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

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Monday, 25 March 2019

BEFORE:

HIS HONOUR JUDGE PAUL MATTHEWS
(Sitting as a Judge of the High Court)

BETWEEN:

PAULINE ANN PRICE

Claimant

- and -

VALERIE ANN SAUNDRY

First Defendant

GERALDINE SANDERS
(as executrix of Martin Gordon Sanders, deceased)

Second Defendant

MR ALEXANDER LEARMONTH (instructed by Michelmores LLP) appeared on behalf of the Claimant
MR EWAN PATON (instructed by Powells Law) appeared on behalf of the First Defendant
MR MICHAEL SELWAY appeared on behalf of the Second Defendant

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. HHJ PAUL MATTHEWS: This is my judgment on the costs questions arising from litigation carried on between the claimant and the defendants. The claimant is a beneficiary under a trust and the first defendant is a trustee of that trust. The second defendant is the executrix of a former trustee of that trust. The main part of the litigation has been conducted between the claimant and the first defendant. The second defendant's part has been limited to some costs issues which have arisen.

2. The substance of the litigation founded on the fact that the claimant claimed to be beneficiary of two trusts deeds executed both by her and the late Mr Alan Saundry in 2006 and 2009. The first defendant is Mr Saundry's widow, and also the executrix and residuary beneficiary of his estate. Mr Saundry was named as settlor in the trust deeds. He was also appointed the sole trustee. On his death in 2013 the first defendant became trustee by virtue of her position as the sole personal representative of the trustee.

3. The litigation between the claimant and the first defendant began as an application to remove the first defendant and her brother, Martin Sanders, who by then had been appointed a trustee as well. However, subsequently, after her brother had unfortunately died and the second defendant was subsequently appointed to represent his estate (she being his widow), the litigation changed its course.

4. I will first deal briefly with the original focus of the litigation. This was a claim to remove the defendants as trustees of these trusts, on essentially three grounds. Firstly, that the first defendant had refused to appoint the claimant as a trustee of the trusts. Instead she had appointed her brother, Mr Sanders, and this was alleged to be a breach of the terms of the trust, so a breach of trust. Secondly, the first defendant, it was said, had made an attempt to buy one of the trust properties at 60 Bristol Road Lower at what was alleged to be an undervalue. The third ground was that there had been a lack of disclosure of financial and accounting information from both of the trustees to the claimant.

5. As I have said, that was the form of the claim as originally made, and that remained the case up until 13 September 2017. During that time, the portfolio of residential properties which had been built up by Mr Saundry and the late Mr Price had begun to

be sold. There is some controversy as to exactly what was sold and at what time, but in broad terms a few of the properties were sold towards the beginning and as time went on the number increased so that by September 2017, 16 out of 20 properties had been sold and the others were in the course of being sold.

6. One month before the trial of the removal claim, the parties agreed at that stage that it would be sensible if the focus of the claim were shifted from the removal application to an accounting exercise. The reason for that seems to have been that the claim to remove the trustees from the trusteeships made a lot of sense when there were properties in the portfolio but made less sense when it was just a question of money, the properties having been sold and the money remaining simply to be distributed and accounted for.

7. At what was supposed to be the pre-trial review, before Mr Simon Monty QC (as he then was), sitting as a deputy judge of this Division, it was agreed and an order was made by consent that, instead of the matter proceeding to trial as an application to remove the trustees, it would proceed as an account in common form whereby the defendants would account to the claimant for the trust funds which had come into their hands and for what they had done with those funds.

8. From 13 September 2017, therefore, this claim went along a completely different path, with a different object in view. There was no claim being made thereafter for breach of trust as such. There was simply a claim that the claimant should have an accounting with vouchers to support the account of what was in the trust fund and what had happened to it. That led to a hearing ultimately before me in February last, over two days.

9. There is a third part of the claim, which I mention at this stage so that it is not forgotten. During the course of the accounting, an issue arose as to whether or not one of the properties was properly a trust property or not. The first defendant claimed that it had been included by mistake and that the relevant trust deed should be rectified to remove that property from the trust deeds. That was argued separately over two half-days on 14 and 15 February and I gave a written judgment in that application, which I handed down on 7 March 2019. On that rectification application I held that there

should be no rectification of the trust deeds and that the property concerned (called 7 Linwell Close) should be still treated as a trust property and, therefore, subject to the account which was proceeding.

10. I turn to consider the costs consequences of what has happened in relation to each of those three parts, two main parts and one, as it were, addendum (the rectification point). Before I do that, I am going to say something a little more generally about costs rules for the benefit of the lay clients.

11. The court has a discretion in relation to costs. This is clear from section 51 of the Senior Courts Acts 1981 and also from the procedural rules set out in the code known as the Civil Procedure Rules. The court has to follow those rules. The court enjoys a discretion, but it is a discretion which is not unlimited, and it must be exercised on judicial principles. CPR 44.2(1) repeats the rule that the court has a discretion as to whether to make an order in respect of costs.

12. CPR 44.2(2) provides that, if the court decides to make an order about costs, the general rule is that the unsuccessful party should pay the costs of the successful party. However, it is made clear that the court may make a different order, so although the default position is that the unsuccessful pays the successful's costs, the court can deliberately decide for a reason to make a different order.

13. In CPR 44.2(3) there are some exceptions to the general rule for certain proceedings in the Court of Appeal. They do not concern us. There are also a couple of exceptions created by the case law, one of which, for example, relates to probate proceedings, but these again do not concern us here.

14. CPR 44.2(4) provides that, "The court will have regard to all the circumstances." That is what it says and including in that specifically the conduct of the parties, which is further elaborated on in paragraph (5): who has had success (if anybody), and also taking into account any admissible offers to settle the proceedings. But the rule is the court must take into account all the circumstances.

15. The first question that the court has to decide logically according to these rules is whether the court should make an order at all and then, if it decides to do so, who should be regarded as the successful and who the unsuccessful party in relation to the litigation. I am going to deal with this, as I have already said, in three parts and I will first of all look at the period from the time that the proceedings were issued in June 2016 through to the pre-trial review consent order on 13 September 2017.

16. During that time, the focus of the claim was a claim to remove the trustees from the trusteeship. The problem that the court has is that no decision was ever made on that claim. The court has never tested by a trial the evidence put forward to show that the grounds put forward by the claimant were justified and that the defendants ought to be removed. Nor has there been any agreement between the parties, no compromise which could have indicated in a rough and ready way who the parties themselves regarded as the successful or unsuccessful party. The court is faced here with a difficult question, which is: what material is there upon which the court can decide whether or not to make an order as to costs, and, if somehow it can, what material is there for the court to decide who counts as the successful and who the unsuccessful party?

17. In that regard, I referred during the argument to, and I repeat here, a passage which I think is helpful in the judgment of Chadwick LJ in *BCT Software Solutions v C Brewer & Sons Ltd* [2003] EWCA Civ 939. In that case there had actually been a compromise on the substance of the dispute but no compromise between the parties on the issue of costs so the court was asked to decide the question of costs although the substance of the matter had already been the subject of agreement between the parties. So, the court had never decided the merits of the case.

18. Mummery LJ gave the first judgment. He made a number of comments about the difficulties that were inherent in a situation for the court trying to decide on costs. Then the judgment of Chadwick LJ, coming second, said this in part:

> "22. The power to make an order as to the costs of civil proceedings is conferred by section 51(1) of the Supreme Court Act 1981 [that is now the Senior Courts Act 1981]. It is in the discretion of the court whether, in any particular

> case, that power should be exercised. That is made clear by CPR 44.3(1)(a). It finds expression in the opening words of CPR 44.3(2) - *'If the court decides to make an order about costs -'*. The first question for the court - in every case - is whether it is satisfied that it is in a position to make an order about costs at all.
>
> 23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party - CPR 44.3(2)(a). But the court may make a different order - CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to 'the general rule' - or should make 'a different order' (and, if so, what order) - it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs."

I should say that the third member of the court, Brooke LJ, simply said, "I agree with both judgments." It is clear that two of the three judges took the view that I have expressed from the judgment of Chadwick LJ. Nothing in the judgment of Mummery LJ is inconsistent with what Chadwick LJ said.

19. Sitting here as a judge of first instance, I should pay considerable respect to those observations of the Court of Appeal. It is fair to say that in cases where, as in that case, the dispute has been compromised, a subsequent constitution of the Court of Appeal (much more recently in 2016) has perhaps adopted a more liberal view. This was another case of a compromise of the substance of the dispute but no agreement as to costs. It is the case of *Powles v Reeves & Ors* [2016] EWCA Civ 1375, where Richards LJ says:

> "18. Before going to the grounds of appeal, it is appropriate to consider first the approach to be taken to an order for costs made in the circumstances of this case. Generally, judges are

> called upon to decide issues of costs after they have heard an application or tried an action, and the conclusions which they have reached on the substantive issues will usually determine or have a very important bearing on the appropriate order for costs. So much is stated in the Civil Procedure Rules. It does, however, sometimes occur that, as in this case, the parties reach a settlement of the substantive issues between them but are unable to agree the appropriate order for costs, and as part of their settlement invite the court to determine the question of costs.
>
> 19. I think it is fair to say that, deprived of the compass normally provided by the outcome of the case, judges often find this to be a difficult exercise. It is neither desirable nor generally practical for the whole case to be heard solely for the purpose of determining costs and it would usually be an unacceptable waste of the court's resources, as well as the parties' resources, to do so. The judge instead has to look for other factors to determine the appropriate order for costs, prominent amongst them being the result of the settlement, the conduct of the parties in the course of the litigation, any reasonable offers of settlement that may have been made and, in any case where it is tolerably clear, which party would have succeeded at trial."

That is what Richards LJ said in that case which, like *BCT Software*, was a case where the substance of the dispute was compromised. Longmore LJ gave a short judgment in which he did not specifically say he agreed with what Richards LJ said but he certainly said nothing inconsistent with it, and he agreed with the result of the appeal, which was that the appeal in that case was dismissed.

20. The Court of Appeal in *Powles v Reeves* has said, at least in a case where there is a compromise of the substance of a dispute, that the court can, if it feels able to, look at various other factors to see what would be the appropriate order for costs. But I emphasise that that does not deal with the sort of case which I have in front of me, which is where the court does not decide the point and the parties do not reach any agreement on it. Instead, they refocus the case away from that.

21. It may be said, however, even though there was neither discontinuance nor dismissal of the claim to remove the trustees and it was simply not proceeded with, that nonetheless the problem which the court faces is a similar problem because there has been no determination on the merits. It seems to me that if you look then at the four points

which Richards LJ mentions, the first point is irrelevant because there is no settlement of this part of the case. Secondly, there is the conduct of the parties. The trouble is that the conduct of the parties in this case is very much disputed, and there is no means for the court at this end of the trial to decide who is right without actually trying those allegations, which the court cannot reasonably do. Thirdly, there is the question of reasonable offers of settlement. The problem with those offers of settlement is that these offers of settlement were for money and the original claim itself was not for money. I do not, therefore, see how the court is in any position to judge how effective those offers of settlement were when the question of whether or not the relief would have been granted cannot be measured by the amount of money being offered. Fourthly, there is the question whether the court is in any position to say which party would have succeeded at trial on the issue of whether the removal should be made.

22. Here, there is no doubt that one could look at what has happened in relation to the claim as it was refocussed, that is so say, looking at the question of the account. In particular, a number of features of the account show that payments that were made out by the trustees should not have been made, for example, payments of remuneration to Mr Sanders, the second trustee; payments in respect of the RBS credit card of the trustee; cash withdrawals that were made where vouchers could not be found; the failure to collect rent from the son of the first defendant, Carl Saundry; the payment of trust funds to pay Mr Alan Saundry's personal income tax; missing invoices and vouchers generally. All of these things show that the trust administration, such as it was during the relevant period, was of low quality and that the trustees at the time (to put it at its mildest) were quite unaware of basic rules of trust law.

23. The problem, however, first of all is that none of these issues which were decided (to the extent they were decided) at the account hearing was pleaded as a ground for the removal of the trustees and in any event this conduct on behalf of the trustees, even though it results in part of the account being either falsified or surcharged (as the case may be) is not necessarily misconduct. In other words, for example, the trustees might have been advised that they were entitled to do such and such a thing or to treat income in such and such a way and although that would be wrong and it would have to be reversed, that would not necessarily amount to misconduct which would justify their removal. You would have to go on and find out more about the circumstances in

which it occurred. That has not happened here because we have not focused on those questions of misconduct. We have focused instead on what the accounts say and what they do not say.

24. Accordingly, I find myself in the difficult and even embarrassing position that I simply do not have the material upon which I can decide whether an order for costs ought to be made and, if so, what that order ought to be and who, for example, could be regarded as the successful party. It was argued on behalf of at least the second defendant, if not the first, that even if the court was unable to award costs to the claimant for the reason I have just given, that nevertheless it was possible for the court to award costs to the defendants or either of them on the basis that the burden of proof lies on the claimant and the claimant has not discharged it. Therefore, the defendants have won, so to speak.

25. However, I do not accept that the burden of proof is of relevant difference here. It seems to me that what is sauce for the goose is sauce for the gander and that in circumstances where there has been no determination by the court of relevant issues that were raised and put forward in the removal part of the claim and there has been no agreement between the parties which could help me, I am in no position to decide whether an order should be made and, if so, what order ought to be made and, in particular, who counts as the successful party for this purpose.

26. That disposes of the **inter partes** part of the question, *ie* whether there should be a costs order on the first part of the claim. However, I need to go on and say something about the trust rules in relation to it because a person who is sued in the character of a trustee has under the general law of trusts an indemnity out of the trust fund. That is embodied in the litigation rules by CPR 46.3 and Practice Direction 46.1.

27. CPR 46.3 says:

> "(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."

I interpolate here that rule 44.5 does not apply in the circumstances of this case.

"(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."

28. Practice Direction 46.1 says this:

"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."

29. First of all, there is no doubt that the trustees in the present case did not obtain directions from the court before defending the claim, so paragraph (a) is not going to be of any assistance. Paragraph (c), "Acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings", means that, if the trustees acted unreasonably in the conduct of the proceedings, then the costs may not be treated as properly incurred and, therefore, the trustee would not be entitled to her indemnity.

30. In the circumstances of this case, I do not think that I can say that the conduct of the proceedings themselves has been unreasonable and I do not think that I am in a position to say that the trustee acted unreasonably in defending the removal proceedings for much the same reason as I have already given, which is that there has been no conclusion to them and I have never had to decide any of the issues which arise in relation to them.

31. That leaves paragraph (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." Here, the trustee defended the removal claim and, of course, the allegations that were made in support of the removal claim to which I have already referred. The question is whether that means that she has acted in substance for a benefit other than that of the estate.

32. The first point to make is that in paragraph 1.2 it is provided that:

> "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."

So the mere fact that the trustee has defended the claim because a claim has been made against her does not automatically mean that it is done in some interest other than that of the trust estate.

The question is whether I can go on to say that she has acted in substance for a benefit other than that of the estate. The difficulty again is that, of course, I have made no findings in relation to the allegations made under this part of the claim and I do not see how I can reach the conclusion that she has committed such misconduct as would justify her being deprived of her indemnity. In relation to the first part of the claim, I can make no order as to costs and I see no basis upon which to deprive the trustees of their indemnity.

33. I move to the second part of the claim. That is the part that relates to the account apart from the costs of the rectification application. Here, I was referred to a number of cases including *Re Skinner* [1904] 1 Ch 289, *Griffin v Higgs & Ors* [2018] 4 WLR 139 and *Sheffield v Sheffield & Ors* [2018] EWHC 2360 (Ch). *Griffin v Higgs* and *Sheffield*

v Sheffield overlap chronologically, in that the hearing and the judgment in each case were split, and the hearing of the second one took place between the hearing and the judgment of the first one (so the judgment in the second one was at the end). They are more or less contemporaneous and it looks very much as though the court in the second case was not aware of the first.

34. In relation to the costs of the account, it has to be borne in mind that an account claim (that is to say, an account in the common form) is very different from a breach of trust claim because here, there is no necessary suggestion that the trustee has committed any wrongdoing whatever except that the account may or may not be correct. It is a question of whether the accounts are correct. In *Re Skinner*, Farwell J says this at page 292:

> "The gist of the complaints against the defendants ... [and they are the executors] is that they would not, and did not, render any proper accounts, though repeatedly requested to do so by the plaintiff and by … their co-executor. Now it is clear that in the case of a small estate like this it is very hard that the plaintiff should be obliged to have recourse to proceedings of this nature in order to get an account. I am always unwilling to make trustees pay costs; but, on the other hand, beneficiaries have a right to expect the performance of their duty by executors, and not the less when one of them has power to make professional charges. In my opinion the conduct of these two defendants amounts to a gross neglect to account."

35. The judge then refers to a decision of Sir George Jessel MR in *Heugh v Scard* (1875) 33 LT 659, a generation earlier, and the judge in *Re Skinner* borrows some of the language of the earlier judge, rather florid and Victorian language from an earlier era, when he goes on to say:

> "Now this present case does appear to me to be one where the neglect was very gross and the refusal wholly unreasonable. The judge before whom the matter originally came reserved the costs down to and including the hearing to be dealt with for further consideration, and on that reservation I now have no hesitation in saying that they ought to be paid by the defendants …"

I interpolate here that that is regarding the costs of obtaining the order that there should be an account. That is not something which is in play in the present case, because the

order for an account was one by consent made by Mr Monty QC on 13 September 2017.

36. Farwell J then says this:

> "Then comes the question as to the costs of taking the account. I think that the view expressed by Lord Langdale in *Hewitt v Foster*, as explained by the Court of Appeal in *Easton v Landor* (1892) 62 LJ Ch 164, was a correct statement of the law applicable at the date of the case before him. Under the old practice, inasmuch as everyone interested in the estate had a right to have the accounts taken in court, the order for an account in an administration action went as a matter of course and the costs of taking it came at a general rule out of the estate but that is no longer the case now. Since 24 October 1883 there is no longer any such general right to have an account taken and it is by no means a matter of course that the costs of taking the account are paid out of the estate. The result is that I have to decide which of the two parties should bear the costs of taking and vouching the accounts. I have come to the conclusion in the circumstances that I ought to make these two defendants pay them."

There, Farwell J is saying it is a matter for the judge to decide on the facts of the case whether he orders the beneficiary who has brought the claim or the trustee who has had to account to pay the costs of carrying out the account.

37. I consider that in the present case the claimant has had sufficient success on the account to justify the first defendant paying those costs of taking the account. The success has been not just a few small sums here and there. There were included some significant ones too. In my judgment, the claimant was wholly justified in seeking an account and has been shown to be right in a number of important matters, even if the total amount of the adjustment that will be effected as a result does not match up to some of the sums which were being bandied about in the earlier correspondence between solicitors.

38. I accept, of course, that some of these payments may have been made on the advice of professionals. Of course, as to that, I cannot make a decision because I have not gone into them but, because they may have been made with advice, they could not be said to amount to misconduct on the part of the trustees. In any event, in my judgment the

claimant has amply demonstrated the necessity to have taken an account in this case and she should have the costs of doing so.

39. I was also pressed with a number of other points made on behalf of the claimant as to why she should have the costs including a number of repeated attempts to provide an account in compliance with the order of 13 September 2017, certain failures to comply with the order of 27 March 2018 and some other points relating to discrepancies. They add weight to my decision but I do not think they are necessary for it. I have looked simply at what has happened on the account in the first instance.

40. The question then arises as to whether this should be costs on the standard basis or on the indemnity basis. There are two bases upon which the claimant says that the costs ought to be on the indemnity costs basis. The first relates to what I may refer to colloquially as a "*Calderbank* offer" (after the case of *Calderbank v Calderbank* [1975] 3 All ER 333) made on 25 January 2017 whereby the claimant would accept the sum of £200,000 to walk away from the case and leave the trustee in possession of the trust fund.

41. Of course, the court is entitled to take that offer into account. However, I have already referred to the difficulty of the court taking it into account when it is for a money sum in relation to the removal application (and it was during that time that it was made) but even using it in the account part of the claim and saying on one view the claimant has done better in the result than that, nevertheless I cannot see this as a justification for awarding indemnity costs because, as it seems to me, the effect of a *Calderbank* offer normally is to give a right to *standard* basis costs. Indemnity costs are reserved for a case in which the court is satisfied that the conduct of the proceedings has been out of the ordinary and that the court requires to mark its disapproval of the party's conduct in that way.

42. Whatever else may be said, I am not prepared to say that the conduct by the defendants and their lawyers of this part of the case has been so out of the ordinary that I should visit that conduct with the mark of indemnity costs and so I decline to do so on this basis, even taking into account the *Calderbank* offer.

43. The other basis for indemnity costs is that the claimant made a Part 36 offer on 28 September 2018 and it is accepted by the first defendant that the conditions in rule 36.17(1) are satisfied, that is that:

> "Upon judgment being entered … judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer."

44. That means that *prima facie* the consequences follow which are set out in rule 36.17(4), that is that:

> "The court must [and I emphasise the word 'must'], unless it considers it unjust to do so [and I will come back to that phrase], order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
>
> (i) the sum awarded to the claimant by the court; or
>
> (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs."

Then there is a table which shows that where the amount awarded is up to £500,000, the prescribed percentage is 10 per cent of the amount awarded and then where the amount awarded by the court is above £500,000, it is different. But that is not something that concerns us, because it would be the first of those two.

45. Paragraph (5) of the rule says:

> "In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings."

46. It was urged on me on behalf of the first defendant that it would be unjust to apply the consequences in paragraph (4). I have to say that I am not persuaded that it would be unjust. It seems to me that the arguments that were being put were really arguments saying that the Part 36 regime was itself unjust and, as was explained by Sir David Eady in *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB), that is is not an argument that can be made. In my judgment the appropriate order is that the Part 36 offer has been successful, and that the consequences will follow as set out in CPR 36.17(4).

47. The last point on this part is the question of the impact of the trustee rules, which I have referred to in CPR 46.3 and in Practice Direction 46.1, and that is whether or not the first defendant should lose her indemnity from the trust fund to which, under the general trust law, she is entitled. I ask myself, therefore, similar questions. Did the first defendant act unreasonably in the conduct of the account? Looking at the way in which the account went through, there were some glitches, there were some difficulties, but I cannot say that at any point in my judgment she acted unreasonably in the conduct of it.

48. The other question is whether the first defendant acted in substance for the benefit of another party or for herself. Here it seems to me that, in relation at any rate to the matters which were found on the account, obviously the same point arises as arose before. This is that there were some payments which were struck out of the account or which were put back in because they were wrongly dealt with. But I cannot say that the first defendant was acting in substance for the benefit of another party, so I cannot find any misconduct in this case. I do not consider that there is any justification for removing the indemnity from the first defendant.

49. That leaves me to turn to the question of the rectification claim on 7 Linwell Close where it is clear that, first of all, the claimant is the successful party and the first defendant is the unsuccessful. The general rule would mean that the first defendant should pay the claimant's costs of the rectification application. I can see no reason here to make a different order, so my order will be that the first defendant should pay the claimant's costs of the rectification application.

50. I accept that this is an issue-based order but I can see no real alternative to dealing with it on that basis. I have no real feel for how the costs of this will impact on the costs as a whole and it would not be fair for me to make a stab in the dark so I think it must be an issue-based order. It seems to me that there is not a great deal of evidential input which relates to this part of the claim and that most of the costs will be the costs actually of the argument that was had (including skeleton arguments, of course) at the time of the hearing.

51. There is then the question of whether the first defendant can claim an indemnity out of the trust fund. It seems to me, however, that it is clear that in making this claim the first defendant was acting not in the interests of the beneficiaries but in her own interests and, therefore, she should be deprived of her indemnity in relation to these costs.

52. That deals, as I have said, with the three different parts. I ought to say something about the position of the second defendant. The second defendant has not had a costs order made against her and, and she does not get any costs in relation to the first part of the claim. The second part of the claim and, for that matter, the third, do not concern the

second defendant so that deals with her position. I hope that I have now dealt with all the costs and issues. I am sorry that it has taken so long for me to spell them out.

(After further submissions)

53. I do not think it is appropriate to order the claimant to pay the second defendant's costs. It seems to me that it is simply part and parcel of the main litigation. It is true that somebody has had to come in (in the circumstances, it is Mr Selway) but I think it is simply part and parcel of the original litigation and I have dealt with that in the costs judgment that I have given.

(After further submissions)

54. Mr Learmonth asks for permission to appeal on three grounds. He says that I should have decided that the removal application would have succeeded. He says that the problem with the indemnities for trustees is that it may make it impossible for a beneficiary to succeed against another beneficiary who is a trustee. I am paraphrasing, of course. Thirdly, if I stand back and look at the matter in the round there would not be anything else that the claimant could have done.

55. One answer to the third point is that the claimant could have gone on with the removal application because that is what she started and that is what she originally wanted. If she succeeded there, it would have been clear that that was because there was something wrong with the trustees who were in place but that was never done and the determination was never made.

56. It seems to me that the problem that Mr Learmonth has really with his application for permission to appeal is that the question of costs is essentially a question of discretion. It is essentially a matter of the judge weighing up innumerable factors and coming to the conclusion that this or that is right. Normally the appellate court does not interfere with an exercise of discretion of that kind. Therefore, it does not seem to me that I ought to take the view that there is a real prospect of success against my decision. But, of course, that does not stop Mr Learmonth from seeking to interest the Court of

Appeal in the point, and no doubt he will take his course as he thinks appropriate. So, I must refuse permission to appeal.

Postscript, 26 April 2019

57. On 27 March 2019, that is, two days after I delivered the extempore costs judgment above, at the end of the hearing, I received an email from Mr Learmonth, for the claimant, but on behalf of both himself and Mr Paton for the first defendant, asking me to deal with three points arising out of that judgment. Mr Learmonth made short submissions in that email, Mr Paton rather longer ones in answer some two hours later, and Mr Learmonth short submissions in reply about an hour later. I was happy to accede to their request, though I asked to be provided with a transcript of the extempore judgment so as to be able to place my new decision in context. This was done, and I therefore set out my decision on the three further points in the paragraphs that follow.

Rate of interest

58. The first point relates to the fact that CPR rule 36.17(4)(c) sets a maximum rate of interest on costs but does not specify the actual rate, which is a matter for judicial decision. My decision above stated (at [44]) that rule 36.17(4) was engaged, but did not specify a rate. I am sorry that I failed to spot that.

59. Mr Learmonth's submission was that the rule was intended to be incentivising, not merely compensatory:*OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195 [2017] 1 WLR 3465, where 10% over base was ordered on the facts of that case. He further submitted:

> "Here I would emphasise D1's refusal even to meet with C to try to narrow issues, despite the obvious deficiencies in the account, as justifying an interest rate at the higher end of the spectrum: 7% over base is suggested, being mid-way between the 'bad case' of *OMV* and the previously standard compensatory rate of 4%."

60. Mr Paton answered this by saying that there was no basis for any penal or 'incentivising' element of interest in this case, and that the Court had made no finding of any unreasonable refusal to meet or mediate. He further said the First Defendant had not refused to meet, but rather was first to seek confirmation whether the largest items in dispute were actually still in dispute. There was no response until 15 November 2018, when it was in substance confirmed that those figures were not contested, and the request for a meeting was not pursued after that. Mr Learmonth's brief response was that the Court of Appeal in OMV had confirmed that the provisions of CPR r.36.17 were intended to incentivise, and that there was no need to show a special circumstance to make it appropriate for the interest rate to reflect that.

61. In my judgment the rate of interest is not purely compensatory, but can involve an element of incentivising, if not actually punishment. Thus, in the *OMV Petrom* case, Sir Geoffrey Vos C (with whom Kitchin and Floyd LJJ agreed) said:

> "38. In my judgment, the use of the word 'penal' to describe the award of enhanced interest under CPR Part 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to 'all the circumstances of the case' in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a). As Lord Woolf said in the *Petrotrade* case, and Chadwick LJ repeated in the *McPhilemy* case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest

> can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable level and at a reasonable time, and to mark the court's disapproval of any unreasonable or improper conduct, as Briggs LJ put the matter, *pour encourager les autres*."

62. In the present case, the problem is that the focus of the trial was on the trust accounts, and not on demonstrating that there had been this or that conduct amounting to a breach of trust, or that the litigation had been conducted well or badly. So I do not have any sound factual basis for increasing the interest rate above a compensatory level. I do not consider that there was on behalf of the first defendant an unreasonable refusal to meet to discuss the mater. Certainly there was nothing of the kind found in the *OMV Petrov* case which there justified interest at the maximum rate possible. Accordingly, in my judgment I should award interest at the rate of 4% over base rate.

Indemnity for adverse costs order

63. The second point is whether, in deciding that the first defendant retained her indemnity out of the trust fund for her legal costs, she was also entitled to an indemnity for the costs awarded against her *inter partes* in favour of the claimant. Mr Learmonth submitted that the order made concerned the indemnity only for the trustee's *own* legal costs and not for those awarded against her. He further submitted that it was only where the trustee was not also a beneficiary, or defending a third party's rather then a beneficiary's claim that costs incurred under an adverse costs order would be regarded as properly incurred.

64. Mr Paton submitted that the trustee could only lose her indemnity against an adverse costs order for the same reasons as she could lose her indemnity for her own costs, *ie* that she was guilty of misconduct and a breach of trust causing loss to the trust fund. He referred to my own decision in *Blades v Isaacs* [2016] EWHC 601 (Ch), especially at [92]-[94]. But, he said, in the present case I had not found the first defendant to have been guilty of misconduct or any such breach of trust. Mr Learmonth replied to say that

this was an argument that had not been made at the hearing and that the first defendant should not be allowed another bite at the cherry.

65. In my judgment Mr Paton is right. I have not found the first defendant to have been guilty of misconduct or any breach of trust causing loss to the trust fund. I have corrected the first defendant's accounting after hearing the evidence, but taking an account in this way is not at all the same as finding proved an actionable breach of trust. The default position for a trustee engaged in litigation is that he or she will have an indemnity for costs properly incurred (including for adverse costs orders) unless guilty of misconduct. In these circumstances I have no basis for saying that the first defendant is not entitled to the indemnity even in respect of the adverse costs order. In any event, I am not aware of any authority for distinguishing the cases where the trustee was also a beneficiary from that where she was not, or was defending a third party's claim, and see no principled reason for doing so.

Indemnity after Part 36 offer expiry

66. The third point made by Mr Learmonth is that I did not decide whether the trustee's indemnity extended beyond the expiry of the Part 36 offer. He points out that, since the claimant did not accept that the indemnity should apply at all, and the first defendant did not accept that the Part 36 offer should have any consequences, *neither* party addressed me on the question of whether the indemnity should apply during the period in which the Part 36 offer's consequences had effect. He submits that the indemnity cannot apply, since a trustee who refuses a Part 36 offer (which is then beaten) cannot say that her costs incurred thereafter were 'properly incurred', reasonably incurred or incurred for the benefit of the trust. Rather, they were incurred in an unsuccessful attempt to avoid the consequences of the Part 36 rules for the trustee personally.

67. Mr Paton criticises Mr Learmonth's submissions as "effectively a fresh submission by the claimant, seeking a variation in part of the decision and order made at the hearing." He starts from the point which in effect I reached in relation to the second point, nemaly, that the trustee's indemnity applies unless and until it is taken away by misconduct. He says that the mere non-acceptance of a Part 36 offer is not misconduct or any other behaviour justifying the removal of the indemnity. He points out that the

claimant "chose to pursue a common form account, with no trustee removal claim, no allegations of breach of trust causing loss, wilful default or anything similar." By way of reply, Mr Learmonth says that "it was left unclear in the Court's judgment whether the indemnity was to apply during the Part 36 period, and [the claimant] was surprised to find it contended that it was."

68. This is a more substantial point than the other two. So far as I am aware, the question whether a trustee who fails to beat a Part 36 offer is for that reason alone to be deprived of her indemnity has not previously been raised, and I am not aware of any discussion on the point in any cases or commentary. On the one hand it can be said that the framers of the Part 36 scheme were not thinking of the special rules that apply to trustees and personal representatives when they created this regime. If they had been thinking about those rules they might have made special provision to accommodate them, or they might not. We cannot know. On the other hand, the scheme *was* intended to apply to all litigants. Trustees and personal representatives are – at least so far as concerns third parties – absolute owners of the assets forming part of the trust or estate, and in principle it might be expected that third parties should not be affected by the fiduciary relations internal to that trust or estate.

69. But the problem raised here is that the litigation is between the trustee *and a beneficiary* of the trust. In addition (though as at present advised I doubt it is relevant) in this case the trustee is *also* a beneficiary. So this is not the standard case of a property owner and a third party in litigation. From a trust law point of view, failing to beat a Part 36 offer can hardly be characterised as a breach of trust, or any kind of misconduct, at any rate not automatically. But from the litigation-efficiency point of view, there is much to be said for incentivising trustees and personal representatives, just as other litigants are incentivised, to accept sensible offers to settle litigation.

70. Yet trusts and estates are only one example of the cases where a litigant is in effect litigating *with other peoples' money*. For example, a corporate litigant is undoubtedly subject to the Part 36 regime, though a director of the company (who may or may not be a shareholder) is not automatically liable to the company just because he or she makes the wrong call and ends up not beating the offer. Similarly a litigant who is indemnified by an insurer (or anyone else) does not lose the benefit of the insurance or

other indemnity just because the wrong call is made. Whether there are any consequences *inside* the relationship between the litigant and those standing behind him or her should be a matter for that relationship, rather than for the Part 36 scheme itself.

71. So in my judgment it is not sensible to attribute to the legislators of the CPR the intention in creating the new Part 36 regime also to interfere with the pre-existing trustee indemnity rules, and in particular to deprive a trustee of the usual indemnity once rule 36.17 is engaged. This means that the questions (i) whether the provisions of rule 36.17 are engaged or not, and (ii) whether the trustee is deprived of her indemnity, are entirely distinct, and must be considered separately.

72. So I return to the question already posed. Has the first defendant committed misconduct, or a breach of trust causing loss to the trust estate, in failing to accept the Part 36 offer put forward by the claimant, and then failing to beat it? In my judgment the answer is No, at any rate without more. Accordingly, the first defendant remains entitled to the indemnity that I held she was entitled to, even in respect of costs incurred after the expiry of the Part 36 offer, except (as already stated) in relation to the costs of the rectification application.

73. I hope that it will now be possible for counsel to agree a minute of order to give effect to my judgment.