



Neutral Citation Number: [2019] EWHC 1394 (Ch)

Case No: BL-2018-000059

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

Rolls building,  
Fetter Lane, London. EC4A 1NL

Date: 04/06/2019

**Before :**

**MASTER SHUMAN**

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**Between :**

**MR JAN STEPHEN FULLER**

**Claimant/  
Respondent**

**- and -**

**H F T GOUGH & CO LIMITED**

**Defendant/  
Applicant**

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**Heather McMahon** (instructed by **BLM**) for the **Defendant/Applicant**  
**Jan Fuller** (acting in person) the **Claimant/Respondent**

Hearing dates: 18 September 2018  
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**Approved Judgment**

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

.....  
MASTER SHUMAN

**MASTER SHUMAN :**

1. This is the defendant's application by application notice dated 13 February 2018 for an order that the claim be struck out under CPR 3.4(a) or (b) or for reverse summary judgment. The application is supported by a witness statement dated 13 February 2018 from Janet Walters, solicitor at BLM, the defendant's solicitors. The claimant opposes the application and relies on two witness statements dated 8 May 2018 and 29 May 2018.
2. The claimant has brought a claim as beneficiary of the will of his late mother, Hedwig Baron-Thieme (the deceased). The defendant drafted the deceased's will dated 5 November 2009 (the 2009 will). The claimant alleges that the 2009 will was negligently drafted and seeks an order that they are "to reimburse the Claimant for all fees and expenses incurred by him as a result of the defendant's negligence and the rectification proceedings that followed as a result of this negligence". In oral submissions the claimant stated that his loss was £5,000.
3. The defendant submits that the claim should be struck out on two grounds:
  - i) There are no reasonable grounds for bringing the claim because the claimant has failed to plead a case giving rise to a recognised cause of action. In any event the claim that is pleaded fails to plead duty, breach, causation and loss, all of which are essential ingredients for a claim in negligence.
  - ii) The claim is an abuse of process, a claim for rectification was brought and a court of competent jurisdiction has already determined the cost liability between the claimant, the defendant and the deceased's estate (the estate).
4. In the alternative the defendant seeks reverse summary judgment on the following grounds:
  - i) The claimant has no real prospect of establishing that the defendant owed him a duty of care, the defendant relies on the analysis in Worby v Rosser [2000] PNLR 140 (CA);
  - ii) If a duty of care was owed the losses are outside of the scope of any duty and therefore unrecoverable: the scope of a duty owed to a 'disappointed' beneficiary is limited to a duty to ensure that effect is given to the deceased's testamentary intentions, Carr-Glynn v Frearsons [1999] Ch 326 (CA);
  - iii) The losses identified in the claimant's witness statements are as a result of the claimant's own actions for which the defendant is not responsible;
  - iv) The losses are not pleaded.

**THE BACKGROUND**

5. The deceased married Michael Baron (Mr Baron) in 1982. She had 3 children from a previous marriage, Helen Mulvaney, Phoebe Fuller and the defendant.

6. In or about December 1999 the deceased and Mr Baron instructed the defendant to prepare wills for them. At that time they owned property in Cumbria as tenants in common.
7. On 3 April 2000 the deceased executed her will (the 2000 will)<sup>1</sup>. Under clause 6 she gave all of her personal chattels, that had not been bequeathed in other clauses, to Mr Baron for his absolute use and benefit during his lifetime or until he remarries or permanently cohabits with a female person as if they were man and wife and thereafter to her children. Under clause 8(b) and (c) she gave all of her interest in the house she resided in at the date of her death to her executors to be held on trust to pay the income to Mr Baron for his life and subject to the same termination on marriage or cohabitation and thereafter to her children (the property fund). There were also provisions dealing with when the executors could enforce the trust for sale. Clause 9 provided that her children living at her death were entitled to the property fund and if Mr Baron remarried or cohabited. By clause 14 she declared that no part of the income paid after her death shall be apportioned but it should belong to the person entitled under the will to the income from the property fund and in the case of Mr Baron as tenant for life of such income, there was specific reference to the income terminating on marriage or cohabitation. This was described by Master Price as an administrative provision which operated to exclude the effect of the Apportionment Act 1870.
8. On the same day Mr Baron executed a will in the same or similar terms.
9. At a meeting on 2 October 2009 the deceased and Mr Baron gave the defendant instructions to amend the 2000 wills. Mr Sandelands of the defendant sought to clarify his instructions and asked whether the trusts were to terminate on remarriage or cohabitation. By an email dated 18 October 2009 Mr Baron instructed the defendant that it was no longer necessary for a cohabitation provision to be included in either of the 2000 wills, “*No ... too old to divorce/remarry or even cohabit*”.
10. On 5 November 2009 the deceased executed her will (the 2009 will). On the same day Mr Baron executed his will.
11. The 2009 will omits references to remarriage and cohabitation in the personal chattels clause, now clause 4, and the sub-clauses in the property fund clause, now clause 7. However clause 14 was included in an unamended form, now clause 13. This referred back to Mr Baron not being entitled to “receive any part of any ... Income which shall be actually received in respect of such property after his death remarriage or cohabitation as aforesaid”. Although there was nothing that it referred back to.
12. The 2009 will appointed Vincent Hambleton-Grey and Peter Nicholls as executors.
13. On 13 May 2012 the deceased died. There is reference to the will being approved and registered on 9 June 2013, which must be a reference to the grant of probate.
14. In July 2015 the claimant alleged that Mr Baron was cohabiting and therefore not entitled to income from the deceased’s estate.

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<sup>1</sup> This is taken from the judgments of Master Price and Rose J.

15. In late 2016 Mr Baron issued a rectification claim against the executors and the residuary beneficiaries. His case was that there was a clerical error in the 2009 will, words that should have been omitted in clause 13 were not and this only came to light much later. The claimant was the 5th defendant and the only party to defend the claim. Master Price reviewed the statements of case and listed the claim for a hearing to determine whether the defence of the 5th defendant had any realistic prospect of success. There were two issues, whether permission should be granted to bring the claim more than 6 months after the grant of probate and, if so, whether the 2009 will should be rectified.
16. The Master concluded that there was “no basis for any resistance to the application to bring the claim for rectification out of time”. He went on to consider the contemporaneous evidence to determine what the deceased’s testamentary intentions had been and whether there was a clerical error in the 2009 will. At paragraph 11 of his judgment he considered clause 13 of the 2009 will as follows,

“So this was essentially an administrative provision and the 2009 will removed the cohabitation termination provisions, as one might describe them, but it continued to apply the apportionment bar, although the words in question, which are, in fact, in clause 13 [14] in the last will, refer back to “cohabitation as aforesaid” but the provisions in the earlier clauses having been removed, there is nothing for the word aforesaid to refer to so that those words are, in fact, meaningless. So it is clear on the face of looking at the document that something has gone wrong. When one turns to the correspondence one discovers exactly what happened.”

He went on to consider the contemporaneous evidence including the email dated 18 October 2009 and a draft of the will with the deceased’s manuscript notes including a tick by the paragraph deleting the cohabitation provisions. At paragraph 16 he said,

“The position, as it seems to me, is that it is clear from the contemporaneous documentation, and indeed also from the witness statement of Mr Baron, the Claimant, that the intention of the testatrix was to remove the provisions as to cohabitation throughout the will and that clause 13 did not give effect to her intentions and this was essentially a clerical error.”

17. The Master ordered rectification of the 2009 will by omitting a large section of clause 13 including the wording that I have referred to. In addition he ordered that the costs of Mr Baron, summarily assessed in the sum of £32,631.60, shall be borne by the estate and in so far as they are unable to recover the same from the defendant, they shall be borne by the claimant.
18. The judgment also refers to the defendant’s unfortunate stance. Initially they appeared to accept that there had been an error and that rectification proceedings would be necessary, absent the relevant parties entering into a deed of arrangement. Following the defendant reporting matters to their indemnity insurers their position changed. In a letter to Mr Baron’s solicitors dated 16 January 2016 they asserted that the instructions to amend the will were limited and that the deceased did not give

instructions to remove the termination on marriage or cohabitation. It is unclear to me how they sought to argue that in light of the contemporaneous documentation.

19. The claimant sought permission to appeal the decision. Rose J made an order on 28 July 2017 revising the costs order as follows,

“to the extent that the Estate is unable to recover these costs from H F T Gough & Co Solicitors they shall be borne, up to a maximum of £5,000 by the Fifth Defendant’s share of the Estate in due course of administration.”

In her reasons the judge said at paragraph 2 that she rejected the claimant’s suggestion that there may have been a draft of the deceased’s will which removed all references to cohabitation and that the deceased must have instructed the defendant to put it back into the 2009 will. As the judge pointed out it made no sense to re-insert it in clause 13 alone. I infer from her reasoning that £5,000 represented the costs that, absent the defendant paying, should be borne by the claimant and were therefore attributable to his defence of the rectification claim.

20. There is an on-going claim by the deceased’s estate against the defendant for damages arising out of the negligently drafted 2009 will.

#### THE CLAIM

21. The particulars of claim runs to 3 pages with a separate prayer seeking the loss claimed in the claim form, word for word. Save for setting out a chronological history from 14 July 2015 until the defendant is said to have made offers of settlement which the claimant considered unacceptable, no claim is pleaded.

#### THE LAW

22. It is the essential role of the particulars of claim to set out, succinctly, what the claimant relies on factually to establish his or her cause of action: CPR 16.4(1). As the claimant brings the claim as a beneficiary the particulars of claim should set out: the basis on which the claimant asserts that he is owed a duty of care by the defendant and what the scope of that duty was; how it is said that duty was breached; and what loss flowed from the alleged breach giving particulars of the loss and damage claimed. It is vital that the other party understands the case which is being brought so that they are able to plead to it and prepare their case accordingly. If the case which is brought is vague or incoherent they may not be able to do that. This adversely impacts on time and costs for the parties and may well impact on other court users where a disproportionate amount of the court’s limited resources are taken up by managing the case.

23. Pursuant to CPR 3.4(2),

“3.4(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings..."

24. The notes to the White Book 2018, at 3.4.2 reiterate that a claim should not be struck out unless the court is certain that it is bound to fail. Paragraph 1.4 of Practice Direction 3A gives examples of cases where the court may conclude that particulars of claim disclose no reasonable grounds for bringing the claim: claims which set out no facts indicating what the claim is about; claims which are incoherent and make no sense; and claims which contain a coherent set of facts but those facts even if true, do not disclose any legally recognisable claim against the defendant.
25. Teare J in Towler v Wills [2010] EWHC 1209 set out, uncontroversially, the court's general approach to poor pleadings,
- "16. CPR 3.4 gives the Court power to strike out a statement of case which is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings. The notes to CPR 3.4 state that these grounds include statements of case which are unreasonably vague or incoherent. That is no doubt because such statements of case are an abuse of the Court's process and are likely to obstruct the just disposal of the case."
26. Where a statement of case is found to be defective the court should consider whether the defect may be cured by amendment and it may allow a party an opportunity to amend.
27. The defendant also argues that the statement of case is an abuse of process in that the claimant is seeking to litigate issues already determined in previous proceedings. The underlying public policy is self-evident, there should be a finality in litigation. This is particularly so when the CPR enshrines dealing with cases justly and at proportionate case both for the case individually and litigation more widely when allocating the court's resources. As the notes to the White Book 2018 at 3.4.3.2 succinctly summarise,
- "As a general rule a party should not be allowed to litigate issues which have already been decided by a court of competent jurisdiction.... However, whether litigation of a decided issue is an abuse depends upon all of the circumstances. It is wrong to hold that simply because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. A broad, merits based judgment should be adopted, taking account of all the public and private interests involved in all the facts of the case."
28. Pursuant to CPR 24.2 a court may give summary judgment on the whole of a claim or on a particular issue if:

“(a) it considers that—

- (i) that claimant has no real prospect of succeeding on the claim or issue; ... and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

29. Both limbs must be satisfied. In the notes to Volume 1 of the White Book 2018 at 24.2.3 it is commented that,

“In order to defeat the application for summary judgment it is sufficient for the respondent to show some “prospect”, i.e. some chance of success. That prospect must be “real”, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word “real” means that the respondent has to have a case which is better than merely arguable”. ... The respondent is not required to show that their case will probably succeed at trial. A case may be held to have a “real prospect” of success even if it is improbable. However, in such a case the court is likely to make a conditional order...”

30. The hearing of a summary judgment application is not a summary trial. The court will therefore only consider the merits of the respondent’s case to the extent that it is necessary to determine whether it has sufficient merit to proceed to trial. The criterion to be applied by the court under CPR 24, unlike a trial, is not one of probability but the absence of reality. The evidential burden is on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. If credible evidence is adduced in support of the application then the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof is not high. As the notes to the White Book 2018 24.2.5 emphasise,

“the Court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it”.

## THE APPLICATION

31. The defendant’s first ground for striking out the claimant’s statement of case is that it discloses no reasonable grounds for bringing the claim. The defendant complains that no properly particularised case has been set out in the particulars of claim. The claim form refers to this claim as being one of professional negligence brought by the claimant as beneficiary under the 2009 will. However the particulars of claim fails to set out the cause of action by reference to duty, breach, causation and loss or at all. Despite the claimant having filed two witness statements in opposition to the application neither contain any sustainable allegation that the defendant owed a duty to the claimant or breached an alleged duty that caused the loss claimed.

32. Whilst the claimant is a litigant in person, as he was also in the rectification claim, the judgment of Lord Sumption in Barton v Wright Hassall LLP [2018] UKSC 12 at paragraph 18 provides a useful summary of how the court should approach a party who does not have legal representation.

“18. Turning to the reasons for Mr Barton’s failure to serve in accordance with the rules, I start with Mr Barton’s status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f) . The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 , para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue “at the margin”, as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR r 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter’s legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.”

33. It is not for the defendant to try to discern what case it has to meet. Whilst the particulars of claim set out a chronology of events from which one can see a potential claim by the deceased’s estate both in contract and in tort against the defendant for



potentially negligently drafting the 2009 will it is not readily apparent how such a claim arises for the claimant as a beneficiary.

34. It is a vital element of constituting a claim in negligence for the alleged breach of duty to have caused loss. In the claimant's very detailed skeleton argument he seeks to address the deficiencies in his pleading, albeit without accepting that his claim is defective. At paragraphs 3.2 and 3.3 the claimant argues that the defendant owed him a duty of care being a beneficiary under the 2009 will and that was breached by the defendant making a mistake in drafting the will. There is nothing controversial about these statements, in isolation.
35. However the claimant goes on at paragraph 3.4 to allege that the breach of duty caused him loss because,

“– the matter needed to be addressed by the executors. This is identified in paragraphs 3 & 6 of the particulars of claim ”

This is a reference to the executors notifying the defendant that they would be applying to court for rectification of the 2009 will. He goes on to say,

“- liability for the mistake had to be established by the court. This is identified in paragraph 8 of the particulars of claim.

- The will needed to be rectified. This is identified in paragraph 7 of the particulars of claim”

The claimant identifies again loss to the estate in bringing the claim for rectification but not loss caused to him personally. This point is reinforced at paragraph 3.5 where the first loss identified by the claimant is “Executors/accountant's fees in dealing with the matter.” He goes on to include the “Costs of the rectification claim” and “Costs of the necessary defence of the claim.” Both are cross-referenced to paragraph 16 of the particulars of claim. It is clear that the former relates to the estate's costs and the latter relates to his own costs in electing to defend the rectification claim. I will go on deal with the claimant's rectification costs later in this judgment.

36. The claimant has had adequate opportunity to plead his case properly. Indeed the witness statement of Janet Walters sets out at some length in what ways the claim is defective. I note that in the claimant's skeleton argument at paragraph 3.8 he argues that “The Defendant, by admitting the error, has admitted negligence so, I believe a claim for negligence in itself does not need to be made.” The claimant has not sought to amend his claim but persists in his obdurate view that he needs do no more. I agree with Ms McMahon's submission that he has failed to plead a proper claim and if the claimant were given yet another opportunity to plead it “would be disproportionate and contrary to the over-riding objective”.
37. The defendant's second ground of strike out is that the issue of costs has already been decided by a court of competent jurisdiction and it would be abusive to allow the claim to proceed. It may be that the volte face of the defendant, after insurers were notified, coupled with the claimant's stance that Mr Baron was not entitled to income from the deceased's estate fuelled the claimant's approach to the claim. However, as

the Master found “there was no basis for any resistance” to the claim for rectification. The claimant caused costs to increase because he chose to defend the claim.

38. The Master ordered that Mr Baron’s costs of the rectification claim, summarily assessed at £32,631.60, were to be borne by the estate but to the extent that they were not recovered from the defendant they should be borne by the claimant’s share of the estate in the administration. It had been specifically argued before the Master that the claimant had increased the costs of the rectification proceedings by electing to defend them. Indeed during the exchange on costs the claimant maintained that he had a defence to the claim.

“Claimant: Well I don’t think I’ve been in the slightest bit unreasonable. There is no evidence that my mother wanted this clause removed. You’ve seen her instructions.

Master: Well, sorry, Mr Fuller, I’ve reached a contradicting conclusion. There is every evidence, and the evidence in my view is overwhelming –”

39. The claimant appealed the Master’s decision. Rose J refused permission to appeal the order of rectification. She did at some length explain to the claimant in the course of his submissions that the rectification claim needed to be brought to mitigate and also to crystallise the estate’s loss. The claimant’s fundamental misunderstanding of the connection between the rectification claim and proving negligence is amply demonstrated in a flow chart exhibited to his first witness statement. That document sets out two options, to defend the rectification claim or not. The claimant states that if he does not defend the claim “there is no investigation into allegation of clerical error” and goes on to say that the professional negligence claim, which “must be made against the defendant if the estate is to recover its losses” is “less likely to succeed because the defendant not yet found guilty”. He attributes a defence to the rectification claim as leading to a finding that the defendant was guilty and a professional negligence claim would then be likely to succeed. Of course this analysis must also be placed in context, as it was the claimant’s view that Mr Baron, his step-father, was not, or should not, be entitled to income from the deceased’s estate because he was cohabiting.

40. In terms of costs there was the following exchange,

Claimant: “But if they have been professionally negligent surely they, they can be made to pay?”

Rose J: “Well they can what they, what the estate is anticipating that Gough’s will say is, ‘yes, it was our mistake, yes, we accept you had to go to rectification but it’s not our fault that Mr Fuller decided to contest it and that cost a lot more money.”

41. Mrs Justice Rose went on to vary the costs order so that the potential exposure of the claimant, if the estate could not recover its losses from the defendant, was capped at £5,000. At paragraph 4 of her reasons she stated,

“Having considered the case in the round, I consider that £5,000 is a fair amount from Mr Fuller to have to pay if Goughs refused cover the total cost the rectification claim. Without, of course, in any way prejudging any future claim against Goughs, the difficulty that has given rise to these proceedings lies not only in the failure to remove the cohabitation wording from clause 13 but that they do not appear to have been unable to produce sufficiently clear instructions from Mrs Baron-Thieme to allay Mr Fuller’s concerns about whether the Last Will truly expresses his mother’s wishes. As I have explained, I agree with Master Price that the only possible conclusion to arrive at from the documents from the wording of the Last Will is that those must be her wishes. But it is unfortunate that this matter could not be simply resolved by Gough’s immediately it arose.”

42. I agree that there was a simpler course for the defendant: admit that it made a clerical error and bring a rectification claim on behalf of the estate. Although I am less convinced about the criticism of the will file. The instructions given by Mr Baron in the email dated 18 October 2009 were unambiguous and sent on behalf of himself and the deceased, the Master had no difficulty in concluding that it was appropriate to order rectification. There are two relevant points that flow from the decisions. First, the claimant was not entitled to recover his costs from Mr Baron or any of the other defendants, including the executors. Second, both Master Price and Rose J considered that the claimant had caused costs to be incurred in the rectification claim and that was ultimately quantified as £5,000.
43. In so far as the claimant has incurred a potential liability to the estate of £5,000, that has already been determined by a competent court as attributable to his own actions. As the claimant’s claim seeks recovery of £5,000, which he confirmed orally, I accept that the entire claim should be struck out as an abuse of process.
44. Notwithstanding my determination of the strike out application I will go on to consider the defendant’s alternative application for reverse summary judgment. This can be narrowed down to three principal arguments: no duty of care was owed; the loss did not fall within any alleged duty of care; and the alleged breach of duty did not cause the loss claimed.
45. First, as a matter of law the claimant cannot establish that the defendant owed him a duty of care. The defendant relies on Worby v Rosser [2000] PNLR 140 (CA). In this case the beneficiaries under a 1983 will challenged the grant of probate in respect of the 1989 will and sought a grant in respect of the 1983 will. After a long trial the judge determined that the 1989 will was invalid; the deceased lacked testamentary capacity, he did not know and approve of its contents and its execution was obtained by the undue influence of T, one of the beneficiaries under the 1989 will. The beneficiaries brought a professional negligence claim against the solicitors who had prepared the 1989 will alleging that they owed them a duty to take reasonable care to

ensure that the testator had testamentary capacity, knew and approved of the contents of the 1989 will and that it had not been obtained by undue influence. The existence of that duty was determined as a preliminary issue against the beneficiaries.

46. The appeal from that decision was dismissed. Chadwick LJ at page 149C,

“The remedy fashioned on *White v. Jones* was needed to fill a lacuna. The remedy is provided in circumstances in which it can be seen that there is a breach of duty by the solicitor to the testator in circumstances in which the persons who have suffered loss from that breach will have no recourse unless they can sue in their own right. In a case like *White v. Jones* the disappointed beneficiary suffers loss but the estate does not because nothing that the solicitor has done or failed to do causes any diminution in the estate.”

47. Further at 149E to G,

“In the present case there is no lacuna to be filled. If the solicitor’s breach of duty under his retainer has given rise to the need for expensive probate proceedings, resulting in unrecovered costs, then, prima facie, those costs fall to be borne by the estate for the reasons which I have already sought to explain. If the estate bears the costs thereby and suffers loss then, if there is to be a remedy against the solicitor, it should be the estate’s remedy for the loss to the estate. There is no need to fashion an independent remedy for a beneficiary who has been engaged in the probate proceedings. His or her costs, if properly incurred in obtaining probate of the true will, can be provided for out of the estate. If there has been a breach of duty by the solicitor, the estate can recover from the solicitor the additional costs (including the costs to which the beneficiary is entitled out of the estate). The practical difficulties which would be likely to arise if solicitors were held to owe duties directly to beneficiaries under earlier wills provide powerful support for the view that it would not be appropriate to provide a remedy in circumstances in which it is not needed.”

48. The claimant’s case falls squarely within the analysis in *Worby v Rosser*. It is the estate not the claimant that has a remedy for the loss caused by the defective 2009 will. The duty of care (both in contract and in tort) owed to the deceased vests in his personal representatives on his death. A beneficiary in an estate that has yet to be administered has no interest in any asset in the estate but merely has a right, as against the personal representatives, to have the estate properly administered. If the personal representatives fail to pursue a claim vested in them, which does not arise here, a beneficiary may commence an administration claim against them to compel them to take proceedings. If there was doubt as to whether a claim should be pursued the personal representatives would seek the protection of a Beddoes order. What a beneficiary cannot do is bring the claim himself unless there are special circumstances that warrant a derivative claim being brought. However such a claim would be

brought by a beneficiary standing in the place of the personal representatives seeking to enforce duties owed to the estate rather than bringing a personal claim himself.

49. Given the factual matrix and the nature of the claim that the claimant seeks to advance there is no independent duty of care owed to the claimant that would support a remedy in tort. As I have already stated he elected to defend the rectification claim. Insofar as he has been exposed to a liability to the estate, up to the sum of £5,000, that is of his own doing. Whilst the claimant is extremely critical of the executors, specifically allegations are made against Mr Hambleton-Grey, that is a matter between him and the executors, it is not relevant to the primary issue of whether there is liability between the claimant, personally, and the defendant. I have been told that the estate is pursuing a claim against the defendant.
50. The second argument is that even if the defendant owed the claimant a duty of care the losses identified by the claimant are outside the scope of any such duty. Ms McMahon submits that the scope of the solicitor's duty to a beneficiary is limited to a duty to take care to ensure that effect is given to the deceased's testamentary intentions: Carr-Glynn v Frearsons [1999] Ch 326 (CA) Chadwick LJ at 337E-F. Indeed such a duty cannot be more extensive than that owed to the deceased. Master Price determined that the deceased intended for the cohabitation provisions to be removed from the 2009 will and rectified it accordingly. The claimant contends that he was compelled to defend the claim in order for the court to determine that there was an error in the 2009 will. However, had the claim proceeded by consent it is difficult to see how the defendant in subsequent proceedings could have denied the fact that there was a clerical error. Further rectification is an equitable remedy, regardless of whether the parties consented to such an order or not, the court had to consider and determine that there was a clerical error as a fundamental requirement for an order for rectification to be made. I am satisfied that even if I had determined that a duty of care was owed to the claimant it is clear that the loss claimed could not have fallen within the scope of any such duty.
51. Thirdly, the defendant submits that the claimant would not be able to establish causation. The loss identified by him which he attributed to the defendant is as a result of his own actions. In this claim the claimant suggests at paragraph 6 of his first witness statement that had the defendant done what the executors asked the rectification claim would have been a simple solution. He says this it would have been acceptable to him and almost certainly to the other beneficiaries. Ms McMahon submits that this is inconsistent with the claimant's conduct in the rectification claim: he repeatedly denied that there was any clerical error and he sought permission to appeal the decision of Master Price. That criticism is a fair one. It was the claimant's choice to defend the rectification claim, he was unsuccessful and he should bear the consequences of his actions, not the defendant.
52. Putting to one side the fact that the claimant has failed to plead a proper claim in law against the defendant, such a claim as is referred to in his skeleton argument and witness statements has no reasonable prospect of success. The claimant seeks recovery of his potential liability to the estate of £5,000. I am satisfied that no duty of care is owed by the defendant to the claimant to support such a claim. Even if it was, the loss claimed is outside of the scope of a duty of care owed to a beneficiary and in any event would fail on causation. There is no other compelling reason why this claim

should proceed to trial. The defendant is entitled to reverse summary judgment in respect of the whole of the claim.