Neutral Citation Number: [2022] EWHC 2505 (Ch)

Case No: PT-2021-BRS-000049

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR
Date: 7 October 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF THE ESTATE OF CLIVE MCDONALD (DECEASED)

AND IN THE MATTER OF SECTION 116 OF THE SENIOR COURTS ACT 1981
AND SECTION 50 OF THE ADMINISTRATION OF JUSTICE ACT 1985

BETWEEN:-

(1) KAREN PEGLER
(2) TAMARA SARAH STRINGER
(3) SERENA JULIET GAHAGAN HULME
(4) JEREMY EDWIN STANLEY GAHAGAN

Claimants

-and-

(1) TIMOTHY BRUCE MCDONALD
(2) HUGH JAMES TRUST CORPORATION LIMITED

Defendants

- -

Louise Corfield, instructed by **Ashfords LLP)**, for the **Claimants**
The First Defendant in person
The Second Defendant was not present or represented

Consequential matters dealt with on paper

- -

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.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 1:30 pm on Friday 7 October 2022.

HHJ Paul Matthews :

Introduction

1. On 29 September 2022 I handed down judgment in this Part 8 Claim to remove the first defendant (whom I shall refer to simply as the defendant) as executor of the will of the late Clive McDonald: see [2022] EWHC 2405 (Ch). I held that the claim succeeded, and invited written submissions on consequential matters, including costs. I have received those submissions from both the claimants and the defendant, and considered them.

2. In a postscript to my judgment, I recorded that, after I had circulated a draft of my judgment, the defendant had sent me two detailed emails, One proposed the addition of significant further material to my judgment, which would have the effect of finding facts on matters which were not relevant to my decision on the claim. The other sought to re-argue the substance of my decision. I have to record that, in addition to the submissions on consequential matters which I had invited, the defendant also sent me a further email seeking to re-argue points in the case. (He also sent a number of exhibits after the deadline for submissions had passed, but I am not concerned with that now.)

Questions to the judge

3. In addition to that, the further email sought answers to questions about me personally. It included these paragraphs:

> "Since your conclusions are so contrary to the weight of the evidence of my capable, reliable, objective and effective handling of the administration of my brother's estate, at no cost other than appraisal, insurance and repair costs etc., I have to conclude that your perverse contrarian decision is driven by some ulterior motive based on some connections to others, including, possibly, in the legal profession. Your very petty puffed-up gaslighting ruling contains much unsupportable contrived hypothetical and hypocritical conjecture, plus errors of fact and therefore lacks merit and intellectual honesty. Again, this is my opinion. With little rancour.
>
> So, in the interests of full disclosure, transparency and proof of judicial independence, I ask that you divulge by affirmation your current status relative to the Bristol Province Freemasons, or any other Freemason hall, and so declare your independence from Freemasons and also your independence from any other connections that the fair-minded observer would consider to be an undue influence on your judgments. Such undue influence could include overly close connections with Matthew Evans or any other Hugh James partners or associates or similarly with Ashford's LLP personnel or other judges such as CJ Myles Kenneth Watkins, born Salisbury 1966, 'convicted' June 8 of oath-breaking *ex-parte* activity, who was on the bench October 1, 2021."

4. The defendant lives in Canada, and I do not know what the relevant rules are there. But applicants for judicial appointment in this country are not asked to declare whether they are freemasons (or belong to any other organisations, social, political or otherwise). Judges in the UK have the same freedom of association, and the same

right to respect for their private lives, as everyone else (*cf* the European Convention on Human Rights, 1950, articles 5 and 8). They are not required to respond to enquiries about their lawful private activities. Judges are in general automatically disqualified for acting in any case in which they have a financial or other personal interest, and in any other case are expected to disclose to the parties any matter which could arguably lead a fair-minded and informed observer to conclude that there was a real possibility of bias. I have made no such disclosure in this case, because I am not aware of any such matter.

The law relating to costs

Generally

5. The rules relating to costs in English civil litigation are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). However, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

6. In particular, the court may make an order (amongst others) that a party must pay a proportion of another party's costs, an order that costs be paid from or until a certain date only, and an order for costs relating only to a distinct part of the proceedings: CPR rule 44.2(6)(a), (c) and (f). But before making an order of the last type, the court must first consider whether it is practicable to make one of the first two types: CPR rule 44.2(7). So, an issues-based order is possible, but the rules require the court first to consider making a proportion of costs order or a time limited order.

7. The general rule requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue".

Trusts and estate litigation

8. In addition to the general costs rules, there are particular rules for costs in trusts and estate litigation. They arise because of the special position of a trustee or personal representative taking part in such litigation, and in particular because of the indemnity of the estate to which such a person is normally entitled. That indemnity is now statutory, by virtue of section 31 of the Trustee Act 2000. This codified the law as it then was: *Price v Saundry* [2019] EWCA Civ 2261, [22]. It provides:

> "(1) A trustee—
>
> (a) is entitled to be reimbursed from the trust funds, or
>
> (b) may pay out of the trust funds,

expenses properly incurred by him when acting on behalf of the trust."

"Properly incurred" here means "not improperly incurred": *Price v Saundry*, [24].

9. Specific provisions in the CPR in effect implement the basic rule in the 2000 Act. Rule 46.3 and para 1 of the Practice Direction to Part 46 contain the main ones. Rule 46.3 is as follows:

> "(1) This rule applies where –
>
> (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
>
> (b) rule 44.5 does not apply.
>
> (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.
>
> (3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis."

(I interpose to say that rule 44.5, referred to in rule 46.3(1)(b) above, concerns costs payable under a contract, and is not relevant to this case.)

10. Para 1 of the Practice Direction to Part 46 is as follows:

> **"1.1** A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') –
>
> (a) obtained directions from the court before bringing or defending the proceedings;
>
> (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and
>
> (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.
>
> **1.2** The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally."

11. In *Blades v Isaac* [2016] EWHC 601 (Ch), I commented on these provisions as follows:

> "66. Rule 46.3 and para 1 of the Practice Direction to Part 46 deal with the costs of trustees and personal representatives. They do not deal with the costs of other parties, such as beneficiaries who are joined to a trustee's or personal representative's application for directions, or who indeed issue proceedings

against the trustee or personal representative for such directions. Nor do they deal with beneficiaries' costs in hostile litigation. These matters are all dealt with in the caselaw, and in particular in the decision of Kekewich J in *Re Buckton* [1907] 2 Ch 406, followed post CPR in *D'Abo v Paget (No 2)* [2000] WTLR 863.

67. In *Re Buckton* one of the beneficiaries of a will trust issued a claim for a declaration as to the true construction of the will against another beneficiary, who had refused to agree with the first beneficiary's view. The trustees were joined, so that they would be bound, but played no part in the argument. The judge held that in substance the first beneficiary was right. He sought his costs against the second.

68. The judge said that there were three classes of case:

> (1) Application by originating summons (now Part 8 claim) by trustees for directions/construction: all parties' costs come out of the trust estate;
>
> (2) Application which could have been made the trustees (as in (1)) but in fact is made by a beneficiary, joining the trustees as defendants: all parties' costs come out of the trust estate;
>
> (3) Application by a beneficiary adverse to other beneficiaries, in hostile litigation which could have been begun by writ action (now Part 7 claim) but was in fact begun by originating summons: the general costs rule applies, and the unsuccessful party is generally ordered to pay the costs.

69. In that case the judge held that in substance the present case fell within the second class, which may conveniently be referred to as "*Buckton* (2)", and that all parties' costs should come out of the trust estate. It will be noted that this case was not about trustees' costs at all. Instead (and as noted by Nugee JA in *Des Pallières v JP Morgan Chase & Co* [2013] JCA 146, [30]-[31]), it was about the circumstances in which *beneficiaries* might obtain their costs, either from the fund, or from another beneficiary."

Submissions

12. The claimants submit (in summary) that:

> (1) the costs incurred by all parties (including Gill Collins, the original second defendant) have been caused by the unreasonable conduct of the defendant in refusing to stand down;
>
> (2) the claimants should not have to pay personally or find themselves out of pocket because of bringing this claim, because it was necessary and in the interests of the administration of the estate that the claim be brought;
>
> (3) the court has a wide discretion in making costs orders, to do justice between the parties in all the circumstances;
>
> (4) costs should follow the event and the claimants should recover their costs from the defendant;

(5) the estate should be entitled to recover from the defendant the costs ordered on 1 October 2021 to be paid to Ms Collins out of the estate;

(6) the claimants should have their costs of the claim out of the estate in the first instance, but the estate should be entitled to recover those costs from the defendant;

(7) the defendant should not be entitled to any indemnity out of the estate in respect of his own costs or expenses (including costs liability to anyone else) in defending this claim;

(8) costs should be assessed summarily, but if they are to be subject to detailed assessment then the sum of £60,000 should be ordered to be paid by the defendant on account of his costs liability.

13. The defendant's written submission in answer contains mostly arguments as to why the substantive judgment is wrong. It would be inappropriate to, and therefore I do not, address those in this costs ruling. However, so far as I am able to separate identifiable costs submissions from substantive judgment re-argument, the defendant (in summary) submits:

(1) the costs incurred by all parties (including Gill Collins, the original second defendant) have been caused by the unreasonable conduct of the claimants in pursuing their "unreasonable unfounded claim to remove the clearly more competent, honest, and objective" defendant;

(2) the claimants should pay all costs personally: they "have failed in establishing that D1 should be passed over. They have merely succeeded temporarily – by the use of false 'evidence' and 'suasion' – to 'convince' HHJ Matthews to remove him, subject to his appeal to the same and/or a higher court";

(3) the defendant agrees that the court does have a wide discretion when making costs orders: the defendant "is clearly in the right in this case";

(4) the defendant's possible challenge to the will is "essentially a red herring", and irrelevant;

(5) the defendant did not bring the claim, and has not fallen out with anyone;

(6) the defendant is "exactly the right person for this executor role. It is because he gets along with people and is very open to opinions other than his own, that he ran a scout group for years and delivered meals on wheels 20, and is still always in demand at social events and as a tennis partner";

(7) there should never have been any claim to remove the defendant, and accordingly there should be no legal costs, and any lawyers' fees should not be visited on the defendant's children (residuary beneficiaries).

Discussion

Two preliminary points

14. I begin with a general point. The court makes (or does not make) a costs order on the basis of the substantive decision already reached. If the substantive decision were different from what it was then the costs order would probably be different too. If the substantive decision is later overturned on appeal, then the costs order made on the basis of that decision will probably be overturned as well. The defendant however seems to wish me, having made my substantive decision, to make a costs order based on what he says my substantive decision *should* have been. But that is not the way the system works. I must make a costs order in the light of the decision I made, and then, if a higher court says my decision was wrong, *that* court can and should deal with the costs order which is appropriate in those circumstances.

15. Next, there is a specific point about costs orders in trust and estate litigation. I have already pointed out that there are both *general* and *special* rules applying to such cases. What this means is that it is necessary to distinguish between (on the one hand) the costs payable by one party to another in the litigation, and (on the other) the right of indemnity which a trustee or personal representative may have to be indemnified out of the estate in question. So, for example, if A sues B, the court decides what the result of the litigation is, and then decides what costs order to make, using the general costs rules. If A wins, the general rule means that B is usually ordered to pay A's costs. But if either A or B is a trustee or personal representative, and took part in the proceedings in that capacity, then, at the second stage, the court may consider whether that person should be entitled to the usual indemnity. It does not matter whether that person won or lost. Even if the trustee or personal representative lost, and is ordered to pay the other's costs, that other's costs (together with his or her own costs) can still be the subject of the indemnity.

The "general rule"

16. In the present case, I consider that it is appropriate for the court to make an order about costs. This litigation has been lengthy and expensive, and is not the kind of case in which it would be appropriate for the court to decide to make no order. In the circumstances, the general rule would be that the unsuccessful party should pay the costs of the successful, although the court has power to make a different order in an appropriate case. Here, the successful parties were the claimants. They brought this claim to remove both of the original defendants. The original second defendant was content to be removed, and was removed at an early stage. The original first defendant (whom I am referring to as simply "the defendant") objected to being removed. So the claim has been tried, and it has succeeded.

17. The defendant says that the claim was both "unreasonable" and "unfounded". I disagree. In my judgment, it was entirely reasonable for the claimants to bring this claim, in circumstances where one named executor had renounced, and the other two were unable to cooperate so as to advance the administration of the estate. Moreover, and as I have held, the claim was well-founded. The defendant, well-meaning as he is, is simply not an appropriate person to act as a personal representative of his late brother's estate, for all the reasons given in my judgment of 29 September 2022. Accordingly, I see nothing in the defendant's written submissions to justify my making a "different order" within the meaning of CPR rule 44.2(2)(b). Applying the general rule, therefore, that would mean that I should order the defendant to pay the claimants' costs of the claim. As I have said, I see no reason to make a different order, and (subject to the next point) I propose to do so.

The costs of Ms Collins

18. However, the claimants actually ask me now to order that all the claimants' costs be paid out of *the estate*, and that *the estate* be entitled to recover those costs (as well as those of Ms Collins) from the *defendant*. Now the costs of Ms Collins were dealt with to some extent at least in the order of 1 October 2021, by which she was removed as executor and a substitute personal representative appointed. Paragraph 5 stated that Ms Collins was entitled to an indemnity out of the estate in accordance with CPR rule 46.3. Paragraph 27 ordered that the costs as between the parties be costs in the case. That is the usual order when directions to trial are given (as they then were). At that stage, the merits of the claim against the defendant had not been adjudicated upon, and the court was in no position to make a costs order that affected him directly. Nonetheless, the defendant sought permission to appeal against this order, but that was refused by Zacaroli J on 24 June 2022.

19. What the claimants are now asking for in this case to some extent resembles a *Bullock* or *Sanderson* order (from *Bullock v London & General Omnibus Co* [1907] 1 KB 264, CA, and *Sanderson v Blyth Theatre Company* [1903 2 KB 533, CA, respectively). These are cases where the claimant does not know which of two defendants caused the loss complained of, and so sues both, one of whom is held liable and the other not. If the claimant acted reasonably in suing both defendants, the court may (i) order the claimant to pay the successful defendant's costs, but (ii) order the unsuccessful defendant to pay not only the claimant's costs but also the successful defendant's costs which the claimant has been ordered to pay. Alternatively, the court may short-circuit the process, and simply order one defendant to pay the other's costs.

20. But in fact this is not really a *Bullock* or *Sanderson* case at all. This claim was to remove *both* defendants as executors, and not just one or the other. One of them consented, and the order was made. The other did not consent. So the claim had to be tried, and indeed was successful. The result is that both defendants have been removed. That is not the usual *Bullock* or *Sanderson* order. Yet it is fair to say that principle behind the old Chancery jurisdiction to order one defendant to pay another's costs was always rather wider than those cases suggest.

21. For example, in *Child v Stenning* (1879) 11 Ch D 82, CA, the lessee of land brought an action against other lessees from the same lessor who claimed a right of way over his land deriving from their leases. In this action he claimed an injunction against those lessees. He also joined the lessor to the action, and in the alternative claimed damages from him under the covenant for quiet enjoyment. The lessor in fact supported the plaintiff's claim against the other lessees. However, at the trial, the other lessees established their right of way, and judgment was given against the lessor for damages for the loss sustained by the breach of the covenant for quiet enjoyment.

22. Sir George Jessel MR, with whom James and Bramwell LJJ agreed, said (at page 86):

> "But the Respondent on the appeal complains that the Judge in the Court below, while he made him—which was quite proper— pay the costs of the Stennings, [the other lessees] against whom the action wholly failed, did not give him those costs over again against the Defendant Wagner [the lessor]. I think that he is entitled to complain of so much of the decision. Who was the cause of the action ? Whose error was it that gave rise to the whole litigation ? Clearly Mr.

> Wagner's. It was his grant to the Stennings which gave them the right of way of which the Plaintiff complained. Who incited the Plaintiff to bring an action against the Stennings ? Who almost requested him to do so ? Mr. Wagner. He represented to the Plaintiff, and even up to the time of trial insisted upon that representation, that he had made no grant of the right of way to the Stennings, and that they were mere trespassers. It appears to me on principle, that he who was the person who caused the litigation, or whose error or representation caused it, ought to be the person to pay the costs of it."

23. So, as I read this decision, one test for ordering a party to pay to another party the costs of a third in the litigation is whether the first party by his or her wrong *has caused the litigation*. *Bullock* and *Sanderson* focus on the fact that the claimant cannot reasonably know until trial which of two defendants caused him the loss of which he complains, each being responsible for his or her own actions. But *Child v Stenning* proceeds on the logically prior basis that one of the two by his or her own actions caused the whole litigation in the first place.

24. In the present case, the claimants expressly argue that the defendant was the cause of the whole litigation, and therefore should in substance pay the costs of Ms Collins, which DJ Watkins were the subject of an indemnity out of the estate. I accept both the premise and the logic of the argument. And, as a matter of simple justice, I understand the point. Had the defendant not behaved unreasonably (as I have found), the litigation would never have been needed, and Ms Collins' costs never incurred. The claimants (as well as the defendant's children) are interested in the estate as residuary beneficiaries. To the extent that Ms Collins's costs are not paid by anyone else, but come out of the estate, the residuary beneficiaries will suffer a loss. The only possible difficulty lies in the fact that the claimants have no liability for the costs of Ms Collins.

25. The order of 1 October 2021 did not order either the claimants or the defendant to pay Ms Collins' litigation costs. As I have said, there was no basis to do so at that stage. So, the court ordered those costs to be "in the case". The question is what effect that order has on Ms Collins' costs, now that the case is over, and the claimants have succeeded. In my judgment, it means first of all that the claimants are entitled to their costs of the hearing of 1 October 2021 as part of their costs against the defendant. Those costs are not only the costs of the directions, but also of the application to remove Ms Collins, which proceeded by consent.

26. But there is a further effect. The claim to pass over or remove the defendant has succeeded, and has also shown that this litigation was caused by the defendant's behaviour. In my judgment, he should therefore pay all the costs. They will include those incurred by Ms Collins in reacting to the claim and consenting to the order sought, as well as her costs of the hearing on 1 October 2021. The order of that date recorded that she was entitled to an indemnity for her costs out of the estate. It did not *grant* Ms Collins an indemnity: she was already *entitled* to it under sections 31 and 35 of the 2000 Act, unless the court took it away from her under CPR rule 46.3 and PD 43 paragraph 1. But the court did not do that. So the defendant must pay Ms Collins' costs, and the indemnity will take effect only in respect of such of the costs of Ms Collins as are not recovered from him.

The statutory costs jurisdiction

27. I think I should also mention an alternative ground of reasoning which reaches the same result. In *Bullock*, Sir Richard Henn Collins MR relied (at page 269) on an alternative ground for his decision, namely the Supreme Court of Judicature Act 1890, section 5:

> "Subject to the Supreme Court of Judicature Acts and the rules of Court made thereunder, and to the express provisions of any statute whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid".

28. The substance of these words is now to be found in section 51 of the Senior Courts Act 1981, which relevantly reads as follows:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High Court; and
>
> [(ba) the family court;]
>
> (c) [the] county court,
>
> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives [or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs].
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.
>
> […]"

29. In *Aiden Shipping Ltd v Interbulk Ltd* [1986] AC 965, Lord Goff of Chieveley, with whom the whole House agreed, said this (at 975A-C):

> "Section 51(1) is (for all material purposes) identical to section 50(1) of the Supreme Court of Judicature (Consolidation) Act 1925, which itself is (for all material purposes) identical to section 5 of the Supreme Court of Judicature Act 1890 (an Act passed to amend the Supreme Court of Judicature Acts 1873-1875). In the rules of court contained in Schedule 1 to the Supreme Court of Judicature Act (1873) Amendment Act 1875, Order 55, which related to costs, opened with the words: 'Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the court; . . .' The words: 'and the court or judge shall have full power to determine by whom and to

> what extent such costs are to be paid' (now to be found in almost identical terms in section 51(1) of the Act of 1981) were introduced by section 5 of the Act of 1890."

30. Lord Goff went on to say this (same page, F-H):

> "In these circumstances, it is not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms. The subsection simply provides that 'the court shall have full power to determine *by whom* . . . the costs are to be paid.' Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised."

31. So, the wider, statutory jurisdiction, conferring "full power" on the court "to determine by whom and to what extent the costs are to be paid" came into being only in 1890, long after (and quite distinct from) the old Chancery jurisdiction just discussed. In *Aiden Shipping*, the House of Lords held that, subject to any relevant rules of court, these words enabled the court to order that the costs of the proceedings be paid by a non-party. In *Glover v Barker* [2020] EWCA Civ 1112, for example, the Court of Appeal held that section 51 conferred jurisdiction to order a litigation friend to pay the costs of the proceedings.

32. This claim might have been resolved at a single trial, resulting in the findings of fact that I ultimately made, and therefore the removal of both the defendant and Ms Collins, On the facts as I have found them, I consider that the appropriate costs order would then have been that the defendant should pay *both* Ms Collins' costs of the claim as against her, *and* the claimants' costs as against him. Ms Collins would have been entitled to an indemnity out of the estate (as indeed recorded in the order of 1 October 2021), to the extent that she did not recoup her costs directly from the defendant. However, the present case has been resolved in two separate stages. Consideration of what costs (if any) the defendant might be ordered to pay could not take place on 1 October 2021, because the defendant was not the focus of that hearing, and no findings of fact as against him had then been made. Now that those findings have been made, and he has been removed, it is open to the court to decide what costs (if any) the defendant should be ordered to pay. In my judgment, he should pay all of them, including those of Ms Collins. Her indemnity applies only to such costs as she is unable to recover from the defendant.

The claimants' right to an indemnity

33. Turning to the position of the claimants themselves, they are *beneficiaries* of the estate, and not *personal representatives*. So in any event they have no statutory right to an indemnity under section 31 of the 2000 Act, or under CPR rule 46.3. This means that the question of any indemnity for them must be dealt with by application of the caselaw, of which *Re Buckton (No 2)* is a prime example. It might be thought that, on the face of it, this was not an application for *directions* within class (2) of the *Buckton* case, but instead *hostile litigation* within class (3) of that case. It certainly has been

hostile litigation. But it was not litigation about the beneficial interests under the estate, or about any breach of duty alleged to have been committed by a personal representative. Instead, it was a (highly contentious) dispute about who should *administer the estate*, a question to be decided according to *the best interests* of those beneficiaries, taken as a whole.

34. In my judgment, this is in substance a case within the second class in the *Buckton* case. In that case, Kekewich J set out this class as follows (at pages 414-15):

> "There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole."

35. Thus, that would normally mean that the costs of all parties should be paid out of the estate. Certainly, I consider that the costs of the claimants should be paid out of the estate, to the extent that they are not paid (for any reason) by the defendant. However, whether the costs ordered to be paid by the defendant (and any other costs he has incurred) should be paid out of the estate depends on whether they were properly incurred, and whether the defendant is entitled to the usual indemnity out of the estate, as set out above, or whether in all the circumstances he should be deprived of it. That is the next question with which I must deal.

The defendant's right to an indemnity

36. In order for the indemnity to attach, costs must be "properly incurred". As para 1.1 of the Practice Direction to CPR Part 46 says, "[w]hether costs were properly incurred depends on all the circumstances of the case". It then sets out three particular matters to take into account. The first asks whether the defendant obtained directions from the court before defending the proceedings. He did not do so. But I do not consider that that on its own would be fatal.

37. The second asks whether he acted in the interests of the estate or in substance for a benefit other than that of the estate, including his own. In this connection I bear in mind paragraph 1.2 of the practice direction, set out earlier. I have no doubt that the defendant thought that in defending the claim he was acting in the best interests of the estate. Objectively speaking, however, I do not consider that what he did was in those best interests. Moreover, I consider that he was acting, at least in part, in his own interests. From the outset he has been concerned to protect and promote his claim to a beneficial interest in the estate's property at 14 Lane End Road, Bognor Regis (which does not arise under the will, but instead under an earlier transaction). He has also been concerned to consider whether to challenge the will of 24 September 2020 as invalid, in favour of an earlier will, under which he would take a large pecuniary

legacy. Whether a combination of the first and second points would justify the court in removing the defendant's indemnity is a nice question.

38. But I need not resolve it, because the third matter is whether the defendant acted in some way unreasonably in defending, or in his conduct of, the proceedings. Here I have been entirely satisfied that it was not reasonable in the circumstances for the defendant to resist this claim to remove him, and that his conduct in defending the claim has been highly unreasonable: see my earlier judgment at [2022] EWHC 2405 (Ch), [57]-[61]. In my judgment, this is sufficient on its own to prevent the costs concerned having been properly incurred. Accordingly, any costs he has incurred in this litigation, including any liability to pay others' costs, were not properly incurred, and consequently he is not entitled to be indemnified out of the estate in respect of them.

Conclusion on costs order

39. What that all means is that (i) the defendant must pay the claimants' and Ms Collins's costs, but (ii) without any indemnity from the estate for them, and (iii) the claimants have an indemnity from the estate for any costs which they are unable to recover from the defendant. Ms Collins also has an indemnity for her legal costs out of the estate, to the extent not recovered from the defendant. In the first instance, the legacy given to the defendant by the will of 24 September 2020 will be set off against the liability for costs owed to the claimants.

Assessment of costs

40. I have not been asked to order the assessment of costs on any but the standard basis, and therefore I will so order. In the interests of saving time and money I am prepared to assess the claimants' costs summarily, rather than send them off for detailed assessment. In the first instance, I propose to do this on paper. The defendant should file and serve written submissions on the costs sought by the claimants in their costs schedule of 9 September 2022 by 4 pm on Friday 7 October.2022. the claimants should file any submissions in answer by 4 pm on Monday 10 October 2022. I will then carry out the assessment exercise as soon as possible thereafter.