Neutral Citation Number: [2023] EWCA Civ 923

Case No: CA-2022-002385

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
Mrs Justice Bacon
Claim No: PT-2022-000662

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2023

Before:

LORD JUSTICE MALES
LADY JUSTICE FALK
and
SIR LAUNCELOT HENDERSON

- -

In the matter of
The Estate of Ian John Smith (deceased)

Between:

Brian Richard Bowser	**Claimant/ Appellant**
- and –	
(1) Julie Ann Smith	**Defendant/ Respondent**
(2) Michael Anthony Green (as personal representative of the Estate of Ian John Smith (deceased))	

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Araba Taylor (instructed by **Bowser Ollard & Bentley Ltd**) for the **Appellant**
Edward Hicks (instructed by **Ashtons Legal**) for the **Respondent**
Michael Green appeared in person as a solicitor advocate

Hearing date: 13 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Launcelot Henderson:

Introduction

1. This is an appeal against a costs order made by Bacon J ("the Judge") on 24 November 2022 ("the Costs Order"), pursuant to directions which she had given on 3 November 2022 when making a consent order removing the two original executors of the will ("the Will") of the late Ian John Smith ("the Testator"), who died on 29 May 2022, and replacing them with an independent administrator.

2. As I shall explain, the dispute came before the Judge on the hearing of an application for interim relief in proceedings brought by one of the original executors of the Will (who was a solicitor in the firm which had acted for the Testator when he made the Will), seeking the removal of the other executor (who was the Testator's estranged wife, and later widow, and the mother of their ten children). With some encouragement from the Judge, an agreement was quickly reached at the hearing that both the existing executors should be replaced, and a suitable candidate for that role was identified, but the question of costs remained outstanding and in dispute. After the parties, through their counsel, had briefly indicated their respective positions on costs, the Judge gave unopposed directions for determination of this question by the court on paper, after an exchange of written submissions and replies thereto within a short period. This procedure was duly followed, and the Judge made the Costs Order on 24 November without any further hearing.

3. The claimant in the proceedings (and the appellant in this court) is Brian Bowser ("Mr Bowser"), a director of Bowser Ollard & Bentley Limited which carries on business as solicitors under the trading name of Bowsers at offices in March and Wisbech in Cambridgeshire. The Testator executed the Will on 30 August 2019, a few months after he and his wife had separated in March of that year, and she had gone to live with the nine younger children of the marriage in rented accommodation. The Will was prepared for the Testator by Bowsers, and his signature to it was witnessed by two employees of the firm. The executors and trustees appointed by the Testator in clause 2(a) of the Will were (a) his wife Julie Ann Smith (to whom I will refer, for convenience and with her permission, as "Julie"), and (b) one of the directors at the date of his death of Bowsers. Mr Bowser was nominated to act in that capacity within a few days of the Testator's unexpected and untimely death in a road accident on 29 May 2022.

4. Julie was the sole defendant in the proceedings brought by Mr Bowser for her removal as an executor, and she is the respondent to the appeal.

5. The replacement administrator was added as a party to the appeal by an order made by Males LJ on 5 July 2023. He is Michael Anthony Green, a partner of Howes Percival LLP ("Mr Green"). He was appointed by the Judge's order of 3 November 2022 to act as substitute personal representative pursuant to section 50(1)(a) and (2)(b) of the Administration of Justice Act 1985 and to take out a grant, conditionally upon his filing a signed consent to act and a witness statement of fitness in accordance with CPR PD 57 para 13.2. Those conditions were fulfilled by 17 November 2022. Mr Green appeared before us in person, exercising his right of audience as a solicitor advocate. He provided a helpful Note with up-to-date details of the composition and value of the estate. His position on the merits of the appeal was, very properly, one of neutrality. I record the gratitude of the court to Mr Green for his assistance.

6. The Costs Order was adverse to Mr Bowser. Indeed, it was described by his counsel, Ms Araba Taylor, in her written submissions as "to all intents and purposes, punitive", although I would not accept this description. Not only was Mr Bowser ordered to pay Julie's costs of the claim on the standard basis, but he was also deprived of any indemnity in respect of his own costs of the claim from the estate. Furthermore, Julie was awarded her costs of the claim to be raised and paid out of the estate on the indemnity basis, if and to the extent that her costs were not otherwise paid by Mr Bowser, although there is no reason to think that he will be unable to pay them. He was also ordered to make an interim payment to Julie of £12,500 within 14 days.

7. The Judge did not deliver a separate costs judgment, but stated her reasons as part of the Costs Order itself. In other words, it was a "reasoned order". Presumably for that reason, it lacks a neutral citation reference. I will need to examine some aspects of the Judge's reasoning in more detail later in this judgment, but in summary she reasoned as follows:

 (1) Mr Bowser began the proceedings without proper pre-action correspondence and without the protection of a *Beddoe* order. There was no urgency which justified this.

 (2) His action was unsuccessful. The order he sought was one restraining Julie from taking any steps in the administration of the estate, and providing for the estate to be administered by himself alone. Instead, the order agreed during the hearing was an order removing both parties as executors and trustees, and substituting an independent personal representative.

 (3) An order in those terms was precisely what Julie had proposed not long after the proceedings were issued: see her witness statement of 8 September 2022, and a repetition of the proposal in a letter from her solicitors (Ashtons Legal, "Ashtons") on 25 October 2022. Ashtons had also repeatedly urged Mr Bowser to resolve the matter without contested litigation, but he failed to do so and did not accept Julie's proposal until the hearing.

 (4) Mr Bowser's position had been based on his perception of a conflict of interest between Julie's role as an executor and her intention to make a claim against her late husband's estate under the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). Mr Bowser belatedly accepted at the hearing "that no such conflict arises as a matter of law", but he instead raised for the first time in his written costs submissions what the Judge considered to be a different conflict argument, "namely that it would not be possible for the minor beneficiaries to be represented by Julie in any 1975 Act proceedings", although Julie had never suggested that she would represent them.

8. The Judge then concluded her analysis as follows:

> "5. The Claimant's conduct in bringing and pursuing the proceedings has not, therefore, been a reasonable and proper exercise of his powers as personal representative. In the circumstances, the Claimant should pay the Defendant's costs and should not be indemnified for those costs or his own costs from the estate.

> 6. To the extent that the Defendant does not recover her costs from the Claimant, she should recover them from the estate. Her position from the outset of the proceedings was a reasonable one, and indeed was the position ultimately ordered by consent at the hearing".

9. Mr Bowser now appeals to this court, with permission granted by Nugee LJ. At the end of the hearing on 13 July 2023, we announced that the appeal would be dismissed for reasons to be given later in writing. In this judgment, I give my reasons for joining in that conclusion.

Relevant Principles of Law

10. The basic principles of law which shape the outcome of the appeal are not in dispute.

(1) In what circumstances may a personal representative be deprived of his right to reimbursement from the estate for expenses he has incurred?

11. Section 31 of the Trustee Act 2000, which is headed "Trustees' expenses", lays down the basic rule in subsection (1) that:

> "A trustee –
>
> (a) is entitled to be reimbursed from the trust funds, or
>
> (b) may pay out of the trust funds,
>
> expenses properly incurred by him when acting on behalf of the trust."

12. This principle is then applied, with appropriate modifications, to personal representatives by section 35, which provides:

> "(1) Subject to the following provisions of this section, this Act applies in relation to a personal representative administering an estate according to the law as it applies to a trustee carrying out a trust for beneficiaries.
>
> (2) For this purpose this Act is to be read with the appropriate modifications and in particular–
>
> > (a) references to the trust instrument are to be read as references to the will,
> >
> > (b) references to a beneficiary or to beneficiaries…are to be read as references to a person or the persons interested in the due administration of the estate..."

13. Where a personal representative has been a party to legal proceedings in his capacity as such, the above principles are reflected in CPR rule 46.3, which states that:

> "(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 [*which is immaterial*] 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."

14. According to paragraph 1.1 of the associated practice direction, PD 46:

> "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."

15. In a recent case in this court concerning the right to an indemnity of a defendant trustee in proceedings brought by a beneficiary for her removal, the leading judgment (with which Underhill and Arnold LJJ agreed) was delivered by Asplin LJ: see *Price v Saundry & another* [2019] EWCA Civ 2261. As Asplin LJ explained at [22], "the source of the right to an indemnity is to be found in section 31(1) of the Trustee Act 2000 and …the provisions of the CPR can only be a commentary upon and complementary to that section". After noting that section 31(1) of the 2000 Act replaced a similar provision in section 30(2) of the Trustee Act 1925, and represented "an attempt to codify the law as it stood", Asplin LJ said at [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."

16. Asplin LJ went on to say, at [29], that the phrase "properly incurred" should be interpreted to mean "not improperly incurred"; and at [31], she observed that:

> "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…"

(2) Is there any principle of law which prevents a claimant in family provision proceedings under the 1975 Act from acting as a personal representative of the deceased's estate?

17. At the hearing before the Judge on 3 November 2022, it was rightly, if belatedly, conceded by counsel for Mr Bowser that there is no principle of law which automatically requires a person who is bringing (or intending to bring) a claim under the 1975 Act, and who is also a personal representative of the deceased's estate, to cease acting in the latter capacity because of a conflict of interest. The reason, simply stated, is that both the applicant for reasonable financial provision, and the beneficiaries under the deceased's will or intestacy at whose expense any award under the 1975 Act would be made, share a common interest in the proper administration of the estate and the maximisation of the assets available to satisfy all beneficial interests in it, whether under the will, the law of intestacy or an award under the 1975 Act. Although we were not shown any judicial authority to this effect, the books appear to be unanimous on the point, while sometimes also stressing the need (with which I agree) for care to be taken by a 1975 Act claimant who is also a personal representative to keep the two capacities distinct.

18. Thus, for example, the notes in the White Book to CPR rule 57.16, which lays down the procedure for claims under section 1 of the 1975 Act, state at paragraph 57.16.1:

> "An application under the Act does not impugn the validity of the grant or the will (if any). There is no need for a spouse or civil partner to renounce probate or the right to letters of administration if such a person wishes to claim under the Act. The personal representative may in that situation be the claimant. There is no need for the same person also to be joined as a defendant in their capacity as personal representative."

19. To similar effect, <u>Ross on Inheritance Act Claims,</u> 4th edition (2017), when discussing the position where the claimant is also a personal representative, says at para 1-032 and following:

> "In general, it is perfectly in order for a claimant under the 1975 Act to act as personal representative, and this situation can arise in a number of ways. It most commonly occurs when the surviving spouse is either appointed executor by the will or has the right to a grant on the deceased's death intestate and is in competition with the deceased's children, whether by that or an earlier marriage….

> 1-033 While it may be natural to assume that a personal representative in such a situation ought to renounce, that is not so. There is no need for a claimant named as executor or having a right to administration to renounce. Making a 1975 Act claim is in no way inconsistent with the claimant's role as personal representative; they are not, by doing so, challenging the will, nor are they making a claim adverse to the estate, as they would be if (for example) they were claiming a beneficial interest in an asset which the deceased had purported to dispose of by their will. They are merely seeking a redistribution of the estate at the expense of the existing beneficiaries."

20. See also Francis on Inheritance Act Claims: Law, Practice and Procedure, chapter 3, at [35], and chapter 12, at [1], where the following cautionary note is sounded:

> "It is for the adviser to ensure that a personal representative, whether claimant or defendant, can wear "two hats" comfortably and that the duties of the personal representative, especially during the litigation of the claim, are performed properly."

(3) What approach should the court adopt when an action is settled apart from the question of costs?

21. Where an action is settled by the parties but they have been unable to agree on costs, and they wish the court to determine that question, the court often finds itself in a position of some difficulty. On the one hand, there is much to be said for the straightforward view that the action has not been settled at all if the important question of costs remains unresolved. On the other hand, if the substantive issues in the case have all been agreed, but the question of costs remains outstanding, the court will sometimes be willing to do the best it can to resolve that question on the limited material available to it, in a laudable effort to promote the settlement of legal proceedings and to avoid the expense of time, money and court resources which a full trial on the issue of costs alone would entail.

22. Valuable guidance on the approach which the court should adopt when faced with a dilemma of this nature was provided by this court in *BCT Software Solutions Limited v C Brewer & Sons Limited* [2004] C.P. Rep 2. The appeal was against a costs order made in the High Court shortly after the beginning of the trial of an action for infringement of copyright in computer software. The parties settled the action on detailed terms set out in the schedule to a Tomlin order, but they were unable to reach a compromise on costs, which they agreed should be determined by the trial judge. The judge agreed to undertake this task, and the party which was dissatisfied with the result then appealed to this court. The leading judgement was delivered by Mummery LJ, who gave the following guidance in the introductory section of his judgment:

> "4. The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action, which he has not tried. There are, no doubt, straightforward cases in which it is reasonably clear from the terms of the settlement that there is a winner and a loser in the litigation. In most cases of that

> description the parties themselves will realistically recognise the result and the costs will be agreed. There will be no need to involve the judge in any decision on costs. If he becomes involved, because the parties cannot agree and ask him to resolve the costs dispute, the decision is not usually a difficult one for him to make.
>
> 5. There are however, more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course, which comes close to conducting a trial of the action that the parties intended to avoid by their compromise…
>
> 6. In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties "If you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well."
>
> 7. The disposition of the judge to help parties in negotiations for a settlement is understood and applauded. Good intentions are not, however, risk free. If acted upon too readily, commendable judicial intentions can make things far worse than they would have been if the judge had adopted the unpopular stance of requiring the parties to confront the realities of their litigation situation. The Judge has a discretion to decline to do what the parties ask him to do…
>
> 8. This court is entitled to approach an appeal against a costs order, which has been made as part of a compromise, with an even greater degree of reluctance than is usually the case when it is asked to interfere with the discretion of the trial judge… If there is a point of principle in this case, which I very much doubt, it does not arise from the way in which the judge exercised his discretion, but from whether he should have ever embarked on this particular exercise at all. As both parties agreed that he should undertake the task, it is reasonable to expect them to accept his decision, unless it can be shown that the result is, in all the circumstances, manifestly unjust. I would certainly not be inclined to interfere with the judge's decision simply because it is possible to detect imperfections in his approach or in his reasoning.
>
> 9. In my judgment, this court should only interfere with the costs order in this case, if BCT makes out a case of manifest injustice…"

23. In a concurring judgment, Chadwick LJ said at [27] that he shared Mummery LJ's view that this was a case in which the judge could not have been criticised if he had required the action to proceed to judgment because the parties had not reached agreement on the

whole of the dispute. Indeed, Chadwick LJ thought that the judge "would have been wise to do so". He continued:

> "But it is not open to the appellant to complain that the judge set out to do what both parties had asked him to do – that is to say, to make an order about costs and to decide what order to make on the material before him and without determining disputed facts. Nor is it open to the appellant to complain that, in seeking to perform that task, the judge adopted an approach which he, himself, described as "broad brush". It is difficult to see what other approach the judge could have adopted in the circumstances."

24. The third member of the court, Brooke LJ, agreed with both judgments: see [30].

25. In the context of the present case, I can see no good reason to depart from the guidance given in the *BCT* case. Accordingly, if Mr Bowser's appeal against the Costs Order is to succeed, he must persuade us that the Judge's reasoning led her to a conclusion which was "manifestly unjust".

<u>The facts in more detail</u>

26. In the light of the above principles, I will now fill in some more of the background facts and then describe the course of the proceedings which Mr Bowser initiated seeking the removal of Julie as an executor of the Will.

(a) Background

27. The Testator was born in March 1979, and Julie in December 1983. They were married in 2009, having previously lived together since 2002. Their ten children were born between January 2003 and January 2019. Only the eldest, Jack Smith ("Jack"), had reached the age of eighteen before his father died, although the second son, Joe Smith, did so soon after, in July 2022. Next in age are twin daughters who were born in April 2006.

28. The Testator owned and ran a small livestock farm of about 40 acres called Mill Hill Farm in a remote rural location near March in Cambridgeshire ("the Farm"). The Farm included a seven-bedroom house ("the Farmhouse") where the family lived. Between 2002 and the breakdown of the marriage in March 2019, it is Julie's evidence that she alone dealt with the administrative side of the business and was "fully familiar" with it, having sole responsibility for the accounts, for the daily management of the Farm, obtaining cattle certificates, and so forth.

29. According to Julie, the breakdown of the marriage was caused by the Testator's violent and abusive behaviour towards her, as a result of which she was obliged to move house with the children to protect herself and them. They went to live in rented accommodation, which she and the nine younger children continued to occupy until very recently (we were told at the hearing that satisfactory arrangements have apparently now been made for their return to the Farmhouse).

30. The Will is dated 30 August 2019. I have already briefly described the circumstances of its execution, and the appointment of Julie and (in the event) Mr Bowser as executors and trustees. By clause 1, the Testator revoked all earlier wills and testamentary dispositions. By clause 3, he directed the trustees to hold his estate on trust to retain or sell it, and after payment of debts, expenses and inheritance tax ("IHT") to divide the residue between such of his children (who were named) as should survive him and attain the age of twenty-one, if more than one in equal shares absolutely. The remainder of the Will contained a professional charging clause and a number of administrative provisions, including wide powers to continue, discontinue or wind up any business in which the Testator might be engaged at his death.

31. Technically, none of the children yet has a vested interest in residue, but Jack will be twenty-one in January 2024 and his tenth share will then vest absolutely, as will the shares of the other children as and when they attain that age. The effect of the class gift is that if any child dies under twenty-one, his or her contingent share will pass to the other members of the class, and it will not devolve as on a partial intestacy (under which Julie would of course have been the principal beneficiary). Thus it is only in the exceedingly remote contingency that none of the ten children attains twenty-one that Julie would have any beneficial interest at all in her husband's estate.

32. Since the Will appoints Julie as an executor, but it makes no beneficial provision for her (with the truly trivial exception just mentioned), it is natural to infer that it was probably drafted on the assumption that the marriage had irretrievably broken down, and that Julie's matrimonial claims on a divorce would have been settled long before the Testator's death. After all, he was only 40 when the Will was made, and there is no evidence that he suffered from ill health.

33. Julie did indeed petition for divorce, and a decree nisi was granted on 21 June 2021. She also began ancillary relief proceedings, but these were still unresolved at the date of the Testator's unexpected death (he was in fact killed in a police car chase) on 29 May 2022. We have no evidence of the stage which the matrimonial proceedings had reached by that date, or of how Julie had formulated her claim. In general terms, however, her position as a party to a long marriage with ten children, nine of whom still lived with her, must have given her a very strong claim to at least 50% of the matrimonial assets, and the court would also need to have been satisfied with the arrangements made for her to care for the children, whether at the Farmhouse or elsewhere.

34. It is clear that the eldest son, Jack, does not have a good relationship with his mother, and although he lived with her for a time after the separation he left home at the age of sixteen and returned to live with his father on the Farm. Since his father's death, Jack has remained on the Farm and done his best to carry on the business, with help from his grandfather, Paul Anthony Smith, and his aunt, the Testator's sister Lorna Hayes. It appears that Jack also has a part-time job as a butcher, and there is some evidence that part of the Farmhouse has been converted into a butchery. According to Mr Bowser, the Testator's intention was that he and Jack would eventually be able to provide high quality meat which had been bred and raised on the Farm and then butchered on site and sold to customers.

35. The main assets of the Testator's estate are the Farmhouse and the surrounding agricultural land, with values at the date of death of £275,000 and £483,500 respectively

according to the most recent valuation report obtained by Mr Green. There is an AMC mortgage of nearly £250,000 secured on the Farmhouse. The farming business was carried on at a loss for a number of years before the Testator's death, and it seems doubtful whether it has any significant positive value as a going concern, although valuations have been obtained of vehicles (£26,000) and the remaining livestock (£30,650). There are also three investment properties (two residential and one commercial) included in the estate, to which values of £155,000, £180,000 and £85,000 at the date of death have now been assigned. In his Note for the court, and with the benefit of the most recent valuation which had not been received when the Note was prepared, Mr Green now estimates that the net value of the estate for IHT purposes is of the order of £1.13 million. IHT has still not been paid on the taxable portion of the estate, after applying relevant reliefs. In his Note, Mr Green estimated that the current value of the residue after payment of IHT, including interest for late payment of IHT, would be unlikely to exceed £805,000, although that figure may require some upward adjustment in the light of the most recent valuation.

36. For completeness, I should also mention that it may in due course become possible to take advantage of the surviving spouse IHT exemption, if and when an order under the 1975 Act is made in favour of Julie, or her claim is compromised on terms set out in or scheduled to a court order: see section 19(1) of the 1975 Act, section 146(1) and (8) of the Inheritance Tax Act 1994 and Ross on Inheritance Act Claims, *op. cit.*, at paras 7-197 ff. It is to be hoped that this fiscal incentive will promote a rapid settlement of her claim.

(b) The history of the present proceedings

37. Although the claim form in the present proceedings was not issued until 2 August 2022, the story begins on 7 June 2022, barely a week after the Testator's death, when Mr Bowser wrote to Julie. In this letter he informed her that Bowsers held the Will, a copy of which was enclosed. Mr Bowser said that he was the director of the firm who had been nominated to act as one of the executors. The letter continued:

> "Although we are still trying to get to the bottom of all the facts, our understanding is that a Decree Nisi of divorce was granted some time ago. You will also see that the will makes no specific financial provision for you. We have no doubt that you are already legally represented and we would respectfully suggest that you take advice as soon as possible over your position. It may be the case that you wish to bring a claim under [*the 1975 Act*] on the grounds that the will fails to make reasonable financial provision for you. If you wish to make such a claim, then you may well be advised that you should renounce your position as an executor of the will. However, that is a matter upon which you must take your own independent legal advice.
>
> The issue of executors is a pressing matter because Mr Smith was of course engaged in a farming business at the time of his death. Arrangements need to be made by the executor or executors to open a bank account to enable the farming business to continue and for the day-to-day expenses to be met. Would you therefore please let us have your decision upon whether you

> wish to renounce your right to the grant of probate as soon as possible.
>
> If you do decide to renounce, then we are certain you will want to know what is happening to the Estate and to have full particulars of the valuations of all the assets. We will be happy to undertake to your solicitors to supply the relevant particulars once we have them to hand.
>
> We are not certain to what extent you wish to be involved in the funeral arrangements. The local undertakers, Turners, have carried out funerals for a number of members of the Smith family and, unless you have any rooted objection, we would suggest appointing them in this instance. Your early confirmation of this and whether you wish to renounce or not, would be most welcome. We therefore look forward to hearing from either you or whichever solicitor you have appointed as soon as practicable."

38. I have quoted this initial letter at length, because it seems to me to be reasonable in both tone and content. Mr Bowser was a very experienced family solicitor, who had dealt with the winding up of many estates during more than 40 years in practice. This was just the kind of letter that one might have expected him to write in the circumstances. Unfortunately, however, the reasonable and cooperative approach evidenced by this first letter was not to be maintained.

39. Having received no reply from Julie, Bowsers wrote to her again some three weeks later, on 27 June 2022. The letter began by informing Julie that Bowsers were instructed by Mr Bowser to act on the administration of the Testator's estate. The letter then repeated the information previously given to Julie about the executorship of the Will, and again reminded her that she would need to consider proceedings under the 1975 Act since both the divorce and the financial relief proceedings had come to an end on the Testator's death. So far, the letter is in substance unobjectionable, although one might perhaps have hoped for a more sympathetic tone when writing to the mother of nine children under the age of eighteen who had very recently lost their father in sad circumstances, and whose funeral was yet to take place.

40. The letter of 27 June then continued:

> "**Issues:**
>
> 1. It appears to us that there is a clear conflict of interest in your role as the Executor and your position as a Claimant in any claim you make against the estate.
>
> At the outset we suggested that you should renounce your executorship to avoid this conflict of interest. This may now not be possible as we believe that you have started to intermeddle in the estate. Intermeddling can happen when someone carries out the role of Personal Representative, as you have done. This is evident from an email from you to Belmont Regency Ltd.

> Insurance Brokers dated 20 June 2022, timed at 13.45 hours in which you provided documents to the brokers and stated that you would be "handling things". We have attached a copy of that email.
>
> 2. You have previously stated that you will not be attending Mr Smith's funeral. However, you have instructed the undertakers that you wish to have a burial arranged as opposed to a cremation. We have to tell you that we have received information from other members of Mr Smith's family, including his recent partner, Clare, that Mr Smith made it very clear that his wish was that his body should be cremated. Given the number of close family who have confirmed his wishes and that his views on cremation were formed later than any wishes he may have expressed to you whilst you were together, Mr Bowser is giving the undertaker instructions to proceed with a cremation. You will of course be notified of the time and date should you decide to change your mind and attend the funeral.
>
> **Way Forward:**
>
> To move matters forward, we invite *[you]* to a meeting with Mr Bowser at our Wisbech office…We need to arrange this meeting as soon as possible as there are various matters to resolve urgently relating to the business and Mill Hill Farmhouse.
>
> In the meantime, please do not further intermeddle in the estate. If you continue to intermeddle or ignore our letter, you will leave us with no other option but to apply to the Court to remove you as an executor. If an application to the Court is required, we will ask the Court to make an order that you pay our costs and expenses in bringing the proceedings. We hope that will not be necessary.
>
> We would again urge you to take independent legal advice and note that we have not heard from any solicitor representing you."

41. I have again quoted from this letter at some length, because it regrettably set the correspondence on a downward path from which (as far as Bowsers were concerned) it never recovered. The main criticisms that can be made of this letter are in my view the following:

    (1) It was simply wrong to assert that Julie was in a position of "a clear conflict of interest" between her role as an executor and her position as a potential claimant under the 1975 Act.

    (2) Use of the language of "intermeddling" was also unfortunate. Although a technical term in probate law and practice, it would appear to a lay person to carry a connotation of improper conduct, and this would not have been much alleviated, if at all, by the partial explanation which Bowsers gave of it. As an executor appointed under a valid will, Julie derived her title as executor from the Will itself

and she was entitled to act in the administration of the estate even before a grant of probate was obtained. The only risk was that, if she did so unequivocally, she would then lose her right to renounce probate, but that was a matter for her to decide.

(3) Mr Bowser's unilateral decision to proceed by giving instructions for the Testator's cremation (which then occurred) was also premature and insensitive, whatever information he may have received from other members of the extended family. As Mr Bowser should have known, arrangements for the funeral were a matter for the two personal representatives of the Testator to arrange jointly, and if agreement could not be reached the appropriate course would have been to make an urgent application to the Court for directions.

(4) It was equally inappropriate, at this very early stage, for Bowsers to threaten Julie with an application to the Court to remove her as an executor, coupled with an order that she should pay the costs of the proceedings. Such an application was clearly envisaged as hostile litigation against a co-executor who was unreasonably refusing to stand down. As such, it could only properly be embarked upon as a last resort, after all reasonable attempts had been made to settle the dispute amicably, and (at the very least) appropriate pre-action conduct had been followed, including a formal letter of claim setting out the basis of claim and inviting a reasoned response. The Judge was quite right to say in paragraph 1 of her reasons for making the Costs Order that this letter was not itself a pre-action letter, nor did it purport to be.

42. Astonishingly, the next step of any significance was the issue by Mr Bowser on 2 August 2022 of a claim form under CPR Part 8 naming Julie as the sole defendant and seeking (1) her removal as personal representative of the Testator's estate, (2) an order that Mr Bowser be confirmed as the sole executor of the Will, or alternatively be appointed as administrator of the estate, and (3) such further or other relief as the court should think fit, including an order prohibiting Julie from taking any further steps in the administration of the estate. Mr Bowser also asked for his costs to be paid by Julie, or alternatively that provision be made for his costs out of the estate. The details set out on the claim form alleged that since the Testator's death Julie had taken "numerous unilateral steps as executor" which were not in the interests of the estate as a whole; that she had refused to communicate with Mr Bowser or otherwise work with him in the due administration of the estate; and that she had also refused to state whether she intended to bring a claim under the 1975 Act.

43. In his witness statement in support of the claim, Mr Bowser explained that not only was he seeking the removal of Julie as an executor, but he was also making an application for emergency relief "which will enable me to obtain a limited grant, take some urgent steps in the administration and prevent the Defendant from interfering and intermeddling further". In fact, Mr Bowser's application notice seeking urgent relief was not issued until 8 August 2022, when it was supported not only by Mr Bowser's witness statement, but also by short statements which he had procured from the Testator's father and Jack.

44. In fairness to Mr Bowser, I should make it clear that his written evidence in support of the claim alleged that Julie had told him during a telephone conversation on 14 June 2022 that she wished to have no further contact with him, and that she wanted to have sole control of the winding up of the estate. He complained about "numerous unilateral

steps" which she had taken, none of which were for the benefit of the estate as a whole. He also reiterated his view that she was in a position of conflict, which made it impossible for her to continue as an executor. No findings of fact have been made in relation to any of these matters, because the claim was compromised without a trial on 3 November 2022. But I am prepared to assume in Mr Bowser's favour that he was sincere in deciding to proceed as he did, and that he perceived the situation to be one which required the urgent intervention of the court.

45. Meanwhile, on 3 August 2022, the solicitors who had acted for Julie in her ancillary relief proceedings, DP Legal, wrote to Bowsers in connection with various matters concerning the estate. The writer of the letter, Susan Pearson, took the opportunity to complain about the unilateral action which Mr Bowser had taken in relation to the funeral, and said that if he continued to act unilaterally, DP Legal would be making an application for his removal as an executor. With regard to Julie's own position as an executor, Ms Pearson recorded Julie's dissatisfaction with Mr Bowser's appointment, and made the suggestion "that it may well be prudent under those circumstances, for an alternative partner to be nominated in place of Brian Bowser".

46. Bowsers replied to DP Legal on 9 August 2022, asserting (among other matters) that Julie had a "clear and fundamental conflict of internet" and that she "cannot continue to act as executor of the will if she believes that she has a claim against the Estate, and, further, is taking steps to pursue that claim". Bowsers also informed DP Legal that Mr Bowser had "submitted an urgent claim against your client to remove her as executor", and a copy of the claim form was provided for information only (it being unclear whether DP Legal had instructions to accept service: it transpired that they did not).

47. Bowsers then took steps to serve the claim form, the application notice for urgent relief, and the supporting witness statements, on Julie at her home address, the effective date of service being 12 August 2022. On 23 August, the court listed the application for hearing before a Deputy Master on 13 September 2022. Bowsers then sought an earlier hearing date, supported by a certificate of vacation business alleging that various urgent steps needed to be taken in relation to the farming business and that the parties were "deadlocked". On 26 August, Deputy Master Teverson made an order vacating the hearing on 13 September, and referring the matter to the Judges' Applications List in view of the injunctive relief sought against Julie. In fact, for various reasons, and despite its supposed urgency, the application did not come on for hearing until it was listed before Bacon J on 3 November 2022.

48. Meanwhile, on 8 September, Julie made her witness statement in the Part 8 proceedings. She explained that she had prepared it with the assistance of Mrs Pearson on a pro-bono basis. In the statement, Julie set out her version of events and complained that she had found Mr Bowser's behaviour to her "aggressive, abusive and intimidating to say the least". She stated or confirmed no fewer than three times that she was prepared to step down as an executor, but made it clear that in her view Mr Bowser was not an appropriate person to be left in the saddle as a sole executor. As she put it in paragraph 19, referring to an email from Mrs Pearson to Mr Bowser (which we have not seen):

> "Suggestions had been made that alternative individuals could stand as Executor in his place, but he has remained silent on that point. I do not believe that Mr Bowser is the appropriate person to deal with this matter solely, due to his extensive historically

> involvement with the family, all of whom were complicit in the deceased *[sic]* bad behaviours in the family courts relating to disclosure of assets."

In substance, therefore, Julie was making it clear that she was willing to be replaced as an executor, provided that Mr Bowser was replaced too.

49. On 14 September 2022, Bowsers wrote to Julie acknowledging receipt of her statement which had been provided to Bowsers by DP Legal. The letter also contained an open offer from Mr Bowser, in the following terms:

> "Our client has also instructed us to ask whether, in principle, you would consent to your removal as executor if a new co-trustee were to be appointed to administer the ongoing trusts that will arise as a result of a number of the beneficiaries currently being minors. If you confirm that this would be the case then our client will make enquiries of suitable candidates."

I observe that this was not an offer by Mr Bowser to agree to his own removal as an executor, but merely an enquiry whether Julie would consent to her own removal if a new co-trustee (not co-executor) were to be appointed of the trusts in the Will in favour of the minor children. In other words, Mr Bowser would remain in place as the sole executor, and the only difference would be the addition of a co-trustee acceptable to Julie who would act with him in his capacity as a trustee.

50. In an email sent on the following day, 15 September, Bowsers repeated the offer, expressing the hope that it would address Julie's concerns regarding Mr Bowser's involvement in the administration of the estate. Julie was asked to give her response as soon as possible, coupled with a strong recommendation that she should obtain independent legal advice before communicating any decisions to Bowsers or the court. The email also repeated the familiar refrain that her position was "almost a case study of a conflict of interest".

51. By late September 2022, Julie had instructed Ashtons to act for her in the proceedings. The partner in Ashtons with conduct of the matter on her behalf was Polly Stephenson. On 29 September, Ms Stephenson wrote to Mr Cameron of Bowsers in order to introduce herself and confirm her instructions in respect of the Testator's estate. She expressed her willingness to talk to Mr Cameron, and asked for copies of the claim form and the witness evidence in support, saying "I can then consider these and take further instructions with a view to then discussing matters with you in order to narrow the issues in dispute". She also asked if there was a hearing date for the claim.

52. Mr Cameron replied on the same day, expressing the hope that Ms Stephenson's instruction "will help get the matter solved a bit more quickly". He offered to discuss matters with her in the following week. He said that "one of the main questions to be answered" was how Julie thought she could properly carry out her duties as executor while stating that she has a claim against the estate under the 1975 Act.

53. On 3 October 2022, Ashtons came on the record as acting for Julie. On 5 October, Ms Stephenson sent a lengthy email to Bowsers with a number of detailed questions about the estate and matters arising in the administration. She emphasised that she needed this

information in order to understand the issues in the litigation, and to help Julie perform her duties as an executor. Among the papers which she requested were copies of Bowsers' files relating to transfers of properties at 73 to 75 High Street, March, which the Testator had made during his lifetime. She also outlined Julie's concerns about the Farmhouse (in which she said that Julie had a beneficial interest), and the use of it in part "as a butchery or abattoir". She said that such use "must not continue", and the property should be restored into a habitable condition. Allowing the conversion (of the property) to take place would amount to the preference of one beneficiary (i.e. Jack) over the others, and could expose the executors to criticism. At the end of the email, she reminded Bowsers that "at the centre of these issues there is a grieving family which is still reeling from Ian's sudden death". She stressed the need for both sides to "work together in a collaborative way" in order to ensure that the estate was preserved for the children's future. It was necessary "to prevent the entrenchment of positions and to facilitate the early exchange of information to narrow the issues and achieve resolution".

54. Mr Cameron replied by email on the same day, saying he understood that there was a grieving family "at the centre of all of this, but there are also very real concerns regarding your client's position". He continued:

> "My client's basic position is that your client is unable to fulfil her duties as executor properly, as she is conflicted. While there is a live application for the court to consider to remove your client from her position, there is no purpose in your client running up large legal bills in relation to the administration of the estate.
>
> The current court application must be dealt with first. If your client is still in her position as executor after that, then your request for documents and information relating to the administration of the estate beyond what is already before the court can be considered in that light."

55. Further correspondence on procedural matters ensued, followed by a long letter from Ashtons on 7 October which set out Julie's position in very considerable detail. The letter is too long for extensive quotation, but among the points raised I would highlight the following:

(1) Ashtons explained why in their view Julie was not in a position of conflict, and it would be possible for Julie to remain as an executor and to advance a 1975 Act claim "as long as those roles remain distinct".

(2) Since Jack and Paul Smith wished to continue running the Farm, it was critical for Julie and the court to understand the viability of that business. This would entail consideration of the accounts and the business plan which Bowsers had asked Mrs Hayes to provide.

(3) The Testator's files in relation to the transfer of 73 to 75 High Street, March, were "critical in establishing the extent of the estate". A schedule of assets and liabilities would also be of assistance. Failing provision of the information

requested, it would be necessary for Julie to make a cross-application for specific disclosure within the existing proceedings.

(4) The proceedings currently before the court had been issued two months ago as an urgent application, but they were "quite obviously…nothing of the sort". The focus should be on allowing Julie and the children to move back to the Farmhouse so they could begin to rebuild their lives in familiar surroundings.

(5) There was no urgent need to remove Julie as an executor, and there would be inherent sense in her remaining in that position given her responsibility for the children and the knowledge of the Farm gained by her during the marriage.

The letter ended with a request for withdrawal of the application for interim relief, and an offer to engage in constructive discussions for settlement of the litigation.

56. Unfortunately, this letter elicited a lengthy and entrenched reply from Bowsers on 19 October 2022, which repeated at least seven times the assertion that Julie was conflicted. The misguided reason given for this assertion was that "her claim would diminish the estate for her own benefit, and that would be a breach of her obligations to act in the best interests of the estate". The letter also contained an express denial that Mr Bowser had ever acted for Paul Smith, as far as he (Mr Bowser) was aware.

57. On 24 October, Bowsers reminded Ashtons that Julie had said in her witness statement of 8 September that she was prepared to step down as executor, and asked whether Julie was "going back on what she has told the Court". Ashtons replied on 25 October, and clarified Julie's position:

> "Having re-read the witness statement that was prepared on a pro-bono basis on Julie's behalf by DP Legal, we take the view that our client's suggestion that she would stand down as an executor was conditional and made on the basis that Mr Bowser stepped down too, with an independent personal representative being appointed in their place. Now Julie has had the benefit of advice from contentious trust and probate specialists she is of the view that it would not be appropriate for her to step down whilst Mr Bowser remains as executor for reasons that we have spelt out in correspondence and upon which we shall expand in further witness evidence should settlement not be achievable."

58. The correspondence continued its melancholy course, with Bowsers still confidently asserting on 27 October 2022 that "The fact of your client's conflict of interest will be apparent to the Court, even if you are unable to accept it."

(c) The hearing on 3 November 2022

59. As I have already recorded, Mr Bowser's application for interim relief finally came on for hearing before Bacon J on 3 November 2022. Both parties were represented by counsel: Ms Araba Taylor for Mr Bowser, and Mr Edward Hicks for Julie. We have been provided with a transcript of the proceedings, the gist of which I have already summarised. Bacon J had read the correspondence, and she rapidly made it clear to Ms Taylor that she was unimpressed by Bowsers' letter of 27 June. She observed that Mr

Bowser appeared to be trying to take control of the administration of the estate unilaterally, and that a similar approach was evident in his approach to the Testator's funeral arrangements. The Judge said that the letter left no room for Julie to negotiate. The Judge also identified the problem as being that both of the executors had been taking unilateral decisions, and it would be very difficult to resolve the disputes between them on an interim basis. If, however, she were to accede to Mr Bowser's application, he would be left in sole control of the administration at least until trial of the action, and would be taking final decisions which could not be reversed. Ms Taylor then said that her application was "for the lowest key form of intervention", with a limited grant of representation (presumably *ad colligenda bona*) confined to the Farm. Ms Taylor also conceded that, if the matter proceeded to trial, it was "likely to be a claim for removal both ways with the appointment of a third party". The Judge then indicated that she wished to explore that possibility, because she was concerned about the acrimony that might ensue if Mr Bowser were left in sole control. After some further discussion, the Judge agreed to a short adjournment of the application to enable the parties to come forward with a joint proposal for the appointment of an agreed third party as a substitute personal representative. The Judge envisaged that, if this could be agreed, she could then give appropriate directions by way of a consent order. Mr Hicks then indicated his agreement with this proposed course of action.

60. After a short adjournment, the hearing resumed around midday. Ms Taylor told the Judge that the parties had been able to produce a draft order which was agreed in every respect apart from costs. She made it clear that the agreement would resolve both the underlying claim and the application, Mr Bowser having said that he would be content with the appointment of Mr Green who was one of the names put forward on Julie's behalf. The Judge then invited counsel to address her on costs, which they proceeded to do.

61. On behalf of Mr Bowser, counsel submitted that the proceedings had been necessitated by a breakdown in the administration of the estate between the executors, and that since the court could not adjudicate on who had been at fault, the costs of both parties should be paid out of the estate. If the Judge was not content to make such an order, Ms Taylor's fallback submission was that Julie should be ordered to pay at least a proportion of the costs of the hearing on 3 November.

62. On behalf of Julie, Mr Hicks then said:

> "My Lady, we seek our costs from the claimant and an order that he not be entitled to recover his costs from the estate, because we say that this entire litigation has been completely unnecessary and improperly pursued".

Mr Hicks then elaborated on that submission, referring to the absence of a letter before action, the aggressive pursuit of the claim, and the flawed nature of its principal basis, namely that Julie had to be replaced because she had a conflict of interest. Mr Hicks referred the Judge to the passages in Julie's witness statement where she had indicated her willingness to step down as an executor, provided that Mr Bowser went as well, and to the repetition of that offer in Ashtons' email of 25 October 2022.

63. The Judge then asked Mr Hicks to address her on the law, which he briefly did, referring to a leading textbook and to section 31(1) of the Trustee Act 2000. Mr Hicks further

submitted that the litigation was essentially hostile in nature, and that since Mr Bowser had not obtained the prior approval of the court for the proceedings in a *Beddoe* application, he was acting at his own risk as to costs. At this point, bearing in mind that the parties had not come fully prepared to argue the question of costs, the Judge suggested that the best way forward would be for her to adjourn that issue for determination on paper after the parties had been given an opportunity to put in brief written submissions (including submissions in reply). This proposal was acceptable to both parties, and the Judge then indicated the directions that she was minded to make. The hearing concluded at 12.45pm.

64. The parties agreed the wording of the directions, which were appended to the consent order of 3 November 2022 removing Mr Bowser and Julie as executors and trustees of the Will, and appointing Mr Green to act in their place. Written submissions on costs were then exchanged pursuant to the agreed timetable, and the Judge made the Costs Order, without a further hearing, on 24 November 2022.

Grounds of appeal

65. Mr Bowser's grounds of appeal are discursively drafted, but for present purposes may be summarised thus:

(1) *Ground 1:* It was procedurally unjust for the Judge to determine the costs of both the application and the Part 8 claim as she did, without directing an oral hearing, on additional evidence, at which appropriate findings of fact could be made about the issues in dispute.

(2) *Ground 2:* The Judge's finding that Mr Bowser's conduct in bringing and pursuing the proceedings was not a reasonable and proper exercise of his powers as a personal representative was perverse, and erroneous in both fact and law.

(3) *Ground 3:* The Judge was wrong to hold that Mr Bowser's claim was unsuccessful when he succeeded in obtaining Julie's removal as an executor, and his own removal was achieved by his consent.

(4) *Ground 4:* The Judge was wrong to determine the question of costs on the basis of Mr Bowser's conduct, and to categorise any of his acts as misconduct.

(5) *Ground 5:* In the absence of express findings of improper conduct, the Judge should not have deprived Mr Bowser of his indemnity out of the estate in respect of his own costs.

(6) *Ground 6:* The Judge further erred in not excluding from Julie's recovery the costs of her intended claim under the 1975 Act.

Discussion

66. Ms Taylor's submissions on behalf of Mr Bowser were attractively presented, but I did not find them persuasive. In my judgement, the Costs Order fell comfortably within the wide scope of the Judge's discretion, and Mr Bowser has been unable to show that, in all the circumstances, it produced a result which was "manifestly unjust" to him. As I have explained, that is the high threshold which has to be met in cases where the parties settle an action except for costs, and the judge (who is not obliged to do so) agrees to

decide that question without conducting a trial or determining disputed facts: see paragraphs [21] to [25] above, and the decision of this court in the *BCT Software* case. But even if some less demanding standard of review were to be applied, I can see no valid ground on which we could disturb the Judge's Costs Order.

67. It is well known that appeals on costs alone are seldom entertained by an appellate court, because of the breadth of the discretion afforded to a trial judge. That reluctance to interfere is intensified where, in an effort to help parties who have reached a settlement save as to costs, a judge agrees to resolve that issue on the material before the court. As Chadwick LJ recognised in *BCT Software,* a judge in that position is inevitably obliged to adopt a relatively broad-brush approach, and it is not then open to the appellant to complain that the judge has done so.

68. With these considerations in mind, it seems clear to me that Mr Bowser's complaint of procedural injustice, as formulated in his first ground of appeal, is misconceived. The parties agreed to the Judge determining the question of costs on paper, and they also agreed the wording of the directions which she gave in the order of 3 November 2022. No appeal was brought against those directions, which in any event were entirely appropriate (to have directed a further oral hearing would have been disproportionate) and the parties duly complied with them. It is thus far too late for Mr Bowser to complain, after the Judge had done exactly what the parties agreed she should do, that (for example) the court had insufficient legal or factual material on which to reach a just decision on costs, or that the Judge should have directed an oral hearing, on additional evidence, if matters of conduct were to sound in costs. The Judge was clearly well aware that she could not make findings on disputed issues of fact, and she did not purport to do so. Instead, she proceeded on the basis of the parties' written submissions, the procedural history of the case, and the detailed correspondence which I have reviewed.

69. In performing that task, the Judge was in my view fully entitled to conclude that Mr Bowser's conduct in bringing and pursuing the proceedings (and engaging in unduly aggressive correspondence while doing so) was not a reasonable and proper exercise of his powers as a personal representative. On any view, Mr Bowser's proceedings seeking the urgent removal of Julie as an executor were started with inappropriate haste, without any serious attempt being made to establish a productive working relationship with her, without waiting until she had obtained legal representation, and without even writing a proper letter before action. In a case such as this, involving a relatively modest estate, the proper discharge of a personal representative's duties requires that hostile court proceedings should be a last resort. The truth seems to be that Mr Bowser took the firm view at a very early stage that Julie was in a position of irretrievable conflict of interest because of her position as a potential claimant under the 1975 Act and, as a result, was determined to have her removed. Unfortunately, that was a misconception, but the potent influence which it exerted upon Mr Bowser and his firm can be traced throughout the ensuing correspondence, and it continued even after Julie had instructed Ashtons to act for her. This is just the kind of misunderstanding which should have been eliminated at an early stage if a more cautious and measured approach had been adopted by Mr Bowser. Moreover, his protestations of the urgency in bringing the matter before the court have a hollow ring when it is recollected that over four months were permitted to elapse between Bowsers' letter of 27 June 2022 and the hearing before the Judge which eventually took place on 3 November 2022.

70. One of the criticisms made by the Judge of Mr Bowser's conduct was that he failed to apply for *Beddoe* relief before initiating proceedings to remove his co-executor. It is indeed true that he did not do so, nor is there any indication in the correspondence or his evidence that he ever gave any consideration to the possibility. Had he done so, it would quickly have become apparent that the making of such an application (seeking the approval of the court to the bringing of such proceedings, and a consequential indemnity for his proper costs in doing so) would itself have been a substantial undertaking. A *Beddoe* application has to be made in separate proceedings, to which the beneficiaries are joined as parties, and the court then has to form a view whether it is for their benefit that the proceedings should be prosecuted. For that purpose, it would have been necessary to obtain representation of the minor children, and to instruct counsel to advise on their behalf: see generally *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 at 1225G – 1226E (Lightman J). In other words, the procedure would itself have been an expensive and time-consuming exercise, and before embarking upon it Mr Bowser should have carefully considered whether the circumstances were really such as to justify the commencement of hostile litigation by him against his co-executor.

71. Furthermore, had Mr Bowser then decided against making a *Beddoe* application, it would have brought home to him that, if he decided to proceed without the protection of such an order, he would be doing so at his own risk as to costs, and that if he was to be indemnified for his costs out of the estate, he would need to show that he had acted reasonably and properly in pursuing the litigation. As Lindley LJ said long ago, in *In Re Beddoe* itself [1893] 1 Ch. 547 at 558:

> "…if a trustee brings or defends an action unsuccessfully and without leave, it is for him to show that the costs so incurred were properly incurred".

See too the judgment of Bowen LJ at 562, where he said:

> "If there be one consideration again more than another which ought to be present to the mind of a trustee, especially the trustee of a small and easily dissipated fund, it is that all litigation should be avoided, unless there is such a chance of success as to render it desirable in the interests of the estate that the necessary risk should be incurred."

72. I can deal briefly with Mr Bowser's third ground, which is, in short, that the Judge wrongly identified him as the unsuccessful party in the litigation. I consider that the Judge was clearly correct to regard him as, in substance, the unsuccessful party, because the order which he consistently sought was the removal of Julie as an executor, and until the day of the hearing he refused to countenance Julie's open offer to stand down, provided that he did likewise. Until then, the result that Mr Bowser was seeking to achieve was a situation where he would be left as the sole executor upon her removal. Given the evident tensions between Mr Bowser and Julie, and the probability that they would be unable to work together harmoniously, it should have been obvious that the best solution would be for both of them to stand down in favour of an independent administrator, such as Mr Green. If Julie's proposal had been accepted, a consent order could have been put before a judge at a fraction of the cost in fact incurred. It is no answer that Julie's proposal did not identify an independent person to act as executor: once the principle of an independent executor was agreed, albeit only after the

intervention of the Judge, the parties had no difficulty in identifying and agreeing on Mr Green.

73. Mr Bowser's fourth and fifth grounds of appeal seem to me to add nothing of substance to points which I have already discussed, while ground 6 again appears to me to be misconceived. As Mr Hicks points out in his written submissions, the only costs orders made in Julie's favour by the Judge relate to her costs of the Part 8 claim. The question whether any specific item of costs properly falls within the scope of that order is then a matter to be determined on detailed assessment, if not agreed. There is nothing in the Costs Order which would purportedly entitle Julie to receive any costs which properly relate to a claim under the 1975 Act which she has not yet even commenced.

74. For all these reasons, I am unable to detect any error of law or principle in the way the Judge exercised her discretion on costs. Still less can I find any defect in her reasoning which demonstrates a manifest injustice to Mr Bowser. Accordingly, on the basis of the material that was before the Judge, I was satisfied that Mr Bowser's appeal should be dismissed.

Julie's application to adduce fresh evidence on the appeal

75. It remains for us to deal with a late application by Julie to admit fresh evidence on the hearing of the appeal, made by an application notice dated 7 July 2023 (six days before the date of the hearing). The application was supported by a witness statement of Julie's solicitor, Polly Stephenson, and a supplemental skeleton argument from Mr Hicks. Mr Bowser responded with a statement of his own dated 11 July 2023 and a skeleton argument of Ms Taylor, opposing the application.

76. We heard brief submissions on the application at the start of the hearing. It soon became clear that it would be undesirable to rule on it without hearing the appeal, so we informed the parties that we would hear the application with the appeal and rule on it in our judgments. Since I have already decided that the appeal should be dismissed on the basis of the material before the Judge, I will deal with the application in fairly short order.

77. Its purpose was to place before the court Bowsers' file and some related conveyancing documents relating to the transfer of 73 to 75 High Street, March, by the Testator to his father in July 2020. As I have already noted, disclosure of this file was requested by Ashtons on 5 October 2022, but Bowsers declined to provide it until Julie's status as an executor had been determined. I have also already recorded Mr Bowser's express denial that he ever acted for Paul Smith. The file should in any event have been disclosed by Bowsers to Mr Green within seven days after Mr Green had filed and served a signed consent to act and a witness statement of fitness: see paragraphs 3 and 4 of the Judge's order of 3 November 2022. Those conditions were fulfilled on 17 November, but Bowsers delayed in handing over their files to Mr Green. It seems that he did not receive this file until much later, and it was only on 6 July 2023 that Mr Green was able to supply the relevant documents to Ashtons.

78. The file, such as it is, begins with a handwritten attendance note by Mr Bowser dated 24 June 2020, recording the Testator's instructions to transfer 73 and 75 High Street to Paul Smith "to repay an old debt owed to [*him*]", split 50:50 between the two properties.

The amount of the debt was recorded by Mr Bowser as "£45,000 recently + £40,000 from years ago", making a total of £85,000 or £42,500 for each property.

79. This attendance took place about fifteen months after Julie had left the Farmhouse with the children, and when it must have been clear to the Testator that their marriage had broken down.

80. On 1 July 2020, Mr Bowser wrote to the Testator informing him that he had prepared the necessary deed of transfer and inviting him to make an appointment to sign it at the firm's March office. The letter then said:

> "You have told me that your Father is owed a large sum of money by you and that this transfer will reduce or pay off the debt. I would appreciate it if you could find out from your Father what he is doing about completing the transfer and getting it registered at HM Land Registry. If he wants us to deal with the matter then I think we can do so, strictly on the understanding that we are not acting for him in connection with the purchase, only arranging for the registration at HM Land Registry".

81. The transfer was then executed by the Testator on 30 July 2020 and witnessed by a chartered legal executive in Bowsers' March office. Meanwhile, confirmation had been provided to Bowsers that Paul Smith wanted them to make the necessary application for registration of the transfer on his behalf. On the same day, Mr Bowser sent his invoice to the Testator, billing him for his professional services in acting on his behalf on the sale of the two properties, drawing the transfer and arranging for its execution, and "completing the matter on your behalf". Despite this wording, however, the invoice was said to be "Payable by Mr P A Smith".

82. The application to register the transfer was made on form AP 1. In panel 13 of the form, Bowsers confirmed, by placing an "X" in the relevant boxes, that they had represented both parties to the transaction. The form was signed by Bowsers as the conveyancer acting for the transferor.

83. Finally, on 7 September 2020, Mr Bowser wrote separately to the Testator and his father to confirm completion of the registration on 5 September 2020.

84. There is no indication on the file that any steps were taken by Mr Bowser to verify the existence or particulars of the loans, or to obtain evidence of the value of the two properties. Nor did the transfer in form TR 5 make it clear that no money had in fact changed hands. Instead, panel 8 of the form recorded the consideration for the transfer as the sum of £85,000 which "The transferor has received from the transferee".

85. Given the nature and timing of this transaction, at a time when the Testator and Julie had been separated for over a year and divorce proceedings by her must have been in contemplation, if not already commenced, the transaction appears to give rise to obvious grounds for serious concern. At the very least, it would have required careful scrutiny by the lawyers acting for Julie on her divorce, just as it will require similar scrutiny in the context of any claim that she may now make under the 1975 Act (section 10 of which deals with "Dispositions intended to defeat applications for financial provision", and empowers the court to order the donee under such a disposition "to

provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order").

86. Furthermore, the transaction would clearly need to be investigated by the Testator's personal representatives, before an Inland Revenue account is submitted and IHT is paid. If and to the extent that the transfer of the properties represented a lifetime transfer of value made by the Testator, it would need to be brought into account in calculating the IHT due on his death. Despite these obvious causes for concern, however, Mr Bowser chose to say nothing at all about the transaction in his evidence or in the correspondence before the court, nor was it mentioned by Paul Smith in his supporting witness statement. Unsurprisingly, Mr Green has appreciated the need for the transaction to be investigated, and we were informed that his inquiries are now in progress.

87. For present purposes, however, the most significant aspect of this evidence, if it is admitted, is that it appears to show the existence of a substantial conflict of interest on the part of Mr Bowser himself. How could he properly investigate the transaction on behalf of the estate, and the beneficiaries under the Will, when he had himself been instrumental in enabling the transaction to take place, and he had apparently taken no steps to satisfy himself about its propriety or the extent (if any) to which genuine consideration was provided for the transfers? This question was not addressed by Mr Bowser anywhere in his evidence and he was plainly content, to put it no higher, that the court should remain in complete ignorance of the transaction when considering his application for interim relief against Julie.

88. The test for the admission of fresh evidence on an appeal under CPR rule 52.21(2) is still governed, for most practical purposes, by the well-known criteria set out in *Ladd v Marshall* [1954] 1 WLR 1489 (CA). In short, the criteria are:

    (a) the evidence could not have been obtained with reasonable diligence for use at the trial;

    (b) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

    (c) the evidence must be such as is presumably to be believed; it must be apparently credible, although it need not be incontrovertible.

    See the judgment of Denning LJ at 1491, and the commentary in the White Book at paragraph 52.21.3.

89. In my view, those conditions are plainly satisfied in the present case. As to the first condition, the evidence could not have been obtained with reasonable diligence for use at the hearing before Bacon J, because Bowsers had refused to disclose the file, and it only came to the attention of Julie's solicitors on 6 July 2023. As to the second condition, I consider that it might well have had an important influence on the Judge's reasoning, because the existence of an apparent conflict of interest on the part of Mr Bowser would have provided a strong further reason for removing him (as well as Julie) as an executor, and replacing both of them with an independent administrator. As to the third condition, the evidence is largely documentary and speaks for itself. There is no reason to doubt its credibility as far as it goes.

90. For these reasons, I conclude that we should exercise our discretion to admit the fresh evidence, and (having done so) I consider that it provides substantial further support for upholding the Costs Order. I would also associate myself with the observations of Males LJ in [93] below.

Lady Justice Falk:

91. I agree.

Lord Justice Males:

92. I also agree.

93. We were informed that arrangements have been made for a mediation to take place, once this appeal has been determined, at which it is hoped that outstanding issues, including Julie's 1975 Act claim, can be resolved. I would strongly encourage this course, which in the circumstances of this case is likely to be a cheaper and more effective way of resolving such issues and making appropriate provision for the future than further litigation.