Neutral Citation Number: [2025] EWHC 116 (Ch)

Case No: PT-2024-000569

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 January 2025

Before :

MASTER BRIGHTWELL

- -

Between :

VIVIEN ANN HANSON	**Claimant**
- and -	
(1) JEREMY ALLARD COLEMAN	**Defendants**
(2) MARCUS LEONARD COLEMAN	

- -
- -

Toby Bishop (instructed by **Warners Law LLP**) for the **Claimant**
Maurice Rifat (instructed by **Palmers Law**) for the **Defendants**

Hearing date: 21 November 2024
Further written submissions: 19 December 2024

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Approved Judgment

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Master Brightwell :

1. This judgment concerns the costs of a claim for the removal of personal representatives. The claimant sought the removal of her two brothers as executors of their late father, Frank Leonard Coleman, who died on 19 June 2021, leaving a will dated 26 August 2005 ("the Will"), by which he appointed the defendants as executors and left his residuary estate to the three parties in equal shares.

2. At the hearing on 21 November 2024, and for more detailed reasons I gave on that occasion, I made an order removing the defendants as executors, and appointing Cripps Trust Corporation Ltd in their place. In order to place the costs points in context, the basis of the decision was, in brief summary, as follows:

    i) The defendants had obtained a grant of probate on 16 June 2022 on the basis of an inheritance tax return which showed the estate having a beneficial interest in two properties, at 41 Ronaldstone Road, Bexley and 41 Salisbury Road, Bexley. The return showed the estate having a two-thirds interest in the former property and a 50% share in the latter. The defendants then subsequently intimated a claim to own a greater beneficial share of the two properties at the expense of the estate, placing them in a position of conflict of interest and duty and did not recognise this until filing evidence in response to the claim. It is common ground that each defendant has a beneficial interest in one of the two properties.

    ii) There has been a significant delay, no progress has been made in realising the estate's interest in the two properties, and the position regarding a minority shareholding in an unlisted company was inadequately explained despite requests being made over an extended period. That delay has at least arguably caused financial loss to the estate, through the diminution in value of property, a loss of occupation rent (and legal costs have been charged to the estate which arguably ought not to have been). The first defendant continues to intend to purchase the interest in the Salisbury Road property from the estate and accepted that, if the claimant did not consent to such a purchase, an application to court for directions would be required.

    iii) There are thus likely to be further legal costs incurred in any event, such that the cost of an independent administrator would not be a factor tending against such appointment.

    iv) The defendants took an incorrect approach to their duties as executors for a long time and, coupled with the delay, the claimant's

> apprehension that the estate would not be administered in the interests of all the beneficiaries was reasonably formed. The interests of the estate as a whole required the appointment of an independent administrator, which overrode the testator's wishes as to the identity of his personal representatives.

3. When it came to submissions on costs, a point of law relied on by Mr Rifat arose, of which the claimant had no notice and on which it appeared to me that the parties were not fully prepared to address me. It is also a point which does not appear to be the subject of direct authority. I accordingly gave the parties permission to exchange further written submissions on that point (and on the recoverability of costs incurred pre-action) after the hearing and indicated that I would give a decision on costs at a later date.

The parties' positions on costs

4. The successful claimant asks for an order that her costs of the proceedings be paid by the defendants inter partes, and on the indemnity basis.

5. The defendants accept that, having been unsuccessful, they should pay the claimant's costs on the standard basis. They resist an order for indemnity costs. Furthermore, however, they contend that they have an indemnity out of the estate for the claimant's costs, such that her costs should be paid only out of the estate, i.e. borne equally by all three parties.

6. The defendants also contend that they should not be deprived of their indemnity for their own costs of defending the claim, which should also be paid out of the estate on the indemnity basis.

7. The availability of an indemnity to a trustee or personal representative when defending proceedings has been the subject of a number of recent authorities. The position was summarised by HHJ Matthews in *Smith v Michelmores Trust Corporation Ltd* [2021] EWHC 1521 (Ch), following the decision of the Court of Appeal in *Price v Saundry* [2019] EWCA Civ 2261. He referred first, at [7], to the right of a trustee or personal representative to an indemnity out of the fund for reasonably incurred expenses, and then continued at [9]-[12]

> '9. ….The indemnity is available for expenses *properly* incurred on *trust* business. In the context of costs incurred in trust and estate litigation, however, there are special rules to be found in the CPR, both at rule 46.3 and also at paragraph 12 of the Practice Direction to Part 46. In *Price v Saundry*, Asplin LJ (again at [22]) described these as "a commentary upon and complementary to" section 31. I understand this to mean that these provisions implement the statutory indemnity in the litigation costs context.

10. The first of these two provisions is as follows:

> "46.3 (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. The second provision reads as follows:

> "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. In *Price v Saundry*, Asplin LJ summarised the effect of all these provisions by saying:

> "24. The test for whether the indemnity is available or has been lost or curtailed is also the same under section 31(1) of the 2000 Act and section 30(2) of the 1925 Act. It is best expressed in the form of two questions: were the expenses properly incurred?; and were the expenses incurred by the trustee when acting on behalf of the trust?

> The answer to those questions is often far from straightforward. They are dependent upon all the circumstances of the case."

13. Asplin LJ then discussed certain authorities, and concluded:

> "29. All of this discussion brings one back to the question of whether the costs incurred by trustees in defending an action or arguing a point in the particular circumstances were expenses 'properly incurred' when acting on behalf of the trust. It seems to me that 'properly incurred' should be interpreted to mean 'not improperly incurred'. This was the way in which Lindley LJ approached trustee indemnity in *Easton v Landor* (1892) 62 L.J. Ch 164 and in *In re Beddoe, Downes v Cottam* (1893) 1 Ch 547. See also *In re Grimthorpe Dec'd* [1958] Ch 615 per Danckwerts J at 623.
>
> […]
>
> 31. It seems to me, therefore, that if a breach of trust causing loss to the trust fund or other misconduct is established against the trustee, the trustee may be deprived of his indemnity depending upon all the circumstances. Misconduct in this context should be construed widely to include not only misconduct in the sense of dishonesty but also conduct which is unreasonable in the circumstances. It does not extend, however, to a mere mistake on the part of the trustee: see *Lewin on Trusts*, 19th ed. para 27-112."'

8. In *Price v Saundry*, at [27], Asplin LJ also cited the decision of Lightman J in *McDonald v Horn* [1996] 1 WLR 1220. Commenting on different forms of trust (or estate) litigation, he referred, with reference to the decision in *Re Buckton* [1907] 2 Ch 406, to different categories of proceedings. One category is that of a 'beneficiaries dispute', which he defined as 'a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future. This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and/or damages for breach of trust'. He then said that, 'A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate: see *per* Hoffmann L.J. in *McDonald v. Horn* [1995] ICR 685, 696'. This is consistent with the characterisation of such a dispute as a category (3) *Buckton* claim, i.e. hostile litigation.

9. I consider that an opposed claim for the removal of a personal representative pursuant to section 50 of the Administration of Justice Act 1985 will frequently constitute a beneficiaries' dispute. It has been said that the court must assess the character of the proceedings and the positions adopted by the

parties and their conduct within them, rather than their form, in order to assess whether the proceedings should be seen as a hostile beneficiaries' dispute (i.e. with costs determined in accordance with CPR r 44) or as a claim pursued for the benefit of the trust or estate (with costs payable from the estate): see *Green v Astor* [2013] EWHC 1857 (Ch) at [56], Roth J. As the authorities discussed above make clear, the relevant provisions of the Civil Procedure Rules give effect to this principle.

The effect of clause 15.1 of the Will

10. The further point raised by Mr Rifat is this: the defendants seek to rely on the exemption clause contained in the Will in support of an argument that it exempts them from personal liability to the claimant in costs. While his further written submissions do not make this clear, my understanding from what was said at the hearing is that the defendants contend that the effect of this is that they have an indemnity for the costs which they are to be ordered to pay, or at any rate do not oppose an order that the claimant's costs be paid out of the estate.

11. Clause 15.1 of the Will provides as follows:

> 'No Executor or Trustee expressly acting as such shall be liable for any loss arising by reason of any improper investment made in good faith or retention of any investment retained in good faith or for the negligence or fraud of any agent employed in good faith by him or her or by any other Executor or Trustee (whether or not the employment was strictly necessary or expedient) or by reason of any mistake or omission made in good faith or by reason of anything except deliberate or reckless wrongdoing on the part of the Executor or Trustee whom it is sought to make liable.'

12. With reference to *Lewin on Trusts*, 20th edn at 41-127, Mr Rifat points out that the protection afforded to a trustee under the general law may be enlarged by the express terms of a trust, which may be achieved by provisions that (a) enlarge the powers of trustees, (b) abridge their duties (c) exclude liability for breach of trust or (d) enlarge rights of indemnity in respect of liabilities to third parties. He submits that clause 15.1 is within (c) as an exclusion clause, and that the defendants are thus exempted for liability to loss from acts wrongly done but within the scope of the executors' powers. Reference is made to *Armitage v Nurse* [1997] Ch 241 at 252, where Millett LJ said that for a trustee to be liable for wilful default, he must be conscious that he is committing a breach of duty or recklessly indifferent whether this is so. Mr Rifat submits that an exemption clause for everything except 'deliberate or reckless wrongdoing' should be construed similarly.

13. Mr Bishop responds by pointing out that the estate has not been caused any loss for which an exemption of liability might be needed. The defendants do not suggest that they have wrongfully paid their own costs of litigation (as opposed to the costs of administration) out of the estate in advance of the hearing of the claim. Nor have they paid the claimant's costs out of the estate. As Mr Bishop says, a loss will be suffered only if the court allows the defendants to indemnify themselves out of the estate.

14. I agree with Mr Bishop. There is no relevant loss, caused in any of the ways covered by clause 15.1, to which an exemption clause could apply. The clause is in my view clear in its intended effect, that it is to relate to loss to the estate which is caused by the executors. As Millett LJ also said in *Armitage v Nurse*, at 255G-256A, clear and unambiguous words must be used in an exemption clause, i.e. confirming that such clauses are strictly construed. See too *Bonham v Blake Lapthorn Linell* [2006] EWHC 2513 (Ch) at [177], Kitchin J. I do not consider that the cost of an executor instructing solicitors to defend a removal claim constitutes a loss for the purposes of the exemption clause, at least where those costs are not wrongfully paid out of the estate. Nor do I consider a costs liability incurred to the claimant in a removal claim to be a loss for the purposes of the exemption clause. The question whether the executor has an indemnity for the costs of the proceedings and how the costs of the successful claimant should be borne are matters to be determined in accordance with the established principles set out in the section above, not by regard to an exemption clause in a standard form.

15. Even though Mr Rifat does not put his case this way, I consider that the only possible way in which his argument could succeed is if clause 15.1 could be construed as encompassing an exclusion of liabilities to third parties. At the hearing, his argument appeared to be that the clause expands the scope of the executors' indemnity such that they are entitled to an indemnity in respect of their liability to the claimant in costs, rather than that such liability is excluded. I therefore referred the parties to the discussion in *Lewin* at 41-147 on this point, but in his further submissions Mr Rifat has not referred to it or to the authorities mentioned within it. In *Nick Kritharas Holdings Pty Ltd v Gatsios Holdings Pty Ltd* [2001] NSWSC 343 Hamilton J held, in relation to an Australian trading trust, that an exemption clause should be construed as extending to liabilities incurred by the trustee to the beneficiaries and to third parties when carrying out the trading operation for which the trust was created. He reached this view on the basis of the application of well-established principles of interpretation, including the matrix of fact surrounding the creation of the trust.

16. I consider that Mr Rifat was correct not to pursue this line of argument in the present case. No particular factor or factors are relied on by way of

background matrix of facts in support of an argument that the deceased might have intended the reference to loss in the exemption to refer to loss other than to the estate, as such a clause is generally interpreted. I do not need to determine whether a clause in a will which purported to give rise to an indemnity from the estate for the cost of meeting an adverse costs order in proceedings brought by a beneficiary would be valid. Such a clause would be extremely unusual and would at the least have to be clearly and unambiguously worded.

17. Accordingly, I do not consider that clause 15.1 of the Will is relevant to the determination of the costs of this claim.

Discussion

18. Mr Rifat submits that, for a number of reasons, the defendants' conduct was not sufficiently egregious to deprive them of their indemnity from the estate. He also opposed the suggestion that this should be characterised as a beneficiaries dispute. In support of these linked submissions, he made the following points:

    i) It might be said that the estate (or the deceased) took the risk of this sort of dispute by appointing two of his children as executors where the properties within the estate were both jointly owned with other parties, including the defendants.

    ii) The delay which has been occasioned in the administration of the estate is not the worst.

    iii) The defendants have acted on the basis of legal representation throughout. Since the departure of their former solicitors, Jarmans, who were the subject of an SRA intervention in early 2024, a more constructive approach has been adopted.

    iv) Even though there was a conflict at one point, as claims were intimated by the defendants against the estate, their position during the substantive hearing (albeit subsequently withdrawn after they had been removed) was that they would not make a claim against the estate.

    v) In the weeks before the hearing, there was an attempt to resolve the dispute through without prejudice correspondence, which I have considered.

19. In light of these factors, Mr Rifat submitted that the defendants' statements were clumsy and ill-advised, not deliberate or reckless. He submitted that the court was not able to come to the view that there was a sufficient breach for

the loss of the defendants' indemnity, suggesting that the indemnity is lost only if there is a 'full-blown breach of trust'.

20. I would also note that Mr Rifat relied on the decision of HHJ Eyre QC in *Perry v Neupert* [2019] EWHC 2775 (Ch) in support of the proposition that there is a low threshold for an executor to retain his indemnity. With reference to Australian authority, the judge said at [22], that it was relevant to consider whether it was reasonable for the trustee (or executor) to defend the application and, at [26], that it was not sufficient that the trustees' views were unreasonable. He went on to say that, 'What was required was that the conduct of the trustee in question in engaging in the litigation and indeed so without referring the matter to the Court for a *Beddoe* sanction was reasonable'.

21. I disagree with this characterisation of the threshold for the loss of the indemnity. The assessment is of the conduct of the defendants before, and most importantly, after removal proceedings are intimated. The key criterion where the claim succeeds and where they are removed is whether they have defended the proceedings in their own interests or in the interests of the estate. There is no need for a positive finding of breach of trust in order for the indemnity to be lost. The question for the court is whether it was unreasonable to defend the application without the court's approval: *Perry v Neupert* at [24]. Furthermore, as Asplin LJ said in *Price v Saundry* at [31], misconduct should be construed widely and the question is whether the defendants' conduct was unreasonable in the circumstances.

22. I am satisfied that this claim is properly to be characterised as a beneficiaries dispute, and that the defendants' conduct has been unreasonable in the circumstances. It should have been obvious to the defendants from the outset that they had a claim against the estate because they disagreed with the advice of Kreston Reeves, as communicated to the claimant on 4 October 2022, that the properties were owned as tenants in common, having been held in equal shares with others (as mentioned at paragraph 2(i) above), but each defendant considered that he had a greater share than this entailed. Even in the without prejudice correspondence in the lead up to the hearing, it was maintained that the first defendant had a greater beneficial interest in the Salisbury Road property. This position was abandoned only on 30 October 2024, when the defendants put forward a proposal for them to finalise the estate administration, but continued to resist any liability for costs. They also continued to assert a right to purchase the properties from the estate. I do not consider this correspondence to justify the characterisation of the defendants' conduct as reasonable.

23. Mr Rifat positively suggested that Jarmans had not served his clients well, although said he could not disclose privileged matters. As I indicated in my ruling on the substantive claim, their correspondence in the early stages of the

dispute was significantly misconceived. They wrote on 12 January 2023 that if the claimant did not accept the defendants' claim to unequal ownership of the properties, it was incumbent on her to issue a claim against them as executors. They then wrote on 26 January 2023 that their clients had a duty to 'correct the fundamental issues and problems within the estate and to finalise a settlement', i.e. to pursue and settle their own claim against the estate while remaining as executors. In light of the obvious conflict they should either have withdrawn their own claims immediately, or indicated a willingness to stand down. Nonetheless they maintained their position as regards the first defendant's claim until after proceedings had been issued, and until well after Jarmans had ceased to act.

24. On this basis, I conclude that the defendants defended the claimant's claim in their own interests (or at least the interests of the first defendant), and also unreasonably. That was fundamentally the cause of the dispute, and this justifies the characterisation of the dispute as a beneficiaries' dispute. Rather than alleging breach of trust, the claimant was alleging that there was a conflict of interest, i.e. a breach of fiduciary duty, on the part of the defendants. It seems to me that she was correct. It was objectively unreasonable for the defendants to maintain their position in the face of the claimant's solicitors repeatedly explaining the correct position as to the defendants' duties as executors. Even when the claim against the estate was belatedly dropped (for a while), other issues remained, such as the long (and in my view, significant) delay in administration and the lack of accounting in relation to the unlisted shareholding.

25. I should add that I do not consider that the deceased can be said to have taken the risk of the conflict which emerged, or to have permitted the defendants to act despite the conflict. The Will did not on its face permit the defendants to act as executors if they wished to pursue a claim against the estate. Their power to exercise powers and discretions even though interested (clause 15.2) was not so wide, nor did Mr Rifat suggest that it was.

26. For these reasons, I consider that the defendants should be deprived of their indemnity for their costs of defending the claim (and, it must follow, for the costs they will be ordered to pay to the claimant).

27. It is accepted that the claimant's costs should be paid on the standard basis. Relying on the same matters as those which justify the deprivation of the defendants' indemnity, Mr Bishop seeks an order that those costs be paid on the indemnity basis.

28. The question is whether the conduct of the defendants is outside the norm. I do not consider that it follows from an order depriving an executor defendant of their indemnity that indemnity costs must be ordered the other way. A

beneficiaries' dispute falls within the third *Buckton* category of ordinary hostile litigation and is treated accordingly for the purposes of costs. An order will generally be made on the standard basis, unless the conduct of the paying party is outside the norm or unreasonable to a high degree.

29. Critical though I have been of the defendants' conduct, I cannot say that such conduct is outside the norm or unreasonable to a high degree. The court is accustomed to seeing personal representatives and trustees clinging to office despite proper requests for them to retire, sometimes (as here) modifying their position in some respects as a hearing approaches. The mere fact that the opposition to a removal claim is unsuccessful is not a reason to order indemnity costs.

30. The costs therefore fall to be assessed on the standard basis. Costs assessed on the standard basis are reasonable costs which are proportionate to the matters in issue, with any doubts as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount to be resolved in favour of the paying party: CPR r 44.3(2).

31. The claimant's costs schedule for the hearing, on which I heard submissions as to the quantum of costs, is in the total sum of £44,140.94, inclusive of VAT. The rates for the grade A fee earner who had conduct of the claim were from £340 from March 2023 and £365 from March 2024. The grade A guideline rate for Kent (National 1) was £278 during 2024.

32. Mr Rifat submits that 25 hours of attendances is too much, that the work on documents (totalling nearly £13,000) is excessive and some items relate to the estate administration and not the claim, and that there should be reductions accordingly. He queries Mr Bishop's brief fee of £6,500 and complains by reference to the work done on documents that some of the work seems to have been done before the proceedings were issued.

33. In his further submissions, Mr Bishop confirms that the pre-action costs amount to around £5,700 including VAT. I accept that they are recoverable insofar as they bear relation to the subject matter of the proceedings or are attributable which gives rise to the claim. I am satisfied that correspondence post-dating October 2022 (which I am told is the relevant period) was directly relevant to the issues which caused the claim to be properly brought and is thus in principle recoverable. Other issues which the claimant had previously raised in person were not then pursued.

34. I consider that some reduction is required to take account of (a) the excess of the rates charged over guideline rates, and (b) the amount of time on attendances and documents – I have doubts on the reasonableness and proportionality of both. I do not consider that a reduction is required because

estate administration matters were considered – the claimant's solicitors were quite properly raising the lack of progress on administration as had to be done in the context of this litigation. Likewise, I consider the brief fee to be reasonable.

35. I will take account of these points by reducing the sum for solicitors' time (£27,604.95) by around 30%. Once VAT is added to a 30% reduction that makes the reduction around £9,937. I will summarily assess the costs for the hearing at £34,000 inclusive of VAT.

36. The claimant's solicitors have also filed a separate costs schedule for the costs of their further submissions. This seeks an additional £6,637.80 in total, including £4,400 for counsel's fees. I do not consider this proportionate to the further points on which submissions were required. Furthermore, there were points on which both sides were not fully prepared to address me at the hearing. I consider that £34,000 is the reasonable and proportionate sum for the claimant's total costs in all the circumstances and do not add any further sum in relation to the post-hearing submissions.

Conclusion

37. For the reasons I have given above, I will make an order that the defendants do pay the claimant's costs of the claim on the standard basis, summarily assessed at £34,000 inclusive of VAT, and depriving the defendants of their indemnity for the costs of the claim.