Neutral Citation Number: [2023] EWHC 2964 (Ch)

Case No: PT-2022-BRS-000104

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

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

Date: 24 November 2023

Before :

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

- -

Between :

HEINIE ELIZABETH STONEY-ANDERSEN **Claimant**

- and –

(1) GHANI ABDUL MUTTALIB ABBAS **Defendants**
(2) REEM ZAINY
(3) GAYNOR IRIS BRETT
(4) RICHARD HALL

- -

Alex Troup KC (instructed by **RWK Goodman**) for the **Claimant**
James Davies (instructed by **Mitchell Wilde LLP**) for the **First Defendant**
George Woodhead (instructed by **Nelsons, Solicitors**) for the **Second Defendant**
The Third and Fourth Defendants did not appear and were not represented

Hearing dates: 9 November 2023

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Approved Judgment

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

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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 10:30 am on 24 November 2023.

HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim under CPR Part 8 relating to the estate of Vincent William Cashinella, who died on 25 November 2019. The deceased left a will dated 30 May 1995, appointing his wife, Olwen, and the first defendant, who was married to his wife's niece. Unfortunately, the testator's wife predeceased him, but there was a substitutionary appointment of his friend June Whiteside as executrix. As it turned out, however, probate of the will was granted to the first defendant alone, with power reserved to June Whiteside to prove the will at a later stage. The net estate was sworn at £491,154, so it is not a very large estate. This is unfortunate, given the intensity of this litigation. For reasons which will become apparent, the focus of this judgment is on who should pay the costs of this litigation.

Procedure

2. A letter before claim was sent by the claimant's solicitors to the first defendant on 19 March 2021. This was a lengthy letter. It rehearsed family history, and made allegations of fact, as well as discussing matters of law. It claimed that the claimant was entitled to considerably more from the testator's estate than she had received. It enclosed a number of documents, including several relating to savings and credit card accounts relating to Iris Daniels, one of Olwen's sisters (discussed further below). Part of the letter made allegations against the second defendant in relation to misuse of Iris's credit card, and subsequent repayments to Iris by the second defendant. The letter concluded with a statement that the claimant was

> "prepared to enter into alternative dispute resolution with you, to include mediation. However, this must follow full and proper disclosure of all evidence as requested".

3. A response to this letter was sent by the first defendant's solicitors on 14 June 2021. This denied the factual allegations, and in particular asserted that it was *the claimant* who had stolen money from Iris. The letter also pointed out that there was a clause in the will exempting the trustees of the will from any liability in the absence of dishonest breach of trust. At the end of the letter the solicitor said, "Subject to the proper provision of information by your client, the proposal of mediation is accepted". The claimant's solicitors responded with a further long letter dated 9 August 2021, in which they withdrew the offer of mediation, saying "in circumstances where your client's liability is clear, it would not appear appropriate at this stage to be arranging a mediation." Instead, the letter required payment of what it said was due to the claimant (£280,130) within the next 28 days, failing which proceedings would be issued. In fact, proceedings were not issued for more than a year after that.

4. On 6 January 2022 the first defendant's solicitors wrote to the claimant's solicitors, in a letter headed "Without prejudice save as to costs", putting forward a proposal to resolve the dispute. It then said, "If this proposal is not accepted, our client invites yours to mediate". On 13 July 2022 the second

defendant's solicitors wrote an open letter to the claimant's solicitors, dealing with both the facts and the law of the dispute, but they also stated that their client was prepared to consider ADR as an alternative to engaging in court proceedings. The claimant's solicitors' reply dated 8 August 2022 dealt with aspects of that letter, but not with the suggestion of ADR. On 1 September 2022, the second defendant's solicitors replied to the letter of 8 August 2022 and dealt with a number of matters. But they specifically noted that the claimant's solicitors had not responded to the suggestion of ADR, and reminded them of the possible costs consequences.

5. Nevertheless, the claim form was issued a week later on 8 September 2022. It was originally for (1) an order removing the first defendant as personal representative and appointing in his place Clarke Wilmott Trust Corporation Ltd, (2) an order permitting the substitute personal representative to charge remuneration, (3) an order that the first defendant provide the new personal representative with an inventory and an account of the estate, (4) an order that the first defendant repay sums paid out of the estate to his daughter (the second defendant) above the legacy of £2000 provided for by the will, (5) a declaration as to the proper division of the residuary estate in the events that had happened (the claimant claiming 66.66%), and (6) costs.

6. The first to third defendants had all acknowledged service indicating an intention to contest the claim. On the other hand, from the outset the fourth defendant did not contest the claim. The claim was supported by a witness statement from the claimant dated 8 September 2022, and opposed by witness statements from the first three defendants, dated 21, 25 and 21 October respectively. The claimant made a second witness statement on 2 December 2022. The fourth defendant filed no evidence. The witness statements filed contained detailed evidence relating to the financial affairs of Iris Daniels. There was also significant correspondence between the parties, in which Iris Daniels' affairs loomed large.

7. A particular bone of contention between the parties appears to have been the fact that the first defendant, as executor of Iris's estate, made a claim to the Halifax Building Society in respect of monies paid out to the claimant which the first defendant said was fraudulent. As a result, the Halifax paid the sum of £50,996.74 to the estate in compensation. The claimant denied having dishonestly taken any monies from Iris, but instead asserted that some £42,996.74 had been retained by the claimant at Iris's request and with her knowledge. In a letter dated 17 November 2022, the claimant's solicitors openly offered to pay the sum of £28,666 to Iris's estate, but only on condition that the entire compensation sum of £50,996.74 was repaid to the Halifax. The difference between the two sums was said to represent the sum of £42,996.74, less the one third share of residue which came to the claimant under Iris's will.

8. On 9 May 2023 the claimant's solicitors even wrote to the Halifax at its "Fraud Operations" office, attaching copies of correspondence from the solicitors for the first and second defendants, and suggesting that the claimant's solicitors' conduct had been "unprofessional and untenable". Somewhat surprisingly, the letter was headed "Without prejudice save as to costs", although there was no issue that I could see between the claimant and

the Halifax for which any such heading could be appropriate. (Rather less surprisingly, on 18 May 2023, the second defendant's solicitors wrote objecting to this course. The first defendant's solicitors also objected by email dated 13 June 2023.) In any event, none of this has anything to do with the testator's estate.

9. On 7 June 2023 the first defendant's solicitors once again suggested that the present claim be mediated, and this suggestion was repeated by the second defendant's solicitors by email dated 8 June 2023. It does not appear that these emails had a substantive response from the claimant. On 19 July 2023 the first and second defendants jointly made a settlement offer to the claimant, headed "Without prejudice save as to costs – subject to contract". Under this offer, the second defendant would keep £67,000 of the £87,000 received. The remainder of the residuary estate would be distributed so that the claimant had 66.67%, the third defendant 16.67% and the fourth defendant 16.67%. The claimant would pay the first defendant £28,666, which, together with the sum of £16,998.92 that he was holding from Halifax in respect of the estate of Iris Daniels, would be returned to the Halifax. This offer was expressed to be made in settlement of

> "all claims in relation to the estate of Iris Daniels and Vincent Cashinella and [the first defendant's] administration of both of these estates and any misappropriation of funds from Iris or Vincent (either whilst they were alive or from their estates after death)".

10. There was then correspondence between the parties as to what evidence might be available or supplied as to the sums received from Halifax, and as to the extent of any misappropriation from the estates of Iris and the testator. Ultimately, however, the joint offer of the first and second defendants was not accepted.

11. On 10 October 2023 the claimant's solicitors made a further proposal for settlement to the first and second defendants. This involved some 11 points. The most important were that (i) the manuscript amendments to the will should be ignored and the will implemented as originally executed, so that the claimant would receive 66.66% of the residue; (ii) the first defendant be replaced as personal representative by Clarke Willmott Trust Corporation Limited, and the first defendant was to cooperate fully in transferring all assets and paperwork to the new personal representative; (iii) the first and second defendants were to pay the claimant's costs in full on the indemnity basis; (iv) the second defendant was to pay £70,000 into the estate (thus retaining £15,000 over and above her will entitlement); (v) the Halifax money would be returned to the Halifax; (vi) the claimant would return two thirds of £43,000 to Iris's estate.

12. The first defendant was prepared to agree to most of this, but insisted that he would not contribute towards the claimant's costs, and indeed required that his costs were paid out of the estate, and that moreover he be released from any liability relating to the administration of the estates of the testator and Iris. The second defendant said there was no claim against her in the current proceedings, and therefore there was no basis to require her to take part in any

settlement discussions. She was not prepared to agree to pay any of the claimant's costs, though she was prepared to bear her own. She was however additionally prepared to pay £70,000 in full and final settlement of all claims that the estate or the claimant might have against her, in order to assist the claimant and the first defendant to come to an agreement. Accordingly, the claimant's proposal went nowhere either.

13. Nevertheless, by the time the matter reached a disposal hearing before me, on 9 November 2023, most of the issues between the parties had been resolved, at least in substance. The claim to orders (1)-(3) had been accepted by the first defendant about a week before the hearing. On 2 November 2023, the first defendant's solicitors sent an email to the other party solicitors, saying:

> "Our client has now decided not to contest the application to remove him as executor".

The second defendant appears to have taken the same view, because there was no opposition to this claim at the disposal hearing. As I have said, the third defendant was neither present nor represented.

14. The claim to order (4) had already stayed by order of District Judge Markland, sealed on 23 May 2023, to be left over to the new personal representative to pursue in due course, if so advised. In these circumstances, of course, the less I say about that claim, the better. The claim to declaration (5) had however been live until the last minute, when the original will had been examined by the attending parties outside court. As I have said, although the third defendant in her acknowledgment of service intimated an intention to defend the claim, she has not in practice done so, and played no part in the disposal hearing.

15. At all events, by the time I came into court, the only remaining live issue was the question of costs. It was that question that was argued before me, with the claimant and first and second defendants being professionally represented, and the third and fourth being neither present nor represented.

Background

16. I will set out shortly the family relationships between the parties, so that the ensuing discussion is more intelligible. The testator was married to Olwen, who had three sisters and a single brother, David. He died in 1998 without issue. Olwen and the testator also had no children, and she died in 1996. Another of Olwen's sisters, Iris, died in 2013, also without issue. (I will have to come back to her.) But the other two sisters, Betty and Gladys, both had children. Betty had two daughters, Linda and Elizabeth, and died in 1993. Elizabeth was the mother of the claimant, and died in 1987. Linda married the first defendant, and died in 2003. Gladys died in 1976, having had three children, one of whom (Gaynor) is the third defendant. The fourth defendant is described as the testator's nephew, and presumably comes from his own bloodline, but I have no further information about him.

17. As I have said, Iris died in 2013. The first defendant had been appointed the executor of her will. As part of his administration of Iris's estate, he

considered that the claimant (who had been her carer) had abstracted funds from Iris's bank accounts. When this was put to the claimant, however, she denied any wrongdoing. The evidence of the first defendant is that he subsequently discussed this matter with the present testator, and that this provided the context for a number of amendments to the testator's will, discussed below. It has not been necessary for me to resolve any factual issues relating to Iris's estate in this claim, although, as will be seen when it comes to costs, those issues appear to have been very much to the forefront of the minds of some of the parties involved in this claim.

18. Coming back to the testator's will, it gave a number of pecuniary legacies, including £2000 to the second defendant (the daughter of Linda and the first defendant, and therefore the claimant's first cousin). It left the whole of the residue to Olwen, but with a substitutionary gift over to five beneficiaries in specified shares: Linda, Iris, the third defendant, the fourth defendant and the claimant. According to the terms of the will, Linda, the third defendant and the fourth defendant each would take 12.5%, the claimant would take a share which I must deal with in a moment, and Iris would take the remainder. The will also contained an accruer clause applicable to the gift of residue. Thus, given (1) that Olwen died before her husband, so that the gift of the residue in her favour failed and the substitutionary gift applied, and (2) that Linda and Iris also predeceased the testator, *prima facie* their shares accrued, in the same proportions as their original shares, to the third defendant, the fourth defendant and the claimant.

19. The will also provided (in unnumbered paragraphs) that:

> "In the absence of proof of dishonesty or the wilful commission of an act known to be a breach of trust none of my Trustees shall be liable for any loss nor be bound to take proceedings against a co-trustee for any breach of trust;"

and also

> "My Trustees shall be entitled to be indemnified out of the assets of my estate against all liabilities incurred in connection with the bona fide execution of the duties and powers".

I shall have to return to the effect of these clauses later.

20. The problem with the form of the will was that the clause dealing with residue contained no fewer than five manuscript amendments. The first such amendment was to scribble over the percentage of residue given to the claimant. The second was to write the manuscript figures "12.5%" next to the scribbling over. The third was to strike through the name of Linda (who as I say was given a 12.5% share of the residue). The fourth was to write the second defendant's name next to the struck-through name of Linda. The fifth was to write the initials the deceased's initials (VC) in the margin opposite. (No other initials were, or signature was, placed there or anywhere else in the will except at the end.) There was no evidence to show when, how and by whom these manuscript amendments had been made. Although the first

defendant in his witness statement refers to being informed by the Probate Registry that it would make enquiries of the witnesses in relation to the manuscript amendments, nothing seems to have happened, and probate of the will was issued in that form.

21. However, as I have said, immediately before the hearing, counsel for the parties present were able to examine the original will (ordered to be brought to court by the order of District Judge Markland sealed on 23 May 2023). They agreed that, notwithstanding the scribbling, it was clear that the original words in the will, under the scribbling, read "50%". On that basis, the share of Iris (who took the remainder of the residue) would have been 12.5%.

22. Accordingly, there was a question, first, as to the validity of the manuscript amendments to the will, and second, a further question as to what would be the position if those amendments were not valid. In part at least, therefore, this question was one of probate rather than construction. Although the rules in CPR Part 57 were not followed in relation to this part of the claim, no point was taken on this by any party, and I am satisfied that it is appropriate to deal with it now. I will make an order under CPR rule 3.10 to remedy the failure to follow the procedure so far as necessary.

The validity of the amendments

23. The claimant said that, as to the scribbling, the doctrine of dependant relative revocation applied, so that the scribbling amounted to a revocation of the gift of a share (apparently 50%) of residue to the claimant, but *only* if the substituted gift of 12.5% was effective. But, the claimant said, that was not effective, because the amendment did not comply with the formalities requirements of the Will Act 1837, section 9, as applied by section 21. The apparent attempt at substituting the second defendant for Linda failed for the same reasons. The death of Iris meant that her share also fell back into residue. On the basis of the accruer clause, the claimant therefore claimed one half of the shares of the predeceased beneficiaries, so that she should take 66.66% of the residue of the estate.

Manuscript amendments generally

24. The presumption is that manuscript amendments to an executed will have been made after that execution. In *Cooper v Bockett* (1846) 4 Moo PCC 419, on an appeal from the Prerogative Court of Canterbury, Lord Brougham, giving the decision of the Privy Council, said (at 451):

> "If a Will, or a note, be tendered in evidence, by a Defendant, as a receipt in proof of payment, and there appears an alteration of the sum, or if the party's name be changed, then there must be proof given, of the alteration having been made, before the signature, else the instrument cannot be regarded as genuine."

25. There is nothing here to rebut that presumption. Therefore, on the basis that they were made after the execution of the will, section 21 of the Wills Act 1837 applies. This provides:

> "21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

26. The section refers to the "signature of the testator and the subscription of the witnesses". In *In bonis Blewitt* (1880) 5 PD 116, the testatrix had made manuscript amendments to her (already executed) will, and she and her witnesses wrote their initials in the margin against the amendments. Sir James Hannen P referred to the terms of section 21, and said (at 117):

> "The only question, then, is, whether the signature and subscription by initials only are sufficient. A mark is sufficient though the testator can write … Initials, if intended to represent the name, must be equally good. The language of the Lord Chancellor in *Hindmarsh v. Charlton* (2), seems equally applicable to the testator's signature as to the witnesses' subscription: 'I will lay down this as to my notion of the law that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name'; and Lord Chelmsford says, 'The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the name in full." … I am therefore of opinion that the interlineations against which the initials of the testatrix and the witnesses are placed, should be admitted to proof."

27. In the present case, it is unnecessary to decide whether or not it was the testator who wrote the initials "VC" in the margin against the amendments. This is because no witnesses have done so. Accordingly, so far as section 21 applies to require attestation, the amendments are invalid. That section clearly applies to the amendments purporting to substitute the second defendant for her mother Linda, and the attempt to assign a 12.5% share of residue to the claimant. They all fail, and the gift to Linda falls under the accruer clause already mentioned.

The obliteration

28. The position in relation to the unattested scribbling over the claimant's share needs a little further consideration. A total revocation by physically burning, tearing up or otherwise destroying the will need not be attested, but it does need to be *intended*. Section 20 of the 1837 Act provides:

> "No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be

> executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

29. As Sir James Wilde (later Lord Penzance) said in *Powell v Powell* (1866) LR 1 P & D 209, at 212:

> "all acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is, therefore, necessary in each case to study the act done by the light of the circumstances under which it occurred, and the declarations of the testator with which it may have been accompanied. For unless it be done 'animo revocandi,' it is no revocation."

30. Here there is no physical injury to the will. But *partial* revocation may also occur, for example by obliterating words without destroying the document. Since 1838, this is governed by section 21 of the Act, set out earlier. However, the section is subject to an important exception. This is contained in the phrase "except so far as the words or effect of the will before such alteration shall not be apparent". What this means is that an obliteration which renders the previous text illegible by *natural* means revokes the obliterated words *even if not attested*. But, where the obliterated (or merely crossed-out) words are still legible by natural means, the revocation is effective *only* if attested in accordance with section 9.

31. In the present case, counsel for the parties present at the hearing, after examining the original will, agreed that the words purportedly obliterated were still legible, and read "50%". Accordingly, the obliteration could not amount to a partial revocation unless it complied with the Will Act formalities. Since however there was no valid attestation of the obliteration, there was no partial revocation of the gift of the 50% share of residue to the claimant.

Dependent relative revocation

32. I may add that, even if there had otherwise been a partial revocation of the words "50%" in the gift to the claimant, the doctrine of dependant relative revocation would have applied to it. This doctrine holds that, where the intention to revoke is dependent on a condition which is not fulfilled, the revocation (being a matter of intention) does not take effect.

33. In *Re McCabe* (1873) LR 3 P & D 94, a testatrix by her will gave legacies to one of her relatives called Galsworthy. The will was duly executed. Subsequently, she erased the word or words immediately before Galsworthy, leaving the words "to [blank] Galsworthy". She had three relatives with that name: her sister Louisa, her niece Edith, and Edith's father, Louisa's husband. Over the erasures the testatrix had written "sister Louisa". The judge (Sir James Hannen) was unable, even "with a strong glass", to make out what was beneath the erasures, although experts on both sides opined that it was "niece Edith".

34. The judge held that, because he could not read them, the words under the erasures were not "apparent" within section 21 of the 1837 Act. This meant that the words under the erasure were revoked without the need for attestation. However, he further held that the intention to revoke the words under the erasures was dependent on the validity of the overwritten gift to Louisa. But this was unattested and therefore invalid by virtue of section 21. Accordingly the intention to revoke the gift which was erased was ineffective, and so therefore were the erasures. That meant that the court was now able to use extrinsic (*ie* more scientific) means to discover the identity of the original legatee: see *In bonis Horsford* (1874) LR 3 P & D 211. That evidence showed that the missing words were "niece Edith". Accordingly, those words were restored to the will, which was admitted to probate in that form: see *In bonis Hall* (1871) LR 2 P & D 211.

35. That conclusion happily coincided with the evidence of Edith's father, Louisa's husband. He deposed that, at the time of the will, his wife had been seriously ill and was expected to die. That explained why the gift as originally drafted and executed was to Edith, rather than to Louisa. Fortunately, Louisa recovered. Unfortunately, the testatrix thought that in those circumstances she could simply erase Edith's name and substitute that of Louisa. Sadly, Louisa died in 1866, and the testatrix lost capacity at about the same time. So, no fresh will could be or ever was made. But dependent relative revocation saved the day for Edith. The doctrine was approved by the Court of Appeal in *Re Southerden's Estate, Adams v Southerden* [1925] P 177, and has been applied on many occasions since. (The *McCabe* case is also notable for one other matter. Edith Galsworthy's attorney was "Mr J Galsworthy", who was a prominent practitioner of the time, and father of the novelist John Galsworthy. Miss Galsworthy was undoubtedly a cousin.)

Conclusion on shares

36. This analysis explains why, once counsel had examined the original will in this case, the first and second defendants no longer opposed the declaration sought by the claimant that she was entitled to (i) 50% of the residue by virtue of the original gift in the will, and to (ii) one half of the shares of the two other beneficiaries, Iris and Linda, who had pre-deceased the testator. Since the claimant had 50%, and the shares of Linda, the third defendant and the fourth defendant were each 12.5%, the share accruing to Iris (who had the remainder) had to have been 12.5%. Under the accruer clause, the 25% from Linda and Iris had to be split in the same proportions as the claimant's share bore to the shares of the third and fourth defendants combined, *ie* two thirds to one third. For the claimant, that amounted to a further 16.66%, making a total share for her therefore of 66.66%. Although the first and second defendants now accept this position, the third defendant is not present or represented. There will accordingly be a formal declaration that the claimant has that share of the residue, and that each of the third and fourth defendants has a share of 16.67%.

Costs

The general rules

37. In these circumstances, I now turn to the question of costs. These rules are well known, and I have set them out in many previous cases. The following words are therefore largely borrowed from earlier decisions of mine. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). 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).

38. If the general rule applies, it 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". As a general proposition, the courts prefer to make costs orders covering the entire action (even if then extending only to a proportion of costs), rather than issue-based costs orders. But it is clear that the court may still make an issue-based order if it considers that this better meets the justice of the case.

The special rules for trusts and estates

39. In addition to these general rules about costs, there are also special rules relating to trustees and personal representatives. First of all, the Trustee Act 2000 relevantly provides:

> "31(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.
>
> […]
>
> 35(1). Subject to the following provisions of this section, this Act applies in relation to a personal representative administering an estate according to the law as it applies to a trustee carrying out a trust for beneficiaries.
>
> […]"

40. CPR rule 46.3 provides that a person who is or has been a party to any proceedings in the capacity of trustee or personal representative 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, and on the indemnity basis. CPR PD 46 paragraph 1 provides that trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate

for costs "properly incurred", which itself. depends on all the circumstances of the case, including whether he or she (a) obtained the court's directions, (b) acted in the interests of the estate or someone else's, (c) acted unreasonably in the proceedings.

The factual allegations

41. In the present litigation, the claimant made various allegations against the first defendant in his conduct of the administration of the testator's estate. First, although the net residuary estate was worth nearly £500,000, and the claimant claimed a 66.6% share, the first defendant has paid the claimant only £45,000. According to the claimant, payment to her had been so limited both on the basis that the manuscript alterations to the will were valid (so that she was entitled only to 12.5% of residue), but also on the basis (which she denied) that the claimant had stolen money from the testator's sister-in-law Iris when she was her carer. Secondly, she said that the first defendant had paid his daughter, the second defendant, the sum of £87,000 from the testator's estate, although she was given a legacy of only £2000. Thirdly, the first defendant sold the testator's house to his own son-in-law, which claimant said was a breach of his fiduciary duty. Fourthly, there is an allegation that he had failed to claim either the residence nil rate band or Olwen's transferable nil rate band in relation to the testator's estate, resulting in an overpayment of inheritance tax. At the outset, all these allegations were denied, except for that relating to the failure to claim the nil rate band for inheritance tax, which the first defendant said was a mistake. Moreover, he said, the overpaid tax had been reclaimed successfully from HMRC, with interest.

The claimant's submissions

42. The claimant submitted that costs should be dealt with in two stages. At the first stage, the court determines the costs as between the litigants in accordance with the general rules in CPR rule 44.2. At the second stage the court determines whether an executor or trustee should be entitled to an indemnity out of the estate, as set out in CPR rule 46.3, taking into account the factors set out in PD 46 paragraph 1, and the indemnity clause in the will.

43. In relation to the first stage, the claimant said that the removal parts of the claim (orders (1)-(3)) had succeeded in the face of opposition by the first three defendants, and so they should pay the claimant's costs under the general rule in CPR rule 44(2)(a). As to the fifth part (declaration (5)), this was an application by one beneficiary making a claim adverse to the other beneficiaries, in the nature of hostile litigation. Thus, in accordance with category (3) of *Re Buckton* [1907] 2 Ch 406, the ordinary costs rules of hostile litigation should apply, with the result that the defendants should similarly pay the claimant's costs.

44. In relation to the second stage, the claimant said that the first defendant should be deprived of his indemnity out of the estate in relation to the "removal" parts of the claim. This was because he acted unreasonably in defending that part, when he knew he had an obvious conflict of interest, both in respect of the overpayment is made to his daughter the second defendant, but also the sale of

the deceased's property to his own son-in-law. He had not acted for the benefit of the estate but for the benefit of others. In any event, so far as the costs of the hearing itself are concerned, he acted unreasonably in not giving in until after the trial preparation had been undertaken and counsel's brief fee incurred.

45. As I have said, the general rule is that the unsuccessful party pays the successful party's costs. On the first three parts of the claim ("removal"), the first and second defendants capitulated a week before the hearing. In relation to the fifth part of the claim (the validity of the amendments) they capitulated on the morning of the hearing outside court. The other part (the fourth) had already been stayed. On the face of it, therefore, the claimant is the successful party, and, applying the general rule, she should therefore be entitled to her costs. But it is a feature of modern litigation that matters are never as clear as they may seem at first sight. Each of the first and second defendants put forward arguments for a different costs order to be made.

The first defendant's submissions

46. The first defendant argued that there should be no order as to costs as against the first defendant, and moreover that he should have the usual executor's indemnity for his legal costs out of the deceased's estate. If, however, any order should be made against the first defendant to pay the claimant's costs, then that should be an order made on the standard basis only. The basis for these submissions may be summarised as follows.

47. The first defendant did not accept the claimant's factual allegations in relation to his conduct as executor. However, he recognised that the appointment of an independent professional executor was now the only way of progressing the administration of the estate. He recognised also that an order for removal does not require proof of breach of trust. What matter are the interests of the beneficiaries: *Harris v Earwicker* [2015] 1915 (Ch), [9]; *Brookman v Potts* [2021] EWHC 2861 (Ch), [36]; *Pegler v McDonald* [2022] EWHC 2405 (Ch), [18]-[19]. He also said that, although he referred in correspondence to the money which he alleged the claimant taken from Iris, he did this only because the claimant in his evidence in this claim raised the matter first, and he was simply responding to it. He acted in what he believed was the best interests of the estate in accordance with what he understood to be the valid terms of the will. He said he adopted a neutral position on what he called the "construction" (but really probate) issue. The first defendant also relied on the provisions in the will exempting him from liability and providing him with an indemnity for liabilities incurred in acting in the administration, as well as the indemnity under the general law.

48. Importantly, however, there was also the question of mediation. The claimant in her letter of claim originally offered mediation, and the first defendant had accepted this. But the claimant then changed her mind, apparently on the basis that there was no defence to the claim. The first defendant made a further offer to mediate in June 2023, as did the second defendant. They referred to the decision of the Court of Appeal in *PGF II SA v OMFS Company 1 Ltd* [2014] 1 WLR 1386. In that case Briggs LJ (with whom Maurice Kay and Beatson LJJ agreed) said:

> "34. In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good."

49. I was also referred to the decision of the Court of Appeal in *Thakkar v Patel* [2017] EWCA Civ 117, where Jackson LJ (with whom Briggs LJ agreed) said:

> "31. The message which this court sent out in *PGF II v OMFS Ltd* was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."

The second defendant's submissions

50. The second defendant said that the only issue which really engaged the second defendant was the fifth part ("probate"), dealing with whether the manuscript amendments were properly part of the will. Moreover, she said that she did not engage even with that with "gusto". She submitted that she should have been released from the proceedings when her solicitors wrote to the claimant's solicitors calling her an "innocent bystander". She adopted the points made by the first defendant in relation to the estate of Iris Daniels and in relation to the claimant's failure to mediate. She accepted that she should not in her acknowledgment of service have intimated an intention to make a counterclaim. If the court was minded to make any order against the second defendant, it should be issue-based.

Assessment

51. **Litigation costs:** First of all, I will deal with the costs in the litigation itself. As I have already said, the claimant is the "successful party", in the way that that term is used for the purposes of the costs rules. Therefore, applying the general rule, she should be entitled to her costs of the whole claim as prosecuted as against the first three defendants, all of whom indicated an intention to contest it. But, as I have said, the court may make a different order. Here different factors pull in different directions, and in relation to different parts of the claim and as against different parties. I will however say

that I am not much impressed with the evidence (from both sides) about Iris Daniels' estate. Nor am I impressed with the "But she/he started it" argument. I do understand the emotions that run high for parties in cases like this. However, the solicitors really ought to have left all that on one side, whatever their clients said. Whilst it may have been of great interest to the protagonists themselves, the matters arising from Iris's estate were and remain irrelevant to the questions which were raised in this claim.

52. In relation to the first defendant, despite his unequivocal acknowledgement of service, intimating an intention to contest the whole claim, when he came to file his evidence he said that he was neutral on what I have called the "probate" aspect. This was (albeit belatedly) a proper position for him to adopt, although for a neutral executor he took rather more interested in the validity of the manuscript amendments than was strictly desirable. In relation to the "removal" part of the claim, the first defendant resisted this until about a week before the hearing, which, other things being equal, was far too late to make any appreciable difference. On the other hand, the first defendant has the benefit of having made the offers to mediate or otherwise conduct ADR in relation to this claim, and that must be taken into account. Frankly, in my opinion, this was a case which cried out for mediation, and from the very beginning. And, even as late as June this year, a mediation (had it been successful) would at least have saved the costs of the disposal hearing in November.

53. In relation to the second defendant, in their letter of 18 February 2022 her solicitors vigorously defended the will as amended in manuscript. Her solicitors also said that she could not be required to pay back the funds paid to her, even if it turned out she was not entitled to them, because of an estoppel. However, I do not accept that the second defendant was not concerned by the removal claim. This depended in part on allegations that the first defendant had overpaid her from the estate, and no doubt she feared that she might be required to pay money back. She was not merely an "innocent bystander".

54. Like the first defendant, in her acknowledgment of service, after the claim was served, she intimated an intention to contest the *whole* claim. Indeed, she went further than this. She (i) sought an order that the testator's will be declared valid, and (ii) *specifically opposed* the claim for an order removing the first defendant as executor, as well as (iii) sought an order that the claimant pay her costs. In her evidence to the court, she asked for a stay on the claim so that she might pursue a "disappointed beneficiary" claim against solicitors whom she said might have given bad advice to the testator when he sought to amend his will. She is not therefore entitled to be treated as interested only in part of the claim. But she too has the benefit of having made the offers to mediate or otherwise conduct ADR in relation to this claim.

55. In relation to the third defendant, she also acknowledged service, intimating an intention to contest the claim, and subsequently made a witness statement which was supportive of the position of the first and second defendants. On the other hand, she was neither present nor represented at the disposal hearing, and has not participated in the proceedings in the same way as have the first and second defendants. But, since she contested the claim and did not concede

it, the claimant was obliged to proceed to the disposal hearing to obtain orders against her. So, I do not think that she can be in a better position than the first and second defendants.

56. I am satisfied that the first and second defendants were right to pursue the possibility of mediation, and that the claimant was wrong, no matter how much she was being told that she would be likely to win, to ignore it. It is a commonplace that both sides are told by their lawyers that they will win. But they cannot both be right. Indeed, sometimes, both sides are wrong. The combination of litigation risk and irrecoverable costs almost always makes it worthwhile considering mediation and other ADR. On the (admittedly limited) material before me, the claimant did not give enough thought to this. In accordance with the caselaw, I consider it appropriate to mark the court's disapproval of the claimant's failure to take up the mediation/ADR suggestions of the first and second defendants. However, in my judgment, it would not be right to deprive the claimant of all her costs. I shall therefore award her 50% of her costs. As between the first three defendants, the second and third defendants will be liable jointly and severally for 50%. However, because the first defendant was neutral on the "probate" issue he will be jointly and severally liable for 35%.

57. The claimant seeks costs against the defendants on the indemnity rather than standard basis. This requires that the conduct of the unsuccessful party or parties should have been, not just unsuccessful, but "out of the norm": *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson* [2002] EWCA Civ 879, [39]. Here the claimant relies on the allegations of fraud, the "hopeless" quality of the defence, the failure to engage in settlement proposals, and the decision to give in shortly before the disposal hearing. However, on this material, and certainly without cross-examination, I am not in a position to find any fraud, and, even if the defence were "hopeless" – which I do not need to, and do not decide – it would (I regret to say) not be out of today's norm. Nor is a decision to capitulate shortly before the hearing, annoying though that undoubtedly is. As for the failure to engage in settlement proposals, I rather think that here the boot is on the other foot, because of the failure of the claimant to take mediation or ADR seriously. So I do not consider that this is a case for costs on the indemnity basis.

58. **Executor's indemnity:** The executor's (or trustee's) indemnity, where it applies, will cover not only the legal expenses incurred by the executor in prosecuting or defending legal proceedings, but also the costs of another party which, under the litigation costs order made by the court, the executor (or trustee) is ordered to pay: see *Re Raybould* [1900] 1 Ch 199, 202, and *Bonham v Blake Lapthorne Linnell* [2006] EWHC 2513 (Ch), [120]-[123].

59. The first point is to establish the terms of the indemnity. For this purpose, it is necessary to consider the effect of the express indemnity clause in the will. The clause (set out earlier) extends to "all liabilities incurred in connection with the bona fide execution of the duties and powers", and not merely to "all liabilities *properly* incurred". So, on its face, it is wider in scope than either section 31(1) of the 2000 Act or CPR PD 46 paragraph 1.

60. However, in *Holding and Management Ltd v Property Holdings and Investment Trust plc* [1989] 1 WLR 1313, CA, a company acting as "maintenance trustee" sought maintenance contributions from leaseholders in a large residential block of flats. Nicholls LJ (with whom Lloyd and Farqharson LJJ agreed) said, at 1324-25:

> "Mr. Price also sought to rely on paragraph 9 in schedule 5 to the leases. Under this paragraph one of the purposes for which the maintenance fund is to be applied is
>
> > 'to make provision for the payment of all legal costs incurred by the maintenance trustee ... (a) ... in the enforcement of the covenants . . . contained in the leases granted of the flats in the building ...'
>
> I can deal with this very shortly. Read fairly, this paragraph embraces legal costs *reasonably* or *properly* incurred by the plaintiff in the enforcement of the covenants. I have already indicated my view that the costs were not reasonably or properly incurred in this case."

61. I bear in mind that a decision on a clause in a trust document from a generation ago does not automatically govern the construction of a will from more recent times. However, in my view the clause in the present will similarly adds nothing to the statutory indemnity to which an executor is *prima facie* entitled. I do not therefore need to decide whether it is possible in law for such a clause to extend the statutory indemnity. Nevertheless, *Lewin on Trusts*, 20th ed 2020, at [48-010], expresses the view that it can, subject always to public policy limits, on the basis that the effect of it is conceptually analogous to that of an exoneration clause. Although I have not heard argument on the point, it seems to me that this is right in principle.

62. The next point is whether the first defendant should be deprived of his indemnity in the present case. The law is that an executor (or trustee) will lose the indemnity if guilty of "misconduct": *Turner v Hancock* (1882) 20 ChD 303, *Re Jones* [1897] 2 Ch 190, *Re Londonderry's Settlement* [1964] Ch 594, 614, *Armitage v Nurse* [1998] Ch 241. For example, in *Turner v Hancock*, a trustee committed an innocent breach of trust, by asserting that the trust owed him money, when in fact it turned out that he owed money to the trust. The trustee sought his own legal costs out of the trust estate, even though he had been unsuccessful. The Court of Appeal held (at 307-08) that that was "no ground for depriving him of his costs in the absence of misconduct".

63. Here, however, the executor has fought the "removal" part of the claim against him and lost, giving up when it was really far too late. This is not acting in the interests of the beneficiaries as a whole, even though he may have thought at an earlier stage that it was. "Misconduct" in this technical sense does not require bad faith. Even without proof that any of the wrongdoing alleged was true, it ought to have been obvious that, in the state of family relations, and in light of the allegations made against him, the administration of the estate would not be carried out effectively and properly so long as he remained executor. Yet he continued to oppose the orders sought until a week before the disposal hearing. In my judgment, this is a sufficient basis for depriving the

first defendant of his executor's indemnity. Of course, this reasoning does not apply to the first defendant's costs of the "probate" part of the claim. But, since he was avowedly neutral on that, his costs of the issue in the litigation will be purely nominal, and not substantive. (If they were substantive, he would not have been neutral, and accordingly he would not be entitled to the indemnity.)

64. I should add for the sake of completeness that I do not consider that the terms of the will exoneration clause assist the first defendant. If effective, they prevent the first defendant from having *personal* liability for certain actions as executor that would otherwise engage such liability for breach of trust or duty, but they do not prevent those actions from amounting to a wrong for other purposes, *eg* an application for an injunction to restrain, or an order to remove, a trustee for breach of trust. In my judgment, an executor (or trustee) may still be removed from office on the basis of conduct which would ground personal liability for breach of trust or other fiduciary duty, but for the exoneration clause.

Conclusion

65. In my judgment, the appropriate costs order is one which requires the second and third defendants jointly and severally to pay 50%, and the first defendant to pay 35%, jointly and severally with the first and second defendants, of the claimant's costs on the standard basis, the first defendant to have no indemnity from the estate either for this liability or for his own costs (save for nominal costs of the "probate" issue), and I will so order.