Neutral Citation Number: [2023] EWHC 615 (Ch)

Case No: PT-2021-001062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST

Rolls Building
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London, EC4A 1NL

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The deemed time and date of hand down is 10 am on **Date: 24/03/2023**

Before:

MASTER KAYE

- -

Between:

BELEN CLARISA VELUTINI PEREZ	**Claimant**
- and –	
(1) EQUIOM TRUST CORPORATION (UK) LIMITED **(2) EQUIOM TRUST (SOUTH DAKOTA) LLC**	**Defendants**

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Andrew Twigger KC and Timothy Sherwin (instructed by **Mishcon de Reya**) for the **Claimant**
James MacDougald (instructed by **Sinclair Gibson**) for the **Defendants**

Hearing date: 2 March 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER KAYE

Master Kaye :

1. This is a consequentials judgment about costs. The background to these costs decisions and my findings are set out in my judgment dated 29 November 2022, the neutral citation for which is **[2022] EWHC 2996 (Ch)** ("**the Judgment**"). The Judgment includes a number of defined terms with which the parties are familiar. I will use the same defined terms in this judgment. References to paragraphs as [ ] are references to paragraphs in the Judgment unless the context denotes otherwise.

2. For the reasons set out in the Judgment and as subsequently recorded in an order also dated 29 November 2022, I made the declaration sought by the claimant in respect of the Revocation, made orders in relation to the transfer of the Assets, limited the Former Trustees' retention to $500,000, and capped/limited their indemnity.

3. I now need to consider the position in relation to the legal costs incurred by the parties as a result of these proceedings. This judgment only addresses the issues of liability for costs and not quantum. According to the updated costs schedules the total of the legal costs the parties are seeking to recover from each other (or from the Assets) are in combination approaching £700,000. That does not include the costs of the Former Trustees themselves, GTC or other third parties involved in either the transfer of the Assets or the claim. The parties' legal costs are substantial and in the context of what was essentially a claim for directions under CPR 64 remain a concern. However, whether costs at those levels will be recoverable either inter partes or by way of indemnity is an argument for a different day and if ultimately there is some form of detailed assessment for a different tribunal.

4. I have had the benefit of written and oral submissions from Mr Twigger KC and Mr Sherwin for the claimant and from Mr MacDougald for the Former Trustees. Even if I do not set out each and every submission made, whether written or oral, I have taken them into account in reaching this decision.

5. The parties have identified the following costs issues which they consider the court should determine:

    i) Whether an inter partes costs order should be made and if so, what it should be;

    ii) What the basis for assessment should be;

    iii) Whether the Former Trustees should be deprived of their indemnity in respect of any inter partes costs order;

    iv) Whether Ms Velutini should be entitled to recover any shortfall in her costs from the Assets?

6. The claimant's position is that she has been the overall successful party and that the Former Trustees should pay her costs on an indemnity basis; further that the Former Trustees should be deprived of their indemnity entirely in relation to any inter partes costs order.

7. The Former Trustees' position is that there should be no order as to costs and that they should be entitled to recover their costs from the Assets subject to the indemnity cap.

However, if I were to make an inter partes costs order, the Former Trustees' position is that they should still be entitled to rely on their indemnity capped at 70% such that they are only liable to pay 30% of any inter partes costs order from their own funds.

8. Pursuant to CPR 44.2(1) the court has a broad discretion in relation to costs and whether they are payable by one party to another. The general rule is that an unsuccessful party will usually be ordered to pay a successful party's costs unless the court, in the exercise of its broad discretion, makes a different order.

9. The court has to determine who it considers to be the successful or more successful party. It is the court's perception of the matters set out in CPR 44.2(4) which determines who is the successful party and what, if any, order for costs the court decides to make.

10. If the court determines there is a successful or more successful party, it must then consider whether to exercise the court's broad discretion to make a costs order in favour of that party in whole or in part or whether to make a different order.

11. However, the approach is one that requires the court to stand back and take a common sense, broad-brush and pragmatic approach to determine where the overall balance lies as between the parties. It is not the role of the judge to analyse at a granular level every issue or argument that was pursued and determine who is successful on each. The cases in which one party will have been wholly successful on every argument or issue are rare. The court should therefore look at the substance and reality of who is overall the successful party.

12. Where a party has pursued a specific discrete issue or claim unsuccessfully or unreasonably it may be appropriate for the court to depart from that general approach and consider an issues or percentage based costs order but the court should be cautious of such an approach save in the clearest case given the often overlapping nature of claims/issues and should always have in mind that the approach to determine who is the overall successful party is a pragmatic and common sense one.

13. What one can draw from the authorities is that each case turns on its own particular circumstances and the weight to be applied to a particular factor or argument will vary from case to case. That is why the court's discretion is so broad and why, consistent with the overriding objective and the overall justice of the case, the court has to stand back and take a common sense approach when determining the reality of who is overall the successful party and/or the party in whose favour a costs order should be made.

14. There is a further consideration in proceedings which involve parties seeking directions or guidance from the court pursuant to CPR 64, as here. Ultimately as set out in the Judgment, I determined that these were *Buckton* type 2 proceedings and should be characterised as "friendly" despite the hostility between the parties.

15. The general rule is therefore that the Former Trustees would be entitled to rely on their indemnity in respect of their costs and expenses by virtue of s.31 Trustee Act 2000. The indemnity can be curtailed if the Former Trustees have acted improperly or unreasonably.

16. Further, in proceedings in which the directions sought fall within *Buckton* type 2, whether brought by trustees or a beneficiary, the more usual order or the starting point would be that all parties would be entitled to recover their costs from the fund/trust assets where their conduct has not been unreasonable or improper.

17. Consequently, in addition to determining who is overall the successful or more successful party and/or in whose favour a costs order should be made the court must consider the extent to which the Former Trustees are entitled to be indemnified from the Assets. The indemnity extends not only to the Former Trustees' costs but any costs they are ordered to pay unless the court orders otherwise.

18. As set out in the Judgment, consideration of any curtailment of the Former Trustees' indemnity is ultimately the exercise of a broad discretion having regard to all the circumstances of the case. Therefore, whilst the general rule and starting point, as set out in CPR 46.3(2), is that the Former Trustees are entitled to be paid the costs of the proceedings out of the Assets insofar as they are not recovered from or paid by another person the court may make a different order. That rule is supplemented by PD46 1.1 such that the Former Trustees are only entitled to be indemnified for costs properly incurred. Whether costs are properly incurred depends on all the circumstances of the case including whether the Former Trustees (c) "*acted in some way unreasonably in bringing or defending, or in conduct of, the proceedings."* An absence of neutrality, beyond simply airing a counter argument, may be seen as an indicator of unreasonable conduct.

Should an inter partes costs order be made?

19. There were four parts to the relief sought: (i) the declaration in respect of the validity of the Revocation; (ii) an order in respect of the transfer of the Assets; (iii) a determination of the amount of the Former Trustees' retention; and (iv) whether the Former Trustees should be permitted to rely on their indemnity. It is helpful to look at what happened in relation to each part of the relief originally sought and what the parties say about it in costs terms before standing back and considering the overall position.

20. In the Judgment I made a number of criticisms about the approach and conduct of the Former Trustees and Lord Balfour. The claimant relies on those criticisms and in particular paragraphs [50], [72], [74] to [75], [86], [146], [175], [193], [220] to [221]. Mr Twigger argues that Ms Velutini was overall the more successful party even if not wholly successful on all aspects of the claim, and/or that the conduct of the Former Trustees, as set out in the Judgment, is such as to justify a costs order in her favour. Further that the Former Trustees' conduct justifies an indemnity costs order. In relation to the Former Trustees' indemnity, he argues that this is a case in which the court should readily depart from the general rule and deprive them of their indemnity such that they cannot recover those costs from the Assets.

21. Mr MacDougald argues that the appropriate order is no order as to costs as neither party was wholly successful in their arguments and no order is the fair balance between them. Further that there is nothing about this claim which takes it away from the general position on an application for guidance and directions albeit issued by the beneficiary. He submits that the claim simply reflects a disagreement between the

Former Trustees and Ms Velutini. The Former Trustees should be able to rely on their indemnity and recoup their costs (and any adverse costs) from the Assets.

Declaration

22. Mr Twigger argues that the following matters support a conclusion that the claimant was the more successful party:

    i) the finding that it was not unreasonable for the claimant to issue the claim when she did;

    ii) the Former Trustees provided no proper basis to challenge the Revocation either before or after the issue of the claim;

    iii) it was only after issue that the Former Trustees finally accepted that the Revocation was valid;

    iv) the findings in the Judgment that the Former Trustees' behaviour pre-issue was untrustee-like and inappropriate.

23. Mr MacDougald argued that:

    i) despite the findings in the Judgment the claimant issued the claim with undue haste;

    ii) the declaration was not opposed after the claim was issued and it quickly became apparent that the only real issues between the parties related to the retention and the indemnity in relation to the litigation costs, which costs would have been avoided if the claimant had not issued when she did;

    iii) the declaration was said to be for the protection of the Former Trustees as well [82].

24. I have already found that the proceedings were inevitable by December 2021 and that it was not unreasonable for the claimant to issue the claim when she did [193]. Further, as Mr Twigger submitted, whilst the Judgment makes it clear that the declaration was for the benefit of the Former Trustees as well as the claimant and GTC, it was the conduct of the Former Trustees which resulted in the declaration being necessary [86]. These points did not seem to me to weigh in favour of the Former Trustees.

25. Mr MacDougald also sought to rely on submissions made on behalf of the claimant during the first hearing that a possible reason for the Former Trustees resisting the Revocation was fees. He submitted this was an inappropriate and unevidenced allegation against professional trustees. However, whilst the claimant does not resile from the submission, it formed no part of any evidence relied on in relation to the claim nor did it form any part of the Judgment. Raising it to seek to counter or re-balance the findings in the Judgment in respect of the Former Trustees' conduct did not seem to me to assist the Former Trustees on the issue of costs and simply highlighted the continuing animosity between the parties.

Transfer of the Assets

26. The claimant accepts that the outcome is not clear cut. However, Mr Twigger argues that the outcome was closer to that sought by the claimant. The court did decide it was appropriate to set a deadline for the transfer of the Assets whereas the Former Trustees had said there should be no deadline at all, and the court should not interfere.

27. The Former Trustees rely on the findings in the Judgment at [91], [94], [96], [103], [109] to [110]. In substance the Judgment makes it clear that the delays in the transfer of the Assets were not one sided and both parties were responsible.

28. As the Judgment makes clear without the focus of a deadline the court had no confidence that the transfer of the Assets would be completed in any reasonable time [109] whereas the Former Trustees had sought to dissuade the court from making any order. In the end despite the court's intervention it was not until shortly before this hearing that it appeared that the transfer had been substantially completed.

29. Despite the time taken at the hearing considering the underlying correspondence generated by the Former Trustees, GTC and others about the transfer of the Assets, the substance of the dispute between the parties related to the retention and the indemnity.

Retention

30. At the time of the hearing US$1.5m had been retained against the Former Trustees' costs and expenses from the Boreal Assets. The Former Trustees had resisted the imposition of any deadline for its release. As set out in the Judgment the evidence supporting the retention of any particular figure was flimsy.

31. Pursuant to the Judgment the Former Trustees were only permitted to retain US$500,000 for 12-months and were not entitled to hold any retention in respect of the PMA Arbitration.

32. The figures upon which the Former Trustees relied in respect of both the handover costs and the legal costs at the first hearing were inaccurate. The figures changed between the first and second hearing but the evidence in support of them remained flimsy [149] to [180]. The figures provided for the PMA Arbitration retention appeared to be entirely speculative.

33. Mr Twigger argues that the claimant was more successful. She succeeded in relation to the PMA Arbitration for which no retention was allowed and limited the retention for handover and legal costs to US$500,000 to be held for 12 months only. Although she had only offered US$250,000, that was in part because there was no cogent evidence on which to base any figures.

34. Mr MacDougald argues that the claimant was only partially successful. He argues that the claimant's approach and the offer of only US$250,000 does not make her the successful party. Further that the allowance of US$500,000 was 75% of the sum that the Former Trustees were seeking in relation to handover and legal costs by the second hearing and thus the Former Trustees were partly successful.

Indemnity

35. Whilst the claimant acknowledges that the indemnity was only partially curtailed, she says that such a curtailment or capping was unusual. She relies on the findings in the Judgment in relation to the Former Trustees' conduct. Mr Twigger argues that although limiting the indemnity to 70% may not be viewed as wholly successful, the claimant should still be entitled to her costs on this issue given the combination of the findings on conduct and the capping of the indemnity.

36. The Former Trustees argue that they were vindicated and partially successful in that the curtailment was limited to 30% which supports an overall outcome of no order as to costs.

Discussion

37. As set out above on an application such as this the parties would generally expect to seek an order that both their costs be paid from the fund and/or otherwise that no order for costs be made but with both parties being able to recoup those costs from the fund. The substance of Mr MacDougald's submissions is that despite the findings in the Judgment there is no reason to depart from that approach here.

38. I have considered Mr MacDougald's submissions carefully but when I stand back and take a common sense approach to who is the overall successful party it seems to me that the balance weighs in favour of the claimant. She is the overall successful party and for the reasons set out below she should have a costs order in her favour.

39. No party has asked me to make an issues based costs order and although I have considered that option as part of my broad discretion, I am not persuaded in this case that is necessary or appropriate particularly given the overlapping nature of many of the submissions.

40. In relation to the declaration I had already found it was reasonable for the claimant to issue the claim when she did. Mr MacDougald's argument that the claim was issued in haste did not therefore assist me. The Former Trustees conceded that the Revocation was valid shortly after issue, but as I found, a declaration was of utility at least in part as a consequence of the Former Trustees' conduct. Whilst there may not be a significant element of the costs associated with this issue, when compared to the costs overall, it is one on which the claimant was the successful party. It was reasonable for her to issue the claim and she achieved what she sought. The Former Trustees were substantially the cause of those costs by their conduct.

41. Had the only issue between the parties been the Revocation the costs would have been modest, and the claim would have been resolved quickly. However, the claim raised three additional areas of contention on which the claimant sought directions. Those three issues, the transfer of the Assets, retention and the indemnity, appear to have generated the majority of the costs incurred by the parties. They generated considerable correspondence and were the focus of at least some of the evidence. They took up the majority of the court time.

42. In relation to the transfer of the Assets the findings in the Judgment make it clear that whilst I considered that both parties bore some responsibility for the ongoing delays, I was not persuaded by the Former Trustees' arguments that the court should not interfere. As referred to in the Judgment [89] – [91] there were delays on both sides.

However, that reflects the underlying work in relation to the transfer of the Assets rather than the conduct of the litigation with which I am primarily concerned when considering the liability for costs. Both parties took me through different aspects of the correspondence that had been generated in relation to the underlying transfer of the Assets. Both parties took up court time in doing so. The outcome when one focusses on the conduct of the claim in relation to the transfer of the Assets was more balanced when viewed against that background. Ultimately, I concluded that both parties needed to do better in relation to the underlying transfer of the Assets. And although the claimant ultimately persuaded the court to intervene to progress the transfer of the Assets, neither party can consider themselves to have been wholly successful on this issue. It seems to me that this issue is broadly neutral as between the parties when considering the overall balance in respect of the costs position.

43. The retention and in particular the arguments about the PMA Arbitration took up a considerable part of the hearings and were hard fought. The Former Trustees were wholly unsuccessful in relation to the PMA Arbitration retention which was the most substantive aspect of this issue being an argument about principle and quantum. The balance of the retention issues concerned quantum only. On the basis of limited evidence provided by the second hearing I allowed the Former Trustees to retain US$500,000. Of the US$1.5m the Former Trustees were therefore permitted to retain only US$500,000 for a limited period of time.

44. Mr MacDougald's argument that the claimant was only partly successful because the Former Trustees were allowed to retain 75% of the figure they relied on at the second hearing for handover and legal costs does not stand up to scrutiny.

45. Whether looking at the retention argument in the round including the late provision of additional evidence and the Former Trustees' failure in relation to the PMA Arbitration or whether trying to look at it on some arithmetic basis it is clear that the claimant was the more successful party. She successfully resisted any retention for the PMA Arbitration. She did not resist the principle in relation to the handover and legal costs but limited the quantum of the retention despite having to contend with limited late and changing evidence. In relation to the time period, I limited the time period to 12 months. It seems to me that the claimant was overall more obviously the successful party.

46. In relation to the curtailment of the Former Trustees' indemnity to 70% on one view that might be considered less of a success for the claimant. However, it is not a success for the Former Trustees as they were resisting any curtailment at all and in that they failed. Further the findings in the Judgment make it clear that the Former Trustees' conduct played a considerable part in the decision to curtail the indemnity. I am satisfied that the Former Trustees were unsuccessful on this issue and that whilst the claimant cannot be viewed as wholly successful, she was more successful than the Former Trustees.

47. As set out above it is a rare case in which one party is wholly successful on every aspect or point in a claim. Here the Former Trustees were unsuccessful in relation to the majority of the issues whilst the claimant was either the successful or more successful party. Standing back and considering the claim in the round it is clear that the claimant was the more successful party overall. In such circumstances the more usual order would be that the costs of the successful party be paid by the unsuccessful

party. There is nothing in the conduct of the claim that persuades me that a different order is appropriate. Indeed, when one adds in the conduct issues identified in the Judgment in relation to the pre-action and post action conduct related to the proceedings, and in particular in relation to the Revocation (rather than the Former Trustees' conduct generally), if there were a need for any additional factors to tip the balance in favour of the claimant, the Former Trustees' conduct would do so.

48. In coming to this conclusion I have taken into account that this claim was for directions and guidance and that I have already found that they are in that context friendly proceedings. Whilst the more usual order in those circumstances might be considered to be no order for costs and/or costs from the fund, in an appropriate case the court can and will make a different order. Here for the reasons set out in the Judgment and in this judgment, I consider that this is an appropriate case in which to make a different order.

49. As a starting point therefore there should be a costs order in favour of the claimant.

Indemnity costs

50. The claimant seeks an order on the indemnity basis. It is important not to conflate the conduct of the Former Trustees in resisting the claim and more general complaints about their conduct as Former Trustees. Both are present in this case.

51. An order for indemnity costs is one that is made where the court is satisfied that a party's conduct in relation to the litigation falls outside the norm. For conduct to fall outside the norm there has to be a significant level of unreasonable or inappropriate conduct in a wide sense that can include both pre-action and post action conduct.

52. Mr Twigger relies on the overall conduct of the Former Trustees and the criticisms made of that conduct in the Judgment as taking their conduct outside the norm.

53. In particular he reminds me that the Former Trustees are professional trustees who should have adopted a neutral stance and behaved in a trustee-like manner rather than in a partisan and hostile manner as found in the Judgment.

54. He points to the pre-issue correspondence from Lord Balfour which was found to be high-handed and inappropriate for a professional trustee. He reminds me that Ms Velutini is an elderly vulnerable litigant. He points to the Former Trustees' change of position on the Revocation only after the claim was issued and the protracted nature of the litigation. He says that the Former Trustees' approach was unreasonable and caused additional costs.

55. Mr MacDougald argues that the Former Trustees' conduct of the litigation itself was not conduct that justified an indemnity costs order. He argued that Lord Balfour's evidence was focussed on historic examples of undue influence as an explanation for the approach taken to the Revocation. He pointed to the fact that the court had already marked its disapproval of the Former Trustees' conduct by curtailing their indemnity. Further that it was only curtailed not removed in its entirety. Relying on [225] in which I found that not all the costs which the Former Trustees will have incurred were costs for which the indemnity should be disapplied, he argues that such a finding is

consistent with a determination that the Former Trustees' conduct did not fall outside the norm.

56. All of these submissions demonstrate some of the difficulties that arise where there are different issues about conduct reflecting on different elements of the dispute between the parties.

57. The question of whether the court should award indemnity costs has to be focussed on the conduct of the litigation, albeit both pre and post issue, and not some of the wider conduct issues arising from the relationship between the claimant and Former Trustees that are referred to in the Judgment.

58. The curtailment of the Former Trustees' indemnity does not on its own justify an order for indemnity costs. It is a different indemnity for a different purpose and may, as here, be reflecting on different elements of the Former Trustees' conduct not focussed simply on the conduct of the litigation. Thus the curtailment of the indemnity does not of itself justify or necessarily read across to an award of indemnity costs in respect of the conduct of the litigation and vice versa.

59. However, if the claimant is entitled to costs on an indemnity basis in relation to the litigation, she should be awarded them. There are no different costs rules or basis for determining if the conduct of the litigation about which complaint is made falls outside the norm where the trustees have the benefit of an indemnity.

60. There is a separate question about the extent to which the Former Trustees can rely on their indemnity to recover the costs and expenses associated with the litigation from the Assets. Of course there is an overlap since conduct that is unreasonable and outside the norm in relation to the conduct of the litigation may well come back into account when considering the approach to a trustee's indemnity. Indeed an order for indemnity basis costs in relation to litigation is more likely to affect the court's consideration of any curtailment of the indemnity. But that is the case in relation to any adverse costs order not only one that is made on an indemnity basis; see for example Asplin LJ in *Price v Saundry* [2019] EWCA Civ 266 at [43] "*[a]lthough an adverse costs order made inter partes does not necessarily lead to the loss of a trustee's indemnity, it is a strong indicator that the requirements of s31 may not have been met.*"

61. The Former Trustees made, what was on any view, a largely unsuccessful attempt to defend these proceedings and I found aspects of their overall conduct, not limited to the conduct of the litigation, to be untrustee-like and partisan resulting in the curtailment of their right of indemnity. As set out above I have already determined that there should be an inter partes costs order in favour of the claimant.

62. However, it is important to look at the conduct in relation to the litigation at the time it occurred and not with the benefit of hindsight. Thus it is not the case that every time a defendant is unsuccessful they should be liable for indemnity costs; there has to be something more which takes their conduct outside the norm.

63. Here once the proceedings were underway the Former Trustees conceded the Revocation issue almost immediately. Thereafter although they pursued unsuccessful defences in some respects based on flimsy evidence, they did not do so in a way that

was so unreasonable that it takes their conduct outside the norm justifying an order beyond an adverse costs order. I have been critical of their underlying conduct and that is reflected in the curtailment of their indemnity but that applies to their conduct far more broadly as set out in the Judgment.

64. The approach to the Revocation and their failure to identify any basis for challenging it and not conceding its validity until after the issue of the claim might have justified an order for indemnity costs had that been the only issue between the parties. However, here there were three other significant issues which were contested throughout, and which formed the substance of the ongoing claim after the Revocation was conceded. I have found the claimant was the more successful party overall, but that does not mean that the Former Trustees' conduct of the claim (rather than their overall lack of success) was outside what might be considered the ordinary and reasonable conduct of proceedings and/or more generally was so unreasonable that it fell outside the norm. Here one has to be careful to separate out the underlying conduct of the Former Trustees and GTC in respect of say the transfer of the Assets and their conduct of these proceedings. There is the separate question of whether their conduct justifies curtailment of their indemnity given their role as trustees.

65. When one focusses in on the Former Trustees' conduct simply in relation to the conduct of the litigation overall, I am not persuaded that the Former Trustees' conduct is such as to justify making an indemnity costs order.

66. The points raised by Mr Twigger do not, either individually or cumulatively, despite the Former Trustees' overall lack of success, take this outside the norm nor was the Former Trustees' conduct in relation to the conduct of this claim itself, as separate to the cumulative effect of their conduct, so unreasonable as to tip the balance in favour of making an indemnity costs order.

67. The order for costs against the Former Trustees should therefore be on the standard basis.

Should the Former Trustees' indemnity apply to any adverse costs order?

68. The final substantive issue to be determined is whether the Former Trustees should be entitled to rely on their indemnity in whole or in part in respect of the adverse costs order I have now made.

69. At the first and second hearing I heard submissions on the law, approach and facts each party relied on in respect of whether I should deprive the Former Trustees of their indemnity. This is summarised from [184] of the Judgment with my findings and conclusions set out at [213] to [232]. All of that comes back into account as I revisit the question of whether there should be any further curtailment of the indemnity in respect of the adverse costs order I have now made.

70. This was a claim for directions. It could have been brought by either the Former Trustees or the claimant and either could have sought guidance and directions from the court about the Trust/New Trust and the Assets. It is always important to recognise the distinction between trusts/trust assets and beneficiaries. Even though the claimant was the principal beneficiary of the Trust there is an important distinction to be maintained between the claimant and the Assets/New Trust. It appears that the

Assets or at least the Non-Boreal Assets are now within the New Trust – the Boreal Assets other than the retention appear to be under the claimant's direct control.

71. In *Price v Saundry* at [41] Asplin LJ explained that she considered an account claim where a trustee had unsuccessfully defended herself on the facts of the case, to be essentially hostile *Buckton* type 3 litigation. She continued at [43]:

> "… Mrs Saundry unsuccessfully defended herself against breaches of trust and serious misconduct. In doing so she was clearly acting on her own behalf and not that of the Trust. As Millett LJ pointed out in *Armitage v Nurse*, it offends all sense of justice to allow a trustee to recoup themselves of the trust fund for the costs of unsuccessfully defending themselves in relation to breaches of trust and, I would add, for doing so in relation to serious misconduct. It seems to me that the nature of the judge's decision in relation to inter partes costs ought to have been some indicator about the indemnity. Although an adverse costs order made inter partes does not necessarily lead to the loss of a trustee's indemnity, it is a strong indicator that the requirements of section 31 may not have been met. In this case, which was essentially hostile litigation, it seems to me that it was a good indicator which ought to have caused the judge to consider section 31(1) of the 2000 Act and the trustee's indemnity in the round…"

72. Two points can be drawn from this: (i) Asplin LJ was considering the position in relation to a dispute which she considered to be essentially hostile falling within *Buckton* type 3, which is not this case, and (ii) whilst my finding that there should be an adverse costs order is a good indicator that there may be conduct that justifies the removal of the indemnity it does not automatically follow that the indemnity is lost.

73. In the Judgment I explained the background to *Blades* on which Mr MacDougald relies. As in the later first instance decision of HHJ Matthews in *Price v Saundry*, Master Matthews' (as he then was) characterisation of the conduct of the trustees in *Blades* as described for example at [123] is qualitatively different to the conduct of the professional trustees in this case as set out in the Judgment. Master Matthews concluded that it would not be fair to curtail the indemnity and determined that the costs of both parties should be paid out of the trust fund saying at [82]:

> "I accept of course, that the effect of such an order is that the costs come out of assets in which the Claimant and her family have the greatest interest, but that cannot be helped. The trust fund is not the alter ego of the Claimant."

74. Master Matthews albeit *obiter* went on to consider what the position would have been if he had made an adverse costs order. He concluded at [124]:

> "Accordingly, if I had decided in the exercise of my discretion that the right order to make was that the defendants should pay the costs of the Claimant, I would have also held that the defendants were entitled to recover what they paid the Claimant

> under that order from the trust fund, as well as reimbursing their own costs from that source, in each case on the indemnity basis. So the substance would have been the same as what I have actually ordered, that is, that both parties take their costs out of the trust fund. (Indeed, as the defendants observed in written submissions, the Claimant does slightly better under my actual order, as her costs are taken out of the fund on the indemnity rather than standard basis.) This is an additional reason for supporting my decision."

75. Not only was this *obiter* but it is not comparing like with like. Further when Asplin LJ considered the same point on appeal in *Price v Saundry* she did not agree as set out above.

76. Each case turns on its own facts and circumstances. (Mis)conduct which might be of a sufficiently serious nature to justify the curtailment of an indemnity in one case may not be sufficient in another. Here the facts and circumstances are qualitatively different from those in either *Blades* or *Price v Saundry* as set out in the Judgment. However, my conclusions in the Judgment were that the overall conduct of the Former Trustees was sufficient to justify a partial curtailment of their indemnity. That decision has not been appealed by either party.

77. Mr MacDougald says that in light of the Judgment it is not open to the court to remove the indemnity beyond the 30% – it would offend against all justice. He argues that (i) the decision to curtail the indemnity was arrived at after considering all the relevant matters at the time and there is therefore no basis on which to make a different decision now and (ii) that as a matter of construction, the Judgment at [224] determines the position and must include the indemnity in relation to any adverse costs award even though the court was not considering what inter partes costs order to make at the time.

78. Mr Twigger argues that the Judgment makes it plain that it was not intended to determine the costs position on an inter partes basis. The Former Trustees' indemnity was curtailed but the Judgment expressly left over the question of any inter partes costs order and so it remains open to the court to make an order to curtail the indemnity in full in relation to the adverse costs order.

79. Since the court had not heard any submissions on the liability for inter partes costs at the time it made a decision about the curtailment of the Former Trustees' indemnity (and made it clear that it had not determined the liability for inter partes costs) it cannot have been determining the position in relation to the indemnity in respect of those costs.

80. Although the court only curtailed the Former Trustees' indemnity by 30% that curtailment was based on an overall assessment of the Former Trustees' conduct covering more than just the costs incurred by the parties in relation to the proceedings. Consequently, Mr Twigger argues that the court is not limited to and can still and it is appropriate to remove the indemnity entirely in relation to the adverse costs order. He points to the findings in the Judgment that the Former Trustees caused the claimant to incur costs that she would not otherwise have incurred in relation to these proceedings. In circumstances where the Former Trustees' behaviour has already been

found to be untrustee-like, unreasonable, and hostile it would offend against all sense of justice to not fully curtail the indemnity.

81. Mr MacDougald argues that the Former Trustees were at least partially successful and partially vindicated in relation to both the claim and the costs. Further he relies on *Blades* at [94]:

> "In other words, where a beneficiary *successfully* sues the trustee, that trustee will have no indemnity for any costs ordered to be paid to the beneficiary where the claim was for a breach of trust causing loss to the trust fund. On the other hand, there is no good reason for withholding the indemnity merely because the trustee has been found to be in breach of some other duty not causing loss to the trust fund. Otherwise, indeed, on the authorities there would be the possibility that in the same case a trustee could have an indemnity for his own legal costs, but not for those he was ordered to pay the other side, which seems inconsistent."

in support of his argument that if the Former Trustees' own costs were 70% properly incurred how could they have caused the claimant's costs to be 100% improperly incurred.

82. The findings in my Judgment, see for example [220] to [225], recognised that the Former Trustees were entitled to charge for their reasonable costs and expenses but that some of the costs and expenses were improperly incurred.

83. The Former Trustees' indemnity has been curtailed on a broad brush basis covering other aspects of their role not limited to the legal costs and as Mr Twigger says this is an unusual case. Consequently, I am not persuaded that having an asymmetric position on the indemnity is inherently inconsistent. It will depend on the particular circumstances of a case and in complex cases particularly where the conduct complained of is not limited to the trustees' conduct in relation to the litigation there may well be circumstances in which an asymmetric outcome would be the most appropriate outcome having regard to all the circumstances.

84. It would be important in such cases to consider, whether for example, the conduct of the litigation was deserving of greater censure than the trustees' conduct overall in relation to trust assets or the reverse and how easily the two could be separated out or whether the degree of overlap was so great that a broad brush percentage approach across the whole was the more appropriate approach.

85. For example where the conduct in relation to the litigation had been particularly hostile and had caused increased costs but the conduct in relation to other matters concerning the trust assets was open to less criticism one might conclude that a curtailment of the indemnity in relation to any adverse costs order should be greater than a curtailment in relation to the trustees' "own" costs and expenses more generally.

86. It is also important to recognise that an adverse costs order and the curtailment of the indemnity are two different things and there is no automatic read across as Asplin LJ

acknowledged.

87. Consequently it seems to me that on a fresh consideration of the indemnity in relation to the adverse costs order alone it would be possible for the court to take a different approach and apply a different percentage curtailment or to remove the indemnity completely if it considered it appropriate to do so.

88. It seems to me that one needs to consider what was included in the Judgment and what was not. The Judgment considered the Former Trustees' conduct very broadly including the additional costs caused by their approach to the litigation and their conduct of the litigation. The Judgment made no determination as to what the costs order should be as between the parties and heard no submissions on what the appropriate order should be. Although by the time of the Judgment the court had considered the Former Trustees' conduct in the round it could not know what the position would be as between the parties in relation to the arguments on costs. The court does not have a crystal ball. There could have been arguments about particular aspects of the costs, offers, without prejudice correspondence and a range of potential issues that might have affected what the appropriate costs order would be that go beyond the matters that were before the court at the hearings.

89. It is only now having heard those arguments that the court is able to finally conclude that there was a more successful party and that the court should exercise its broad discretion to make a costs order in favour of the claimant. I have set out in this judgment my decision on costs and my reasons for making it.

90. Here the Former Trustees' behaviour was behaviour deserving of some criticism as set out in the Judgment. That behaviour caused the parties to incur additional costs both in relation to this claim and more generally. In relation to the claim itself although the claim was for directions by the claimant as beneficiary, the Former Trustees did not simply take a neutral role or one that raised the counter arguments to assist the court but took an active self-interested approach to the dispute particularly in relation to, for example, the PMA Arbitration. However, that is not the end of the consideration of all the circumstances. When one is considering what to do about the indemnity it needs to be kept in mind that the application whether by the beneficiary or the trustee should be focussed on the benefit of the trust fund.

91. In this claim as set out above whilst the claimant was successful in persuading me that she should have an inter partes costs order in her favour, she was not overwhelmingly successful. And conversely although the Former Trustees were unsuccessful overall the margin by which they were unsuccessful was not overwhelming.

92. The hostile approach and conduct of this litigation caused both parties to incur significant costs. That conduct was not one sided. The extensive correspondence between the legal teams all said to be for the benefit of the New Trust and the Assets was not the measured and neutral type of conduct that one might expect of parties seeking directions from the court. Just as I concluded that the underlying poor conduct for example, in relation to the transfer of the Assets was not all one sided so it seems to me to be the same in relation to the litigation. Despite the fact that this claim by its nature was friendly in the *Buckton* type 2 sense the hostility and animosity generated by this claim was also not one sided either. That is only emphasised by the level of costs generated by both parties on an application for guidance and directions from the

court which might therefore be considered to be a contra indicator in terms of the approach to the indemnity.

93. Consequently although I remain satisfied that the claimant is entitled to an order for costs in her favour, I am not satisfied that as a corollary to that the Former Trustees should lose their indemnity in its entirety.

94. There will be many cases in which the circumstances are such that although as Asplin LJ said an adverse costs order is a good indicator in relation to the loss of the indemnity, the outcome is not so clear cut. This is one of those cases.

95. I have considered the Former Trustees' conduct in relation to this claim as set out in the Judgment. Although I have made an adverse costs order against the Former Trustees, as I have identified, their conduct in relation to the proceedings themselves did not fall outside the norm, did not justify an indemnity costs order, and indeed the balance in terms of making the adverse costs order only marginally weighed in favour of the claimant.

96. There was nothing in the submissions made on behalf of the claimant that persuaded me that the indemnity should be curtailed by more than the 30% set out in the Judgment. There were no additional factors or matters of conduct raised in support of the costs arguments beyond those that had already been considered by me and taken into account in the Judgment.

97. Although an adverse costs order may be a good indicator, in this case when I consider all the matters identified in the Judgment, and the factors identified in this judgment I do not consider that there is any basis for a greater curtailment of the indemnity in relation to the adverse costs order as separate to the overall assessment I have made in the Judgment in relation to the Former Trustees' conduct overall. It appears to me that the curtailment of the indemnity in relation to the adverse costs should, in this case, be the same as the curtailment set out in the Judgment. There is no additional element to the Former Trustees' conduct that was identified in relation to the making of the adverse costs order which appears to me to tip the balance in favour of more onerous curtailment in this case.

98. The claimant's costs should therefore be paid by the Former Trustees but on the standard basis. The Former Trustees' indemnity has been curtailed by 30% and that 30% applies in relation to the payment of those adverse costs as well.

Should the claimant be entitled to recover any shortfall in her costs from the Assets?

99. Further I will direct that the claimant may recover any unrecovered costs from the Assets in so far as such an order is needed. As Mr Twigger submits that would be the usual order in a *Buckton* type 2 case such as this. The Former Trustees do not oppose this precisely because they are the Former Trustees and as Mr MacDougald says it is now a matter between the claimant and GTC. It is the usual order for a beneficiary in a *Buckton* type 2 case such as this and I will make it.

100. I invite the parties to seek to agree the terms of an order to include any matters such as the quantum of any interim payment by the time this judgment is handed down. If any consequential matters cannot be agreed I will resolve those on paper following receipt

of concise written submissions and the parties should instead provide an order setting out a timetable for the exchange of those submissions.