PT 2021 LDS 000099

Neutral Citation Number: [2025] EWHC 455 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY TRUSTS AND PROBATE LIST

28 February 2025

Before:

MR JUSTICE LEECH

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B E T W E E N:

(1) JOHN OSBORNE **Claimants**
(2) PATRICIA HOWES

- and –

MICHAEL OSBORNE **Defendant**

- -

MR MARK DIGGLE (instructed by **Latham & Co**) appeared on behalf of the Claimants

THE DEFENDANT in person

Hearing dates: 25 and 26 February 2025

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APPROVED JUDGMENT

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This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Friday 28 February 2025

Mr Justice Leech:

I. The Claim

1. By Claim Form dated 21 July 2021 and issued under CPR Part 8 the Claimants, Mr John Osborne and Mrs Patricia Howes, sought the disclosure of documents from the Defendant in their capacity as joint executors of the estate of their father, Mr Winston Osborne deceased (the "**Deceased**"), from the Defendant, Mr Michael Osborne, who is also an executor of the estate. They also claimed that once they were properly able to assess the position once disclosure had been given and an account taken, they may look to bring a claim against the Defendant either for breach of trust or to remove him as an executor under section 50 ("**S.50**") of the Administration of Justice Act 1985.

2. The Claimants and the Defendants are the children of the Deceased, who died on 1 June 2013. On 14 January 2014 his will dated 22 November 2010 (as amended by codicil dated 11 December 2010) was admitted to probate. By its terms the Deceased appointed the Claimants and the Defendant to be his executors, he bequeathed certain sums and chattels to members of his family and institutions and he devised the residue to his three children in equal shares. The specific financial bequests have all been paid. The Deceased served in the Fire Brigade during the Second World War and also as a member of the Auxiliary Fire Service and gifts of memorabilia to the Leicester City Fire Brigade Museum Society have also been made (or mostly made). The residue of the estate has not been administered and distributed although the Claimants accept that substantial distributions have been made. In particular, it was common ground that in 2015 the estate distributed £180,000 to each of the Claimants and £30,000 to the Defendant.

3. It was Mr John Osborne's evidence that the three executors divided up the tasks associated with administering the estate shortly after the Deceased's death and, in particular, that it was agreed that the Defendant would deal with the Deceased's interest in W Osborne & Co (the "**Firm**"), the family accountancy practice. The Deceased and the Defendant were the partners in the Firm and it was sold in 2011. It was also Mr John Osborne's evidence that the Defendant would deal with the Deceased's property in France, Le Solliec, Petit-Moustoir, Meslan (the "**French Property**") and his various investments.

4. On 5 August 2021 the Defendant filed an Acknowledgment of Service stating that he

intended to contest the claim in some respects. He also stated that a counterclaim was submitted. He annexed or enclosed with the Acknowledgment of Service an explanation for his dealings with the assets of the estate and put forward a counterclaim in which he asked for certain information and evidence from the Claimants. On 8 December 2021 District Judge Shepherd gave preliminary directions including directions for disclosure.

5. During 2022 a number of hearings took place before District Judge Shepherd. On 31 May 2022 she adjourned the claim for an account and ordered a further directions hearing. One of the recitals to the Order states that the Claimants had written to the Court stating that they intended to a bring a claim under S.50 (the "**S.50 Claim**"). Although the judge ordered the question whether it was necessary for the Claimants to issue a new Claim Form to be considered at a later date, no direction was subsequently made requiring them to do so. The judge also ordered the Defendant to serve a witness statement detailing his involvement with Brander Rimmer Investments Ltd ("**BRI Ltd**") from 2009 to 2019 setting out, in particular, changes in his shareholding and any decisions in which he was involved relating to a freehold property, Harwood House Melton Mowbray LE13 1TX ("**Harwood House**").

6. Further hearings took place and orders were made between May 2022 and October 2024. However, on 17 October 2024 District Judge Shepherd listed the S.50 Claim for a two day hearing. She also ordered the Claimants to file and serve a witness statement in support of the application by 20 December 2024 and the Defendant to file a witness statement in answer by 23 January 2025. It is clear from the second recital to her Order that the judge considered that it was within the scope of the relief set out in the Claim Form to make an application for removal of the Defendant without amendment because she stated that the Claimants' application would terminate on the determination of that issue and then proceeded to give directions for its determination. There was no appeal against that Order or the directions which the judge made. In any event, the application was fully argued before me over two days and in my judgment it is appropriate for me to decide it on the merits.

7. On 20 December 2024 Mr John Osborne, the First Claimant, made a witness statement setting out the basis for the removal of the Defendant. On 10 January 2025 the Defendant made a witness statement in answer to the S.50 Claim. By Application Notice dated 4 November 2024 the Claimants also applied for specific disclosure of certain categories

of documents. The application was supported by the witness statement of Mr Nicholas Price, the Claimants' solicitor. By Order dated 9 January 2025 District Judge Shepherd adjourned that application to be heard at the trial of the S.50 Claim. She also directed that the Claimants should serve a Scott Schedule setting out their case on the issues which were relevant to the S.50 Claim and that the Defendant should return the Scott Schedule setting out his position on each of these issues. She ordered the Claimants to serve a chronology and for the Defendants to respond to it. The Order also recited that the Court observed that a possible way forward would be for all of the parties to resign and for a substitute personal representative to be appointed by the Court.

8. On 7 February 2025 the Claimants served the Scott Schedule identifying seven issues. They also served their chronology. On 16 February 2025 the Defendant returned the Scott Schedule setting out his answers on each of the seven issues. He also served a revised chronology which is significantly longer than the Claimants' chronology although it incorporated the Claimants' entries. On 18 February 2025 a hearing took place before Her Honour Judge Jackson at which the Defendant's application to make a counterclaim for the removal of the Claimants was listed to be heard. At the hearing the Defendant did not seek to pursue that application because he wanted the trial to proceed and his application was dismissed. However, as he made clear to me during the hearing, he wished to reserve his position to make such an application if he was removed.

9. By letter dated 13 February 2025 Latham & Co wrote to the Defendant making an open offer to settle the S.50 Claim on the basis that all three parties stepped down as executors, that an executor from an independent firm of solicitors be appointed in their place and that the Claimants' costs be paid out of the estate. By letter sent the same day the Defendant rejected the offer and made a counter-offer that all three executors should step down on terms that £50,000 was paid to the Claimants and £50,000 to him on account of costs.

10. On 25 and 26 February 2025 the hearing of the S.50 Claim took place before me. Mr Mark Diggle appeared on behalf of the Claimants. The Defendant appeared in person. Neither the Claimants nor the Defendant gave oral evidence and Mr Diggle submitted that this was the procedure which District Judge Shepherd had in mind. I accepted that the application should proceed on this basis. There were, however, a number of issues of fact between the parties and I proceed on the basis that it is not for me to decide those

issues and that they could only be resolved if they were fully pleaded, disclosure and exchange of witness statements had taken place and if the parties had given oral evidence.

II. The Law

11. I turn next to consider the law. A personal representative may be removed by the court under the power conferred by S.50. This empowers the court to appoint a person to act as personal representative in place of one or all of the existing personal representatives or, if there are two or more personal representatives, to terminate the appointment of one or more, but not all, of them. In applications to remove an executor, the Court will apply similar principles to those applicable in the case of removing trustees. Not every mistake, neglect of duty or inaccuracy of conduct will cause a removal of the representative and, as Lord Blackburn put it in *Letterstedt v Broers* (1884) 9 App Cas 371 at 386: "the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

12. Mr Diggle relied upon two decisions of Chief Master Marsh. The first was *Harris v Earwicker* [2015] EWHC 1915 (Ch) in which he summarised the relevant principles as follows:

> "i. It is unnecessary for the court to find wrongdoing or fault on the part of the personal representatives. The guiding principle is whether the administration of the estate is being carried out properly. Put another way, when looking at the welfare of the beneficiaries, is it in their best interests to replace one or more of the personal representatives?
>
> ii. If there is wrongdoing or fault and it is material such as to endanger the estate the court is very likely to exercise its powers under section 50 . If, however, there may be some proper criticism of the personal representatives, but it is minor and will not affect the administration of the estate or its assets, it may well not be necessary to exercise the power.
>
> iii. The wishes of the testator, as reflected in the will, concerning the identity of the personal representatives is a factor to take into account.
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> iv. The wishes of the beneficiaries may also be relevant. I would add, however, that the beneficiaries, or some of them, have no right to demand replacement and the court has to make a balanced judgment taking a broad view about what is in the interests of the beneficiaries as a whole. This is particularly important where, as here, there are competing points of view.
>
> v. The court needs to consider whether, in the absence of significant wrongdoing or fault, it has become impossible or difficult for the personal representatives to complete the administration of the estate or administer the will trusts. The court must review what has been done to administer

> the estate and what remains to be done. A breakdown of the relationship between some or all of the beneficiaries and the personal representatives will not without more justify their replacement. If, however, the breakdown of relations makes the task of the personal representatives difficult or impossible, replacement may be the only option.
>
> vi. The additional cost of replacing some or all of the personal representatives, particularly where it is proposed to appoint professional persons, is a material consideration. The size of estate and the scope and cost of the work which will be needed will have to be considered."

13. The second decision upon which Mr Diggle relied was *Long v Rodman* [2019] EWHC 753 (Ch) in which the Chief Master cited *Harris v Earwicker* and stated that where the personal representative is or may be in a position of conflict because of intimated claims against him which need to be investigated, this is a material consideration in the exercise of the Court's discretion. However, he also stated that a conflict does not have to be established to merit removal and that an outward appearance of or potential for conflict can result in removal. He cited *Re Folkes* [2017] EWHC 2559 (Ch) and *Re Weetman* [2015] WTLR 1745 at [25] and he agreed with the approach of Deputy Master Linwood in *Re Folkes* where the Deputy Master stated as follows at [41]:

> "It seems to me that the appropriate test to be applied to each allegation is whether there appears to be on the evidence before the court, or with such evidence that appears likely to be obtained at proportionate cost, the basis for a claim which has reasonable prospects of success, subject to consideration of potential defences. Such a claim must enhance the value of the estate relative to the costs of pursuing it. Evidence for a claim or a defence before the court is unlikely to be determinative but must not be speculative or dependent upon matters which may or may not happen. Further, the whole may be more than the sum of the parts in that individual claims may be borderline but together they may persuade the court that investigation is necessary. Then the question of the replacement of the Executors must be considered in the context of their position as far as knowledge and possible conflicts of interest are concerned."

14. I adopt the summary of the law in *Harris v Earwicker* and I also adopt the approach to potential claims against the Defendant in *Re Folkes*. Neither decision is binding on me. But in my judgment the statement of principle in *Harris v Earwicker* accurately represents the law derived from *Letterstedt v Broers* and the approach taken in *Re Folkes* is particularly apposite in the present case where the Court was faced with contested issues of fact which would arise in any claim brought by the Claimants (or any substitute executors) against the Defendant.

III. The Letter of Wishes

15. The principal issue of fact between the parties was whether the Deceased had signed a document and, if so, whether it was filed with the probate application and either attached to the grant of probate or accompanied it. There was no dispute that it was not a document executed in accordance with the necessary formalities and that it was not binding as a codicil to the Deceased's will. I will therefore refer to this document as the "**Letter of Wishes**" and it states as follows:

> "It is my request that my capital account in the books of W Osborne & Co at the date of my death be aggregated to form part of my Residuary Estate for the purpose of its division. Michael will be able to take over that balance as my successor without it being taxed and it is my request that such balance be taken by him as part of my share of my Residuary Estate."

16. The Defendant produced what he asserted was the grant of probate issued by the Probate Registry together with original copies of the will, the Letter of Wishes and the codicil stapled to it and he showed it to me and to Mr Diggle on the first day of the hearing. It was not sealed although the Defendant stated that it contained the impression of a seal. Overnight, Mr Price made a second witness statement dated 26 February 2025 and he produced the copy of the unsealed grant of probate which his firm had obtained online from the Probate Registry in preparation for the hearing. His evidence was as follows:

> "On 6th February 2025 Counsel asked that a copy of the grant of probate be obtained in readiness for the trial. I therefore instructed a member of my firm's support staff Ms Samantha Ellard to obtain a copy electronically. I am told by Ms Ellard and believe that she filled out an online form requesting a copy of the relevant grant at about 1017 on the same day, the order was reported as fulfilled at about 1034. I am further told that Ms Ellard then downloaded the document from the relevant GOV.UK website and forwarded it to my secretary who in turn forwarded the document to me. The email to me from my secretary consisted of a grant of probate and had attached to it a pdf file consisting of a 3 page Will. This version, which for the reasons set out above, I believe has been obtained from the Probate Registry, does not have the page referred to above as containing the codicil or expression of wishes. I refer to a copy of that document marked NJP1."

17. On the second day of the hearing the Defendant produced a further version of the Letter of Wishes which he told me was the original document. He also produced a further version of the grant of probate with the will and codicil annexed (but this time without

the Letter of Wishes). He said that he had taken the original of the Letter of Wishes with him to the probate office with the Claimants and that it had been handed back to him by the official because it was not a testamentary document. He also explained that the second version of the grant of probate was likely to be the one which the probate registry had filed and which must have made its way on to the website. Finally, he told me that he did not see his father execute the Letter of Wishes but that he left it for him in an envelope to be opened after his death.

18. The Defendant also asserted that the Claimants were fully aware of the Letter of Wishes and had agreed to give effect to it. He relied on an exchange of emails dated 16 and 17 May 2015. The first of those emails was sent by his sister to him and the second was his reply and I set out the relevant parts immediately below:

> "Hi Michael
>
> Thank you for the cheque which I received today. I notice that you paid John and I cheques for £180,000 and yourself only £30,000. I acknowledge that it's your intention to take over W. Osborne & Co, Harwood House and property and land in France as part of your settlement in the future, but I would like to see written down a breakdown of how you envisage this happening. How will this affect how much each of us will have to pay with regard to Capital Gains Tax? Do we have to pay Capital Gains Tax on the sale of Investments and Shares? Is there any equivalent Capital Gains Tax to pay in France for the French property and land?
>
> If it is your intention of taking over the French property and land we would need to have an official up-to-date valuation done and also for Harwood House.
>
> As joint executors of Dad's Will please can you let both John and myself have copies of the figures submitted for probate purposes as we don't have a copy. We also need to have copies of the accounts of W Osborne & Co from just before the sale up to date and for Brander Rimmer Investments Ltd covering when Harwood House was transferred over from one to the other."
>
> "Dear Patricia
>
> Thank you for your email. I will address your points as follows.
>
> I have taken over father's balance in W. Osborne & Co and the shares in Brander Rimmer Investments Ltd in accordance with his expressed wish.
>
> I did not necessarily intend to take over his share of the property in France but I believe the market for property sales in France has not been good for some time. Incidentally I received an email from the French agent on Friday to say that someone was interested in Tanguy.
>
> The balance in the practice was provisionally assessed in completing the

> probate application. There are still some issues to resolve. When I have worked out the precise figure, that will be the amount to include in the distribution. The value of the shares in Brander Rimmer was included in the probate valuation at the par value of £5000. That was the value at which the transfer of shares was made. I will not value Harwood House again. If anything I suspect that its value could have been less than the value at which it was transferred into the company. I have responded to an enquiry from HMRC on this value and a couple of other questions that were raised."

19. It is impossible for this Court to decide whether the Letter of Wishes is a genuine and authentic document. As Mr Diggle pointed out, it bears the same date as the Deceased's will itself and if the Deceased had wanted to leave the balance on his capital account or his interest in the Firm to the Defendant, there is no apparent reason why he could not have included such a gift in his will or executed a codicil at the same time as he executed the first and only codicil to his will. The Defendant tried to offer an explanation for this but it was no more than speculation and, as I pointed out to him, this was not a trial of the issue at which any of the parties were giving oral evidence.

20. It is not possible either for the Court to decide whether the Claimants agreed to treat the Letter of Wishes as binding on them. There is no doubt that the Defendant approached the administration of the Deceased's estate on the basis that his father intended him to have his interest in the Firm and that he told the Claimants that this is what he wanted to do. Indeed, this much is clear from his reply dated 17 May 2015. However, there is no documentary evidence that the Claimants ever agreed to this and Mr Diggle told me on instructions that since 2015 the Claimants had always challenged the Letter of Wishes when the Defendant sought to rely on it. The Defendant was unable to produce any documentary evidence apart from a handwritten note of a meeting on 5 August 2015 (part of which I quote below).

21. I am not satisfied that I can safely decide this issue in the Defendant's favour on this application on the basis of his handwritten notes alone. I say this because the exchange of emails above clearly shows that the Claimants were not willing to agree to his proposals until he provided them with certain critical information which I consider in much greater detail below and there is no suggestion that he ever did so before the meeting on 5 August 2015 (assuming it took place). If this issue comes to be litigated, the Defendant may persuade the Court that the Claimants entered into a binding agreement to give him the Deceased's interest in the partnership to him and thereby

assented to transfer the Deceased's interest in the partnership to him. But I am not satisfied that they did so on the basis of a single handwritten sentence unsupported by any other documentary evidence.

22. Moreover, the Claimants were continuing to press for the same information almost three years later. The Defendant told me that the final breakdown in the relationship between the Claimants and him took place either when the First Claimant sent him an email dated 27 August 2018 or shortly afterwards. In that email the Claimants were still asking the Defendant to produce the following information:

> "3. Copies of trading accounts and balance sheet for Brander Rimmer Investments Ltd for all of the year ends 31st March 2008 to date, with detailed explanations of all loans, bank and other debtors, creditors etc to enable us to see the transition of the property from W. Osborne & Co and any financial implications. 4. Copies of trading accounts and balance sheets for all the year ends 5th April 2008 to date, likewise to fully understand the changes, these to specifically show the Partners capital Accounts individually, (we being fully aware of the massive credit balance to father's account while your account was massively overdrawn), together with bank loans/borrowing debtors and creditors etc. 5. We would also like to see a copy of the sale agreement of W Osborne & Co and details of how the agreed contracted sale price was paid and when."

23. It is also common ground that the Defendant did not reply to this email or provide the relevant information in answer to it. His explanation was that he received two emails from the First Claimant that day and did not open the second email. It is unnecessary for me to decide whether that explanation is correct. But as a consequence he was unable to satisfy me that he had answered the questions which his co-executors had raised. It also made it far less likely that the Claimants would have agreed to give effect to the Letter of Wishes and allowed the Defendant to take the Deceased's interest in the Firm (or, for that matter, his shares in BRI Ltd) if they were still complaining about the lack of information almost three years later.

24. Finally, the Defendant could provide me with no explanation why he had not taken legal advice in relation to the Letter of Wishes once a grant of probate had been issued. If the Letter of Wishes had been an authentic document and he had believed it to be genuine, it would have been incumbent upon any reasonable executor to inform himself whether it was binding and whether it was lawful to act on it. I accept that the Claimants themselves did not take legal advice from Latham & Co until 2018. But the Defendant knew that the

assets of the Firm were substantial and his failure to take legal advice casts some additional doubt on his case that the Letter of Wishes is genuine and that he believed that he was entitled to give effect to it.

25. In my judgment, the dispute over the authenticity of the Letter of Wishes gives rise to an actual conflict between the Defendant's personal interest and his duty as an executor. I am also satisfied that the test in *Re Folkes* is met and that the Claimants have a real prospect of proving that the Letter of Wishes is not authentic or genuine in the light of Mr Price's evidence. I am also satisfied that the value of that claim to the estate may be substantial because the amount on the Deceased's capital account and his share in the Firm was significant and the Defendant acquired them either at no cost or at a significantly reduced value (as I explain below).

26. But even if the Defendant is able to prove by expert handwriting evidence or other admissible evidence that the Letter of Wishes is a genuine and authentic document, I am also satisfied that the estate has a potential claim against the Defendant and that this claim also has a real prospect of success. There was no suggestion that the Letter of Wishes was a binding testamentary document and, even if it is genuine, the Defendant would have to prove that it took effect either under the rule in *Strong v Bird* (1874) LR 18 Eq 315 or by way of promissory or proprietary estoppel.

27. I am prepared to accept that the rule in *Strong v Bird* would apply in the present case even though the Defendant is only one of three executors. The editors of *Lewin on Trusts* 20th ed (2020) state that the rule applies to a gift to one of a number of executors: see 3—044 and footnote 241. They cite *Re Stewart* [2008] Ch 251 for this proposition and it is clear from that decision that Neville J considered that the estate vested in each one of the executors so that the gift could be perfected: see 254. But I am not prepared to accept that any defence based on the rule in *Strong v Bird* is bound to succeed. The editors of *Williams, Mortimer & Sunnucks Executors, Administrators and Probate* 22nd ed (2023) state as follows at 44—21 (footnotes excluded):

> "The principle ought not to be extended so as to apply to a gift of money which is not sufficiently identified to enable it to be separated from the rest of the testator's property. Nor will the principle be extended to apply to a promise to make a gift or a mere intention to make a gift. It only applies where it is clearly shown that the gift was complete in all respects except as regards the legal formalities necessary for the proper transfer of

> title. Moreover, the intention must remain unchanged until the settlor's death, and so, where the settlor had forgotten the existence of a settlement, and continued to regard the settled property as her own, the rule was not applicable."

28. I did not hear argument on this issue because I raised it myself with the parties when the Defendant produced the Letter of Wishes during the course of the hearing. I can easily foresee an argument that the Deceased did not promise to make a gift of his capital account to the Defendant but left it to his executors to decide whether they should honour his request. He used the words "It is my request" on two occasions in the Letter of Wishes and this may also explain why he was not prepared to execute a formal codicil to that effect. I can also foresee an argument whether the rule applies to the capital balance of one partner in a partnership where a dissolution account has not been taken and the partnership has never been wound up. But the Defendant can hardly complain that the Court is not in a position to decide this point in his favour. If he had taken legal advice in relation to the Letter of Wishes when probate was granted, this issue might not have been the subject matter of a potential dispute over ten years later.

29. I was initially concerned that the Court might need to hear full evidence and argument on this issue before it could decide whether to remove the Defendant because it might deprive him of a defence to a potential claim by the estate. However, on reflection I see no reason why the Defendant should not be able to raise as a defence to any claim by the estate that his appointment perfected the gift in the Letter of Wishes and that the relevant property was transferred to him whilst he was an executor. I asked Mr Diggle whether he accepted that the Defendant would be able to raise such a defence even if he had been removed from office and Mr Diggle agreed that he would. Moreover, I see no reason why he should not be able to rely on any proprietary or promissory estoppel in his favour which he may be able to establish on the facts.

IV. The French Property

30. The French Property consists of a house in a small hamlet or row of four houses and a separate plot of land. It is connected to a larger house owned by the Defendant and his family and two other smaller houses. The hamlet also contains another property across the road together with a number of outbuildings. There was no dispute that the French Property was valued at £50,000 for probate purposes. The Defendant took me to a

handwritten valuation in which the house was identified as Plot 20 and the land as part of Plot 60. He produced a handwritten valuation showing that in 2015 the plot of land was valued at €45,000 to €55,000 and that both his and the Deceased's land were valued at €205,000 to €235,000.

31. On 20 May 2015 the Defendant rejected an offer of €53,000 for his own property, Tanguy, and after some prevarication, he accepted that the French Property had not been marketed since that date (although it remained on the books of the agents whom he had originally instructed). On 16 December 2018 the Defendant made three offers to the Claimants: (i) to market the whole property (i.e. the French Property and his own property) as a single lot or (ii) that they should take over the marketing of the French Property themselves or (iii) they should sell their shares in the French Property to him for £10,000.

32. The Defendant told me that he arrived at the value for their shares of £10,000 in the following way. He deducted £15,000 from the probate value of the French Property to reflect a fall in property prices and he deducted a further £15,000 or £20,000 to reflect both insurance and local taxes but also a notional figure to account for the fact that the French Property did not have its own septic tank and that any purchaser would have to negotiate with him for access to it. On this basis he arrived at a value of £15,000 which he split three ways. The Defendant accepted that this offer gave rise to a potential conflict of interest and that he was aware of the potential conflict "all the way down the line". But he stated that he absolutely refused to accept that this potential conflict of interest coloured his judgment.

33. In my judgment, the Defendant's attempt to negotiate with the Claimants also gave rise to actual conflict between his duty as an executor and his personal interest in acquiring the French Property at a reduced price. Indeed, the fact that he and his family had a potential ransom right heightened rather than reduced the conflict. The Defendant baulked at the word "ransom" when I put it to him and he described it as an "ugly" word. But he did not dispute the fact that he considered that it gave him a negotiating position as the owner of the adjoining property on which the septic tank was located. Moreover, he provided no credible explanation for his failure to obtain an independent valuation of the French Property before making an offer to buy it from the estate. He claimed that its low value did not make it worthwhile. But I see no reason why he could not have obtained

an informal valuation from an agent as he had done in 2015 or even a drive-by valuation to satisfy the Claimants.

34. Nevertheless, I would not have considered that this conflict between interest and duty was by itself sufficiently serious to merit the removal of the Defendant or of significant weight for two reasons: first, the Claimants did not accept the Defendants' offer and, indeed, made a counter-offer of £48,000 themselves. Secondly, the Deceased must have been well aware of this potential conflict when he appointed the Defendant as an executor. It is well-established that the existence of a conflict of interest may be an insufficient reason to remove a trustee or executor if the conflict has been created by the settlor or testator themselves.

35. It is of much greater concern, however, that following his offer the Defendant took no further steps to realise the French Property and he has still not done so. He relied on family illness and also Brexit to explain his inactivity. He also relied on the fact that he had offered to allow the Claimants' to market the French Property themselves. But this offer did not excuse his own failure to perform his own duty to take steps to get in the assets of the estate and he provided me with no explanation for his inactivity over the last six years. Moreover, I am not satisfied that the Claimants could usefully have done very much to sell the French Property without the co-operation of the Defendant himself. As he himself recognised, any purchaser would have required him to sell them access to the septic tank.

36. In my judgment, the estate has a real prospect of succeeding in a claim against the Defendant that he has acted unreasonably in failing to take any steps to sell the Property for almost ten years since he attempted to market the French Property and over six years since he made his offer to the Claimants. I am also satisfied that the estate has a real prospect of succeeding in a claim that the Defendant was inhibited in the performance of his duties as an executor by his own interest in acquiring the French Property at a significant undervalue.

37. It is not possible for me to place a value on such a claim. But I am satisfied that it is not negligible. If the French Property had been sold for €90,000 in 2015 the estate would have had the use of that money for 10 years. It would also have avoided insurance, local taxes and maintenance costs. Moreover, if there has been a significant fall in property

prices since 2015 the estate may also have a claim for diminution in value. I express no final view about this claim. But in my judgment, it satisfies the *Re Folkes* test. I am not satisfied that it would be proportionate for the estate to pursue this claim alone but I am satisfied that it would be proportionate to pursue this claim in conjunction with any other claims which the estate may have against the Defendant.

V. BRI Ltd

38. In 1978 the Firm acquired Harwood House for £48,818 and it was included in the accounts of the partnership at cost. In 2009 it transferred the property to BRI Ltd (which had been incorporated in 1977). In a witness statement dated 21 March 2023 the Defendant gave evidence that in 2009 the issued share capital of the company was 10,000 shares of £1 each and that 5,000 were held by the Deceased and 5,000 by him. The Defendant told me that no money changed hands but that the sale price of Harwood House was £400,000 of which the company paid £180,000 by assuming a loan to the bank which was secured on the property. The balance was treated as a debt owed by BRI Ltd to the Firm. This debt was shown in the books of the Firm as £223,066 on 5 April 2011 and £187,983 on 5 April 2012.

39. The Defendant valued the Deceased's shares in BRI Ltd at par (i.e. £5,000) for probate purposes and he told me that this figure was based on the balance sheet in the company's abbreviated financial statements for the year ended 5 April 2012. This showed tangible assets of £412,493 (which represented the price of £400,000 paid for Harwood House plus costs) and short and long-term creditors totalling £147,559 and £245,084 respectively giving a net asset value of £19,850. The Defendant also told me that he reduced this figure by almost 50% to reflect the fact that his father did not have control of the company. Again, he did not suggest that he had taken any expert advice in relation to the value of the shares or, indeed, the size of the discount.

40. In his witness statement dated 21 March 2023 the Defendant also gave evidence that after probate was granted he and his wife and daughters were registered at Companies House as the owners of the Deceased's shares in BRI Ltd so that he held 7,000 shares and that each of his wife and two daughters held 1,000 shares each. He did not produce any share transfers or the company's share register. But he produced an annual return dated 8 December 2014 which confirmed his evidence. There was no suggestion that he paid the

estate even the nominal value of £5,000 although he told me that a figure of £1,666 for one third of the shares had been included in the distributions of £180,000 which he made to each of the Claimants and to which the Second Claimant referred in her email dated 16 May 2015 (above).

41. In his witness statement date 21 March 2023 the Defendant also gave evidence that on 14 October 2019 the shares in BRI Ltd were sold to Hacking Commercial Investments 1 Ltd and that he ceased to be a director and the company secretary on that date. However, he did not disclose at that stage how much either he or his family were paid for the shares in BRI Ltd. Under cover of an email dated 8 January 2025 the Defendant provided certain information in answer to the Claimants' specific disclosure application dated 4 November 2024. In particular, he stated that the shares in BRI Ltd had been sold for £220,000 but that he could not find any signed documents to confirm this. He also produced a Land Registry search dated 13 October 2024 which showed that on 14 October 2019 the sale of Harwood House was completed at a price of £645,000. However, this was the same date as the sale of the shares in BRI Ltd and the vendor and purchaser of the property were not identified. Finally, in his responses in the Scott Schedule he stated again that the shares were sold for £220,000.

42. In answer to a direct question from me, the Defendant stated orally that the shares in BRI Ltd were sold for approximately £545,000. He gave me a breakdown of that figure which suggested that some of the money was paid to the company itself rather than the shareholders and that some of the money was treated as discharging the debt owed to the Firm. He also stated that some of the funds were repaid to the current tenant. He did not explain, however, the difference between this figure and the figure of £220,000 which he had given as the sale price of the shares on at least two occasions. The Defendant also told me that the sale of Harwood House which took place on 14 October 2019 was not a sale by him but a sale on by BRI Ltd once the sale of shares had been completed. When I asked him whether he was aware of this sale at an uplift, he confirmed that he was and explained the uplift on the basis that the purchaser was a property speculator and achieved an increase in price of £100,000 for marketing the property and introducing the purchaser.

43. None of the explanations which the Defendant gave to me orally during the hearing were given on oath or explored in cross-examination and it would be unfair to him to draw

adverse inferences from the failure to disclose the sale price of the shares in BRI Ltd or the difference between the figure of £220,000 which he repeated twice (once in a Court ordered document) and the figure of £545,000 which gave to me orally. For present purposes, I am prepared to accept, therefore, that the shares in BRI Ltd were sold for £545,000 and that the figure of £220,000 was the net balance after paying off the bank, the tenant and the loan to the Firm. I am also prepared to accept that the Defendant himself was not involved in the onward sale of Harwood House for £645,000. However, it remains open to the Claimants to challenge those explanations and to seek further disclosure if any future proceedings are brought.

44. I am also prepared to draw the inference that the Defendant complied with the company formalities required by the Articles of Association of BRI Ltd and that a single executor has both the power and authority to transfer shares in a private company to a purchaser even without the execution of a vesting assent or any registration of the executor in the share register of the company. Finally, I am prepared to accept that the Defendant and his family executed share transfers which had the effect of transferring the Deceased's 5,000 shares to the purchaser. But, again, it remains open to the Claimants to challenge these assumptions and to seek further disclosure if any future proceedings are brought.

45. But even making all of these assumptions in the Defendant's favour, I am satisfied that the test in *Re Folkes* is met. In particular, I am satisfied that the Claimants have demonstrated that they have a claim which has a reasonable prospect of success and that it would be proportionate to pursue it. In my judgment, this case involves a fairly straightforward application of the self-dealing rule by which a trustee is disabled from purchasing trust property: see *Lewin* (above) at 46—008. The rule is a strict one and the transfer of the shares by the Defendant to himself was voidable by the estate. Alternatively, the estate was entitled to adopt the transfer and require the Defendant and his family to account to the estate for the profit which they made on the sale of the shares. If the price which the Defendant received for the shares was £545,000 then the Defendant is liable to account to the estate for 50% of the purchase price or £272,500. It will be for him to demonstrate that the net price was £220,000 (or even less) and that he properly applied the total consideration of £545,000 in meeting, say, the debts of the company and repaying the loan expressed to be owed by the Firm.

46. I accept that the Defendant may well have a number of defences to this claim. But I am

not satisfied that any of them are unanswerable at this stage. The Defendant may say that the Letter of Wishes was intended to extend to Harwood House and the shares in BRI Ltd. But on its face it only refers to the Deceased's capital account balance and not to the shares in BRI Ltd. The Defendant's case before me was that the Claimants agreed to the transfer of shares and he relied on both his email dated 17 May 2015 and his handwritten note. This is headed "Meeting with Patricia and John Notes at 5 August 2015" and records (or purports to record) that: "Brander Rimmer Accounts 31/3/12 + 31/3/13 Property put into company November 2009. IHT now agreed. We have agreed that I would take over the company." The Defendant asserted that these were notes of the meeting rather than an agenda.

47. For the reasons which I have set out above, I do not accept that the exchange of emails dated 16 and 17 May 2015 provides evidence of an agreement which is so convincing that I can safely accept on this application. I am not prepared, therefore, to make a finding of fact to that effect without disclosure, witness statements and oral evidence on the basis of the handwritten notes alone. But even if there was such an agreement, the Defendant would have to demonstrate that the Claimants gave their fully informed consent to the transfer of shares in BRI Ltd and I am not satisfied that I can properly conclude that they did so on the basis of the evidence before me.

48. In particular, I am not satisfied that at the date of the transfer the Claimants were aware of the true value of Harwood House or that the Defendant had valued the shares in BRI Ltd on the basis that its net asset value included the loan by BRI Ltd to the Firm. The Defendant did not disclose either the rent which the Firm was receiving from the property or the terms of any lease or leases. In her email dated 16 May 2015 the Second Claimant expressly requested a valuation for Harwood House and in his reply the Defendant stated that; "I will not value Harwood House again." The Second Claimant also asked for the accounts of the Firm and the Defendant did not respond to this request.

49. If the Claimants had appreciated that the shares in BRI Ltd had been valued on the basis that the company owed a debt of approximately £220,000 to the Firm (and, therefore, by the two shareholders to themselves) they would have appreciated that the Defendant was effectively taking for himself the equity in Harwood House and any increase in its value since it had been acquired. They would have realised that he was doing this by asserting his entitlement to the Deceased's interest in the Firm and acquiring the shares in BRI Ltd

at their nominal value of £5,000. He did not explain any of this in his email dated 17 May 2015. Moreover, he did not explain that he had unilaterally chosen to reduce the value of the shares by 50% to £10,000 to represent the lack of control without taking any expert advice at all.

50. Finally, the Defendant may be able to rely on a defence of acquiescence. I fully accept that the Claimants have taken no action since 2015 to set aside the sale of shares. But mere delay is not enough. The Defendant will have to demonstrate that the Claimants delayed in taking action with full knowledge of the relevant facts or that there were other circumstances or conduct which make it inequitable for the estate to enforce its rights. In answer, Mr Diggle submitted that the Claimants took action promptly once they were aware that Harwood House was about to be sold – and was then sold – at a substantial profit. He relied on the fact that as soon as the Claimants became aware that Harwood House was for sale and that an abortive attempt had been made to sell it at auction, they challenged the Defendant: see Latham & Co's letter dated 5 July 2019. They also required him to account to them for the sale price of the property: see Latham & Co's letter dated 24 October 2019. Again, I am not satisfied that any defence of laches, waiver or acquiescence is bound to succeed.

VI. The Firm

51. The Claimants also relied on the fact that the Defendant had failed to produce accurate final accounts for the Firm. They placed particular reliance upon accounts headed "Practice Revenue Account For the Year ended 5th April 2009" which the Deceased had prepared before his death. These accounts showed that there was a credit balance on the Deceased's capital account of £336,248 and a debit balance on his own capital account of £110,361. If this had represented the true position on the death of the Deceased, then the Defendant was liable to repay over £100,000 to the Firm and the estate was entitled to assets worth £336,248 when it was wound up and the assets had been got in and distributed.

52. The Defendant accepted that his father had prepared these accounts and that they had been annotated by him. But he did not accept that they were final accounts. He produced three different versions of his own balance sheet the last of which ("**V3**") he handed up during the hearing. This showed that the Firm had net assets of £410,913 which included

the sum of £200,043 paid by Osbornes Advisory Ltd in 2011 for the goodwill of the practice and the loan to BRI Ltd of £187,983. It also showed that there was a balance of £188,657 on the Deceased's capital account and a balance on the Defendant's capital account of £222,256. This balance had been struck by the Defendant after a number of adjustments which the Claimants did not accept. They included £107,000 in additional salary added back for the previous five years and additional fees of £25,785. He had also deducted corresponding amounts from the Deceased's capital account.

53. The Defendant accepted that he had made some (if not all) of these adjustments after the Deceased's death. Moreover, V3 showed that his drawings significantly exceeded the profit on his capital account during the five year period from 2007 to 2012 and that the effect of the adjustments which he had made was to reverse a debit balance on his capital account or, at least, to give him a much greater share of the proceeds of sale of the Firm and of the loan made to BRI Ltd.

54. It is trite law that the effect of the death of a partner is to dissolve a partnership subject to any contrary agreement. Furthermore, the executors of a deceased partner are entitled to have the partnership wound up and the deceased's partner's share of any surplus is treated as a debt due from the partnership to the estate: see section 43 of the Partnership Act 1890 and *Lindley & Banks on Partnership* 21st ed (2022), 26—002 to 26—004. The editor of *Lindley & Banks* also points out the difficulty which this legal position creates for a surviving partner appointed as an executor of the estate at 26—006:

> "Needless to say, the foregoing difficulties are exacerbated rather than resolved where one of the surviving partners has been appointed an executor of the deceased partner's will, as Lord Lindley explained:
>
> > "… his own personal interest as a surviving partner is brought into direct conflict with his duty as an executor. Everything therefore which he does is liable to question and misconstruction on the part of the persons beneficially entitled to the estate of the deceased; and he is practically much more fettered in the discharge of his duties, and in the exercise of his rights, than if he did not have to act in the double character imposed upon him.""

55. In my judgment, the estate was entitled to bring an action against the Defendant as the surviving partner to wind up the partnership and to have dissolution accounts taken: see *Lindley & Banks* (above) at 25—98. Once the account was taken, the estate would have been entitled to demand payment of any amount due to the estate from the partnership as

a debt. The difficulty for the Defendant in the present case is that although the goodwill of the practice was sold and the loan repaid on the sale of Harwood House, a dissolution account was never properly taken and the Firm was never wound up. Moreover, as pointed out in *Lindley & Banks*, the Defendant had a direct conflict between his personal interest as the surviving partner and his duty as an executor.

56. I would not have been prepared to remove the Defendant as an executor simply because the estate had a legal right to bring this claim or even because there was an obvious conflict of interest. As I have already stated, this is something of which the Deceased himself must be taken to have been aware. However, in the present case the position is very different from a case in which, say, one partner of a two partner firm dies and appoints his partner as his executor. In the present case, I am satisfied that the test in *Re Folkes* is met and that the Claimants have demonstrated that they have a basis for a claim which has a reasonable prospect of success and which it is proportionate for the estate to pursue. I have reached this conclusion for the following reasons:

(1) The dispute in relation to the authenticity and effect of the Letter of Wishes increases the intensity of the conflict between the Defendant's personal interest as the sole surviving partner of the Firm and his duty as an executor, especially if he relies on the Letter of Wishes to justify his conduct in relation to the assets of the partnership.

(2) If the Letter of Wishes is not genuine or does not take effect under the rule in *Strong v Bird* or by virtue of an estoppel, then on any view the Defendant has failed to account to the partnership for at least one of its principal assets, namely, the loan made to BRI Ltd. The Defendant told me that the loan had been repaid to the Firm and that he had received the benefit of it. Until or unless the partnership is wound up, this was a debt due to the Firm.

(3) Even on the Defendant's account as set out in V3 the partnership had net assets of £410,913 when it ceased to trade including the proceeds of the sale of the goodwill of the practice. I do not consider it disproportionate for the estate of the deceased partner of a two partner firm to take proceedings for a dissolution account and to wind it up when it has net assets of that order of value which the surviving partner has failed to distribute to his former partner's estate.

(4) The adjustments which the Defendant has made to the balance sheet in V3 clearly excite suspicion and, in my judgment, it is reasonable for the Claimants to wish to investigate them and, if necessary, enforce the estate's right to a dissolution account. The capital account of the Deceased for the year ended 5 April 2011 is shown in V3 as £344,884 and would have been £444,884 but for the adjustment of £100,000 made by the Defendant on account of the additional salary which he claims.

(5) Quite apart from those adjustments which I have identified above, the balance sheet in V3 raises more questions than it answers. In particular, it records (or purports to record) that the partnership made a loss in the year ended 5 April 2012 but that the partners did not share that loss equally. It also shows that a capital profit of £176,512 was added to the Defendant's capital account but no capital profit was added to the Deceased's capital account.

(6) These adjustments and entries explain why the final amount credited to the Defendant's capital account for the last year of trading (i.e. the year ended 5 April 2012) increased to £222,256 and the amount credited to the Deceased's capital account reduced to £188,657. It may be that the Defendant will have full, satisfactory and reasonable explanations for these adjustments and entries. But they are not obvious to me and were not obvious from any of the explanations which the Defendant gave either to me or to the Claimants.

(7) Given the obvious conflict between his interests as an executor and his interests as the surviving partner and as the beneficiary relying on the Letter of Wishes, I would have expected the Defendant, as a professionally qualified accountant, to recognise and act on that conflict. In particular, it would have been reasonable for the Claimants to expect him to instruct solicitors to give advice in relation to the Letter of Wishes and, if necessary, instruct counsel. At the very least I would have expected him to invite the executors to instruct an independent accountant to draw up the dissolution account.

(8) Finally, given the sums involved and his intention to rely on the Letter of Wishes, it is no answer for the Defendant to protest that this would have caused the estate to incur unnecessary costs. I do not consider the costs of taking counsel's opinion

in relation to the Letter of Wishes or the cost of instructing an independent accountant to draw up a dissolution account would have been unreasonable. The Defendant's failure to recognise and act on his obvious conflict of interest may well cause the estate to incur substantially greater costs.

VII. Delay

57. The Claimants also relied on the significant delay in the administration of the estate. Mr Diggle took me to the First Claimant's email dated 27 August 2018 to which the Defendant did not reply (whatever the reason). He also relied on the Defendant's delay in the conduct of this action. He took me to the Order dated 17 January 2022 in which District Judge Shepherd made an unless order against him because the Defendant had failed to comply with her earlier order dated 8 December 2021. He also took me to the judge's order dated 30 December 2022 and the Order of His Honour Judge Davis-White KC dated 30 January 2023 in which he dismissed an application for permission to appeal. He submitted that the Defendant caused a delay of over a year by his unreasonable conduct in refusing to agree directions and the form of the Orders put forward by Latham & Co and that this conduct was reflected in the costs orders which the Court had made.

58. I am satisfied that the Defendant has been solely responsible for some periods of delay since this dispute arose in 2018. However, all three parties must share responsibility for the overall delay in completing the administration of the estate. I am not satisfied, therefore, that the Defendant's delay justifies his removal as an executor. However, the delay for which the Defendant is solely responsible and for which all three parties are responsible exacerbates the conclusions which I have already reached and leads me to the conclusion that it is unlikely that the parties will be able to resolve any of the issues which I have considered unless the Defendant is removed as an executor.

VIII. General

59. I now stand back and consider the general principles which Chief Master Marsh set out in *Harris v Earwicker* and *Long v Rodman.* I remind myself that it is unnecessary for the Claimants to prove that the Defendant has been guilty of any wrongdoing or breach of duty and that the overriding question is whether the administration of the estate is being carried out properly and whether it is in the best interests of the beneficiaries as a whole to remove the Defendant.

60. In my judgment, the Defendant is not conducting the administration of the estate properly and it is in the best interests of the beneficiaries of the estate as a whole to remove him. I have not found that he is guilty of any wrongdoing and, in particular, that he has consciously preferred his own interests to the interests of the estate. However, I have held that the Letter of Wishes and the Defendants' reliance on it give rise to a conflict between his personal interests and his duty as an executor. I have also held that there is an actual conflict of interest and duty in relation to all of the remaining principal assets of the estate, namely, the French Property, the shares in BRI Ltd and the Deceased's share of the assets of the Firm.

61. I accept that not every potential or even actual conflict of interest and duty requires the removal of a trustee or executor, especially where the settlor or testator must be taken to have been aware of it when choosing the trustee or executor. However, the conflict in the present case is far more significant and pervasive than this. I have found that the estate has a real prospect of succeeding in substantial claims against the Defendant which it would not be disproportionate to pursue and if I do not remove the Defendant, this may prevent the estate from realising those assets of the estate.

62. Further, the Defendant accepted that he was fully aware of the potential conflict between his interests as a partner in the Firm and a beneficiary of the estate and his duty as an executor in the context of the French Property but refused to accept that it clouded his judgment in any way. With the greatest of respect to him, I do not accept this. Whether or not the Defendant is later found to have misappropriated any of the assets of the estate or exploited them for his own benefit, I am satisfied that the conflict with his personal interests has inhibited the proper performance of his duties for a very significant period of time and that it is in the best interests of the beneficiaries as a whole to remove the Defendant.

63. In my judgment, a reasonable and prudent executor in the position of the Defendant would have taken legal advice very soon after the Deceased's death in order to establish whether he could properly rely on the Letter of Wishes (assuming that it is genuine) and, if so, whether he could continue to act as an executor. Further, even if the Defendant had not been advised to renounce his executorship, he could and should have taken safeguards to protect the beneficiaries such as instructing an independent accountant to conduct a dissolution account and to obtain valuation advice in relation to Harwood House, the

French Property and the shares in BRI Ltd. In my judgment, the Defendant's failure to address his conflict of interest and duty or to take any steps to mitigate it for over 10 years is sufficiently serious to merit his removal as an executor.

64. I make it clear that in reaching this decision I take into account the wishes of the Deceased and his close personal and professional relationship with the Defendant. Given those wishes I would not have considered it appropriate to remove him unless I had been satisfied (as I am) that the estate had a real prospect of bringing substantial claims against him and that his failure to address his conflict of interest was serious. However, given that the executors and the residuary beneficiaries are the same people, I attach little weight to the wishes of the individual beneficiaries and, in particular, to the fact that two of the three residuary beneficiaries wish to remove the Defendant.

65. I am also satisfied that it is now impossible for the executors to complete the administration of the estate unless the Defendant is removed. I fully accept that a breakdown in the relationship between the three individual executors is not by itself sufficient to merit removal. However, I am also satisfied that the Defendant's conflict of interest and his failure to address it for at least 10 years has made a significant contribution to the breakdown between the Claimants and him and that if he had taken the steps which I have indicated at an early stage, that breakdown might have been avoided and the administration of the estate might have been completed by now. Given the extent of the delay, I have no confidence that the administration of the estate will be completed promptly if he remains in place.

66. Finally, the Defendant submitted that the estate would incur additional costs in completing the administration of the estate if the Court removed him and that given the modest size of the estate, those additional costs were not justified. I reject that submission. I accept that the claims in relation to BRI Ltd and the Firm overlap and that the claim in relation to the French Property may be worth significantly less than either of those claims. But if the estate is entitled to recover the balance on the Deceased's capital account before the adjustments which the Claimant has made and further sums in relation to the sale of shares and the French Property, the total amount to which the estate is entitled ought to justify the costs of any further investigation and the formulation of the claims themselves. But none of that can take place if the Defendant remains an executor.

IX. Disposal

67. For these reasons, I will make an order for the removal of the Defendant as an executor. I will deal with all consequential matters when I hand down judgment. Although I consider it appropriate to remove the Defendant from office without imposing any terms, I would invite the Claimants to consider their own position. It may be that the parties may be able to agree to the appointment of an independent executor to take the place of the existing parties who will be able to bring a fresh set of eyes to the estate's claims. If they fail to do so and bring proceedings against the Defendant, this may prompt an application by him to remove them as executors. It may also impede the final settlement of all claims and the final winding up of the estate with the minimum of legal costs.