letter asserts that this is just one among "numerous promises" he made in relation to different parcels of land that he said would be transferred to her at different times in consideration of all the work that she had done for him on an unpaid basis throughout the course of her adult life.

68. This correspondence also reveals a reluctance in Tom (despite repeated entreaty by Jacqueline's solicitors) to go to solicitors and incur their costs. This may have been a natural inclination in him as a thrifty Yorkshireman. It may have been caused or his resolve may have been strengthened by an apparent dispute with solicitors' fees in the past. This was also a factor in him not instructing solicitors regarding his 2017 will but instead asking Claire to help him in its drafting.

69. Increasingly during 2017, Tom came to like and rely upon Ms Grime to help him with the correspondence from Jacqueline and her lawyers, from Wakefield Council (who initiated criminal proceedings in the magistrates court over the planning issue) and others.

70. As I have said, Ms Grime, until comparatively recently (after the issue of the proceedings herein) worked as an investigator for the National Law Enforcement Agency. Prior to that she had been a serving police officer for 32 years or so with the Greater Manchester Police where she reached the rank of Detective Constable. Although, as I have said, Tom seemed to have a concern that fancy women would, in effect, direct Gary to give things away to them, he does not seem to have harboured such concerns about Ms Grime.

71. In about April/May 2017, Tom decided to make a new will. He asked Claire to help him draft it. She based it upon the provisions in his 2005 will, making changes that he directed or suggesting changes to some of the more technical clauses which she did

not think were needed. Tinkering with a will like this is of course dangerous but, to be fair, Ms Grime made clear that she told Tom that he should check her draft with a firm of solicitors. The ultimate result was the 2017 will.

72. The main provisions of the 2017 will are as follows:
   (1) The sole executor and trustee is Gary;
   (2) Gary is given the Rolls Royce motor car.
   (3) His wife, Valerie is given his personal chattels;
   (4) The shares in the company are given upon trust (the trust for sale was omitted) to continue to run the farm but
   (5) SantingleySantingley Grange farm house is to be made available for Valerie and, if she does not want to live there, then her trustee has a discretion to provide a different property for her to live in.
   (6) The trustee has power to sell Pear Tree Farm and associated land and buildings for the sole benefit of Gary;
   (7) The Tenerife flat is to be made available for Valerie while she remains in a company property and thereafter it is gifted to Gary.
   (8) SantingleySantingley Grange Farm is to be used as a working farm until it is sold or Gary dies, at that point the proceeds should be distributed to a number of his grandchildren and one of his great grandchildren. The grandchildren are Jaqueline's children (but with the exception of Nicola and Kelly) and Gary's children. The great grandchild is Bailey, the son of Kelly.
   (9) The residue is held for Gary absolutely.
   (10) All previous wills and testamentary dispositions are revoked.

73. In early May 2017, it is said that Valerie found out about the draft 2017 will. She marked it up in a way that shows that she had identified that Nicola was not included as a beneficiary. She discussed the will with Tom. It is also said that Valerie was very cross and/or anxious that there was now no annuity for her and that Gary would, in effect, be in charge of the provision for her at SantingleySantingley Grange farmhouse or alternative premises. At this point, it is said, she started pressing for Tom to provide her with a home during her lifetime. Ultimately the Tenerife flat was sold and the proceeds used, in part at least, to provide her with a new house which she had found. The Tenerife flat was put on the market (via Facebook) as early as 4 May 2017. Tom had already expressed a desire to sell the flat because he was not enjoying going out there so much and travelling there was more of an effort than it had been. A buyer was found very quickly and by 18 May 2017 solicitors with Spanish qualifications were involved in taking steps to put the formalities of a sale in place.

74. On 6 June 2017, Tom, accompanied by Gary, had two meetings at MKB. One was with Ms Rhiannon Wilcockson, about his will, and the other was with Mr Wright about the dispute with Jacqueline. Recordings of these meetings were revealed rather late in the day by Gary. Also, rather late in the day, third party disclosure was obtained in relation to MKB's files. The meeting with Ms Wilcockson is one where Tom focussed on Valerie, and how he was going to buy her a house but on the basis that he did not want her to get anything else by way of his property. Although, apparently, Tom and Valerie were to continue to live together, Tom expressed himself in no uncertain terms that financially Valerie as not to get anything more than the house he was then prepared to buy her. It is also apparent from the recording that Tom will understood what was in the 2017 Will (though he was inconsistent as to whether

it had or had not by then been executed). He also repeatedly corrected Gary to make clear that he was only prepared to give Gary as a lifetime disposition Pear Tree farmhouse and not the farm buildings. In discussing and explaining the 2017 will (described as being "in place now for short term" and that if a new will were to be made in a few months time it would be substantially different) it is fairly clear that Tom knew what was in the 2017 will and was happy with it. Matters were left that Tom would come back with instructions for a new will, to replace the 2017 will, when things had moved on a bit.

75. In about June 2017, Tom moved solicitors to Crooks Commercial Solicitors which is where Mr Jenkins then worked. The instructions were initially to deal with the dispute with Jacqueline and in particular either to evict her or achieve a rental for Tom from the caravan park.

76. The 2017 will is dated 11 July 2017 and Tom's signature is attested by Neil Shaw (Tom's accountant, who worked at the same firm as Mr Bretton, who had by then retired) and Ms Ann Richardson, a secretary working at the same firm. Claire's evidence, which I accept, was that once she had carried out her drafting function and advised Tom to check it with a solicitor, she had no further involvement in its execution. Gary's evidence, which I also accept, was that he too had nothing to do with the execution of the 2017 will.

77. Again, various recordings of meetings between Mr Jenkins and Tom/Gary were disclosed rather late by Gary. Also, the relevant papers from Crooks (by now with other firms, some had followed Mr Jenkins to the firm he currently works for) were not obtained timeously because a third party disclosure order was sought late in the day and at that point the question of legal professional privilege was raised. That issue was not finally resolved until the first day of the trial, as I have adverted to above. That also resulted in Mr Jenkins, called by the 1st, 2nd, 3rd and 5th defendants, providing a witness statement rather than a summary.

78. In oral evidence, as confirmed by the recordings and Mr Jenkins' approach at the time, there was no hint to him at the time or any circumstances alerting him to any possibility that Tom was subject to the undue influence of Gary (or anyone else).

79. A first meeting seems to have taken place on 21 June 2017. A separation agreement with Valerie seems to have been on the cards at this stage (see letter from Crooks Commercial Solicitors to Tom dated 3 July 2017). It is clear from the files notes that this separation agreement was something Tom wanted and it was not something that Gary had procured him to agree to.

80. By 17 July the sale of the Tenerife apartment was coming to a conclusion but the sale had still not completed at that stage.

81. One meeting with Mr Jenkins was on 27 July 2017. According to the recording, Claire and Gary broke up with each other the week before. It is recorded that the proceedings by Jacqueline had been issued on or about 18 July 2017. Also in the conversation, the position with Valerie surfaced. Tom reiterated his position that he wouldn't give Valerie assets because she would want to give them to her son. He explained that it was "greed for her son" that was causing he and Valerie to split up.

The house that he was buying for her was said to be ready in another fortnight. It appears that Tom may in fact have been intending to continue living with Valerie as a couple. His concern was solely the financial position.

82. Under cover of a letter dated 31 August 2017, Mr Jenkins at Crooks Commercial Solicitors sent Valerie a separation agreement for her to sign. The agreement provides for a sum of £150,000 to be paid by Tom to Valerie as a contribution towards a house for Valerie in full and final settlement of any claims either might have against the other. The agreement provides that both would continue to live at SantingleySantingley Grange farm "free from the marital control of the other" and that on completion of the purchase of a property for her, Valerie would then move to that property. In fact, it seems highly probable that Tom and Valerie did not intend that she would move out of SantingleySantingley Grange Farm, at least during Tom's lifetime. This agreement seems to have been signed by Val towards the end of September 2017, and after the Tomlin order that I have referred to and to which I now return.

83. A mediation took place between Tom and Jacqueline on 14 September 2017. This resulted in the Tomlin order that I have referred to. Gary was present at that mediation as providing support for Tom. It is clear that the question of Tom's will surfaced during the mediation.

84. The Tomlin order provided that the proprietary estoppel proceedings brought by Jacqueline against Tom and the Company should be stayed on the terms set out in the attached schedule. Those terms included payment of a lump sum of £250,000 to Jacqueline, her vacating the caravan park, her not being liable for any overage payable to British Coal, the leaving of the Lodge at the Caravan Park and its becoming the property of the Company. The agreement and order also dealt with Gary's position. The recital to the order provide that in consideration of the terms set out in the schedule, Tom undertook that he would arrange his estate by will such that Gary would obtain a life interest in Santingley Grange (owned by the Company) except Pear Tree Farm and that after such life interest had terminated on Gary's death the estate would be shared equally between Tom's grandchildren. It was implicitly recognised that Tom intended to transfer Pear Tree Farm to Gary either during his, Tom's, lifetime or by will on his death. The schedule provided that it was agreed between the parties that the estate (of Tom) should not bear any inheritance tax liability in respect of Pear Tree farm and that Gary had agreed to give a separate inheritance tax indemnity in respect of any such tax. As a condition of the agreement, it was agreed that Tom and the Company would procure that Gary would give such a tax indemnity by separate deed. A separate tax deed indemnity was later drafted but to date has not been executed. On this matter Mr Homer, senior partner at Howard & Co solicitors, acted for Gary.

85. During the latter part of October 2017 one of the problems identified was that Pear Tree Farm was subject to a restriction in favour of the Coal Authority preventing transfer. Such a restriction was also in place as regards title to Santingley Grange Farm which hampered ability to raise funds secured on that title. The Coal Authority was also entitled to overage in the event that relevant planning permission was obtained in relation to either property and such planning permission had been obtained in relation to Pear Tree Farm and Santingley Grange Farm. These problems

hampered attempts to (a) transfer Pear Tree Farm to Gary and (b) to raise funds on Santingley Grange Farm to enable Jacqueline to be paid in full under the agreement scheduled to the Tomlin order.

86. In January 2018, Mr Homer saw Tom and Gary about Tom's will. The transcript of that meeting makes fairly clear that Tom was well aware of the terms of the 2017 will. The notes on the solicitors' file of itself makes clear that Tom wanted to make a new will to remove the residence conditions for Valerie as contained in the 2017 Will and that the provision regarding the Tenerife apartment needed to be removed as the apartment had been sold but also that he wished to retain the provisions regarding Gary having some form of life interest in Santingley Grange Farm (or the shares in the company owning the farm). It is implicit form the solicitor's notes that the terms of the 2017 will were talked about as he made notes on a copy of it. Interestingly, the proposal seems to have been to change the identity of the grandchildren who took Santingley Grange Farm (by way of the shares) after Gary's interest in the Farm expired. Nicola was added in and Bailey, the great grandchild, removed. Kelly (Bailey's mother and Jacqueline's daughter) was not included. Andrew Holliday was added. This is possibly a mistaken reference to one of Gillian's children, but the other one was left out. Thus, not all the grandchildren were included.

87. Payment under the Tomlin order to Jacqueline was due to take place in June 2018. A sum of £30,000 being paid on account (and other terms being agreed), an extension of time was granted by Jacqueline.

88. By the summer of 2018, relations seem to have broken down again between Tom and Gary.

89. By August 2018, Gunnercooke llp, solicitors for Gary, were writing to Tom about the non-transfer of Pear Tree farm to Gary and asserting a proprietary estoppel based on repeated promises to Gary that Pear Tree farm would be his and alleged substantial expenditure and work and other things done by Gary in reliance on such promises and the alleged fact that the lifetime transfer of Pear Tree Farm to Gary was the basis upon which Jacqueline's claims were compromised under the Tomlin order.

90. A draft response in manuscript to such letter, apparently prepared on Tom's behalf, asserts (among other things) that Gary and Claire Grime persuaded Tom to change his will by "trickery", caused the breakdown of Tom's marriage, that Gary appeared at the mediation not to assist Tom but to influence and pressure him into "getting everything in Gary's favour", that various substantial sums were owed by Gary to Tom. The draft did however offer to transfer Pear Tree Farmhouse only, but not the "farmshop land or carpark", to Gary on certain conditions including that Gary repay Mr Naylor a sum of £40,000 (as to which there seemed to be a suggestion that this might be due? from Tom, which Tom denied).

91. The actual letter sent in reply in typescript (the copy in the trial bundle appears incomplete) refuted the intention to transfer Pear Tree farm to Gary during Tom's lifetime by pointing to the terms of the 2017 will. Detrimental reliance was also denied. An offer, similar to that set out in the manuscript draft, was put forward.

92. In September 2018, Tom instructed Switalskis solicitors in connection with the making of a new will. The new will would initially have left everything to Nicola but, in the event that that gift failed, the estate was held on trust for the remaining nine grandchildren. Tom's instructions later changed to exclude the two of Gary's children, apparently because of a violent incident committed by them.

93. Mr Jenkins continued to act for Tom in relation to the ongoing issue of compliance with the conditions of the agreement schedules to the Tomlin order. At a meeting with Tom in about October 2018, Tom told Mr Jenkins that if he had known what was in the 2017 will he would never have signed it.

General approach

94. I have to remind myself that the question is not whether the case ultimately failed but whether at the time it commenced and thereafter was persisted in the position was either that the testator (or residuary beneficiary) can be said to have had caused the relevant proceedings or whether there were, at the least, reasonable grounds (within the meaning of the probate costs principles) for opposing the will and requiring the court to investigate. In doing that I have to consider the matters put forward by the defendants not only on an individual basis but also on a collective basis.

95. In assessing the defendants' position I am, in my view, entitled to take into account not only the position as known to them, or capable of being found out by them, prior to the issue of proceedings but also as matters emerged and whether they then still persisted in their case. To take one example, Tom discussed his 2017 will with Mr Homer, solicitor, in January 2018 in the context of changes that he would like to make to it. That transcript was provided some time before the trial. It revealed that Tom had a good understanding of the 2017 will. Nevertheless, the case as to lack of knowledge and approval and undue influence continued to be persisted in.

96. As I have already mentioned, my view is that it is not correct for me to take into account evidence that I did not hear on behalf of the defendants in support of a case that there was sufficient suspicion to mount all or any part of the case that they did. On the other hand, it is appropriate to take into account matters referred to by a witness of the defendant where those matters are agreed or established by the evidence that I did hear. Further, it is appropriate to take into account matters referred to by defence witnesses which, on their face, tend to lean against any relevant justified suspicions about the 2017 will.

97. It is also necessary to apply a reality check to alleged inconsistent statements in the evidence of witnesses for the claimant. It is all to easy to point to inconsistency or inaccuracy when a witness is attempting to remember events of some years before. What a court has to be alive to is inconsistencies which really raise a suspicion as to the veracity of a witness's evidence and that which may be understandable and not of great significance. A great many of the points raised by the defendants seem to me to fall within the latter category.

Due execution

98. As pleaded, the case for testing due execution put forward by the 1st defendant was that:

(1) The attestation clause referred to the signature of the testator as having been placed not just directly underneath the attestation clause but also on the preceding pages, whereas the preceding pages were unsigned/uninitialed;
(2) the defendant would require the document to be submitted to an expert for examination, it not being admitted that the document was in its present form when signed;
(3) shortly after the date of the 2017 Will, the claimant approached Mr Keith Naylor and asked him to witness a handmade will in the name of the testator which Mr Naylor refused to do.

99. The joint expert eventually instructed in the proceedings reached the following opinions by way of conclusion regarding the 2017 will:
(1) The evidence was inconclusive as to whether the date on the will, 11 July, was written by Tom, Gary or someone else;
(2) There was no evidence to assist in determining whether the three pages of the 2017 will were attached at the time that it was executed;
(3) The testator's signature was written in Ink A and all other handwritten entries in Ink B;
(4) There was moderate approaching strong evidence to support the proposition that Tom wrote the signature in his name on the 2017 will. The alternative proposition, that the signature was a simulation (freehand copy) by another individual was "fairly unlikely";
(5) There was no evidence to suggest that more than one printer had been used in the creation of the 2017 will. There was no evidence to determine whether the pages had been created on the printer at a single point in time or at different points in time.
(6) There as no evidence to assist in determining whether the witness details were both appended at the same point in time.

100. The evidence from the attesting witnesses, was that neither of them remembered attesting the signature of the testator on the will but the relevant signatures were theirs and they had no reason to think they would not have duly attested the will. Their evidence did not change in the witness box. Mr Briggs cross-examined the attesting witnesses. Although, therefore, he may not have been able to complain if those witnesses had not been called in light of the concession made on behalf of his clients, he did therefore seek to test their evidence and/or obtain other evidence from them.

101. Mr Briggs for the 1st, 3rd and 5th defendants says that it was reasonable for them to raise the issue of due execution, but after considering the joint expert report to drop that issue. He says that those defendants should not be responsible for the costs of that issue up and until the issue was dropped by them nor, in any event, thereafter. As regards the 2nd defendant, he relies upon her position under CPR r57.7.

102. In my judgment, there is no case for saying that the testator was responsible for a case of invalid execution being raised. Further, there were no reasonable grounds for raising the issue of due execution. It does not seem to me right that a party can assert that due execution has to be proved and that to that end expert evidence is required unless the circumstances justify it. If they do not, then it is really for the defendant to obtain expert evidence himself which raises a relevant issue. In this case the pleaded circumstances relied upon were the fact that the attestation clause referred to earlier

pages being signed when they had not been. That, in my judgment, at least in this case, is not enough reasonably to raise an issue as to the validity of the execution. The attesting witnesses had indicated their position (which did not change) as early as 2018, before proceedings were issued. They were not solicitors. The deceased was not a professional. The wording had been lifted from an earlier will. The wording as to earlier pages being signed is directed not at valid execution within s9 but at the issue of authentication of the earlier pages (see Theobald on Wills at paragraph 3-104). The only requirement is that the relevant sheets of the will are in the room when the will is signed. This will be presumed. The expert evidence was inconclusive on the point of what pieces of paper were affixed to each other at the time of signature and so that issue was not clarified by the expert report (after which some of the defendants dropped their case requiring proof of due execution) and no new evidence assisting on the issue emerged at trial.

103. The other matter relied upon by the 1st defendant was the evidence of Mr Naylor. However, having heard from him I am far from satisfied that his evidence was that he was asked to witness a signature of the testator, by signing either when the testator's signature was not there and was added later or when it had already been placed on the will. His evidence was that he was asked to witness a will. He says he saw the first page only. His evidence was that he refused to be involved because he thought Gary and Claire had prepared the will in a situation where they were, in his view, subject to a conflict of interest. Had he been asked to witness a signature that was not there or was already there I consider that he would have raised that with Tom but he accepted that he did not raise the question of being asked to witness the will with Tom. Gary's evidence was that Mr Naylor had been asked to witness his, Gary's will, that may be right. I am prepared for the purposes of the issue before me to assume that Mr Naylor's evidence (pre any cross-examination) gave reasonable grounds for thinking he had been asked to witness Tom's will. I do not however accept that it gave reasonable grounds to think that the 2017 will was ultimately not properly witnessed by the two independent attesting witnesses.

104. As regards the propriety/reasonableness of taking the due execution point, Mr Roberts on behalf of the 4th defendant makes the following additional points:

(1) The witnesses to the will had in fact indicated as early as December 2018 that they could not recall signing the Will.
(2) They also indicated that they would not attend Court voluntarily.
(3) There was no visitors' book and no written record of Tom attending at his accountants to execute his will.
(4) There was nothing in Valerie's diary to indicate that Tom had gone to the accountants on that date.
(5) At a late stage, it emerged that Tom had told Ms Mills at MKB that the 2017 will had already been signed and witnessed prior to the date of that meeting (6 June 2017).
(6) Gary was present and did not disagree or express any surprise about what Tom said.
(7) This is in contrast to his written evidence that he knew nothing at all about the execution of the Will.
(8) Despite this knowledge on the part of Gary, his pleaded claim has always been that the 2017 Will was executed on 11 July 2017.
(9) The will ended up in the possession of Gary. Tom does not appear to have said at any stage how that came about.

(10) In the circumstances, there was a reasonable and valid suspicion that the Will was not validly executed and also that Gary may have had a hand in the execution of the Will.

105. As regards these points, none of them persuade me to change my assessment that neither probate costs principle applies on the issue of due execution.

106. As regards paragraphs (1) & (2): There is nothing suspicious in the attesting witnesses refusing voluntarily to attend court to give evidence. They did in fact voluntarily give witness statements. They did not remember subscribing their signatures as attesting witnesses and their evidence at trial did not in substance change from the evidence given in their witness statements, yet on the basis of that evidence the defenants agreed that the 2017 has been proved to be validly executed.

107. As regards paragraphs (3) to (4), the absence of such records is not in itself suspicious. They are simply examples of evidence that might have strengthened the case one way or the other had they been available. There is no reason to think that Valerie would have made a relevant diary entry. Tom would often pop into his accountants, apparently for little more than a chat and in any event it is clear that he kept things from Valerie (e.g. the original intention to change the 2005 will)

108. As regards paragraphs (5) to (8), Tom's statements in June 2017 were in fact inconsistent, at one point he said the will had been executed at other times he said it had not. That evidence emerged not long before the trial. No evidence either way was adduced that directly clarified these points. Mr Roberts accepted that the date of execution was not key to valid execution. Paragraph (7) has to be read in context. Gary did not know how and when the will had been executed: he was not directly involved in its execution. He would not have been in a position to express surprise or otherwise at the meeting in June 2017 at MKB. Gary has asserted the July date based on that date appearing in the will.

109. As regards (9), Gary explained how he obtained the signed copy of the will: in a box handed to him by his father. Clearly he had seen the will (unexecuted) earlier than that. The fact that there is no hearsay evidence from Tom as to him handing the box with the executed will in it (among other papers) to Gary, is not suspicious.

110. Accordingly, the 4th defendant should pay all the costs relevant to the due execution issue. (I deal below with the generic question of whether the 4th defendant should in any event not be liable for the claimant's costs incurred prior to her joinder).

111. There is a question as to whether the 1st, 2nd, 3rd and 5th defendants should not pay any costs of the claimant arising in relation to the due execution issue after May 2020. However, the only significant costs are likely to be in connection with the tendering of the attesting witnesses for cross-examination. Mr Briggs on behalf of these defendants did ask questions in cross-examination of those witnesses. There seems therefore little point in ordering that these defendants should not pay the claimant's costs attributable to the due execution issue after May 2020 because in reality any such costs are either not severable and/or are de minimis.

Undue influence/fraud and lack of knowledge and approval

112. In my judgment, there were no reasonable grounds to raise a case regarding undue influence/fraud and the raising of this issue was not caused by the deceased or Gary, such that it would be appropriate for the costs to be paid from the estate. Accordingly, the costs of this issue should be paid by the defendants.

113. As in the *Cutcliffe's Estate* case, the defendants' cases (I deal with the 2nd defendant separately below) were run on the primary basis that the 2017 will had been induced by a fraudulent conspiracy between Gary and his girlfriend in which undue pressure had been placed upon Tom such as to overbear his free volition and in circumstances where steps were taken to ensure that he did not know or understand what was in his will and where false representations were dishonestly made to Tom about the contents and effect of his 2005 will. I will come on later to elements said to bear solely upon knowledge and approval rather than being, in effect, a knock on effect of the alleged conspiracy.

114. As regards undue influence, the matters set out in the 1st defendant's defence and counterclaim that were relied upon were:

(1) a conversation between Nicola and Tom, in which the latter is said to have asserted that he did not have a clue what was in the will, the will was not read out him, he only signed the will because Ms Grime told him the claimant was going to have a mental breakdown and that he had given in to the pressure of Ms Grime and the claimant in signing the will;
(2) a conversation between Kim and Tom, in which the latter is said to have asserted that he could not read the will, that he had never had it read to him and that he had signed the will because he didn't wish to lose his son, as Gary had threatened;
(3) a conversation (at about the same time as those in (1) and (2)) between Mr Jenkins and Tom in which Tom said that if he had known what was in the 2017 will he would not have signed it.
(4) The letter sent in August 2018 in relation to a proprietary estoppel claim intimated by Gary which included words that he had been presented with the will and he had been persuaded to sign it;
(5) Gary physically dominated Tom, acting in an aggressive and controlling manner towards him in his old age;
(6) in December 2016, Claire Grime told the deceased that he should "sign his assets over" to the claimant.
(7) That the deceased was illiterate, Gary and Claire involved themselves in his correspondence and affairs putting themselves in a position of influence over him;
(8) December 2016, Gary and Ms Grime repeatedly put pressure on Tom to transfer assets to the claimant during his lifetime;
(9) Ms Grime applied pressure to Tom by claiming his failure to hand assets over was causing the claimant to suffer a nervous breakdown and to be at risk either of suicide or leaving Tom entirely;
(10) Because of the relationship of Claire and Gary, it was to be inferred that as Claire was involved in preparation of the will, so must Gary have been closely involved. There was no independent advice regarding the meaning or effect of the will or any contact with a solicitor in respect of it.

(11) Shortly after the 2017 will was made, Tom told Mr Keith Naylor that the claimant had made a will for him and told him to sign it and that he and Claire had bullied him into making the will.

115. As regards the allegations as what Tom had told other people before his death, these are matters that do not give rise to a case for payment of the defendants' costs from the estate. This follows from the *Cutcliffe's Estate* case. Mr Briggs (supported by Mr Roberts) submitted that that case could be distinguished from this one. The relevant dicta of Hodson LJ were, it was submitted, dealing with promises or statements as to what an unmade but future will might contain not as to statements going to the invalidity of an existing will. I have dealt with the facts in *Cutcliffe's Estate* earlier in this judgment and in my view this distinction cannot be drawn.

116. Of course what Tom said could be a relevant to the second probate costs principle which, if applicable, points to there being no order for costs.

117. Similarly, in my judgment it is going too far to say that Tom "caused" the litigation in other respects. for example, by previously asking solicitors to prepare his will whereas in the case of the 2017 will (recognised by him as one that needed to be revisited and as a holding position) he used the assistance of Claire to amend the terms of an existing will.

118. I also do not accept that there is any relevant conduct by Gary which could be said to have caused a case in undue influence to have been brought.

119. In terms of the surrounding circumstances, they too do not in my judgment justify an order, on the basis that they raised sufficient suspicion to make it reasonable for an undue influence claim to be brought, that the defendants should not have to pay the claimant's costs in relation to the undue influence claim. Without going through each and every point raised by the defendants, the big picture position is that (a) the separation deed was put forward by a solicitor for Tom, suggesting that the solicitor did not consider that there was any hint of undue influence in that respect; (b) the fact is that there was no lifetime transfer to Gary so Tom's will was obviously not overborne to that extent; (c) the character of Tom must have been well known to the entire family and his tendency to make promises, break them and fall out with members of the family; (d) the mediation in relation to the proceedings brought by Jaqueline (in which Tom was represented by a solicitor) resulted in a publicly stated position as to Tom's wishes, which was that Tom wanted Gary to get a life interest in Santingley Grange Farm but was prepared for Gary to obtain Pear Tree Farm (strikingly similar to what was in the 2017 will). The evidence available shows quite clearly that Tom was aware of the terms of the 2017 will at the time and that it reflected his then wishes. This fatally undermines the statements by Tom that he did not know the contents of the will. It also means that a case that he did know the contents but that his will was overborne such that he made the 2017 will, was also unrealistic; (e) the 2017 will hardly represents a massive gain for Gary. True it is that he obtained Pear Tree Farm but he received only a life time interest in (or referable to) Santingley Grange. Had Gary been seeking to "scoop the pool" and had he overborne Tom's will one would have expected an absolute gift to Gary (as there was to Nicola in the 2005 or proposed 2018 wills); (f) the help that he and Claire gave to Tom reflected the needs of Tom as recognised by the defendants, and indeed as previously

and/or subsequently met by Jaqueline and Nicola; (g) Claire was a person on the face of it of impeccable good character; (h) The suggestion that Tom made the 2017 will because of threats of suicide and the like is fanciful on the facts and not made out on the evidence before me; (i) although it is true that Nicola was left out of the 2017 will, Tom was not consistent in the positions that he took regarding disposal of his estate on death among the grandchildren and in any event decided to execute the will despite Valerie having raised with him the fact that the 2017 will (in draft) did not include Nicola as a beneficiary.

120. At the end of the day I understood Mr Briggs to accept that a case that the estate should pay the defendants' costs was likely to be a difficult case to succeed upon.

121. As regards evidence as to what Tom told members of the family after the breakdown of relations between him and Tom, I did not receive evidence from those witnesses, nor were they cross-examined on it. It seems to me that defendants cannot rely upon it before me as giving rise to a reasonable suspicion of undue influence. Even if I am wrong however, such evidence and most of the other matters relied upon as particulars of undue influence run up against the problems that I have already identified.

122. As regards reliance on the evidence of Mr Naylor, that evidence was fatally flawed by two matters. First that the conversation was said to have taken place at about the time the 2017 will was executed. However, given the other evidence (including evidence that at the mediation Tom, then instructing his own solicitor, was agreeable to Gary having Pear Tree Farm so either this conversation was later, after the falling out between Gary and Tom or totally unreliable). Secondly, Mr Naylor's statement did not reveal the fact (almost spontaneously revealed by Mr Naylor in the witness box) that Tom had been furious that his former accountant, Mr Bretton, would not witness the 2017 will. That hardly suggests that he did not want to execute it or that he was forced into it against his will. There is force in Mr Fryer-Spedding's submission that this fact was on that should be treated as one that the defendants could reasonably have found out.

123. The extra matters relied upon in the 1st defendant's defence and counterclaim in relation to lack of knowledge of and approval by the deceased include:

(1) The testator's illiteracy;
(2) That the will was contradictory and unclear and would not have made sense;
(3) The will contains provisions regarding the Tenerife flat and Valerie's residence rights which were about to be overtaken by the sale of the apartment and the purchase of a house for Valerie;
(4) Tom was not in touch with solicitors about his will.

124. Mr Briggs relied on various other matters too, such as that Claire has said in her witness statement that the list of grandchildren to be benefited under the 2017 will was provided to her by Tom and she was told by him that Valerie had written that list, but Valerie denies having done so. I have not heard from Valerie and in any event accept that the list was given to Claire by Tom.

125. As regards illiteracy, there is ample evidence, available to the defendants, that Tom was aware of the contents of the 2017 will at the time. Furthermore, and in any event, the defendants' own witnesses intimated that the terms of the will had been discussed with him before he went to his accountants to go and execute it (see e.g. the witness statements of Valerie and of Eve Moxon).

126. As regards the terns of the 2017 will which are said to be problematic, the arguments on the whole turned on legal argument as to whether the will was effective. It was suggested that Tom would not have understood the true legal effects (or legal doubts) about the 2017 will. If these points were good then they remained good at the stage that the defence was dropped. Many of these points were insignificant in any event, such as the letters "Mmmm" at the end of clause 4(b) of the 2017 will or that the clause about the Tenerife apartment appeared in the midst of a clause about the shares in Goodwin Farms Limited but the Tenerife apartment was separately owned by Tom personally.

127. As regards the sale of the Tenerife flat and the use of the proceeds to provide alternative residential provision for Valerie to that in the 2017 will, these matters had not been completed at the time that the 2017 will was prepared nor at the time it was executed. Further, it was recognised by Tom that the will would need to be changed to deal with these developments.

128. As regards the will not being prepared by solicitors, that is correct as a matter of fact but in fact evidence available to the defendants shows that Tom was in contact with solicitors and that he did envisage the 2017 will as being a holding operation and that he would be amending that will through solicitors.

129. Mr Roberts for the 4th defendant relied on further points, but they do not in my judgment take matters further. Thus, by way of example, the fact that a version of the 2005 written on as being "void" by Claire has not come to light nor has the list of grandchildren that she used in drafting the 2017 will is not of itself suspicious.

130. In conclusion, I do not consider that the circumstances are such that the either probate costs principle comes into play with regard to the issues of either undue influence or knowledge and approval. If I am incorrect on this point with regard to knowledge and approval, then I consider that this case falls within the circumstances as they applied in the *Re Cutcliffe's Estate* case, as found by both Morris and Ormerod LJ. It is true that in this case I have not heard and determined that the defendants' evidence is false: I did not hear it, but they have in effect accepted that it is insufficient to raise a case which ought to be put before me to determine whether undue influence (or lack of knowledge and approval) is made out.

The 2nd defendant

131. Although Nicola's defence contains the notice provided for by CPR r57.7(5), I do not consider that Nicola in fact followed that notice. Her witness statement clearly sets out a very positive case indeed that the 2017 will is invalid. Mr Fryer-Spedding, with some justification, described Nicola as the main witness for the defendants. Further, Nicola was represented by the same solicitors and counsel as the 1st, 3rd and 5th defendants. It was impossible for me to distinguish during the trial when Mr Briggs was only acting for those other defendants and when he was acting for Nicola (alone or

including these other defendants). In my judgment, where a positive case is in fact run the mere compliance in form with the requirement of CPR r57.7(5), by the pleading stating the terms of such notice, is insufficient to protect the relevant defendant in costs as provided for by CPR r57.7(5)(b) if the way that the case is run does not reflect that notice Mr Briggs submitted that I should distinguish the case being run by Nicola from the evidence that she put forward. I disagree. If a party decides to put forward positive evidence then that reflects a positive case being put forward by that party.

132. Even if I am wrong about that, for the reasons already given I am satisfied that there was no reasonable ground for requiring proof of the will in solemn form by reference to possible issues of (a) undue influence and (b) lack of knowledge and approval.

133. If I am incorrect in my assessment that there was no reasonable ground for requiring proof of the will in solemn form as regards lack of knowledge and approval, then I would in any event order the 2nd defendant to pay the claimant's costs of the proceedings on the same broad basis that Hodson LJ and Morris LJ came to a similar conclusion in the *Cutcliffe's Estate* case (and as discussed by me above). In other words, and put broadly, the whole case was in reality run on the basis of the allegation of undue influence which in large part depended on the defendant's evidence which was not put before me.

134. Finally, in this context, I note that Nicola did not bring a counterclaim. Nevertheless her defence was a defence to the claim that the 2017 will was valid and the 2005 no longer valid. Had that defence succeeded the 1st defendant's s counterclaim would have succeeded. That counterclaim was extremely short, just repeating the defence and asking for the corresponding relief following from a successful defence. In my judgment any extra costs flowing from the counterclaim are minimal and inherent in the defence run, I would not make a separate order regarding the costs of the counterclaim so as to exclude liability of Nicola for such costs.

The 4th defendant

135. As a general point, Mr Roberts submits that the 4th defendant cannot be liable for any costs of the claimant prior to joinder of the 4th defendant. As I understood matters Mr Briggs did not make an equivalent submission in relation to the 3rd and 5th defendants. I reject Mr Roberts' submission. By asking to be joined to the proceedings and adopting the 1st defendant's defence, the 4th defendant is, in my judgment, as much open to a costs order in respect of the costs already incurred by the claimant at the stage of joinder as would have been the position had the 4th defendant been joined from the inception of the proceedings and taken the same position.

Conduct of the parties

136. It was submitted by Mr Briggs (whose submissions were adopted by Mr Roberts), that the conduct of the claimant in making late disclosure of various recordings made on his mobile telephone of meetings between Tom (and himself) with various solicitors was such that there should be a costs impact. In particular it was said that such late disclosure had dramatically increased the costs of the proceedings. A similar submission was made in relation to what was said to have been the unhelpful stance of Ms Grime when asked to make disclosure.

137. First of all, I do not consider that Ms Grime's conduct in relation to disclosure is relevant. She is for these purposes a third party. It is not right to attribute her conduct to Gary for costs purposes. In any event, Ms Grime could have been made the subject of a third party disclosure application. No such application was made.

138. As regards Gary's late disclosure, having heard and considered the evidence carefully, I accept his version of events that the recordings had only come to his attention shortly before they were disclosed. The recordings actually assisted rather than damaged his case. I do not accept, as submitted by the defendants, that the disclosure was only made because the relevant solicitors' papers were about to be disclosed under a third party disclosure order. In my judgment, had Gary wished to hide the recordings thereafter he could have done so. The relevant solicitors were unaware that the meetings were recorded. Further, the material that was really important, the attendance and other solicitor's notes and papers were disclosed late but that was the caused by the parties' failure to make third party disclosure applications timeously. I also reject the submission that third party disclosure would have been sought earlier had the recordings been disclosed earlier. If the third party disclosure orders were properly sought (as they clearly were) they should have been sought at a much earlier stage so that the material was available to all parties well before trial instead of (in at least one case) only becoming available during the course of the trial. Further, it is said by the defendants that Gary made disclosure because of the imminence of third part disclosure by the solicitors. If that is so, there is no explanation as to why such third party disclosure applications were made at all, let alone so late in the day. In my judgment, the need for third party disclosure orders was obvious. Indeed, it is somewhat surprising that the claimant had to make the third party disclosure application to obtain files of Mr Jenkins (and ultimately to confirm he could give evidence) when he was in fact the witness of Mr Briggs' clients.

139. Accordingly, I reject the submission that any adverse costs consequences (whether by an order for costs against, or a reduction in the costs awarded to, Gary should flow from the late disclosure.

Admissible offers

140. I have been shown a number of costs offers to or by Gary. Not surprisingly, these offers largely attempted to resolve a number of outstanding family issues as well as the issue of the validity of the 2017 will. Thus, for example, the primary offer relied upon by Mr Briggs (a letter dated 19 December 2019 from his instructing solicitors) attempted to resolve the dispute over the will but also any proprietary estoppel claim by Gary. In addition, to assess the offer it is necessary to identify the sort of income that could be made from the farm and to capitalise such income, as the offer offers Gary a lump sum payment in effect while he gives up the income from Santingley Grange farm. I do not have the material before me to embark upon such exercise.

141. I accept that the various offers between the parties demonstrates that the parties have engaged in attempting to settle this (and other) disputes. However, as I have indicated, it seems to me that I am unable to reach a conclusion that Gary has failed to beat any offer made to him or that he has acted unreasonably in refusing to accept the offers that I have been referred to.

142. Accordingly, the offers that I have seen do not cause me to adjust the costs orders that I would make.

Other conduct

143. Mr Roberts relied on other conduct of Gary. In my judgment many if not all of the issues he raised were relevant to a submission that on certain sub-issues costs should not be ordered in favour of Gary. Having considered the points that he made, my view of the appropriate orders was not changed.