



Neutral Citation Number: [2024] EWHC 752 (Ch)

Claim No. PT-2023-000102

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

28 March 2024

Before :

Jonathan Hilliard KC sitting as Deputy Judge of the High Court

Between :

KAREN LANE
(as Personal Representative of the Estate of DAVID LANE (deceased))

Claimant

-and-

(1) SUSAN DOROTHY LANE
(As Personal Representative of the Estate of MONICA LANE (deceased))
(2) DANIEL LANE
(3) GEORGIA LANE
(As Beneficiaries of the Estate of MONICA LANE (deceased))

Defendants

Daniel Burton (instructed by Greene & Greene Solicitors) for the Claimant
Mark Blackett-Ord (instructed by Barker Gotelee solicitors) for the First Defendant
Hearing date: 7 March 2024

APPROVED JUDGMENT

JONATHAN HILLIARD KC sitting as a Deputy Judge of the High Court:

Introduction

1. This judgment deals with the costs of the claims that I determined in my 9 February 2024 judgment (the “**Judgment**”), neutral citation number [2024] EWHC 275 (Ch). The Judgment dealt with two questions concerning the effect of a will and the administration of an estate respectively, specifically (1) whether a gift under the will had adeemed and (2) whether the executrix, Susan, should be replaced by an independent solicitor. I decided that, as contended by Karen, the gift had not adeemed and that the executrix should be replaced by an independent solicitor. The former claim turned heavily on the construction of the Will, so I shall continue to refer to it as the Construction Claim. I shall adopt the other defined terms in the Judgment, including that of the Removal Claim to denote the second claim.
2. Karen’s submission is that that (1) the costs of and occasioned by the Removal and Construction Claims should be paid by Susan on the standard basis subject to detailed assessment, with £50,000 on account of costs payable in 28 days, (2) any sums not paid by Susan should be deducted from Susan’s share of the estate and if exhausted deducted as a proper expense of the estate, and (3) Susan should bear her own costs and not be entitled to indemnify herself out of the estate in respect of them. Susan’s position by the time of the hearing was that all costs should be borne by the estate on an indemnity basis.
3. For the reasons that follow, in my judgment:
 - (1) Susan should pay Karen’s costs of the Removal Claim, on the standard basis to be subject to detailed assessment if not agreed, and any sums not paid by Susan shall be deducted from Susan’s share of the estate and, if exhausted, deducted as a proper expense of the estate. Susan shall bear her own costs of this claim and shall not be entitled to indemnify herself out of the estate in respect of them.
 - (2) The costs of the Construction Claim should be paid out of the estate on an indemnity basis.

Relevant background

4. The background to the substantive dispute is covered in my Judgment. There are the following other points relevant for present purposes.
5. The relief sought by Karen in her claim form included costs from Susan personally. In her accompanying witness statement, Karen explained that she did not want to involve the second and third defendants, Daniel and Georgia, in litigation unnecessarily and was not seeking any relief against them personally. She joined them in case they wished to take part and to ensure they were bound, as the other residuary beneficiaries and beneficiaries of the estate generally. She anticipated that Susan would defend the Construction Claim on her own behalf and on behalf of Daniel and Georgia.

6. In her acknowledgement of service and witness statement, Susan sought a declaration as to the construction of the provision of the Will relevant to the ademption argument and stated that she remained unconvinced by the arguments put by Karen on the point.
7. Daniel and Georgia did not file acknowledgments of service. They attended the first day of the hearing and stated that they did not intend to participate but supported Susan remaining as executrix.

Legal principles

8. The core legal principles were common ground before me.
9. R.44(2) of the Civil Procedure Rules 1998 (“CPR”) contains general rules about costs, specifically:

*“(1) The court has discretion as to –
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.*

*(2) If the court decides to make an order about costs –
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.”*

10. The CPR makes specific provision for the costs of trustees and personal representatives. CPR r.46.3 deals in the following terms with the Court’s power to award costs in favour of a trustee or personal representative:

*“(1) This rule applies where –
(a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
(b) rule 44.5 does not apply.*

(2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.

(3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis.”

11. Further guidance is given on this by para.1 of PD 46, which provides that:

“1.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative (‘the trustee’) –

(a) obtained directions from the court before bringing or defending the proceedings;

(b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee’s own; and

(c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.

1.2 The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally.”

12. Helpful guidance on how beneficiary costs of construction claims and certain other claims should be borne is provided by the well-known decision in *Re Buckton* [1907] 2 Ch. 406 at pp.413–417. As explained in *Lewin on Trusts* (20th ed., 2020) at [48-033], the following principles can be collected from *Buckton*:
 - (1) Category (1) claims are brought by the trustee to have the guidance of the Court as to the construction of the trust instrument or some other question of law arising in the administration of the trust or in relation to the trusts on which the trust property is held. In such cases, the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it.
 - (2) Category (2) claims are where the application is made by someone other than the trustee, but raises the same kind of point as in the first category and would have justified an application by the trustee. Such proceedings differ in form but not in substance from the first category and similar considerations apply as to costs.
 - (3) Category (3) claims are where the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category, in that they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant, and is resisted for similar reason. In such situations the general principles as to costs of hostile litigation apply between the claimant and the party against whom the claim is directed, and so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation.

The same principles apply to trusts and estates in this regard.

13. It is important to appreciate that *Buckton* was concerned with beneficiaries’ costs. Its guidance is of relevance to the costs of trustees or personal representatives in such cases, but one must be careful to appreciate that it does not detract from the general rule in 46.3 or the guidance in para.1.1 of PD 46. Those reflect the right of indemnity of the trustee or personal representative.
14. Reflecting this, the role of the trustee in *Buckton* (1) and (2) cases is dealt with separately in a specific subsection in *Lewin*. I was referred to the first paragraph of that subsection at [48-035], which explains that generally a trustee should remain neutral in such proceedings:

“...generally the proper role of the trustee is a neutral one as between the beneficiaries or persons who claim to be beneficiaries. Provided that a trustee conducts himself in the proceedings in this way, his right of indemnity in accordance with general principles is secure, though a trustee who takes the side of some beneficiaries against others, thereby acting for a benefit other than that of the trust fund, is at risk of being held to have acted unreasonably and so deprived of his right of indemnity and may be ordered to pay costs of the successful beneficiary under Part 44, rule 44.3(2) of the Civil Procedure Rules. Such a trustee should raise the issue of costs in advance of any directions or disposal hearing, so that the court may consider whether, in the absence of an engaged and active party opposing the claim (especially where there is an unascertained class of beneficiaries), some person should be nominated or appointed to raise points in defence...”

The last sentence, on which reliance was placed by Mr Burton, was added by supplement to the latest edition. Again, these passages are equally apposite to a personal representative.

15. However, given the multitude of different factual situations that can arise in *Buckton* (1) and (2) cases, it is important not to reduce the duty of a trustee or personal representatives to passive neutrality in all circumstances in such cases. A trustee is a fiduciary involved in proceedings brought for the benefit of the trust to provide guidance as to how the trustee should administer the fund, and so where necessary the trustee should for example put forward the other side of the argument to assist in the resolution of the issue. This is reflected in [48-036] of *Lewin*:

*“Being neutral should not necessarily be equated with being passive, especially in cases falling with *Buckton* categories (1) and (2). Since the objective in cases within these categories is to obtain the guidance of the court, the court may well be assisted by submissions from the trustees as to the principles of law or construction involved. Further there are cases where the argument presented on behalf of the beneficiaries is one-sided, and the court is assisted by hearing the contrary argument from counsel for the trustee. For example, if unborn beneficiaries are in a position of their own, the trustees are under a duty to address the Court on their behalf and likewise where there is a class of beneficiaries with an opposing interest of whom none is willing to participate in the proceedings. A trustee who assists the court in this way will not be deprived of costs.”*

16. In my judgment, [48-036] is consistent with the authorities cited in that paragraph. While *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 contains the strongest statement of principle that a trustee’s duty is to remain neutral between beneficiaries (at 1225C), Lightman J was careful to focus particularly on *hostile* litigation when stating that a trustee who unsuccessfully defended a claim would ordinarily not be entitled to rely on an indemnity (at 1225E). I agree with the suggestion in footnote 162 of *Lewin* to [48-036] that he did not have in mind the sort of points concerning *Buckton* category (1) and (2) cases made in [48-036]. In *Buckton* category (1) and (2) cases a trustee may - in the ways set out in [48-036]- be able to assist the Court to resolve the dispute in the interests of the trust by taking steps that go beyond passive neutrality.

The costs of the Construction Claim

17. As mentioned at [8] of the Judgment, in deciding the Construction Claim I was assisted by the arguments of both Mr Burton and Mr Blackett-Ord in relation to the ademption argument, the construction of the Will, and the effect of s.43 of the Partnership Act 1890, and it was common ground between the parties that there was no previous case that had dealt with whether a gift of a share and interest in a partnership adeemed where the partnership has passed the point of dissolution before a partner's death. Therefore, while- having dealt with the partnership law backdrop- I ultimately considered the answer to be straightforward and accepted Karen's submissions, I consider that Susan could reasonably have sought directions on it. Indeed in my judgment I explained that I consider that she should have done so some time ago if she disagreed with David and Karen on the ademption point, particularly in circumstances where she had been administering the estate for a number of years. It is not the sort of case where one can say that the only reasonable course for Susan would have been to administer the estate on the basis that the gift had not adeemed and that Court directions were unnecessary.
18. Given that my consideration of costs includes dealing with Karen's costs as beneficiary and that *Buckton* is- as explained above- of some relevance to the costs of an executrix like Susan, I shall start by setting out my views on what *Buckton* category it falls into. In doing so I emphasise again that it is important not to lose sight of the fact that the ultimate question in relation to Susan is whether the costs were properly incurred by her in dealing with the claim, because the claim was brought against her as executrix.
19. Mr Burton contended that this was either a *Buckton* category (2) or (3) claim. I consider that it falls into *Buckton* category (2). Karen brought a claim for substantive directions that Susan could have brought as personal representative or beneficiary and that Susan defended as personal representative. In my judgment, it was in the interests of the estate for the matter to be resolved. It raises the same kind of point as if the personal representative had put it before the Court and would have justified an application by Susan as personal representative. Consistent with this, Susan stated in her evidence that she wished as executrix to have the directions of the Court on the point given the disagreement.
20. Mr Burton contends that both Susan and Karen had a personal interest in the issue. If Susan does have a personal interest, I do not consider that is on its own sufficient to make it a *Buckton* category (3) case. I note in that regard that construction issues in trust or estate cases will frequently be contested, and in most cases they will be argued by people who have a personal interest in them, as they were in *Buckton* itself. Indeed, that will normally be what qualifies them to be the appropriate people to take the relevant side of the argument and if appropriate act as representative for a class taking one side of the argument. Common examples of the latter include an employer and a member in a pension scheme construction claim. Therefore, as *Lewin* makes clear at the end of [48-037], the fact that a trustee is also a beneficiary does not of itself stop a claim falling within *Buckton* category (1) or (2), at least where there is no trustee who is not also a beneficiary.
21. Further and separately, as I noted at paragraph 12(8) of my judgment, a third of the residuary estate was given to David, one third to Susan, and a sixth to each of Georgia and Daniel. Susan's evidence is that she has varied the destination of that part of the residue that would pass to her if the Gift adeemed, so as to pass it to Daniel and

Georgia instead, in order that she would have no financial interest in the issue. While a deed was not put before me evidencing this, I have no evidence to contradict what Susan states in her evidence, so she does not appear to have a direct financial personal interest and it would be Daniel and Georgia, the children of her late brother Peter, who had the direct personal interest. It is true, as Mr Burton points out, that Susan's evidence does not state when this variation took place, but the point remains that by March 2023 at the latest, shortly after the issue of proceedings, she did not on her evidence have a direct financial interest and I do not consider that I can go behind her evidence that the variation took place without evidence to the contrary.

22. Given the different views on the ademption question, it was an issue that arose in relation to the administration of the estate which needed to be resolved in the interests of the estate. Therefore, the matter was fundamentally one of administration, rather than hostile litigation that takes it into *Buckton* category (3). The fact that the claim was brought together with removal proceedings does not alter this. The construction claim needed to be determined in the interests of the estate whether or not the removal claim was upheld.
23. Mr Burton relied by analogy on the example given in [48-033] of *Lewin* of a category (3) case, namely where the whole of the trust fund has been distributed to a specific beneficiary in reliance on some construction of the trust instrument or view of the law, and another person claiming to be the true beneficiary brings proceedings against the recipient or trustee in relation on a rival construction or view of the law. In my judgment, the case before me is significantly different to one where the trust fund has been distributed to one beneficiary and an action is brought against the recipient for recovery or against the trustee for breach of trust. The example in *Lewin* is typical hostile litigation, namely either an asset recovery exercise against the recipient or a breach of trust claim for past conduct against the trustee, conducted by a claimant for its own benefit and defended for the same reason. That is different from debating a point of construction before any distribution has been made in reliance on it.
24. As explained above, generally a trustee or personal representative remains neutral in a *Buckton* (1) or (2) case. Therefore, the question arises of whether the fact that Susan took the other side of the argument from Karen in the way that she did prevents those costs being properly incurred.
25. Aply though Mr Burton put his arguments, in my judgment it does not. Here, the natural people to put the different arguments on the construction and ademption issue were Susan and Karen. While not acceding to Karen's arguments, Daniel and Georgia did not wish to play any active role in the proceedings, and in that situation it would normally fall to the personal representative or in a trust case the trustee to take the contrary argument or otherwise ensure that the contrary arguments were put, as set out in *Lewin* [48-036]. A Court faced with the arguments on the effect of s.43 of the Partnership Act and the construction of the Will on an untested point would want to hear the arguments the other way on the point before deciding it. It would not have made sense in this case to bring in a third party, such as a solicitor with the benefit of a representation order, to argue the point, with the extra cost that would have been involved.
26. As for the last sentence of [48-035] of *Lewin* set out in the extract at paragraph 14. above, it is certainly sensible and common outside *Buckton* (1) and (2) situations for

trustees to seek directions when they wish to defend a claim brought against the trust in circumstances where the beneficiaries are not proposing to do so. That is a traditional *Beddoe* claim, including in cases where a third party claims to be beneficially entitled to the whole fund. Such a claim is brought in separate proceedings to the main claim.

27. In a *Buckton* (1) or (2) case, I agree that there are cases where it will be sensible for a trustee to seek Court directions well before the substantive disposal hearing before arguing one side of the claim, as suggested in the authority referred to in the last sentence of the [48-035] extract, which is the decision of Master Shuman in *Fantini v Scrutton* [2020] EWHC 1552 (Ch) at [62]. Take for example a very high value trust dispute where there are two sets of beneficiaries, groups A and B, group B consists of minors and unborns, and group A takes a construction of the instrument that is in its interests and not the interests of group B, the trustee is unsure as to whether it should take the other side of the argument and group A argues that it would be improper for the trustee to take the other side of the argument, saying the point is obvious and the trustee will have to bear the costs if it loses. In such cases, the trustee may well wish to seek Court confirmation as to whether it is appropriate to take the other side of the argument from group A.
28. However, whether such an application is appropriate will depend on the facts of the case. I would not wish to encourage trustees or personal representatives to do so as a matter of course in all cases. For example, in the case of a small value trust or estate, in circumstances where it is accepted by the beneficiaries that the trustee should take the other side of the argument and the trustee is comfortable with doing so, it is hard to see what would be gained by the cost of making such an application to Court. In *Fantini* itself, for example, there was agreement that the claimant executor should set out both sides of the argument and therefore no need to refer the matter to the Court: [60]-[61].
29. Applying that to the facts of the present case, I consider that it might have been sensible for Susan to have raised the point with Karen, in circumstances where Karen had stated that she was seeking the costs of the claim from Susan personally, asserted that Susan's stance on the point was motivated by conflict of interest and sought Susan's removal, and if Karen had not initially accepted Susan should take the other side of the argument, to have raised it with the Court. In such a situation, raising the point and if necessary asking the Court to give a direction on it would have put the point to bed. However, Mr Burton accepted that Karen would not in that scenario have opposed Susan taking the other side of the argument in circumstances where Georgia and Daniel did not wish to play an active role, and in my judgment that would have been the right stance for Karen to take. Therefore, given also the limited liquid assets in the estate, I do not think Susan can be faulted for choosing to take the other side of the argument without Court endorsement to the extent of making her costs of taking the other side of the argument costs that are not properly incurred. That would be an overly harsh reaction. By way of sense-check, had the matter come before me without anyone taking the side of the argument for ademption, I would have asked Susan to do so. Further, at worst that could have led to the extra costs of an adjournment.
30. A linked, but broader question, is whether Susan conducted the claim more generally in the way that one would expect a fiduciary to do. One can have situations where a

trustee takes the position at trial that it must ordinarily remain neutral but to assist the Court it should take the other side of the argument.

31. Here, Susan took one side of the argument without saying that she would normally remain neutral and was simply taking one side to assist the Court, and did so both when the point first arose a number of years ago in correspondence and at the substantive hearing before me. Further, she did not respond to the detailed articulation of the ademption argument by Karen through her solicitors in her 7 March 2022 letter or the reference back to this in the letter of claim.
32. Given the points in paragraphs 29. to 31. above, I have considered whether Susan can be said to have acted otherwise than for the benefit of the estate within the meaning of PD 46 para.1(1)(b) or have acted unreasonably in the conduct of the proceedings within the meaning of PD46 para.1(1)(c), and if so whether the costs of taking the other side of the argument were by reason of this not properly incurred and whether the costs of Karen arguing out the point were ones that Susan should bear personally.
33. As to para.1(1)(b), I do not consider that I can find that she was acting for her own benefit, all the more so in the circumstances set out in [22] above, and in circumstances where the issue needed to be resolved in the interests of the estate given the difference in view and where she herself asked as executrix in her acknowledgment of service and witness statement for the matter to be determined.
34. As to para.1(1)(c), there will be cases where unreasonable conduct in the proceedings by a fiduciary will cause unnecessary costs to have been incurred. In such cases, the fiduciary should be responsible for them and not be able to indemnify themselves from the fund. However, here, I have found that it was reasonable and indeed necessary to have Susan take the other side of the argument from Karen on the Construction Claim. While I consider that Susan should have responded to the letters that I have mentioned, I cannot see that the failure of Susan to respond to the analysis in the 7 March 2022 letter of claim or the letter of claim could have caused unnecessary cost, as the subsequent costs of litigating out the Construction Claim would have still needed to be incurred even had Susan responded.
35. Here, I have found that it was ultimately reasonable and indeed necessary to have Susan take the other side of the argument from Karen on the Construction Claim. As set out above, if I had been asked at the start of the hearing whether I wanted to hear written and oral submission from Susan as to the other side of the argument, I would certainly have said that I did, and as explained above Karen would have accepted if it had been raised earlier than Susan should address the Court on the other side of the argument. Further, Susan did make clear in her response to the claim that she sought the Court's determination as executrix and had explained in her evidence that she had sought to remove any financial interest of hers in the issue.
36. Therefore, I consider that the costs of Susan putting one side of the argument were properly incurred. Once it is accepted that she could properly put one side of the argument, I consider those costs were properly incurred whether or not she prefaced it with the fact that ordinarily a personal representative would remain neutral. For the same reasons, I do not consider that her conduct means that Susan should bear Karen's costs personally rather than those costs coming out of the estate.

37. I have taken into account the fact that I consider that Susan should have brought the claim earlier. That was of relevance in deciding the Removal Claim, in respect of which I decided that Susan should be removed and have decided below that Susan should bear the costs of this claim personally. However, I do not consider that should cause me to deprive her of getting her costs out of the estate of the Construction Claim, as the costs of arguing it out would have been incurred if she had taken that step a few years ago, and in any event this relates to historic conduct well before the claim was brought.
38. I have also taken into account the other arguments put forward by Karen, but I do not consider they are sufficient to cause me to deprive Susan of her costs of this. Ultimately this needed to be resolved by the Court given the different stances on it, and responding to the letter before claim would not have made a difference to this.
39. Finally, Mr Burton contended in oral argument that the effect of ordering costs out of the estate could be that it was borne rateably by the different specific bequests, including the property at Nether Hall Farm, the largest value asset in the estate and one which was to pass to Karen, necessitating its sale, which she very much wanted to avoid. The reason for that, he contended, was that if the remaining residue of the estate was about £150,000, which would be used in the first instance to pay the further IHT of around £60,000, then the combined total costs of the parties of around £160,000 would more than exhaust the residue, taking into account also the costs of the appointed independent personal representative. Therefore, to meet such expenses from the estate, recourse would need to be had to the sixth priority category in Part II of Schedule 1 to the Administration of Estates Act 1925, namely property specifically devised or bequeathed rateably according to value. He contended that what in practice would happen was that Karen would waive her claim to costs to avoid that, and Susan may not, which would be unfair to Karen and could even lead to her paying Susan's costs. Therefore, he contended, the costs should be borne by Susan instead.
40. Paragraph 1.1 of PD 46 explains that whether costs were properly incurred depends on all the circumstances of the case. However, in my judgment this factor should not tip the balance against Susan in determining whether she properly incurred the costs of defending the claim. It does not concern the conduct of the litigation by Susan in incurring the costs that she has expended. Therefore, in a typical case there would be no question of someone who had otherwise properly incurred the costs of a standard *Buckton* (1) or (2) case being deprived of recovering their costs from the estate because of the impact on another of the parties of such an order. I do not consider the position should be different here. Further, for completeness, I have held that the costs of the removal claim, which Mr Burton suggested could account for approximately £80,000 of the £160,000 total costs incurred, should be borne by Susan, and there is not specific evidence before me of precisely how the £80,000 odd costs of the Construction Claim would be borne in practice. To take an example, it is as yet undecided how the burden of the IHT will ultimately be borne, and if, as explored in [91(1)] of the Judgment, David's estate and Susan are each ultimately liable for half of the £387,000 IHT and Daniel and Georgia's third of the residuary estate would be reimbursed for the IHT that has been paid from it, there may be more in the residuary estate than submitted by Mr Burton.

The costs of the Removal Claim

41. I decided in the Judgment that the estate has not been administered as it should have been in a number of respects that gave me serious cause for concern, so I have found conduct on the part of the executrix which justifies removal. For example, at [85] I stated that:

“I have a number of serious concerns about how the estate administration has proceeded to date in Susan’s hands. There are a number of steps that should have been taken which have not. I have explained above that there are a number of steps that Karen has taken in the past that she should not have, but the focus for the purposes of removal must be on Susan because she is the executrix.”

42. I then went through what those serious concerns were and what the steps that I considered should have been taken were. Similarly, I explained at [95] that *“I consider the past administration [of the estate] has been lacking in a number of respects”*.

43. Mr Blackett-Ord submitted that I did not make findings against his client and was simply judging what was in the interests of the estate. Rather, by focusing, as I did, on what was in the best interests of the estate, and in circumstances where the trial was conducted on the written evidence, I was simply finding that it was in the interests of the estate for an independent executor to be appointed.

44. I agree that there can be cases where relations have simply broken down and that in removal cases one is not seeking simply asking which party is right but rather- per [62] of my Judgment- examining what is in the interests of the beneficiaries. However, my serious concerns about how the estate administration had proceeded in Susan’s hands and my view that a number of steps should have been taken that were not, necessarily relate to the administration by Susan, her actions and the actions of those on her behalf. Therefore, this went well beyond a case where through no fault of the parties, a new personal representative is required.

45. In these circumstances, the costs of defending the claim were not properly incurred. Rather Susan contended that there was no cause for removal, that the estate had been administered properly and that it was not necessary for the future to have an independent appointment made, and I rejected that. This is not simply a case where there has been a breakdown in trust and confidence, for example.

46. A trustee or executor who is removed on the grounds of their conduct and unsuccessfully resists the claim until judgment will normally bear personally their own costs and those of the claimant, because they will not have properly incurred their costs or their liability to the claimant. The practice that has developed, and was adopted in this case, of dealing with the matter on the written evidence does not change the underlying principles in this regard, although it naturally reduces in practice in some cases what findings can be made as to the conduct of the personal representative.

47. Where removal proceedings are intimated against a trustee or someone administering an estate, and the beneficial class is split in their view as to the appropriate course of action, it is sensible for the recipient to consider seeking Court directions promptly to resolve the matter if such proceedings have not yet been launched by the beneficiary,

or making or agreeing to an offer for appointment of an independent trustee. If instead they resist the claim without qualification, they necessarily run the risk that the Court finds that they have not acted reasonably in defending the claim, and cannot rely on their indemnity.

48. Here Susan has maintained forcefully until Judgment the position that she is the appropriate administrator. I have rejected that and found that I have serious concerns about the administration of the estate for the future in light of how it has been conducted in the past.
49. Finally, Mr Blackett-Ord submitted that the concerns in the Judgment about the past administration of the estate were slightly unfair, and that this may be relevant to costs. I do not propose to go into them in any detail because I have set out my reasoning in the Judgment. For completeness, I reject the submissions that Susan could not have applied for directions until she obtained probate in January 2023, respond to a letter before action sent before that point or consider the remaining issues in the administration at that stage. Karen was able to seek directions as beneficiary, as she did, and Susan was able to do so, whether as named executrix or beneficiary. Similarly, Susan, who had engaged solicitors for some years by that point, and was administering the estate, should have responded to the letter before action and considered how to progress the outstanding issues. Further, as I made clear in the Judgment, whatever the reason for the failure, I would have expected to have been provided with an up-to-date account of the estate and its assets, whether BPR or APR had been claimed and its amount. In relation to the composition of the estate, for example, as I stated at [79], no breakdown of the current state of the estate was put before me and Susan and her representatives were unable to assist in relation to my questions about them.
50. Therefore in my judgment Karen's costs of this should be borne by Susan, or- if not paid- out of her share of the estate, or if that share is insufficient as an expense of the estate, and Susan should bear her own costs personally.
51. The costs should be subject to detailed assessment if not agreed. The substantive hearing lasted considerably longer than one day and I do not consider summary assessment would be appropriate.
52. Finally, Mr Burton submitted that there should be an interim payment of £50,000, payable within 28 days, on the premise that Susan would be liable to pay Karen's costs of both the Removal and Construction Claim.
53. The total costs of Karen of the two claims are just over £80,000 and Susan just under £80,000. Mr Burton submitted that it was fair to regard half of each party's costs as attributable to the construction issue in circumstances where both issues were fully argued out. I am content to adopt that course for the purposes of interim payment, the removal issue having occupied more evidence and the construction claim more time in oral submission.
54. Treating therefore Karen's costs of the construction claim as £40,000 and taking into account the slight uncertainty as to the precise proportion attributable to the construction claim, I therefore consider it appropriate that there should be an interim payment of £25,000, payable within 28 days.

55. This does not exceed a reasonable proportion of the likely amount that will be awarded on detailed assessment, and in my judgment Karen should not be kept out of the money longer than is necessary.