



Neutral Citation Number: [2025] EWHC 2609 (Ch)

Case No: PT-2022-BRS-000087

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL

TRUSTS AND PROBATE LIST (ChD)

IN THE ESTATE OF YEAMON KEITH CARE (DECEASED)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 14/10/2025

Before :

HHJ MICHAEL BERKLEY
(sitting as a Judge of the High Court)

Between :

LUKE ELLIS

Claimant

- and -

(1) STEPHEN ELLIS
(2) STEPHEN BERRYMAN
(both as executors of the estate of
YEAMON KEITH CARE (deceased))

(3) VIVIAN CARE

Defendants

Charlotte John (instructed by **Wright Hassall LLP**) for the **Claimant**

Joss Knight (instructed by **Stephens Scown LLP**) for the First and Second Defendants at the costs and consequential hearing

James McKean (instructed by **Coodes LLP**) for the **Third Defendant**

Hearing dates: 29th, 30th April, 1st, 2nd May, 1st July and 5th September 2024, 17th July 2025

COSTS JUDGMENT

HHJ Michael Berkley:

Overview

1. This is my judgment on costs in this matter, the Substantive Judgment (as I shall refer to it) having been circulated as long ago as December 2024 (and handed down in January 2025). There was initial difficulty in listing the costs and consequentials hearing due to unavailability of Counsel, followed by an extended period of medical leave on my part. The costs and consequentials hearing took place on 17 July 2025.
2. It is assumed that the reader has read the Substantive Judgment and so no introduction to the case is to be given here. The starting point, however, is to bear in mind that Keith died in March 2020. I refer to his will, the subject of the substantive dispute as “the Will”.
3. I am grateful to Counsel for their written skeleton arguments, the contents of which I have fully taken into account, as well as their oral submissions.
4. Although Ms John, Counsel for the Claimant, addressed the court first at the hearing, it is acknowledged by all that Mr McKean’s applications and submissions are those that run against the normal operation of CPR Part 44 and so in the interests of reducing the length of this judgment (though not entirely successful) I shall set out his submissions first.

Third Defendant’s Submissions

5. Mr McKean accepted that the Claimant had been the successful party, but did not accept that the First and Second Defendants had been successful. He submitted that there were three broad grounds for departing from the general rule in CPR Part 44 that costs follow the event. These were:
 - (i) unreasonable pre-action conduct by the Claimant, and in particular a failure to comply with the relevant Practice Direction and pre-action protocol;

- (ii) a refusal to mediate on the Claimant's part until September 2023 and ignoring requests prior to that;
 - (iii) the application of the well-known probate exceptions.
6. Mr McKean did not go so far as to seek an order for costs against Luke but sought an order that there be no order for costs until September 2023. This was the simplest way to balance Part 44 with these three elements of the case, he said. He also submitted that Luke's Part 36 offer made in January 2024 was not a valid Part 36 Offer and/or it was not a genuine offer to settle the matter. Finally, Mr McKean submitted that there was no principled basis for the First and Second Defendants recovering their litigation costs from Vivian. He also made submissions on the appropriate payment on account and applied for permission to appeal. I deal with the latter in a separate short judgment.

Conduct

7. Mr McKean accepted that the relevant pre-action protocol was the generally applicable one. He emphasised the purpose of the reference to the need for exchange of information in advance of proceedings and that litigation should be regarded as the last resort. He submitted that Vivian had been constructive and amicable throughout the pre-action phase.
8. Mr McKean took me through the correspondence from the first intimation of a claim by Vivian on 30 June 2020 through the *Larke v Nugus* request made on 16 July 2020 to the repeated requests for more documentation and information made on Vivian's behalf, including those relating to the Barclays Bank loan and the Adult Social Care files. In their email of 24 August 2021, Coodes wrote:

We are still collating documentation and investigating the claim. We are still awaiting documents from Barclays Bank and Adult Social Care and we will provide full details of our clients claim on receipt and perusal of the outstanding documentation. We envisage being in a position to outline our client's claim by the end of September when we are in full receipt of the facts.

9. In response to criticism from Ms John in her submissions, Mr McKean submitted that these two classes of disclosure were not irrelevant to the letter of claim because the loan

lay at the heart of the ‘knowledge and approval’ claim, i.e. the residue vs. the assets situation. And the morphine levels suggested that Keith was unable to deal with money and understand the nature of the estate.

10. He pointed out that Vivian was trying to formulate a letter of claim from the beginning but was frustrated by a lack of cooperation from Stephens Scown, solicitors for the executors.
11. On 27 September 2021, Mr McKean pointed out that Coodes had suggested that a limited grant be obtained for the purposes of obtaining documentation and made further requests of Stephens Scown. On 7 December 2021, Coodes made five further requests for information all of which were necessary before drafting a letter of claim, he said:

Any information concerning the up to date position at this stage would be helpful including: -

- 1. An up to date redemption figure concerning the Barclays loan.*
- 2. Three up to date and independent valuations of Tregear Farm.*
- 3. Confirmation of what assets have already been disposed of and the value including any estate income received.*
- 4. Details of what assets have been collected by the Executors, including any monies paid into Stephens Scown client account.*
- 5. Whether you have settled the invoices from UK Sires concerning the bull semen.*

The above information should be readily available or easily obtained by the Executors.

We note what you say concerning there being insufficient funds in the Estate to allow for the Executors to apply for a limited grant however for any grant to be obtained there will be a cost to the Estate, so we fail to understand your reluctance in this regard.

12. They wrote to Nalders on the same day stating that they would not remove the Caveat pending the claim and would put in an Appearance if a valid Warning was entered. Nalders could expect a letter of claim in 6-8 weeks they said.

13. By 28 February 2022, Coodes stated that they were still considering their position regarding the disproportionate use of resources to apply for a limited grant.
14. It was pointed out by Mr McKean that Mr Clarke's first account of the witnessing of the Will (suggesting non-compliance with the Wills Act) was provided by him on 15 February 2022.
15. Mr McKean submitted that a letter from Stephens Scown dated 4 March 2022 was "finally" a reply to Coodes' letter of January 2021. In order to assess the validity of that characterisation, it is worth setting some of it out:

Please find attached an updated Schedule of Assets. The liabilities since death have remained static save for:

- 1. Electricity, which is being met by Luke.*
- 2. Water, to which we return below.*
- 3. Barclays loan.*

In so far as the loan is concerned, the executors have not received any updating statements and we understand interest will be added to the principal sum borrowed. We have not requested an updated statement because that may encourage Barclays to call in the loan at a time when our clients are being prevented from administering the estate. That in turn could result in Barclays forcing a sale or part or all of the farm.

It did go on to deal with some small outstanding sums to do with water but pointed out that those matters could not alter Vivian's stance towards the Will in principle.

16. Against that background, Mr McKean submitted that the fact that Luke issued proceedings on 29 July 2022 without so much as a letter of warning let alone a letter of claim was a brazen breach of the Practice Direction for pre-action conduct. Paragraphs 12 and 13 of Mr McKean's skeleton argument summarised the position thus (I have corrected an apparent transposition of D3 and C throughout):

12. The result was that, by C's own admission, D3's case was not understood and relevant evidence was missing. In C's letter of 13 October 2022, sent nearly eight [in fact nearly three] months after proceedings had been issued, C admitted that the absence of Betty Care's will file 'may well be pivotal' [C45] and sought further clarification about D3's case.

13. As well as Betty Care's will file, essential documents, including part of Keith's will file [C86]; Keith's social care and hospital records [C75 – 76]; and an unredacted copy of the loan agreement to Barclays Bank [C105] with the associated business plan, were not disclosed until well into the proceedings.

17. For reasons that will become apparent, that is a miscategorisation of that position, not least because Vivian had full access to Betty's will file as the executor of her estate, although Mr McKean did say, rather surprisingly, that it was nevertheless the responsibility of the First and Second Defendants to obtain it. The letter from Nalders was pointing out that Vivian had disclosed no evidence to support his proprietary estoppel claim.
18. Mr McKean criticised Stephens Scown's will file as disclosing no reason for Keith's failure to provide for his family in the Will, and submitted that the mortgage file and business plan were also important; and that just because the full hospital and social care records were not obtained even for the trial, it did not mean that it was wrong to try and get them in advance. Mr McKean denied that Betty's will file was only relevant to the proprietary estoppel claim because the resentment said to have been felt by Keith was relevant to the contents of the Will, and the failure to give effect to his expected bequests to family members gave rise to suspicions.
19. Mr McKean went on to submit that the letter of 13 October 2022 from Nalders in response to the Counterclaim was exactly why a letter of claim should have been issued by Luke before commencing proceedings. As I have already indicated, I do not agree with that submission: that 13 October letter was a letter pointing out the weaknesses in Vivian's case on proprietary estoppel due to a lack of evidence of any promises etc. Mr McKean went to submit that, had there been such a letter of claim from Luke, it would have led to an identification of the missing information and documentation, and in turn to a concerted effort by both parties to fill those gaps and thence to a mediation.
20. The case of *Merial Ltd v Sankyo Co Ltd* [2004] EWHC 3077 (Pat), in which Mann J held that the absence of a Pre-Action Protocol Letter which would have had no effect on early settlement did not result in a costs penalty for a claimant, did not create a general rule, submitted Mr McKean. In that case there had been no defence filed and further, here, there was the possibility of mediation to boot.

Failure to Mediate

21. Mr McKean described the obligation to mediate as trite. He referred me to a summary of the law by Arnold LJ in *Northamber Plc v Genee World Limited* [2024] EWCA Civ 428 at paragraph 103:

'It is almost 20 years since this Court held in Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576, [2004] 1 WLR 3002 that an unreasonable refusal to participate in alternative dispute resolution constitutes a form of unreasonable litigation conduct to which the court may properly respond by applying a costs sanction. It is over 10 years since this Court held in PGF II SA v OMFS 1 Ltd [2013] EWCA Civ 1288, [2014] 1 WLR 1386 that silence in the face of an invitation to participate in mediate is, as a general rule, of itself unreasonable even if a refusal might have been justified by the identification of reasonable grounds.'

22. The first invitation from Vivian for Luke to mediate was on the 16 March 2023. Luke's was response was on 16 March 2023:

We refer to your email sent at 0945 today, which is intended to show your client as being prepared to mediate.

We record that you have simultaneously written to Stephens Scown, acting for the executors, that 'the parties will not be able to participate in meaningful negotiations without a complete and accurate representation of the estate'.

We therefore do not consider mediation or other alternative dispute resolution to be appropriate at this time, and despite the purported proposal, we infer from your comments to Stephens Scown that you would agree that mediation presently has no prospect of success.

23. Mr McKean described these as unreasonable reasons to refuse. The relevant information was in fact supplied by Stephens Scown on 17 March 2023, he said (though I was not directed to any correspondence to this effect and I can identify none in the correspondence bundle; the letter said to have been "finally" replying to the January 2021 letter was dated 4 March 2022). As regards the suggested low prospects of success, Mr McKean submitted that the basis for this reason is belied by the fact that Luke did in fact agree to mediate in September of 2023.

24. Mr McKean took me to Coodes' letter of 2 May 2023 which he submitted showed that Vivian was doing the hard work towards mediation and constructive cooperation: That was a letter dealing with CCMC directions and said, *inter alia*:

We ask that you proceed with taking your client's instructions further to our letter dated 13 April 2023. If your client is not willing to mediate this matter, then we propose the parties look at entering into a stay of proceedings so that the parties meet to seek to agree what if any land should be sold for the purpose of repaying the Barclays Loan and the restrictions that are placed on a limited grant.

25. In their reply, Mr McKean pointed out that Nalders did not address these ADR proposals which is, by definition, he said, unreasonable. He passed over Coodes' letter of 18 May 2023 in reply to Nalders' reply which itself does not raise the lack of a response to the ADR proposal, but continues the discussions regarding CCMC directions and comments again on a long-running spat between these parties that Luke had filed his Defence to Counterclaim 1 day late.
26. Having got the CCMC out of the way, Coodes write again on 6 June 2023 referring to a proposed meeting to discuss which land may be sold under a limited grant to allow for the Barclays loan to be reduced or discharged. That was not an invitation to mediate as Mr McKean sought to categorise it in his submissions, though I accept it was an attempt at constructive discussions to narrow the issues at the same time. In this email (pursuant to the CCMC Order) Coodes gave Nalders access to Keith's medical records by way of a link. Significantly, this was the first time that Luke had had access to those records, Coodes having declined to give early disclosure until the CCMC.
27. Nalders' response on 8 June 2023 was that, having reviewed the medical records, they could see no basis for Vivian's claim for Keith's lack of testamentary capacity and enclosed a Notice to Admit Facts.
28. On 22 June 2023, Coodes wrote to Stephens Scown having reviewed other files disclosed pursuant to the agreed CCMC order. They sought to portray themselves as the proposers of the limited grant for sale of land by way of a letter dated 27 September 2021 (whereas they had there in fact proposed a limited grant to obtain documents and it had been Stephens Scown in January 2023 who had proposed the land sale). They concluded:

Our position remains the same and we still consider it is in the interests of all parties that a limited grant be agreed to allow the parties to obtain relevant documentation necessary for the purposes of resolving the issues in dispute and with a view to establishing what, if any, land or buildings may be sold to settle the estate liabilities. For the sake of clarity, the limited grant will allow our client/the Executors to obtain the following: -

- 1. A complete file from Cornwall Council relating to Keith's involvement with Adult Social Care.*
- 2. Any missing documentation from Farm Cornwall.*
- 3. Missing documentation from Barclays Bank.*
- 4. Files from Kelsall Stelle Accountants.*
- 5. Any files relating to the Deceased's eye health i.e. opticians records.*

29. Mr McKean submitted that Coodes were again chasing for dates for ADR in their letter of 27 June 2023. That letter was in fact chasing for dates to meet to discuss the limited grant and the land that might be sold pursuant to it. There was no mention of mediation or ADR going further than that.
30. In September 2023, Wright Hassall (who acted for Luke from July 2023) agreed to a mediation.
31. Mr McKean submitted that Nalders simply ignored the requests for ADR which were inherently unreasonable. Furthermore, he said, Luke's reason for refusing to mediate earlier was a lack of documentation. They can't have it both ways, he submitted: if Luke was criticising Vivian for failing to provide a letter of claim which led to him issuing proceedings in frustration, then there must have been sufficient documentation for a mediation. And vice versa: if there was insufficient documentation, then Vivian cannot be criticised for failing to provide a letter of claim and Luke issued prematurely, the investigation phase having gone on until at least September 2023.
32. Dealing with the fact that the mediation in November 2023 had been unsuccessful, Mr McKean submitted that it was "well known" that delays in mediation give rise to an increase in costs which in turn make mediation less likely to succeed. Accordingly, the

failure of the mediation in November 2023 is no guide to what might have happened in March or April 2023, he said.

33. Whichever way one looks at it, submitted Mr McKean, there must be some sanction imposed against Luke in respect of his failure to agree to mediate until September 2023.

Probate Exceptions

34. Mr McKean submitted that both probate exceptions apply to this case.

1. Where the Testator was the Cause of the Litigation

35. From Vivian's perspective, Mr McKean submitted, the question is whether he reasonably believed that the farm would be left to him, such belief having been induced and encouraged by Keith during his lifetime. He had never told him otherwise, and there had never been a complete falling out between them. Those matters, coupled with the fact that the two parts of Tregear were enmeshed, is what caused the litigation, submitted Mr McKean. It was only in January 2024 when Ms Wright's witness statement was served did Vivian have any reason to doubt his belief.
36. Mr McKean submitted that there was no principle to be derived from *In Re Cutcliffe's Estate* [1959] P. 6 such that mere conduct or promises made by the testator which mislead the disappointed beneficiary and inspired false hopes was outside the range of possible circumstances which would lead to this probate exception. The passage in that case by Hodson LJ was made *per incuriam*, the Court having not had two earlier authorities cited to it. Furthermore, it was not part of the substance of the judgment, and it was not a case containing the sort of promises that were made here, he said. The behaviour of the testator said to be responsible for the false belief by the disappointed beneficiary was a letter and an outburst, he said, but the real cause of the litigation was found by the judge at first instance and confirmed by the Court of Appeal was the witness evidence of the failed litigant.
37. Mr McKean referred me to *Theobald on Wills* (19th Ed.)

In earlier cases it was held that where the testator's own statements had induced litigants unsuccessfully to plead undue influence, costs must be paid out of the Estate. These cases were not cited in Re Cutcliffe in which Hodson LJ said:

“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 that it should extend to cases 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”.

In Kostic v Chaplin [2007] EWHC 2909 (Ch), it was held that the conduct of the testator was such as would inevitably lead to a challenge to his testamentary capacity, and could reasonably be taken to have been the cause of the litigation, at least until a realistic assessment of the merits of the claim could first properly be made out. After that, the unsuccessful (beneficiary) proponent of the Will could take its costs out of the estate only until it had had an adequate opportunity to consider its position, to gather information, and to decide whether or not to contest the proceedings.

38. Mr McKean invited me to depart from *Re Cutcliffe's Estate*. He submitted that the exception can still apply to familial expectations raised by the testator by a number of factors giving rise to confusion and suspicion in this case: (i) the intermeshing of the land; (ii) confusion and uncertainty caused by Keith's promises; (iii) the family assumption that I had found at paragraph 312 of the Substantive Judgment; (iv) Keith had never disabused Vivian and the family of these beliefs nor even told them of a new will and (v) Keith and Vivian had never fallen out and Keith had even asked Adam Care to look after the large white pigs he had expected to inherit. Mr McKean concluded that this was a case in line with *Mitchell v Gard* (1863) 3 Sw & Tr 275 (cited in *Kostic* @ 8):

“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.”

39. I set out paragraph 312 of the Substantive Judgment for ease of reference:

“312. The worst that can be said against Keith is that he did not live up to expectations that he had allowed to develop within the family. However, I have found that such statements as he made were based on his then current intention to leave the farm within the family, which was probably true. He had never made assurances of sufficient seriousness and commitment to Vivian that, objectively judging his subsequent behaviour, it could be regarded as

unconscionable to renege from. Even to the extent that he had encouraged Vivian to believe until 2013 that he would be leaving his share of the farm to him or his sons, (a) he never repeated such assurances after 2013 but (b) much more importantly, Vivian suffered no detriment by relying on that expectation being met, save for the sheer disappointment of Tregear not remaining in the family. I am prepared to accept for these purposes that that disappointment is acute and felt by Adam as well as Vivian and indeed Valerie. However, Vivian cannot point convincingly to anything that he would have done differently or refrained from doing, to his detriment in either case, had he known that Keith would not fulfil the familial expectation that Tregear would remain in the family.”

2. Reasonable Grounds for Investigation

40. Mr McKean submitted that this exception arises out of a combination of Mr Clarke’s initial evidence that the attestation witnesses had not been in the same room when the Will was signed which was later changed, combined with Dr Fairlie’s evidence to the same effect which was only doubted after his cross-examination. When that is added to the large doses of morphine and Keith’s contradictions of his promises together with the gaps in the Will file, it was only in January 2024 with Ms Wright’s witness statement that the investigation phase ended, Mr McKean submitted. However, Vivian was content for the “no order as to costs” to only run to September 2023, dovetailing with the conduct and mediation point.

Part 36

41. Wright Hassall made what purported to be a Part 36 offer on 15 January 2024. It contained a proposal for two fields to be transferred to Vivian along with two of Keith’s three tractors plus a sum of £20,000 plus the obligation for Vivian to pay Luke’s costs on the standard basis if not agreed.
42. Mr McKean said that this was confusing because it was both a Claimant’s and a Defendant’s offer because of the Counterclaim. He said that there was so much missing from it so as to render it a nullity, certainly to render it a failure as a Part 36 offer. There was no reference to the claim succeeding or being dismissed; or the Defence succeeding or being dismissed; it is silent on the Will being admitted in solemn form; it doesn’t deal with the claim for intestacy or a variation of the Will. Furthermore, only

two of the three tractors were disposed of and there was no suggestion as to whom the third would go to.

43. Mr McKean asked the rhetorical question of how any party could have sued on it? It was so uncertain and lacking in detail, he said. He relied on dicta from Newey LJ in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188 at 13:

‘I do not doubt that an "offer" can be so lacking in certainty as not to represent a Part 36 offer, but, on the other hand, a valid Part 36 offer can still, as I see it, leave some matters (especially of mechanics) to be further defined.’

44. Here, Luke was offering property that was not his (it was the executors’) and was unlikely to ever be his because of the bank’s charge, Mr McKean submitted. Accepting that Vivian himself had made offers involving a division of Keith’s share of Tregear (despite the land belonging to the executors at the time), Mr McKean distinguished his position by stating that Vivian had made it clear that he was in a position to raise funds to clear the bank’s charge.
45. Even if this was a valid Part 36 offer, these factors rendered it otherwise than a genuine attempt to settle the case, Mr McKean submitted.
46. Even if he was wrong on all of that, Mr McKean submitted that the conduct and mediation points should be borne in mind when the Court was considering the Part 36.17 consequences. A 10% uplift would be way too punitive, he said. He accepted that Coodes had never raised these points when the offer had been made, although they had suggested it was incapable of acceptance albeit for different reasons.

The Executors’ Costs

47. In his skeleton argument, Mr McKean had stated bluntly that “*There is no principled basis on which D3 should be ordered to pay the costs of the Executors, who were neutral parties*”. In oral submissions, he expanded the position. He repeated that he accepted that Vivian had been unsuccessful against Luke, but not against the executors. There were no pleadings between them and no prayer for costs, he said.

48. So far as Luke was concerned, he was only interested in the residue of the estate after costs had been deducted. This dispute was part of the administration of the estate, Mr McKean submitted: Stephens Scown had been trying to “chivvy things along”. On it being pointed out that his suggestion would mean that Luke paid the executors’ litigation costs, Mr McKean submitted that this secondary unfairness was not a good reason to depart from costs being paid by the estate.

Claimant’s Submissions

49. For reasons that will become apparent, I largely concur with Ms John’s submissions both as framed very clearly in her skeleton argument and chronology.
50. Ms John went through the chronology. Luke instructed solicitors in May 2021, having waited over a year since Keith’s death for Vivian’s dispute to move forward. She pointed out that the completed forms of authority for Vivian to obtain medical records were supplied in October 2020, their use was expanded to include the mortgage file, bank statements and the charity files (provided Vivian sought permission in advance). Ms John referred to the fact that Coodes took until late September to undertake to pay the *Larke v Nugus* reply costs and had refused to undertake to pay the further costs of the additional enquiries made by Coodes in 2021.
51. By mid-2021, Ms John stated that Coodes had had Keith’s will and Power of Attorney file; the answers to their questions to Stephens Scown, and had the power to make their own enquiries by virtue of the signed authorities from the executors. Nalders were reasonable in making their enquiry of the nature of Vivian’s case, she said. The only documents outstanding as at 24 August 2021 were the full mortgage file and the Social Services records. Ms John pointed out that those files were never disclosed (the bank and Social Services I am told normally require a grant) and that Stephens Scown had disclosed all of the records that were in Keith’s possession which Stephens Scown thought were fairly complete in any event. These painted a picture of a man with capacity, and it is noteworthy Ms John said, that Adult Social Care only became involved in April 2018, nearly two years after the Will had been executed by Keith.

52. Ms John submitted that by the time that proceedings were issued in July 2022, Vivian had had all of the key documents and information; this was two years after the *Larke v Nugus* request and 14 months on from when Luke first requested Vivian to provide the nature of his claim. Of course this was now 28 months after Keith's death. Repeated promises of a letter of claim within defined periods had been made and broken without explanation, Ms John said, and it was simply the case that someone had to do something to move things on. Moreover, Luke's case was simple: he wanted a professionally drafted will executed by a man whose records disclosed no suggestion of incapacity to be admitted to probate. It does not lie in Vivian's mouth to complain that he did not know what Luke's case was before he issued proceedings, she said.
53. Ms John said that Coodes could certainly be criticised for their approach to the Reply and Defence to Counterclaim being served 1 day late: they simply stonewalled any discussion about the issues raised, she observed, until a formal application was made by Nalders to correct the position (though there is no sanction for this lateness in the CPR).
54. Ms John did rely on *Merial v Santyo*: She relied on paragraph 31 in which Mann J said:

It is clear from the recitation of that correspondence that there was no letter before action provided by the Claimant to the Defendant. Logically, the first question I have to decide is whether Mr Turner is correct that I can be satisfied that, had there been a letter before action, on the facts the matter would have settled with the Defendants effectively caving in before proceedings were brought. This is effectively a causation point.

55. Ms John gave a distillation of paragraphs 40; 43 and 44 in *Merial* as that it is only where the settlement opportunity is lost or that question is uncertain should a penalty follow from the lack of a letter of claim. Where a court can be certain that there was no difference to the course of the litigation by that failure, no sanction should follow.
56. In the instant case Ms John pointed out that the case had been hard fought to trial; Vivian had been invited to drop certain key parts of the claim and had refused and had even declined to concede capacity following the Notice to Admit Facts.

Mediation

57. Ms John submitted that, as of April 2023, Vivian was holding a lot of information that he had not shared with Luke e.g. all information relating to the proprietary estoppel claim and also Betty's will file. He had refused to provide early disclosure of this material. Accordingly, Nalders were perfectly justified in refusing to mediate at that stage absent Vivian's agreement to early disclosure. Thereafter, once the CCMC was listed the parties were rightly concentrating on that, she said. It was only at the CCMC that Vivian agreed or was ordered to give disclosure by 6 June 2023 of the medical records he held in respect of Keith and by 27 June 2023 all parties were to disclose all documents in respect of a very detailed and extensive list of issues. Ms John emphasised that it was after disclosure of the medical records that Luke issued the Notice to Admit Facts on 8 June 2023.
58. Luke changed his solicitors and instructed Wright Hassall on 10 July 2023 who immediately informed Coodes of the change. Once they had reviewed the case with the benefit of the disclosure ordered at the CCMC, Ms John submitted that their agreement to mediate communicated on 8 September 2023 was reasonable and in good time.
59. Ms John distinguished *Northamber* on the basis that in that case the Claimant had ignored the invitation to mediate and refused to mediate at all. There was no authority cited by Mr McKean that dealt with a delay. A party is entitled to wait until it is in receipt of sufficient information (within reason) to make a mediation worthwhile Ms John submitted: Vivian held all the cards and had refused to disclose them, she said.
60. Furthermore, Ms John submitted, nobody was saying that an earlier mediation would have been successful. On the issue of fewer costs having been incurred in April 2023 as compared to September, Ms John said that that needed to be weighed against the lack of material. It was never raised as an issue by Coodes that the delay had caused damage to the prospects of success, either prospectively or at the time. By the same token, very little costs had been involved between the first suggestion of mediation and September (and all steps from September were suspended pending the mediation itself). Furthermore, Ms John observed that Coodes' response to the invitation to Vivian to make an offer in advance of the mediation was to refuse and instead invited Luke to discontinue and pay all other parties' costs to date. It was clear, she submitted, that the parties were very far apart, even at the stage of agreeing to mediate.

61. Concluding on this issue, Ms John submitted that there were no conduct grounds of complaint, and nothing that did or did not happen vis a vis Luke's conduct made a difference to the trajectory of the litigation or incurred additional costs.

Probate Exceptions

62. The first observation made by Ms John is that these cannot in principle apply to the proprietary estoppel claim, which account for at least 50% of the costs incurred by the parties. In fact, she submitted, the proprietary estoppel claim involved much wider disclosure: Betty's will file; evidence as to detrimental reliance, especially the investigative work carried out by Wright Hassall which revealed important adverse findings such as the gift of Burhos to Vivian as opposed to his purchase of it and the transfer of the barns to Vivian's sons. There was also an extremely lengthy witness statement from Adam which went primarily to the proprietary estoppel claim and at least 50% of the cross-examination went to the proprietary estoppel claim, she added.

1. Testator's Conduct

63. Ms John prefaced her submissions with the general proposition that costs may be paid from the estate only where the testator's own conduct (or that of a beneficiary) generated the dispute; a "very strong" factual case is required and modern authority "narrows rather than extends" this ground: see *Leonard* para. 13-14.
64. She referred to Mr McKean's invitation to depart from *In Re Cutcliffe's Estate*, and referred me to paragraphs 18 and 21 of *Kostic* reiterating the principled approach is to narrow the scope of this exception.
65. Ms John submitted that there was no obligation on Keith to tell Vivian and his sons that he had made a will excluding them, as that was contrary to both *Kostic* and *Cutcliffe*. There was no obligation on Keith to explain his reasoning. There were policy reasons not to require a testator to reveal their testamentary intentions. To depart from *Cutcliffe* would set a dangerous precedent Ms John suggested: it would encourage litigation over wills at the estate's expense even in weak claims.

66. The facts of this case were nowhere near a proper finding as to the first exception Ms John submitted. The court found at paragraph 303 of the Substantive Judgment that there had been no serious promises made. Keith was not the cause of this litigation. The court found that Keith's actions had been "logical" by virtue of the family's disinterest in him after Betty had died. Ms John said that with a bit of logical soul searching it should have been obvious to Vivian that Keith had good reason to leave his share of the farm elsewhere, particularly as it was pleaded out in the Reply and Defence to Counterclaim with Betty's division of the farm and the family's abandonment of Keith. Ms John also emphasised how Keith had taken careful steps to have the Will professionally drafted with his GP as one of the witnesses.

2. Reasonable Grounds for Investigation

67. The starting point of Ms John's submissions was the very extensive disclosure list produced by Vivian running to 21 pages of entries, many involving multiple pages and class entries such as GP records. This showed the extent of knowledge and documentation Vivian had prior to proceedings being issued.
68. By 8 September 2023 Vivian was willing to mediate without expert medical evidence and with limited witness evidence and so, submitted Ms John, the investigative phase had clearly finished by then. But it had in fact finished much earlier given the material that Vivian had (and refused to disclose – itself a conduct issue Ms John said). She referred me to paragraph 12 of her skeleton argument to which I shall return.
69. As regards the issue of medication, the Court was able to reject the capacity case very easily submitted Ms John, and there was no further investigation required beyond the GP Notes and the charity files all of which Vivian had from an early stage. These reflected Keith's ability to hold long and lucid conversations she said. The most obvious observation was the fact that Keith's own GP witnessed the Will without any concerns about his capacity and he was fully aware of the level of medication Keith was on.

Part 36 Offer

70. Ms John submitted that Mr McKean's points regarding the incompleteness or lack of detail in the Part 36 were simply wrong. She referred me to paragraph 13 of *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188, submitting that a Part 36 Offer is not a contract and often leaves the mechanics to be decided at a later stage. Ms John emphasised that none of the points now raised had been raised by Coodes at the time. Such matters as the issue of admission of the Will to probate and Luke not being in a position to transfer the land were obvious and the current attack is opportunistic.
71. In terms of the genuineness of the offer, Ms John referred me to *Leonard* at paragraph 17-18. She submitted that there was real value to the offer, amounting to 14.6% of the estate with a value of approximately £82,000 (as calculated in her skeleton argument).
72. In the circumstances, the court should apply CPR 36.17 with full force Ms John submitted. In light of Vivian's conduct and the discredit applied to him and some of his witnesses, the uplift percentage should be the full 10% she said.

The Executors

73. The simple point made by Ms John was the obvious one that if Vivian did not pay the executors' costs, it would effectively be Luke paying them despite being the successful party in the litigation.
74. Ms John also submitted that the executors' costs would not have been incurred if Vivian had not challenged the Will, and that there was absolutely nothing in principle to suggest that Vivian should not pay their costs in those circumstances.

The First and Second Defendants' Submissions

75. Mr Knight referred to the "very, very late *volte face*" in relation to Vivian's opposition to a full grant which he now supports, he said, and so the purpose of his attendance at this costs and consequential hearing was now limited largely to the incidence of the payment of the executors' costs.
76. Referring to Mr McKean's reference to there being no principled basis upon which costs could be ordered against Vivian for the executors' costs, Mr Knight turned that

back onto Mr McKean, observing that that would be the normal order in contentious litigation, and Mr McKean had cited no authority for his proposition. There was no reason why the court could not make an order against Vivian for the executors' costs under CPR 44.2(1). There was certainly no principled reason why not, and there were three reasons why that was obviously right:

- a) It is plainly right that the Third Defendant was the cause of the First and Second Defendant incurring costs in this litigation. Though it was the Claimant who issued proceedings, having got understandably fed up with waiting for Vivian to formulate his case, that is irrelevant: if Vivian had moved more quickly then the executors would still have been Defendants along with Luke. It is all because Vivian challenged the Will and brought a proprietary estoppel claim that the costs have been incurred.
- b) The practical and obvious reality is that it would be Luke paying the costs if Vivian does not pay them.
- c) In *Tucker v Felton* [2025] EWHC 530 (Ch), there was no contest that the losing Claimant would pay the costs of the executors (see paragraph 99). Here the executors are the executors of a valid will; in that case they were merely named executors of an (ultimately invalid) will.

77. In addition, Mr Knight observed that all parties had agreed the executors' costs budget which was tantamount to agreeing that someone (the unsuccessful party) would pay them.

78. On the balance of the issues, Mr Knight agreed with Ms John that September 2023 was not an appropriate date for the beginning of the incidence of costs. And as regards the *Spiers v English* exceptions, the first exception was untenable here, Mr Knight said; and as for the second exception, the court should not encourage open-ended investigations. It was absolutely apparent that Vivian was casting around for a reason to be able to oppose the grant. He referred to the correspondence and in particular Nalders' letter of 2 August 2020 in which they sought an indication within 14 days of *why* the Will was

being contested, and nothing firm was forthcoming prior to July 2022 and indeed until the Counterclaim.

79. Vivian was continually finding reasons to ask more questions about, and seeking disclosure of increasingly irrelevant information and documentation whilst promising a letter of claim which never materialised, Mr Knight submitted. It was not some heretical breach of the rules said Mr Knight: it is clear that Luke just got completely fed up with waiting; he was just trying to propound a will, and the Particulars of Claim reveals the simplicity of his case: they are one-page long Mr Knight observed.

Discussion and Conclusion

The Legal Framework

80. It is common ground that the framework governing the exercise of the court's discretion is to be found in the CPR. The general rule (pursuant to CPR 44.2(2)(a)) is that the unsuccessful party will be ordered to pay the costs of the successful party, albeit that (pursuant to CPR 44.2(2)(b)) the court may make a different order.
81. Pursuant to CPR 44.2(4) and 44.2(5):

"(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

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

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

- (b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
 - (c) *the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
 - (d) *whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."*
82. There is no question that the general rule applies to contentious probate cases, and the question is always whether there is sufficient reason for departing from the general rule. However, it is common ground that, in probate cases only, it is also necessary to consider whether the court should be guided in the exercise of its discretion by two long-established common law exceptions which have survived the introduction of the CPR. These exceptions were summarised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch); *Perrins v Holland* [2009] EWHC 2556 (Ch) and more recently by Joanna Smith J DBE in *Leonard and Others v Leonard and Others* [2024] Costs LR 723.
83. Joanna Smith J summarised the exceptions as follows at [13]-[14], and it is worthwhile setting out her very helpful summary in full:

13. *The exceptions "allow good cause to be shewn why costs should not follow the event" [Spiers v English [1907] P 122 @ 123], and require the court to ask [Mitchell v Gard (1863) 3 Sw & Tr 275) as approved in Kostic and Perrins v Holland]:*

- i) whether the litigation was caused by the testator or a beneficiary. If so, the court may order the unsuccessful party's costs to be ordered out of the estate;*
- ii) whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter. If so, the court may make no order as to costs.*

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

- i) the exceptions as formulated were "designed to strike a balance between two principles of high public importance", the first being that "parties*

should not be tempted into fruitless litigation by the knowledge that their costs will be defrayed by others", and the other being that "doubtful wills should not pass easily into proof by reason of the cost of opposing them" (Kostic at [10]);

- ii) since the advent of the CPR, the exercise of the court's discretion is governed by the CPR, but "the considerations of policy and fairness which underlie the two exceptions remain as valid today as they were before the introduction of the CPR" (Kostic at [4]);*
- iii) the exceptions are intended as "guidelines, not straitjackets, and their application will depend on the facts of the particular case" (Kostic at [6]);*
- iv) a positive case premised on one or both of the exceptions must be made out before the court will depart from the general rule (see Kostic at [6] and Perrins v Holland at [3]). It is necessary to make out a "very strong case on [the] facts" if an unsuccessful litigant is to get his or her costs out of the estate (under the first exception) (see Re Plant Deceased [1926] P 139per Scrutton LJ at 152; cited in Kostic at [17]);*
- v) in respect of the first exception, "the trend of more recent authorities has been to encourage a careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged" (Kostic at [21]). This narrowing of the scope of the first exception (reiterated by Henderson LJ in Royal National Institution for Deaf People v Turner [2017] EWCA Civ 385 at [17]) is a function of the fact that, firstly, nowadays less importance is attached to the independent powers of the court to investigate the circumstances in which a will was executed than was the case in Victorian times; and secondly, the courts are increasingly alert to the dangers of encouraging litigation and discouraging the settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party (Kostic at [21]);*
- vi) however, the same narrowing of scope does not apply to the second exception because "there is ... still a public interest that where reasonable suspicions are raised about the validity of wills they should be proved in solemn form" (see Perrins v Holland at [17]);*
- vii) even where one or both of the probate exceptions applies, the point may be reached where the litigation becomes ordinary hostile litigation, from which point the normal rule entitling the successful party to an order for costs comes into effect (see Walters v Smee [2008] EWHC 2902 (Ch) per HHJ Purle QC at [8]).*

Conduct

84. I am afraid that I consider Mr McKean's characterisation of Luke's conduct as being in brazen breach of the CPR as mistaken.
85. I first bear in mind three significant factors of general application.
- a) Vivian was the sole possessor of knowledge in respect of the proprietary estoppel claim, and he had full access to Betty's will file and any other records held by him as executor of her estate.
 - b) By 1 December 2020, Vivian's legal team were in possession of Keith's will file and the mandates which gave them access to all but the most peripherally relevant material, including the GP records and the mortgage file and the charity files, the latter of which disclosed Keith's lively interest in conversation and current affairs.
 - c) Luke's case was clear all along: he simply wanted the caveat removed, whereas it was Vivian who had the case to make to attack the Will.
86. The criticism raised against Luke under this heading of conduct is the failure to issue a letter of claim and his issuing of proceedings in July 2022 which was said to be precipitous because Vivian was still collating his case. A summary of my reasons for disagreeing with those criticisms (as also in general argued for by Luke and the executors) is as follows. Vivian had had ample time and was furnished with ample material to have served a letter of claim, probably by the summer of 2021, and it was understandable, even inevitable, that Luke's patience would run out (as well as the executors' funds running out) and that Luke would issue proceedings sooner or later. In fact, I would go so far as to say that Luke was rather patient in deferring as long as he did. Without having been told the detail of what Vivian's case was, he was in no position to know what the prospects of settlement were and, furthermore, there was no practical effect of the failure to issue a letter of claim because the nature of Luke's case was obvious. Further still, a letter of claim would have achieved nothing but more delay

and prevarication on Vivian's behalf. Luke had done what he could to provoke Vivian into action by issuing a Warning against the Caveat which simply led to an Appearance from Vivian and that took the matter no further. Some more detailed observations on the delay on Vivian's part follow.

87. It is notable that Coodes refused to agree to pay Stephens Scown to reply to the questions arising from the replies to the *Larke v Nugus* requests which were clearly themselves in the form of such requests. Those requests were detailed and very specific, and verge on the pedantic at the stage of drafting a letter of claim. In passing, I do not agree with Mr McKean that the letter of 4 March 2022 from Stephens Scown was "finally the reply" to this letter: the contents hardly related to it. Most of the relevant information was supplied in Stephens Scown's reply dated 3 June 2021.
88. I accept that some of the delay between July and November 2020 must be attributed to Stephens Scown's failure to supply the signed mandates, and there would inevitably be a short delay whilst those mandates were being put into effect. However, it is not the case that Coodes acted swiftly to issue a letter of claim after the mandates were received. It was thus not this delay which caused Luke to issue proceedings.
89. Luke waited until May 2021 before instructing solicitors to start probing Vivian's position which was, itself, somewhat patient, and reflects Luke's understated and diffident approach to the whole issue of Keith's gifts to him. Nalders pressed for a letter of claim on 2 August, and it took Coodes until 24 August to promise one within 5 weeks. Nothing materialised and no explanation was given.
90. The documents that Coodes were holding out for after June 2021 were simply not of sufficient importance to the drafting of a letter of claim to justify the delay that followed. There was some information from Barclays and the social services records (these were in the event never obtained). These were not necessary to formulate Vivian's claim. The details requested made by Coodes in their letter of 27 September 2021 are too granular: a letter of claim is not a pleading, and the list of assets is not relevant to the letter of claim.

91. By November 2021 Stephens Scown had released all the Adult Social Care material in Keith's possession which they told Coodes was unlikely to be materially added to by access to the files themselves. It must be borne in mind that Adult Social Care did not get involved with Keith until long after the Will was executed. Stephens Scown on at least two occasions told Coodes that the costs of obtaining a limited grant outweighed the very limited benefit that would ensue: Vivian had access to most of the material for both of his claims to be set out. Coodes' retort that there would be a need for a grant application in any event was misconceived, as Stephens Scown pointed out: a limited grant would be in addition to a full grant and so would represent additional expense.
92. I note here that the executors have been scrupulously neutral throughout the pre-action and the litigation phase despite the obvious links between Stephen Ellis and Luke in the face of very hostile litigation from Vivian.
93. The five further requests made by Coodes in December 2021 did not go to the issues required for a letter of claim: they were practical issues which may have had some bearing on whether it was commercially prudent to make a claim, but not to the principles of founding one.
94. Mr Clarke's first statement was given in February 2022, and that formed the basis for the due execution part of the claim, together with Dr Fairlie's evidence which they already had. Mr Clarke corrected himself on 1 March 2022.
95. Mr McKean's attempts to suggest that the whole of the Barclays file, together with the business plan produced for Keith, were necessary in order for Vivian to formulate his claim simply do not hold water. The business plan was not even Keith's document and the fact of the Barclays loan was all that was required to advance Vivian's case that its existence showed that Keith had no grasp of money and/or his estate.
96. I reject, too, Mr McKean's submission that the letter of response to Vivian's Counterclaim was an indication that a letter of claim should have been issued prior to the issue of proceedings. As I have already stated that letter was a tactical effort to expose the lack of evidence that Vivian had disclosed for his proprietary estoppel claim at that time. I note, too, that Vivian refused early disclosure in December 2022: Luke

was not given access to Keith's medical records until after the CCMC in June 2023. So, Vivian's protestations about a lack of full and early disclosure by Stephens Scown do not ring true.

97. It is important to make the distinction between Coodes' requests for a limited grant for the purposes of obtaining documents and a grant *ad colligenda bona*: neither would have stopped time running on the Barclays loan or allowed any reduction in its balance. Coodes claims in their letter of 22 June 2023 regarding a grant for the sale of some land being made as long ago as September 2021 misdescribes that request. There were discussions between the parties about a meeting to do so, but that was much later.
98. Mr Knight referred to the correspondence and in particular Nalders' letter of 2 August 2020 in which they sought an indication within 14 days of *why* the Will was being contested, and nothing firm was forthcoming prior to July 2022 and indeed until the Counterclaim. It is noticeable that Vivian was able to plead the counterclaim with no apparent difficulty. No Part 18 requests were issued in relation to any of the Claimant's pleadings.
99. For all these reasons, I do not consider that Luke was precipitate in issuing proceedings some 2 years and 4 months after Keith's death and over 2 years since Vivian had indicated that he had a claim. Having now heard the trial, delivered judgment and heard the arguments on the putative effect that a letter of claim might have had, I find with little hesitation that a letter of claim would have made no difference to the trajectory of the litigation and would, if anything, have delayed it further, with no prospect of settlement at that stage. Whilst there has been a breach of the protocol, I find that the frustration of the Claimant was caused largely by the inaction and failure of the Third Defendant to provide his own letter of claim.

ADR and Mediation

100. The delay in Luke agreeing to ADR must be seen in the light of the foregoing, together with Vivian's refusal to offer early disclosure, even of the critical medical records. Furthermore, he never disclosed (i) that he had been gifted Burhos as opposed to purchasing it; (ii) the fact that he had gifted two barns to his sons, and (iii) the planning

applications in relation to Burhos. This was not “cards on the table” litigation from Vivian’s perspective.

101. It must also be pointed out that the relevant delay was for a period from March to September 2023: a total of 6 months (or about 5 if you allow for some response time).
102. I fully accept what was said by Arnold LJ in *Northamber Plc v Genee World Limited* [2024] EWCA Civ 428 at paragraph 103, but each case turns on its own facts. Mr McKean described silence in the face of an invitation to mediate as “automatically” unreasonable by virtue of Arnold LJ’s *dicta*. I do not agree: Arnold LJ specifically referred to the proposition as being “a general rule”.
103. Mr McKean also relied on *DSN v Blackpool Football Club Ltd* [2020] EWHC 670 (QB) at 28 in which Griffiths J said:

‘The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant “continues to believe that it has a strong defence”. No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded [...].’

104. The reasons given by Nalders for refusing to negotiate were the lack of prospects of success, given Coodes’ own complaints to Stephens Scown that they were not in the full picture vis a vis the estate. This is different from the alleged lack of material in relation to the letter of claim. As I have already indicated, a lack of details about the size of the estate and its debts etc. is indeed a factor that a party has to factor in in deciding the commercial realities of settling or proceeding with litigation. Nalders were not therefore unreasonable in concurring with Coodes’ position at that stage. Mr McKean stated that Stephens Scown had supplied the information two days later, but there is no correspondence to that effect, and nothing from Coodes saying that Luke’s stated reasons for not mediating had fallen away. The fact that Wright Hassall did agree to mediate in September 2023 is nothing to the point: disclosure had taken place by then.

105. Coodes seemed content (correctly) to allow preparation for the impending CCMC to take precedence over the suggestion of ADR (I have already noted that their letter to Nalders of 18 May 2023 was silent on ADR). I have already pointed out above that Coodes' email of 6 June 2023 did not contain a reference to mediation or any ADR: merely to a meeting to discuss an early limited grant. As did their letter of 27 June 2023. Accordingly, there were no further silences on Nalders' part in the face of invitations to mediate.
106. I have no hesitation in finding that it was perfectly reasonable for Nalders to wait until after the CCMC to consider whether mediation was appropriate at that stage. This is particularly so because Vivian had refused to disclose the evidence in support of his case, and in circumstances that he was uniquely positioned to know the evidence he had available in support of his proprietary estoppel claim, as well as the medical evidence in support of his capacity claim.
107. Luke instructed new solicitors in July 2023 which did bring about a change in the tone of correspondence, at least for a period, and they almost immediately started liaising with Coodes regarding a meeting to discuss a limited grant and/or a mediation (see email from Coodes to Stephens Scown dated 8 August 2023). Once they had read into the case, they agreed to mediation on 10 September 2023. I note that very little, if anything, of substance happened between the parties between June and September 2023.
108. I reject Mr McKean's submission that the additional costs incurred between March and September would have rendered the mediation less likely to succeed: the CCMC was essential before mediation could proceed (because of disclosure) and very limited costs were incurred in that period in any event.
109. I am far from being persuaded that any alteration to the usual costs order is required as a result of Luke's conduct, either through not issuing a letter of claim or his failure to agree to mediation prior to September 2023.

The Probate Exceptions

The Testator's Conduct

110. I am asked by Mr McKean to depart from *Re Cutcliffe's Estate* based on the extract from *Theobald* set out above. However, Joanna Smith J DBE held at paragraph 27 in *Leonard* as follows:

27. Where the question is whether the testator himself has been the cause of the litigation (as in this case), there is no requirement under the first exception to show moral fault or culpability on his part, but rather "the touchstone should be whether it was the testator's own conduct which has led to his will 'being surrounded with confusion or uncertainty in law or fact'" (Kostic at [9]). This may arise, for example, in circumstances where a testator has left his testamentary papers in a state of confusion, where the Will cannot be found, or where the testator has used language which is difficult to understand and where he or his solicitor has created the difficulty (Kostic at [9] and [18]). However, the first exception does not extend to a case where the testator has, by his words, misled other people or inspired false hopes that they would benefit after his death (Re Cutcliffe's Estate [1959] P 6 and Kostic at [18]).

111. In circumstances in which two relatively recent authoritative decisions have, after a review of the authorities, endorsed *Re Cutcliffe's Estate*, it would have to take a very strong set of facts to depart from that authority. This is certainly not such a case, particularly when the recent encouragement has been to narrow the scope of the application of the first exception rather than broaden it (see *Kostic* at [18]).
112. In my Substantive Judgment, I did refer to there having been a familial expectation, but the context of that finding is important (I refer back to paragraph 312 set out above). It was largely based on things said and done in Betty's lifetime (so some years before the Will was made and even further before Keith's death) and they were largely implicit in what Keith said and did rather than positive deceit on his part. Even without *Re Cutcliffe's Estate*, I would have found it impossible to apply the first exception to the instant facts. It was not incumbent upon Keith to tell his family that he had made a will, as was suggested by Mr McKean. It is still very much the case that a person does not have to justify their testamentary gifts, provided the will is otherwise lawful and the testator is of sound mind.
113. The real mischief that the first exception is aimed at is that behaviour of the testator which goes directly to the comprehension of the testator's intentions, examples of

which were given by Joanna Smith J as set out above. The instant facts fall far short of supporting the application of the exception: Keith went out of his way to engage professionals (solicitors) or quasi-professionals (in the form of the charity support) both in discussing and evaluating his proposed gifts and in setting them down on paper. Keith's will was in short form and was perfectly clear.

114. Accordingly, I find that there is no scope for applying the first probate exception in this case, and I decline to do so.

The Investigation Period

115. This exception is highly fact specific, and much will therefore turn on the evidence and findings. I draw on Ms John's helpful skeleton in this regard, for which I am grateful.
116. **General – Vivian's state of knowledge:** Whilst Vivian was not involved in making the Will, much of the essential factual background would be known to him as Keith's brother and given his daily presence at Tregear. Coodes were in possession of most of the relevant documents disclosed in these proceedings prior to Luke instructing solicitors in May 2021. By March 2022, Mr Clarke had had his memory jogged in relation to the attestation. The evidence of a non-Wills Act compliant attestation thereafter was fairly weak: how likely, one might ask, would it be that Dr Fairlie should recognise someone from a photograph who they met once, extremely briefly and when the focus was not on the social fact of meeting but on executing a document in the middle of a busy surgery, particularly when Dr Fairlie, like many doctors, attests to many wills over time. The fact that mediation was being suggested in March 2023 (once the information had been supplied (as per Mr McKean's submissions) on 17 March 2023), prior to exchange of disclosure or statements, suggests that Coodes considered that their pre-issue enquiries had yielded sufficient information to form a view about the validity of the Will and to make a commercial assessment of the risks and benefits of continued litigation. As stated above, Vivian was in possession of much more information than Luke by that stage.
117. **Testamentary capacity:** The plentiful medical evidence did not suggest testamentary incapacity, as was pointed out by Nalders and hence the Notice to Admit Facts. CPR

32.18(5) provides that “*If a party fails to admit a fact after service of a notice to admit facts, the court may take this into account when deciding whether to make an order as to costs.*” This bolsters the case against the engagement of the second exception. Dr Series’ description of Keith has been found to be alien to the true picture, and Vivian would or should have been aware of the true picture of Keith’s acuity in the period running up to the execution of his will. In *Leonard*, Joanna Smith J concluded that the investigative phase had ended post-mediation notwithstanding the fact that the unsuccessful defendants had a supportive expert report. Dr Series’ personality disorder hypothesis is not only apparently unprecedented to support a finding of testamentary capacity, but it emerged at a very late stage of the proceedings. Dr Series’ theory was founded on a one-sided analysis of the evidence as he was not provided by Coodes with the witness statements on behalf of Luke at the point when he prepared his report. Vivian and his team would have known that, and to consider that reliance on his report was anything other than hostile litigation was misguided if it was the case.

118. **Knowledge and approval:** This was a professionally drawn will that, save for minor points of detail, accorded with instructions given by Keith to Ms Wright and recorded in a comparatively detailed attendance note. Vivian was in possession of the Will file long before Luke instructed solicitors. Even without prior knowledge of the meeting on 2 August 2016 when Keith went through the draft will with his executors, Peter Clarke and Patrick Evans, this was always going to be an extremely difficult ground of challenge to succeed on. The various factors cast by Vivian as suspicious did not objectively require investigation and have been emphatically rejected by the Court.
119. **Due execution:** At first blush, this may have had more mileage in that there was an apparent conflict in the evidence of Dr Fairlie and that of Peter Clarke. However, as noted, Coodes had spoken to both witnesses prior to the issue of proceedings. Dr Fairlie’s evidence, at its highest, was that he could not remember Peter Clarke being present; he has never asserted a positive recollection that the Will formalities were not observed. Coodes were also aware prior to issue that Peter Clarke, after his initial discussion with Coodes, had reflected further and was saying that the Will was executed at the surgery. Any assessment of the extent to which it was reasonable to continue to pursue this issue must factor in: (a) the strength of the presumption of due execution which is not displaced merely by lapses in memory on the part of attesting

witnesses; (b) the standing of the attesting witnesses as professionals or quasi-professionals; (c) the evidence on the Will file that Ms Wright had given Mr Clarke careful instructions on execution; and (d) the attendance note of Ms Wright's conversation with Mr Clarke on 25 August 2016. That attendance note was agreed by Dr Fairlie to refer to Keith's visit to the surgery on the date of execution on 23 August 2016. The attendance note recorded that Mr Clarke had been present at the surgery with Keith on that day and, since Mr Clarke described Dr Fairlie's mood, in all probability placed Mr Clarke and Dr Fairlie in the room together.

120. An objective assessment of the essential facts and legal principles, which were all available to Vivian pre-issue and long prior to the exchange of witness statements on this issue in the lead up to mediation, ought to have led to the realisation that this was likely to be a very difficult issue to succeed on at trial and was certainly going to be in the nature of hostile litigation. It is relevant that this exception applies to reasonable investigations: once the parties are aware of the settled positions of the attestation witnesses, time must begin to run to decide whether the investigation phase is over, and the parties need to decide whether to pursue hostile litigation. The fact that no positive case was originally pleaded by Vivian in relation to due execution (see para. 67 original Defence and Counterclaim which was in the PTR bundle at page 63 which merely put Luke to proof) is an indicator that this was not perceived as a substantial ground of challenge. It is also highly relevant that the costs incurred in dealing with this aspect of the matter are almost *de minimis* compared to Vivian's other challenges to the Will.
121. Even if this exception applied to the due execution issue post-issue of proceedings, which I find that it does not for the reasons set out above, the only just way to apply it would be by way of an issue-based costs order because of its *de minimis* contribution to the costs of the case. However, I do not reach that point.
122. Standing back and looking at the second exception in the round, it is my judgment that the investigation period was complete by the end of August 2021 in respect of all issues save for the due attestation issue and that the period for that issue concluded soon after 1 March 2022. If there are any costs incurred by Luke in dealing with all intimated claims by Vivian before the end of August 2021, then there shall be no order for costs

to that date; if there are any costs incurred by Luke in respect of the due attestation issue alone, there shall be no order as to costs to 15 March 2022.

Part 36 Offer

Was it a valid Part 36 Offer?

123. It must be borne in mind that the Part 36 regime is not a contractual one, albeit that it has similarities. No doubt that is what Newey LJ was referring to in the *dicta* in *Adams* set out above.
124. The only issues raised by Vivian at the time of receipt of the offer (which contained the usual requirement that the recipient should identify any deficiencies in the offer as a Part 36 Offer) were in a letter from Coodes dated 08 March 2024. They suggested that Luke's Part 36 offer was not a viable offer, and thus may not be a genuine offer, because (i) the offered land did not directly conjoin Vivian's existing land and it was suggested that the fields did not have their own access and (ii) it was asserted that the land was expressly offered without connection to a water supply. As Ms John pointed out, these complaints are unfounded:
- a) Whilst the parcels 2500 and 3700 sit below the railway line (which has its own parcel number – 2000), access to the parcels was expressly offered via the track (over which Vivian already has a right of way). A marked-up plan illustrating the access gateways (produced by Coodes) shows the existing access gateway from the track to field 2500 which in turn gives access to field 3700.
 - b) The parcels were not expressly offered without connection to water supply - the letter made no direct reference to the point. There would obviously be conveyancing detail to be dealt with in the necessary transfer, but even if such a right was not expressly dealt with it would be implied under s.62 of the Law of Property Act 1925. Further, and in any event, landowners have a right to a water supply under s.55 of the Water Industry Act 1991, for which purpose the relevant water company can compel an adjoining landowner to allow access (s.160(1)).

125. As to the latterly raised objections in Mr McKean's written and oral submissions, I find that the submissions relating to the whether or not the Will would be admitted to probate and/or it was the claim or counterclaim that was successful and/or that the third tractor was unaccounted for to be pedantic in their nature. Clearly these are the sort of technical details that could have been sorted out had the Part 36 Offer been accepted. In fact, the third tractor would, by implication, have remained with Luke in any event as part of the residue.
126. The submission that the offer was not Part 36 compliant because Luke did not own the land in question, it being vested in the executors, is almost contrived: clearly the executors would abide by any agreement the parties had come to, within reason. Similarly, the bank: the net value of the estate even three months after the offer had been made was approximately £487,599, net of the Barclays loan. It is inconceivable that the bank would not have accommodated a settlement that provided for the repayment of the loan or at least left them with sufficient equity to give them comfort, safe in the knowledge that the estate could finally be administered.

Was it a Genuine Attempt to Settle?

127. This is even less attractive as an argument. The relevant law was set out by Joanna Smith J at paragraph 19 of *Leonard*. I do not set it out here because the argument does not warrant it, but I bear that passage in mind.
128. As Ms John calculated, the offer represented 14.6% of the estate at November 2023 values, and the authorities she cited at paragraph 18 of her skeleton argument (*Leonard* itself and *Grierson v Grierson* [2024] EWHC 3048 (Ch)) indicate that much lower percentages will suffice. The offer was made post-mediation and the acceptance period extended well beyond the exchange of witness statements on 25 January 2024 i.e. to 5 February 2024. There is no question that Vivian was not in a position to assess it when it was made. The offer was certainly a genuine attempt to settle in my judgment.
129. Accordingly, I find that Luke's Part 36 Offer made on 15 January 2024 was valid and, since Luke has obviously beaten it, the consequences set out in Part 36.17 must be

considered. Luke will be entitled to the costs consequences set out in CPR 36.17(4) subject only to the defendants satisfying the court that it would be "unjust" to make such an order.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

**Amount awarded
by the court**

Prescribed percentage

Up to £500,000

10% of the amount awarded

Above £500,000

10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

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

(5) ... all the circumstances of the case including –

a) the terms of any Part 36 offer;

b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

- c) *the information available to the parties at the time when the Part 36 offer was made;*
- d) *the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and*
- e) *whether the offer was a genuine attempt to settle the proceedings.*

131. Mr McKean in his skeleton argument relied on all his arguments in relation to the Part 36 Offer to submit that it would be unjust to visit the full Part 36.17(5) consequences on Vivian. He thus appears to rely solely on paragraph (e) of subsection (5) of the Rule. In his oral submissions he expanded that position to include, not only the “doubts” about the Part 36 Offer itself but all the conduct points he made in the costs and consequential hearing. He submitted that 10% would be “way too punitive”, although he did accept that Coodes had not raised the issues that he had raised at this hearing, but emphasised that they *had* claimed that the offer was incapable of being accepted, albeit for different reasons.

132. Ms John submitted that Luke had beaten the Part 36 Offer by a long way, with 100% success in the proceedings. There were conduct issues against Vivian, too: in particular, the failure to disclose those matters relating to Burhos and his persistence in pursuing the testamentary incapacity claim to the bitter end despite its obvious flaws, including the way the personality disorder was raised and how Dr Series had been either misled or under-instructed by failing to provide all of the relevant witness statements to him.

133. Dealing with the 36.17(5) considerations in turn:

- (a) The terms were clear enough and offered Vivian a significant advantage over the judgment result.
- (b) The offer was made only three months before trial, but I accept that that was in good time to have avoided the trial costs which have been significant given the need for additional hearings.

(c) The parties had all the information available at trial except the witness statements at the time of the offer. However, as stated above, the witness statements were exchanged before the period for acceptance expired. No extension of time was sought.

(d) This is not relevant.

(e) I have found that it was a genuine offer to settle the proceedings.

134. Taking these matters into account, I do consider that there needs to be some adjustment to the paragraph 4 provisions to prevent an unjust result, principally because it would be unjust to charge interest on all costs at the full rate for the entire period of the litigation when the offer was made three months before trial. On the other hand, ‘all circumstances of the case’ includes the conduct in relation to the personality disorder issue. I therefore reduce the figure in sub-paragraph (c) to 5%. The balance of the sub-paragraph shall apply in full.

The Executors’ Costs

135. The executors are the executors of a valid will who remained as neutral as they could whilst being forced to engage to some extent with the proceedings.

136. Mr McKean was unable to cite any authority for his submission that there was no principled basis upon which to order that Vivian pay the executors’ costs. CPR Part 44.2(1) clearly incapsulates the executors as parties.

137. The most glaring reason for refusing to award the executors’ litigation costs (as opposed to their usual indemnity) from the estate is that if I did so Luke would be paying them despite being the successful party, which would be wholly unjust. Another important reason is that one only has to step back and ask oneself why the executors’ litigation costs were incurred. The obvious and straightforward answer is because Vivian challenged the validity of the Will on almost every conceivable ground. I might add in passing that this costs judgment is so long because Vivian has taken almost every point imaginable in relation to costs, even when some of them were unmeritorious.

138. Mr Knight was also correct to point out that the executors happen to be Defendants along with Vivian when, had Vivian taken his intended path of making a claim himself, they would have been successful Defendants along with Luke. He was also correct to refer to the fact that all parties recognised that there would be litigation costs as a result of Vivian's stance by virtue of the executors' agreed costs budget.
139. Finally, Ms John referred me to *Kostic* at [43] by which the costs of the administration pending suit were paid by the losing party. By analogy, she submitted, Vivian should do the same. I agree that that is a reasonable analogy.
140. I will therefore order that Vivian will pay the executors' litigation costs on the standard basis if not agreed subject to the 'no order as to costs' periods referred to above.

Payment on Account

141. Mr McKean cited Christopher Clarke LJ in *Excalibur Ventures v Texas Keystone* [2015] EWHC 566 (Comm) at paragraph 23:

'23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.'

142. Mr McKean submitted that Luke's budgeted pre-action costs should be removed from the calculation simply because they took no steps pre-issue in breach of the Practice Direction. He wrongly submitted that I had awarded Vivian his costs of the PTR (at which there was the successful application to launch the personality disorder claim), whereas Ms John pointed out that I had ordered Luke to pay the costs of the attendance for hand down of judgment on 28 March 2024 but otherwise ordered the PTR costs to be in the case, and the costs of the amendment to be paid by Vivian in any event.

143. Mr McKean suggested a figure of 70% as suggested by the executors, and submitted that, because of the prospects of success of Vivian's intended appeal were so good, 80% would be too high.
144. Ms John, because time was short at the hearing, referred me to her skeleton argument on the point. So far as the quantum is concerned, she submitted where the costs form part of a costs budget that can properly be regarded as approved, the payment on account should be no less than 90% of that budgeted amount (*Cleveland Bridge v Sarens* [2018] EWHC 827 (TCC) at paragraph 20). In relation to incurred costs that are not approved costs, the court must determine a reasonable sum by reference to an estimate of the likely level of recovery, subject to an appropriate margin for error: *Ibid* at paragraph 21.
145. The sum sought on behalf of Luke was £94,000. Luke's incurred costs as at the date of the CCMC stood at £21,562.80 (inclusive of VAT) and his onwards costs were budgeted at an additional £86,400 (inclusive of VAT). The sum sought on account amounts to (rounded to the nearest thousand) 90% of the budgeted costs and 75% of the incurred costs. Ms John submitted that 75% is a reasonable level at which to assess the incurred costs in circumstances where the sum incurred at the date of the CCMC on 30 May 2023 (some 10 months post-issue) was relatively modest.
146. Furthermore, the overall sum is reasonable Ms John submitted bearing in mind the indemnity basis assessment applicable from 06 February 2024. Budgets will have been substantially exceeded on both sides, she said, which is palpably true. There have been a range of unanticipated additional costs that were not budgeted for and which would justify departure from the budget in any event, including the fact that the matter was ultimately listed for six days plus the further consequential hearing (where four days were budgeted for) and the need for an addendum report from Dr Fawzi and additional statements due to the way that the personality disorder issue developed.
147. I agree with Ms John and will order the payment on account of costs that she seeks.
148. Mr Knight sought 70% of the executors' budgeted costs on account, not least because the estate is illiquid and the administration needs to proceed with pace once probate is

granted. In accordance with *Clevedon Bridge* in which Miss Joanna Smith QC (as she then was) undertook a review of the authorities and specifically relied on *MacInnes v Gross* [2017] EWHC 127 (QB)), I find that 70% is too low, and so I will award 85%, taking into account both the incurred costs at the time of budgeting (£7,693) and the budgeted costs (£12,585) plus the factors referred to by Ms John (excepting the indemnity costs point).

Conclusion

149. I have dealt with the costs orders above.

150. I understand that the parties are now agreed that a full grant shall issue and there should be a solemn grant in favour of the Will.

151. Counsel have subsequently agreed a draft Order subject to the insertion of dates which I have approved.