Neutral Citation Number: [2019] EWHC 753 (Ch)

Case No: PT-2018-000043

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

Rolls Building, Fetter Lane,
London EC4Y 1NL

Date: 29/03/2019

Before:

CHIEF MASTER MARSH

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Between:

DAVID ERIC LONG (as Administrator of the estate of Norman Rodman deceased)	**Claimant**
- and -	
(1) LINDA ANN RODMAN	
(2) DEBRA FAY RODMAN (individually and in their capacity as Administrators of the estate of Arline Bette Rodman)	
(3) BARBARA SUSAN RODMAN	
(4) ROBERTA RODMAN HANLEY	**Defendants**

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Andrew De La Rosa and Richard Dew (instructed by **Charles Russell Speechlys LLP**) for the **Claimant**
Andrew Mold and Simon Atkinson (instructed by **Macfarlanes LLP**) for the **1st and 3rd Defendants**
The 2nd Defendant appeared in person
The 4th Defendant did not appear and was not represented

Hearing dates: 4 to 6 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. Norman Rodman died on 15 January 2008 at the age of 81. He had executed a will on 8 April 2003 appointing his wife Arline Rodman as his sole executor and leaving his entire estate to her. She executed a will on the same date that was the mirror image of her husband's will. Arline Rodman was diagnosed with Alzheimer's disease in 1999 and at the time of Norman's death the disease had advanced to a stage at which she was suffering from a major deterioration of her cognitive function.

2. Norman and Arline Rodman were both born in the USA and were US citizens. They were married on 7 September 1952 and had four daughters, Linda, Debra, Barbara and Roberta who were born between 1953 and 1957. They are the defendants to this claim. They are also US citizens. For convenience I will use the parties' given names as a shorthand. I will also refer to Linda, Debra, Barbara and Roberta collectively as the Rodman sisters.

3. Norman was a successful international businessman in the fields of manufacturing, shipping, mining and oil. Having lived and worked in various countries in the 1960's, Norman and Arline moved to Geneva in 1971 and in 1973 they moved to London. They bought a house at 4 Chesterfield Hill in Mayfair, London which was held in the name of PEK Finanz Anstalt.

4. From the 1980's Norman's principal activity was the management of his wealth. By the time of his death in 2008, the value of his estate was approximately US$ 134 million which mainly comprised 'Certificates of Deposit' ("CDs") payable to bearer issued by the London branches of several international banks. Norman administered the income and redemption proceeds from the CDs through a network of offshore entities principally based in Panama and Liechtenstein which held accounts in their corporate names at UBS and/or Bank Leumi in London. Norman displayed a strong disinclination to pay tax, either in the United Kingdom or in the United States of America. Undoubtedly, he engaged in substantial tax evasion over an extended period and failed to complete accurate tax returns both in the UK and the USA.

5. Norman made substantial gifts to his daughters during his lifetime. In the years immediately before his death, he was making monthly transfers to his daughters of US$50,000 which then increased to US$75,000 per month. As an illustration of this, the tax return later submitted to the US Federal Internal Revenue Service ("the IRS") for 2007 records gifts to the Rodman sisters of US$3 million in that year.

6. Norman engaged the services of two key individuals, Vincent Basanese and Stephen Saunders. Mr Basanese was originally engaged as Norman's driver but over time he became a trusted assistant and assumed responsibility for the day to day care of Arline. Mr Saunders provided financial advisory services to Norman.

7. The Rodman sisters say they were unaware of the will their father had executed and that they were unaware of his accrued tax liabilities. On his death, they took pre-emptive action to distribute his estate. This included continuing to make monthly payments to themselves of US$75,000. In March 2008, Linda and Debra arranged for $15 million to be placed in an account at Bank Leumi (UK) plc in the name of Haslen Securities Corp which was intended to be used for Arline's benefit. At around the same time, CDs worth US$5 million and US$4 million were given to Mr Basanese

and Mr Saunders. In February 2009, the remaining CDs were split equally between the Rodman sisters. They say that no legal advice was taken after Norman's death and they gave no thought to what the position would be on an intestacy. No attempt to obtain an English grant was made.

8. Debra provided an account of her dealings with her father's business affairs in an email dated 9 January 2009. She says that in 2006, she and her sister Linda were given access to their father's safety deposit boxes in London and were given the ability to deal with the CDs that had a value well in excess of US$100 million. She says her father gave instructions for the disposal of his wealth on his death that included the payments of US$15 million to Haslen Securites and payments to Mr Basanese and Mr Saunders. She concludes her account by saying:

> "Based on the above conveyances and instructions of my father during his lifetime upon his demise I with Graz [a Swiss lawyer who worked for Norman] went before the Swiss Courts and attested that my father a long term Swiss resident of 30 years had died with no assets."

9. It is not plainly not right that as a matter of English law Norman could be regarded as having died with no assets on the basis of instructions given to his children during his lifetime and the grant of possession or control of the CDs; and the fiction that Norman was resident in Switzerland is no longer maintained. He died a US citizen who was obliged to file returns with the IRS and he was domiciled in England and Wales for the purposes of liability to pay UK taxes. The IRS sent notice in October 2008 that a federal tax audit was commencing for the years 2005-2006. Other aspects of his US Federal tax affairs remained open at around the date of his death and Norman's estate had a liability to pay estate tax and gift tax. In view of Norman's failure to make accurate declarations to HMRC and the IRS, it was inevitable that his estate's tax affairs would take some time to resolve and that penalties and interest would be payable.

10. It is said by the Rodman sisters that Norman's will was discovered in August 2009. Arline as his sole beneficiary was entitled to his entire net estate. Her will lapsed by virtue of Norman having pre-deceased her and her estate fell to be distributed on an intestacy with Norman and Arline's daughters being the sole beneficiaries.

11. Separate applications were made by Linda and Barbara and by Debra and Roberta to the Court of Protection for the appointment of an interim deputy over Arline's property and affairs. The applications were prompted by concerns about the possible misappropriation of monies by Mr Basanese and Mr Saunders and also concerns about her mother's whereabouts. Mr Matthew Pintus, who was then a partner with Macfarlanes LLP, was appointed as interim deputy by an order dated 29 October 2009. On 5 February 2010, Mr David Long ("Mr Long"), the claimant in these proceedings, was appointed as Arline's deputy in place of Mr Pintus. Despite having had disagreements between them about what needed to be done to protect Arline's interests, all four sisters agreed to Mr Long's appointment and the order recites that they were willing to cooperate with him. Mr Long was authorised to take such steps as may be necessary to obtain a grant of representation in England and Wales over Norman's estate for Arline's use and benefit.

12. On 15 June 2010, a grant of representation was issued to Mr Long "for the use and benefit of Arline Bette Rodman limited until further representation be granted". The grant incorrectly identified Norman's domicile as being the State of New York. This was corrected on 20 April 2011 with an amended grant. In September 2012, the family home in London at 4 Chesterfield Hill was sold by Mr Long achieving a net sum of £5.5 million.

13. Arline died on 13 January 2015. This created legal uncertainty because her death may have had the effect of revoking the grant Mr Long had obtained over Norman's estate. As a consequence, Mr Long made an application to the court in March 2015 for directions and for an order for a grant of administration pending suit. An order was made in those terms on 16 March 2015 and a grant to Mr Long as administrator pending suit issued on 23 June 2015. On 8 February 2016, an order was made giving directions with the intention that Mr Long's role as administrator would end under the terms set out in detail in the order. That has not occurred.

14. On 13 April 2016 Linda and Debra were granted letters of administration over Arline's estate in England. The value of her UK estate, gross and net, was sworn to at a figure just in excess of £7 million which, as Norman's sole beneficiary, would appear to be substantially less than her true entitlement. There is no available information about the steps Linda and Debra have taken to administer Arline's UK estate or what steps have been taken in the USA to deal with her estate. They have been asked by Mr Long to provide this information but have refused to do so.

15. On 12 January 2018, Mr Long issued an application seeking further directions from the court. He is criticised for making the application but its significance has been largely eclipsed by the application made on 12 March 2018 by Linda and Barbara, who instruct Macfarlanes LLP, for an order under section 50 Administration of Justice Act 1985 to remove Mr Long as the administrator of Norman's estate and for Linda and Debra[1] to be appointed in his place. That application was made about 8 years after Mr Long had been appointed as Arline's deputy and he obtained a grant in respect of Norman's estate. A great deal of work has been undertaken by Mr Long over that period in relation to what was on any view a complex estate that required careful and judicious handling. Norman and Arline's daughters have not always acted in harmony and I have no doubt that the administration of Norman's estate has been complex and demanding.

16. In addition to Mr Long's application for directions and the application under section 50, Linda and Barbara applied for the hearing to be in private pursuant to CPR 39.2(3).

17. This application under section 50 is unusual. Often such applications are made after a long period with an administrator in post based on the administrator's failure to make substantial progress with the administration of the estate. In this case it is broadly common ground that most of the steps that needed to be taken in the estate have been completed or, where that is not the case, a way forward has been agreed that will not involve Mr Long being required to take further action on behalf of Norman's estate. It

[1] Debra was represented by Farrers LLP at one stage. At the hearing she appeared in person but opted not to make submissions.

is also common ground between the parties that the relationship between Mr Long and the Rodman sisters has completely broken down. The evidence is replete with accusation and counter-accusation and claims are threatened by the Rodman sisters against Mr Long and Charles Russell Speechlys LLP ("CRS") who have acted for him throughout.

18. Instead of taking a neutral stance, Mr Long has firmly opposed the application despite his acceptance of the breakdown of the relationship. In those circumstances, the opportunity to be replaced might have been thought to be very welcome. Ironically, one of the grounds upon which Mr Long opposes the application is that there is nothing of substance left for administrators to undertake. However, he focusses particular attention on his case that Linda and Debra are not suitable appointees.

19. The discretion under section 50 is to be exercised in a pragmatic way: see Lawrence Collins J in *Re Loftus, Green & others v Gaul and others* [2005] WTLR 1325 at [199] and Evans-Lombe J in *Dobson v Heyman* [2010] WTLR 1151 at [26]. The need for the court to take a pragmatic approach to the jurisdiction has been disregarded by parties who have, on both sides, adopted an approach that is indulgent and wasteful. Much of the evidence is of limited assistance to the court.

20. At the hearing the court has to consider first, whether the circumstances are such that the discretion is engaged, secondly whether an order should be made under section 50 and, thirdly, if so, what order is appropriate. I would add that it will only rarely be necessary for an application under section 50 to result in a trial because it is usually not normally necessary to make findings in relation to disputed issues of fact for the purposes of dealing with the application.

21. The principles to be applied are not in dispute. The applicants have relied on my attempt to summarise them in *Harris v Earwicker* [2015] EWHC 1915 (Ch) at [9]:

"The relevant principles for the purposes of this application may be summarised in the following way:

i. It is unnecessary for the court to find wrongdoing or fault on the part of the personal representatives. The guiding principle is whether the administration of the estate is being carried out properly. Put another way, when looking at the welfare of the beneficiaries, is it in their best interests to replace one or more of the personal representatives?

ii. If there is wrongdoing or fault and it is material such as to endanger the estate the court is very likely to exercise its powers under section 50. If, however, there may be some proper criticism of the personal representatives, but it is minor and will not affect the administration of the estate or its assets, it may well not be necessary to exercise the power.

iii. The wishes of the testator, as reflected in the will, concerning the identity of the personal representatives is a factor to take into account.

iv. The wishes of the beneficiaries may also be relevant. I would add, however, that the beneficiaries, or some of them, have no right to demand replacement and the court has to make a balanced judgment taking a broad view about what is in the interests of the beneficiaries as a whole. This is particularly important where, as here, there are competing points of view.

v. The court needs to consider whether, in the absence of significant wrongdoing or fault, it has become impossible or difficult for the personal representatives to

complete the administration of the estate or administer the will trusts. The court must review what has been done to administer the estate and what remains to be done. A breakdown of the relationship between some or all of the beneficiaries and the personal representatives will not without more justify their replacement. If, however, the breakdown of relations makes the task of the personal representatives difficult or impossible, replacement may be the only option.

vi. The additional cost of replacing some or all of the personal representatives, particularly where it is proposed to appoint professional persons, is a material consideration. The size of estate and the scope and cost of the work which will be needed will have to be considered."

22. The core guide to the exercise of the court's discretion derives from the judgment of Lord Blackburn in *Letterstedt v Broers* (1884) 9 App Cas 371, as applied to applications under section 50 by Lewison J in *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch 395. It is the welfare of the beneficiaries.

23. Mr Mold, who appears for the Linda and Barbara, submits that considerable weight should be given in this case to the views of the beneficiaries who are unanimous that they wish Mr Long to be replaced. It is undoubtedly right that their wishes may be relevant to the Court's consideration of the exercise of its discretion: see *Perotti v Watson* [2001] EWCA Civ 116, [24] and [26]. Mr Mold also relies on *Khan v Crossland* [2][2012] WTLR 841 at [32], a decision by HH Judge Behrens sitting as a judge of the High Court in respect of an application under the related jurisdiction in section 116 of the Senior Courts Act 1981, for the proposition that where the beneficiaries are all of full age and capacity and unanimous in their wish for the personal representative to be replaced, this will be a *"very powerful factor"*. To my mind this overstates the position for two reasons:

(1) Section 116 operates in a narrower compass than section 50. It applies only prior to a grant and at that point the estate has not been administered. The jurisdiction under section 50 may be invoked, as in the present case, some considerable period after the grant has been obtained and after the administration of the estate to a greater or lesser degree.

(2) At paragraph [32] the judge records his acceptance of the unsurprising proposition that each case turns on its own facts and goes on to record that the unanimous wishes of the beneficiaries are a very powerful factor in that case. It is not right to draw the conclusion that their wishes will always be a very powerful factor, albeit I accept that the unanimous views of the beneficiaries is important where the primary test is their welfare.

24. It is common ground between the parties that friction or hostility between trustees and beneficiaries is not of itself a reason for removal. But where that hostility is grounded on the mode in which the trust (or estate) has been administered, it is not to be disregarded: *Letterstedt v Broers* (1884) 9 App Cas 371.

[2] The report of the decision is defective in a number of respects but the part of it cited appears to be complete.

25. Where the personal representative is or may be in a position of conflict because of intimated claims against him which need to be investigated, this is a material consideration in the exercise of the Court's discretion. Conflict does not have to be established to merit removal; an outward appearance of or potential for conflict can result in removal: see *In re Folkes* [2017] EWHC 2559 (Ch), [24] and *Re Weetman; James v Williams* [2015] WTLR 1745.

26. I agree with the approach put forward by Deputy Master Linwood in *In re Folkes* at [41] for dealing with allegations made against the personal representative:

> *"It seems to me that the appropriate test to be applied to each allegation is whether there appears to be on the evidence before the court, or with such evidence that appears likely to be obtained at proportionate cost, the basis for a claim which has reasonable prospects of success, subject to consideration of potential defences. Such a claim must enhance the value of the estate relative to the costs of pursuing it. Evidence for a claim or a defence before the court is unlikely to be determinative but must not be speculative or dependent upon matters which may or may not happen. Further, the whole may be more than the sum of the parts in that individual claims may be borderline but together they may persuade the court that investigation is necessary. Then the question of the replacement of the Executors must be considered in the context of their position as far as knowledge and possible conflicts of interest are concerned."*

27. In deciding what alternatives to replacement of the executors might be available to the Court, the Deputy Master had regard to the importance of a claimant having access to the estate documents in order to investigate the alleged wrongdoing. At [223], he stated:

> *"But the first step here is the investigation which can in my judgment only properly be carried out by an independent administrator – who in part does need the proprietary rights of the Executors to carry out that investigation."*

28. As is made clear in *Roberts v Gill* [2010] UKSC 22, there must be *"special circumstances"* before a Court will countenance a derivative action. The unifying factor – what it is that has to be special about the circumstances – is that the derivative action is needed to avoid injustice: per Lord Walker, [110].

29. It is not necessary to refer to the body of witness evidence in detail but it is appropriate to make some general observations about it.

    (1) 14 witness statements have been filed running to over 200 pages. Such a volume of evidence is unhelpful.

    (2) Both the witness statements filed by Mr Arr, who is a partner with Macfarlanes, on behalf of Linda and Barbara and those filed by Mr Long are far too long.

    (3) It is not normally appropriate for evidence in a section 50 application to be provided second hand by a solicitor instructed by the applicant or the respondent. The court will usually wish to receive primary evidence. There

are two reasons for this. First, the court wishes to hear the account of the witness in his or her own words and not a version filtered by the solicitor. Secondly, although it is not common, and should not be common, for evidence in a section 50 application to be tested by cross-examination, it cannot be assumed when filing evidence at the outset that cross-examination will not be required.

(4) There are unhelpful elements in Mr Arr's first statement which includes a number of partisan and tendentious comments about Mr Long. For example, he says:

(i) "Mr Long's efforts had seemed focussed on enabling him to avoid taking any action… Mr Long has used it as an excuse to bring expensive, unnecessary and time-consuming direction proceedings."

(ii) "Presumably seeing the danger if he were to allow the claim to elapse on his watch, Mr Long appears to have made … half-hearted efforts to…".

(iii) A section of Mr Arr's first witness statement is headed: "Mr Long has consistently sought to supress the gift splitting claim".

(5) The evidence beyond the initial exchange descends largely into a series of comments on comments. Where this is done, it provides the court with very little assistance.

(6) The Applicants' evidence disregarded the requirements of Practice Direction 57A paragraphs 13.1 and 13.2 until very late in the day. It was not until the first day of the disposal hearing that evidence of fitness to act (consent to act could be inferred from earlier evidence) was provided in the form of a witness statement from each of Linda and Debra. Helpfully, no objection to the late filing of these statements was made. I would observe, however, that although Practice Direction 57A does not say so in terms, it should be obvious that evidence of fitness to act should normally come from someone other than the applicant; someone who is independent. A statement saying (I paraphrase) "I am suitable to be appointed" is of rather less help than a statement from an independent person who can speak as to the appointee's qualities. In any event, the Practice Direction requires evidence of fitness to act to be filed when the application is made. This assists the defendants to assess the strength of the application at the outset.

30. I would add that at the hearing Mr De La Rosa commented upon the heading I mention at paragraph 29(4)(iii) above. He submitted that it was clearly intended to convey that Mr Long had deliberately suppressed the claim in question. Mr Arr made a statement after the hearing in which he said that the section heading: "… was not meant to suggest that the following section of my first witness statement was accusing

Mr Long of any dishonesty or intentional impropriety. I apologise for any confusion caused."

31. It is often the case that applications made under section 50 involve making allegations against the incumbent administrator of varying degrees of seriousness. Allegations in the context of family members often create much heat and light but provide little illumination about the merits. It matters not whether the incumbent is a professional person. In every case, those representing the applicant(s) should make the case for replacement in a dispassionate way. The role of the witness statements is to provide the court with the evidence it needs to make what is sometimes a finely judged decision. Save in a case of obvious wrongdoing, it should be possible for the evidence to make the case without tendentious comment. It is one thing to offer conclusions to be drawn from the evidence, but quite another to mount a personal attack on the incumbent.

32. I would add that where, as here, there is a real likelihood of further proceedings in the future, the court must be careful to avoid appearing to make findings of fact which may influence those proceedings.

33. The relief sought by Linda and Debra has been amended informally over time. The application notice itself seeks the appointment of Linda and Debra as administrators. Shortly before the hearing, it was proposed, as an alternative, that Mr Pintus, formerly of Macfarlanes, should act jointly with Linda and Debra. A witness statement providing his consent to act and providing evidence of his suitability was served a few working days before the hearing. It is accepted by Mr Long that he is a suitable person to be appointed but it is not accepted by Mr Long that Mr Pintus would be able to work effectively with Linda and Debra. That is not a subject Mr Pintus addresses in his statement.

34. The final development was that during his closing submissions Mr Mold, who appeared for Linda and Barbara, suggested as a further alternative, if the court was not in favour of either of the first two alternatives, that Mr Pintus should be appointed on his own to replace Mr Long. No request was made to amend the application and it is clearly unsatisfactory that Mr Long did not know the entire case he had to meet until hearing the applicants' submissions in reply.

Should Mr Long be removed?

35. It is telling that the parties have not been able to agree the approach the court should adopt when dealing with this question. In summary, the parties' positions are:

    (1) Linda and Debra frame the question for the court as being: "*Is the replacement of Mr Long as administrator of the Estate justified?"* This is followed by eleven sub-questions that the court is invited to consider including such matters as the weight to be accorded to the breakdown in the relationship with Mr Long, the weight to be attached to the wishes of the Rodman sisters, possible claims against Mr Long and conflicts of interest.

    (2) Mr Long frames the question differently. He invites the court to answer the question: *"What if anything remains to be done in the English administration of Norman Rodman's estate ("The Estate") that requires the issue of a fresh*

> *grant of administration to Linda and Debra Rodman? In particular, is there any action in the administration that the Respondents claim needs to be taken that they cannot already take either in their personal capacities or (as respects Linda and Debra Rodman) in the capacities they already hold of (1) English Administrators of the estate of Arline Bette Rodman and/or (2) California administrators of the Estate?"*. Ten sub-questions follow which are similar to those asked in the applicants' formulation.

36. It seems to me that neither of these formulations pay close enough regard to the core test that arises from *Letterstedt v Broers*. It is neither a question of what is justified nor a question of what remains to be done. Mr Long's formulation is to my mind some considerable distance off target.

37. I propose to focus on the issues raised in the letter sent by Macfarlanes to CRS and Mr Long on 16 November 2018 just over two weeks before the hearing commenced. The letter is written on behalf of Linda and Barbara[3]. It runs to over 27 pages and describes itself as preliminary notification of a claim pursuant to paragraph 5 of the Protocol governing professional negligence claims. Although it does not purport to be a letter of claim, it crystallises the criticisms of Mr Long and CRS and it highlights the need for conflicts of interest to be carefully considered.

38. The timing of the letter is unfortunate. Plainly it could have been sent much earlier and the decision to send it immediately before the hearing was tactical. However, it is a carefully drafted letter and has to be taken at face value. It seems to me that it is a convenient starting point for a consideration of the section 50 application because it provides what may fairly be regarded as the high point of concerns about Mr Long.

39. There are three main claims that are notified. They each centre on US taxes and in particular US gift tax:

    (1) A claim against CRS for filing inaccurate US gift tax returns.

    (2) A claim against Mr Long and/or CRS for a failure to advise and/or bring claims timeously in relation to the US gift tax returns.

    (3) A claim against Mr Long for devastavit arising from the wrongful administration of the estate.

40. Norman Rodman left his estate with substantial liabilities for tax both in the United Kingdom and in the United States. Mr Long has dealt with the UK tax payable in a manner that has not been the subject of any significant criticism. There is no further liability to tax, interest and penalties in the United Kingdom. The position concerning US tax is, however, more complex and the subject of complaints in the letter from Macfarlanes. The background to the US tax position needs to be summarised.

41. In March 2010 Mr Long was sent a lengthy memorandum prepared jointly by Baker & McKenzie LLP (New York) and Macfarlanes LLP providing advice about the estate's liability to tax in the UK and the USA. Baker & McKenzie were acting for

[3] Macfarlanes do not act for Debra in the proceedings but it appears they are instructed by her to make a claim.

Debra and Roberta and Macfarlanes were acting for Linda and Barbara. The content of the memorandum is unimportant for present purposes. It is, however, an indicator of the degree of engagement of the Rodman sisters on the subject of tax at that stage. The clear impression to be gained is that they were acting in a constructive way. Based on the information that was then available, the estimated liability for income tax alone in aggregate amounted to $26,155,138. This estimate took no account of liability for Inheritance Tax in the UK, and Estate Tax and Gift tax in the USA.

42. On 13 July 2010 McDermott Will & Emery LLP ("McDermotts") were retained to provide advice about US federal tax the estate was liable to pay. Mr M Read Moore ("Mr Moore") who is licensed to practice in both Illinois and California was the partner who was the primary source of the advice provided by the firm. There is some question about whether the retainer was between CRS and McDermotts or Mr Long and McDermotts but nothing turns on it for the purposes of these proceedings. Turning the clock forward, the current position is that a professional negligence claim is being pursued on behalf of the estate by Linda and Debra against McDermotts. The primary basis of the claim is an allegation that McDermotts failed to advise the estate adequately about 'gift-splitting', that is the entitlement to apportion gifts between husband and wife with a view to mitigating the amount of tax that would otherwise be payable.

43. In July 2010 there was a meeting in London between Mr Long, CRS, Baker & McKenzie and Macfarlanes at which Baker & McKenzie were invited to produce a strategy for reducing the amount of US estate taxes that would be payable on Arline's death and proposals for funding of her care. They provided another lengthy memorandum on 10 September 2010. It is notable that the proposal sets out clearly the willingness of the Rodman daughters to provide Mr Long with the amounts he needed to pay all of Norman's historic tax liabilities. On 24 September 2010 CRS (then Charles Russell LLP), wrote to say that the proposal was under consideration. In addition, CRS highlight an issue that has remained a source of disagreement between the parties. The Rodman daughters had taken the bulk of their father's estate at around the time of his death. Mr Long asked to give him the estate assets which they had taken. CRS complained with some justification that Mr Long had been given no information about what had happened to the estate assets. The letter makes clear the importance of this information being provided.

44. By September 2011, a year later, no information had been provided. Baker & McKenzie said in a letter dated 1 September 2011 that the information would be provided "in due course". The letter goes on to express a lack of confidence on the part of all the Rodman daughters in Mr Long's handling of Norman's estate and Arline's affairs and describes animosity being displayed by Mr Long and CRS towards them.

45. An email exchange between Mr Moore of McDermotts and Mr Whitby-Collins of CRS in January 2011 describes the approach adopted by Baker & McKenzie as "fanciful". Mr Whitby-Collins said he thought "… "fanciful" is somewhat generous". The general tone of comment about the Rodman sisters is disparaging. It is also clear from Mr Moore's email that there was concern on the part of Mr Long to avoid the risk that by making distributions from Norman's estate to pay US federal taxes, this would create personal liability to the IRS: the risk, however, is described as being low. In a similar vein, McDermotts advised against Mr Long seeking the appointment

of an executor in the USA and advised it should be left to the Rodman sisters to do so. "We would rather make it the daughters' problem."

46. In the latter part of 2011, a decision was taken by Mr Long not to inform the Rodman daughters in advance that returns were being filed with the IRS. Mr Whitby-Collins observed that this was the approach that had been adopted when filing a disclosure report with HMRC. On 3 February 2012, federal estate and gift tax returns for the years 1999 to 2008 were submitted to the IRS without having been provided to the Rodman sisters in advance. They say there were errors in the returns and crucially box 12 on the forms which, if ticked 'yes', gives consents to gifts being split equally between husband and wife was ticked 'no'.

47. A statement attached to the returns gives the reason put forward by Mr Long for payment of the tax due not being made with the form:

> "Mr Long has been unable to obtain possession of a substantial portion of the decedent's assets. As a result, Mr Long lacks sufficient funds within his possession and control to pay the amount due on this return. For this reason, no payment accompanies this return."

48. The returns were provided to Macfarlanes in February 2012. They expressed surprise about the reason given by Mr Long for not paying the tax that was due and about the absence of a request to the Rodman daughters to provide funds with which to pay the tax. They asked Mr Long to provide details of the amount that was needed to pay the full amount of tax that was due. Mr Long was clearly reluctant to pay the tax due himself in order to avoid the risk of being personally liable to the IRS. That may have been a reasonable stance to take, I express no view one way or the other, in light of the Rodman daughters having taken control of the bulk of Norman's estate (in relation to which Arline was the sole beneficiary). However, it suggests that requests by Mr Long for the estate's funds to be repatriated to him were half-hearted and his preference was to ensure that payment was made direct. However, it is right to note that the Rodman sisters never revealed to Mr Long what they had done with Norman's estate and where the funds they had taken were held.

49. On 22 November 2012 Debra sent an email to Mr Whitby-Collins of CRS about the availability of gift splitting. He immediately forwarded the email to Mr Moore of McDermotts with the observation that there might be difficulty in obtaining Arline's agreement to gift splitting due to her lack of capacity. Mr Moore advised that Arline's consent was needed (and it could be provided by a court appointed conservator) but that the election could not be made after the return had been filed.

50. Mr Whitby-Collins replied saying he had discussed the subject with Mr Long and:

> "… we are simply going to reply to Debra to say that we are advised that gift splitting is not available. We do not want to get into a discussion about the reasons why with Debra."

51. There is also evidence of the subject of gift splitting having been discussed in a meeting between Mr Whitby-Collins and Mr Moore in London in September 2010 some considerable time before the returns were submitted. A hand-written note of the meeting records "split the gift tax" and "better if [Arline] made gifts".

52. Mr Mold relies in particular on the reaction of Mr Long and CRS to Debra's email in November 2012. On one view there was a failure to inform her in clear terms that gift splitting had been an option provided consent on behalf of Arline could have been provided but the opportunity had been lost by filing the returns without claiming it. It might have been strictly accurate to have said to Debra that gift splitting is (present tense) not available but there is at least an arguable case to say that it was misleading by omission by failing to say that Mr Long had opted not to apply for gift splitting.

53. Amended returns were filed in May 2014 but it was by then not open to Mr Long to opt for gift splitting.

54. On 7 September 2016, Macfarlanes wrote to CRS raising the failure to opt for gift splitting. At around the same time, Mr Long instructed Caplin & Drysdale in Washington to provide advice.

55. On 13 December 2016 CRS sent McDermotts a copy of Caplin & Drysdale's advice memorandum. This was a curious step to take given that the remainder of the letter complains about McDermotts' failure to advise about gift splitting.

56. In January 2017 Macfarlanes pressed Mr Long to bring a claim against McDermotts and set out in a careful letter dated 20 January 2017 why their clients considered the claim should be brought. The letter records a difference of view between the US tax advisers about the amount of tax that could have been saved. Under the heading "next steps" Macfarlanes wrote:

> "8.1 We do not think it is appropriate for someone in either your or David Long's position to be defending or seeking to advance arguments where it has been acknowledged by the US Advice that a breach of duty by [McDermotts] has occurred, and further where there is a strong possibility that substantial damage to the value of the Estate/Mrs Rodman's estate has been suffered as a consequence."

57. It is unnecessary to deal with the remaining correspondence on this issue in any detail. CRS suggested assigning the cause of action against McDermotts to the Rodman daughters. However, when that was looked into it was established that in California professional negligence claims are not capable of being assigned. Mr Long obtained advice from Holland & Knight in California. However, the clear impression given in the correspondence is that Mr Long did not relish the prospect of bringing a claim and there is criticism of him and CRS for the delay in concluding a standstill agreement (a "tolling agreeing" in US legal jargon) with McDermotts. Ultimately, Debra and Linda obtained a grant in respect of Norman's estate in California on 15 March 2018 and a claim was issued by Parker Mills LLP on their behalf on 23 March 2018. The claim seeks a sum in excess of $5 million.

58. The claim records that Debra is resident in Lamu, Kenya having previously been resident in Los Angeles County, California.

59. There are three further complaints made in Macfarlanes' letter dated 16 November 2018:

(1) Failure to comply with the order dated 8 February 2016.

60. This order was made in the proceedings commenced by Mr Long shortly after Arline's death when he was appointed as administrator pending suit in respect of Norman's estate. The need for the order arose from the possibility that Mr Long's appointment may have been revoked by her death. In any event, the purpose of the February 2016 order was to bring to an end Mr Long's role. In summary the order provided for:

    (1) Mr Long giving an undertaking to the court to make certain payments that are set out in paragraph 3 of the order and to pay the balance over to Arline's administrator. It was suggested by Mr De La Rosa that the recital was not intended to be an undertaking to the court but I do not consider that this submission is right.

    (2) Paragraph 3 required Mr Long to pay the United States estate tax and penalties and interest. Paragraph 3.1(a) required Mr Long to pay $3,275,995.97 to the IRS within 5 business days of the order.

    (3) Paragraph 4 of the order is based on the premise of Mr Long receiving a release in a form acceptable to him. In that event, he was to retain £400,000 up to "the Conclusion Date" which turned out to be in accordance with the definition 11 May 2017 (in light of no HMRC enquiry having been initiated). The balance of the sum retained was to be paid over to Linda and Debra as Arline's administrators. Mr Long was also required to pay over to the IRS within 5 business days of receiving the release, £575,000.

    (4) Paragraph 5 is based on the premise that the release is not entered into. In that event Mr Long was authorised to retain the entirety of the funds held by him and to pay taxes and costs up to the Conclusion Date with any balance to be paid to Arline's administrators.

61. Mr Long paid the sum of circa $3.3 million to the IRS in accordance with the order in respect of estate tax, penalties and interest. Linda and Debra are now seeking a refund of circa $1.6 million together with an abatement of the late filing penalties.

62. In November 2016, Linda and Debra made payments totalling $2,867,424.97 in respect of gift tax. From evidence filed a few days before the hearing it emerged that Linda, Debra and Barbara have been working together to pay the outstanding gift tax and filed revised gift tax returns and paid the amount they say is outstanding $634,746.03. However, they have not provided a calculation of that figure or any documentation to support it or the fact of payment having been made. At the time the February 2016 order was made, the estimated liability for gift tax was $6.2 million. How it is that the sum due has substantially reduced has not been explained.

63. No release was agreed with Mr Long. He insisted on an indemnity not just for himself but also for CRS. It is also said that he is in breach of his undertaking to the court. His response to this latter point is that the claim against McDermotts was a change of position which justified departure from the order. Plainly it would have been desirable for Mr Long to have referred the latter back to the court when he recognised that he was not going to comply with the order.

(2) The decision to apply to the court for directions in January 2018

64. Mr Long is criticised for applying to the court for directions in January 2018. This is said to have been a pre-emptive move by him but that in reality it was unnecessary.

(3) Fees

65. The administration expense that Mr Long has incurred, excluding the role as deputy for Arline, amount to well over £6 million. Particular complaint is made about the level of fees that has been incurred since the order made in February 2016 of approximately £700,000. On any view, the amount of fees and expenses is very substantial and calls for an explanation.

66. Mr Long denies that there is any basis for criticism that would justify his removal. Mr De La Rosa submitted that the application is unnecessary because:

(1) The Rodman sisters are already personally liable for the gift tax. They are able to deal with the IRS and resolve the total that is due without obtaining a grant in place of Mr Long.

(2) The complaint about the level of costs that Mr Long has incurred has been referred to a costs specialist instructed by Debra.

(3) The claim against McDermotts is already being pursued by virtue of the grant obtained in California.

(4) If there is a wish to pursue a claim against Mr Long and/or CRS, Linda and Debra can pursue that claim as Arline's administrators.

67. Mr De La Rosa also submits that the real reason the section 50 application is made is under the misguided belief that Linda and Debra, if appointed, will be able to obtain more extensive working papers relating to the estate than otherwise. The backdrop to this submission is that a subject access request has been pursued under the Data Protection Act and large volumes of Mr Long's and CRS' records have been disgorged. The court was provided with submissions by Mr Dew, Mr De La Rosa's junior, on this subject explaining why no further documents and records will be produced. I do not consider, however, that this is an area that needs to be explored.

68. It is not the role of the court on hearing an application under section 50 necessarily to make findings of wrongdoing. It is clear however, that where the beneficiaries are able to make out complaints that warrant further investigation, the continued tenure of the administrator becomes untenable unless the complaints are trivial. It seems to me that the issues in the letter from Macfarlanes meet that threshold requirement. They are certainly not trivial complaints and they place Mr Long in a position in which he has conflicts of interest that make it inappropriate for him to remain in office.

69. As I indicated earlier in this judgment, I consider that Mr Long's advisers have incorrectly framed the threshold question for the court. I accept that had the administration of Norman's estate been completed, the court might not have been willing to exercise its discretion to replace the incumbent administrator. But that is not the position here. There are loose ends that need to be tied up and, importantly,

potential claims to be pursued. To say that all steps that are required can already be carried out by other means is not a complete answer. And, so far as potential claims against Mr Long and CRS are concerned, it is not appropriate that a derivative claim has to be pursued in place of a direct claim. There must be special circumstances before a derivative claim will be permitted - see *Roberts v Gill* [2010] UKSC 22 at [110] per Lord Walker. It is plainly preferable here that any claim is pursued by the administrator of the estate.

70. It is odd that Mr Long has opposed the application to replace him with such vigour. It is not obvious why Mr Long did not say as soon as the proposal to replace him was put forward that he would stand down subject to a suitable replacement being found. It would have been helpful in circumstances in which he considers Linda and Debra to be unsuitable candidates to have put forward an alternative. Instead, he has opposed the application altogether.

71. To be fair, the issues of whether Mr Long should be replaced and, if so, by whom are easily conflated. They are, however, separate issues. In parentheses, I remark that it is possible to envisage circumstances in which the court considers it is in the best interests of the beneficiaries to remove an administrator but declines to exercise its discretion to do so because no suitable alternative can be found, or replacement needs to be deferred. However, in general the jurisdiction needs to be approached in stages.

Are Linda and Debra suitable candidates?

72. In this case, Linda and Debra's evidence of their fitness is provided in witness statements they each made on 3 December 2018, the day before the hearing commenced. No explanation has been provided for it being served so late. Their witness statements are in a similar form. They provide a little about their background and self-certify that they are a fit and proper person to be appointed. They each confirm that they will not charge for their services. Notably, neither witness statement says anything about their willingness to accept an appointment with Mr Pintus or about why they felt it was appropriate to deal with Norman's assets after his death without obtaining a grant.

73. It is necessary to digress to deal with an issue concerning further evidence filed after the hearing. Debra's witness statements give her address as 9663 Santa Monica Boulevard Suite 402 Beverly Hills California 90210. This address is also given for her in the grant in California. However, as I have noted, the claim against McDermotts gives her address as Lamu, Kenya. Debra's witness statement dated 3 December 2018 refers to this address where it provided a summary of her education and work experience. She says:

> "In the charitable sector, I opened the Man-Rod Academy which operated between 2009 and 2014 in Lamu, Kenya, which was a school for 350 Somali and Christian children with a clinic attached."

74. During the course of the hearing, I raised with Mr Mold practical considerations about Linda and Debra working together as joint administrators with Linda living in New York State and Debra in California. Later a further discussion took place when it emerged that that Mr Pintus who is based in London might be appointed to act alongside them. These discussions took place on the premise that Debra was resident

in California. I was assured the time differences and the physical distances would not create a difficulty. Debra was not represented at the hearing but was in court and she was asked whether she wished to add any submissions of her own which she chose not to do. It was open to her to correct any error or misunderstanding.

75. After the hearing, I asked about Debra's correct address and ultimately a series of further witness statements were provided on 18 January 2019. They explain that:

    (1) Farrer & Co LLP, who were acting for Debra when she filed her first and second witness statements, included the Californian address in error.

    (2) Parker, Milliken, Clark, O'Hara and Samuelian who prepared the papers for the Californian grant were provided with Debra's address in Santa Monica and included it in the application. The grant is not invalidated by the error.

    (3) Macfarlanes prepared Debra's third statement and copied her address from her earlier statement.

    (4) Debra says her current address is PO Box 440 – 800500, India Village, Langoni, Lamu, Kenya. She says she was resident in California between 2011 and January 2015, her last address there being in Marina Del Rey.

    (5) The address in Beverly Hills is a private box to which her mail is posted and from which a private assistant forwards it to her.

76. Mr Pintus, Linda and Debra have each taken the opportunity to say that they feel able to work together if appointed and that the logistics of doing so will not create undue difficulty. Debra says she has a lease for 12 months of a flat in London and intends to spend in total two of the next six months in London.

77. It would be inappropriate to make more of the discrepancy about Debra's address than it warrants. I am unable to accept, however, that Debra was unaware of the need to provide an accurate address for the purposes of the section 50 application and unaware of why an accurate address is important. The witness statements are hers and she should have corrected the obvious error in them. It is symptomatic of a casual approach to the truth.

78. Mr De La Rosa's made detailed submissions about Linda and Debra's suitability and suggested that they have not displayed an understanding of how a fiduciary should act. Although I do not accept all the submissions provided by Mr De La Rosa, I do accept that Linda and Debra are not suitable appointees. They seek to be appointed to act together and so I do not distinguish between them. My principal concerns, without making findings of fact, are:

    (1) Debra's attempt to obtain a grant in respect of Norman's estate in Switzerland, on the basis of his supposed residence there for 30 years and that he died with no assets, could not have been made honestly.

    (2) The behaviour of all four daughters in treating Norman's estate as their own albeit that their mother was alive was highly questionable. Dealing with his estate without obtaining advice, as they appear to suggest, does not

demonstrate the approach of a fiduciary. To act in that way was, if it is correct that no advice was obtained, reckless.

(3) I accept there was a helpful attempt to agree an approach to the payment of tax made by Baker & McKenzie. However, the refusal to provide any information about what had happened to the funds the Rodman sisters had taken, or to repatriate any of Norman's money without being told how much Mr Long was seeking put the cart before the horse. The daughters are not beneficiaries of Norman's estate.

(4) Linda and Debra have not been frank with Mr Long or the court. They have never explained how inconsistent figures for Arline's estate have been calculated. On the face of the figures, her estate has been substantially understated. They have also (a) refused to provide copies of the amended estate tax returns they have filed with the IRS and (b) failed to disclose any evidence about the recent recalculation of gift tax.

(5) I am unconvinced that the Rodman daughters are able to agree an approach. I have real concerns that Linda and Debra will, if appointed, seek to have their own way.

(6) The undertaking that has been offered to the court to ensure that the gift tax is paid is not acceptable. It is correct that the daughters have personal liability for the tax and therefore every incentive to pay it. However, as fiduciaries, they must ensure that the correct amount of tax is paid. In the absence of any knowledge about the information they have supplied to the IRS, the court is unable to form a view about whether an undertaking to pay is meaningful. I also have in mind that it appears the undertaking to the Court of Protection concerning Arline was overlooked or possibly ignored.

79. Late in the day the notion of Mr Pintus acting as a third administrator was added to the application. He is plainly a suitable candidate to be appointed. He has a good deal of relevant experience and is beyond reproach. I accept that the logistical difficulties of acting together with Linda and Debra can be overcome, albeit they are not ideal. However, I am unconvinced that his addition provides an acceptable solution. As Mr De La Rosa submitted, Mr Pintus appears to postulate in his witness statement dated 27 November 2018 that he will play a subsidiary role to that of Linda and Debra saying that his role would be limited to "strategic input and decision making". It is understandable that he would wish to leave matters that are truly day to day concerns to his co-administrators because they would be working without charge. However, in light of the history of Linda and Debra's dealings with the estate I have concerns that he will be unable to perform his role because he will not be provided with the information he needs.

80. The final suggestion made late in the day is that Mr Pintus could be appointed to act on his own. He has consented to act on that basis. I will make an order replacing Mr Long with Mr Pintus.

81. In light of that decision, the application made by Mr Long for directions falls away and no order needs to be made.

82. The final matter concerns the application for the hearing to be in private and for the 'court file to be sealed'. The principal basis of the application arises from the review in the evidence of privileged material concerning the claim against McDermotts. It is plainly right that where on the hearing of an application for directions by a trustee or an application under section 50, the court is required to consider privileged material, that material should normally be protected. In this case the concern is real because the claim against McDermotts is due to be tried in July 2019.

83. CPR 39.2(3) permits the court to derogate from the principal of open justice and to hold a hearing in private if it involves confidential material and publicity would damage that confidentiality. I accepted at the outset of the hearing that some derogation from the principle of open justice was appropriate. The hearing had been listed as taking place in private because the court file had been marked 'private' for reasons that are not entirely clear. I made an order directing that the hearing would continue in private but that a judgment would be handed down in an unrestricted manner on the basis that it was unlikely to be necessary to refer to any privileged material. In the usual way, this judgment has been provided to the parties in draft and account has been taken of concerns they expressed about particular passages in the draft and amendments have been made where necessary.

84. The terms of the order to be made and other consequential issues will be dealt with on the handing down of this judgment or on a date to be fixed.