Neutral Citation Number: [2022] EWHC 2405 (Ch)

Case No: PT-2021-BRS-000049

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR
Date: 29 September 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

IN THE MATTER OF THE ESTATE OF CLIVE MCDONALD (DECEASED)

AND IN THE MATTER OF SECTION 116 OF THE SENIOR COURTS ACT 1981
AND SECTION 50 OF THE ADMINISTRATION OF JUSTICE ACT 1985

BETWEEN:-

(1) KAREN PEGLER
(2) TAMARA SARAH STRINGER
(3) SERENA JULIET GAHAGAN HULME
(4) JEREMY EDWIN STANLEY GAHAGAN

Claimants

-and-

(1) TIMOTHY BRUCE MCDONALD
(2) HUGH JAMES TRUST CORPORATION LIMITED

Defendants

- -

Louise Corfield, instructed by **Ashfords LLP)**, for the **Claimants**
The First Defendant in person
The Second Defendant was not present or represented

Hearing dates: 14 September 2022

- -

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.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Thursday 29 September 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim under CPR Part 8, by claim form issued on 13 May 2021, to remove or pass over the original defendants as executors of the will of the late Clive McDonald. In fact, the original second defendant to this claim consented to be removed, and the present second defendant was substituted for her by an order of DJ Watkins (as he then was) on 1 October 2021. This trial has concerned the remaining part of the claim, against the first defendant only. The present second defendant has not been concerned in that remaining part, and so, for convenience I refer in the remainder of this judgment to the first defendant as simply "the defendant". The trial was conducted remotely by me by MS Teams on 14 September 2022. As I explain later, there was no oral evidence, and the entirety of the hearing consisted of submissions.

2. I have already given two interlocutory judgments in this matter. The first was handed down on 1 August 2022 (neutral citation [2022] EWHC 2069 (Ch)), concerning applications by the defendant for an adjournment of the trial and for a *Beddoe* order. The second was handed down on 6 September 2022 (neutral citation [2022] EWHC 2288 (Ch)), concerning applications by the defendant for summary dismissal of the claim against him, for an order that I recuse myself from hearing this case and an adjustment to the start time of the trial hearing. All these applications were dismissed. As a result of the dismissal of the first two, which were recorded as totally without merit, coupled with the dismissal and recording as totally without merit of two earlier applications made to other judges in this litigation, I made an extended civil restraint order against the defendant.

Background

3. The purpose of referring to my two interlocutory judgments is mainly that they give some detailed background to this case, although they also play a minor part later in the story. This means that I can outline the essential facts more quickly than I might otherwise need to. In brief, the family circumstances were as follows. The late Clive Angus McDonald died on 30 September 2020, in Bognor Regis, aged 85 years. His wife had predeceased him, I understand in 2011, and he had no children of his own, but he was survived by his only brother (the defendant), now aged 86, his brother's two children, his stepson Philip Samuels, and his late wife's four nephews and nieces (the claimants). The defendant and his children live in Canada. Three of the claimants and Mr Samuels live in England, but one of the claimants lives in Australia. I understand that the value of the estate is less than £750,000.

4. Under a will dated 24 September 2020, the testator appointed as his executors (1) the defendant, (2) his stepson, and (3) not more than two of the partners in the firm of Warwick & Barker, solicitors who had drafted his will. So far as (3) is concerned, the partner proposing to act was Gill Collins, the original second defendant, who had drafted the will. The will of 24 September 2020 gave pecuniary legacies to some 18 beneficiaries, amounting to about £180,000. These included one of £50,000 to the defendant. The residue was given as to 50% to the defendant's two children, and as to the other 50% to the claimants and Philip Samuels.

5. An earlier will, dated 2 March 2017, appointed as executors (1) the defendant, (2) the first claimant and (3) the partners in the firm of solicitors who drafted the will. It gave pecuniary legacies to some 14 beneficiaries, amounting to some £288,000, including one of £100,000 to the defendant. It also conferred the right of occupation in the testator's home at the time of his death on a lady called Jacqueline Delauney (the testator's partner at the time of his death) until her death, which I understand occurred in August 2021, or certain other stated events. The residue was given as before, that is 50% to the defendant's two children and as to the other 50% the claimants and Philip Samuels.

6. In an email from the defendant to Ms Collins dated 12 October 2020, he referred to the will of 24 September 2020 as an "invalid … deathbed will" and as a "highly suspect pop-up will". In an undated letter of about the same time to Ms Collins, the defendant said:

> "I can only conclude that the deathbed September 24 [will] is, in fact, fraudulent. A con, a scam.
>
> Accordingly, I will contest this will in court and much more if you do not do the following … by the close of your business on Thursday the 15th:
>
> - By any lawful method available, annul this bogus will which is CONTRARY TO CLIVE'S WISHES, and 'endorse' my alternative much less toxic 'version' as presented in the last column of my chart. … "

On 28 January 2021, the defendant caused a caveat to be placed on the will of 24 September 2020, in order to prevent a grant in relation to it. There is a reference in the correspondence to its still being in force in January 2022, and the defendant told me in a comment on the draft of this judgment that it is still there. On 16 February 2021 Mr Samuels renounced his appointment as executor, and on 23 February 2021 he disclaimed all his beneficial interests under the will.

Procedure

7. As I have said, on 1 October 2021, DJ Watkins made an order substituting Hugh James Trust Corporation for the original second defendant, and giving directions to trial. (This was subsequently listed for Friday 11 February 2022.) That order also provided that, if the defendant intended to challenge the validity of the will of 24 September 2020, he was to issue his claim forthwith, and if he did not do so by 4 PM on 1 November 2021, he would be debarred from doing so without the permission of the court. The defendant did not in fact issue such a claim by that date, or indeed at any time since, and accordingly the position is he may only bring such a claim if he first applied for and obtained the permission of the court. So far as I am aware, he has made no application for such permission to date.

8. On 29 October 2021 the (first) defendant applied for permission to appeal against the order of 1 October 2021 in relation to the removal of the original second defendant and the substitution of Hugh James Trust Corporation. On 10 December 2021, the defendant applied for a stay of execution of the order of 1 October 2021, pending his appeal. It seems that DJ Taylor considered that he had granted such a stay on 4 February 2022. On 3 February 2022, the first defendant applied for a *Beddoe* order.

On 4 February 2022, DJ Taylor of his own motion vacated the hearing listed for 11 February 2022, on the basis of the outstanding application for permission to appeal. On 21 February DJ Taylor said that the *Beddoe* application could not be dealt with until the appeal had been dealt with, but this was only communicated to the defendant by letter of 17 March.

9. On 22 March 2022 the first defendant issued a further claim (claim number PT-2022-BRS-000043), seeking relief in relation to the estate of the deceased. However, this was struck out by DJ Taylor on 13 April 2022 as incomprehensible and procedurally defective, and as disclosing no reasonable grounds for bringing a claim. The defendant's application for permission to appeal against the order of 1 October 2021 was finally listed for 24 June 2022. Zacaroli J, after hearing the first defendant, refused that application, and recorded that it had been totally without merit. He further directed that the claim be relisted for trial "on the first available date after 22 July 2022". It was listed for 14 September 2022 before me, and, as I have said, I conducted it on that day.

Evidence

10. The evidence before me, in accordance with CPR rule 8.5, was in the form of witness statements which had been filed by the parties. These statements were as follows:

(1) witness statements from the first claimant (dated 13 May 2021) and the original second defendant, Gill Collins (dated 14 June 2021);

(2) four witness statements made by the first defendant, dated 6 June 2021, 24 June 2021, 10 August 2021, and 18 October 2021.

11. The witness statements exhibited a vast quantity of correspondence between the parties and others. There is also correspondence subsequent to the witness statements, which was in the hearing bundle before me. I do not set this out here, but I have looked at all of it, and in particular at the correspondence sent by the defendant to others, since I am considering whether he should continue to act as an executor, and that might inform me about his approach to relevant matters. I record here that there was no application for cross-examination of any of the witnesses on their witness statements, and accordingly no cross examination took place.

The law

Statute law

12. The claim by the claimants is (i) to pass over, or (ii) to remove, the defendant as executor of the will of the deceased. The relevant law falls into two parts. First of all, there is the law relating to *passing over* a person appointed as executor and granting letters of administration to someone else. This takes place under section 116 of the Senior Courts Act 1981, which reads as follows:

> "(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have

> been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
>
> (2) Any grant of administration under this section may be limited in any way the court thinks fit."

13. Secondly, there is the law relating to removing a personal representative and appointing another person to administer the estate of the deceased, whether solely or jointly with another person or persons. This is governed by section 50 of the Administration of Justice Act 1985, which (so far as material) reads as follows:

> "(1) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion— (a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them; or (b) if there are two or more existing personal representatives of the deceased, terminate the appointment of one or more, but not all, of those persons.
>
> […]"

14. Section 116 of the Senior Courts Act 1981 is plainly applicable to the case (which is this case) where no grant of probate or letters of administration has yet been obtained. It ceases to apply once a grant has been obtained: *A-B v Dobbs* [2010] WTLR 931, [8]. In *Goodman v Goodman* [2014] 1 Ch 186, Newey J (as he then was) held that section 50 of the Administration of Justice Act 1985 also applied to the pre-grant situation, as well as to that where a grant had already been obtained. In the present case, therefore, both jurisdictions are available. However, the criteria to be applied by the court in the case of each jurisdiction are different.

Caselaw

15. Section 116 requires merely that there should be "special circumstances" making it at least "expedient" to appoint someone to administer the estate who is not the person who would otherwise do so. In *A-B v Dobbs* [2010] WTLR 931, Coleridge J glossed the statute when he said:

> "20. The point of the section is to ensure that a testator who takes the trouble to name people to administer his or her estate after his death should not have his intentions likely set aside unless the people he chooses by the time of his death, for one reason or another, have, more or less, disentitled themselves from carrying out the task. … All I know is that there does have to be some special feature which disables the appointed executive from carrying out his or her task … "

(For the avoidance of any doubt, I make clear that the section also applies where the deceased died intestate, and the question is whether the person with the highest entitlement to letters of administration should be replaced with someone else: *Re Crippen* [1911] P 108. But, in the case before Coleridge J, the deceased had made a will, which is no doubt why he expressed himself as he did.)

16. In relation to section 50, the claimants referred me to the well-known decision of the House of Lords in *Letterstedt v Broers* (1884) 9 App Cas 371. That case was actually about the removal of a trustee, but in *The Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch 395, [44]-[47], Lewison J made clear that the same principles applied to the removal of a personal representative. He cited several relevant passages from the speech of Lord Blackburn, but I do not think I need to set them out here, with perhaps one exception.

17. That one passage is this (at page 306):

> "It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate."

18. The reason that I do not set out any other passages from *Letterstedt v Broers* is that, much more recently, Chief Master Marsh in *Harris v Earwicker* [2015] EWHC 1915 (Ch) summarised the modern position in these words:

> "[9] 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."

19. And, in *Schumacher v Clarke* [2019] EWHC 1031 (Ch), the same judge said:

> "18. It is critical for present purposes that the core concern of the court is what is in the best interests of the beneficiaries looking at their interests as a whole. The power of the court is not dependent on making adverse findings of fact, and it is not necessary for the claimant to prove wrongdoing. It will often suffice for the court to conclude that a party has made out a good arguable case about the issues that are raised. If there is a good arguable case about the conduct of one or more of the executors or trustees, that may well be sufficient to engage the court's discretionary power under s.50, or the inherent jurisdiction, and make some change of administrator or trustee inevitable. The jurisdiction is quite unlike ordinary *inter partes* litigation in which one party, of necessity, seeks to prove the facts its cause of action against another party."

20. Finally, it is clear that, under each section, the burden of proof to establish sufficient grounds for passing over or removing a personal representative lies upon the claimants. In the present case, they put forward a number of grounds, based on the evidence filed. I will deal with each in turn.

Conflict of duty and interest

21. The first is that the defendant is heavily conflicted, because he has (and intends to pursue) significant personal claims against the estate. In his witness statement of 18 October 2021 the defendant says this:

> "I intend to advance 2 claims against the deceased's Estate, namely:
>
> 1. For half the net sales proceeds of 14 Lane End Road, Bognor Regis, and half the rent on this same property from September 1995 to September 2020, less some 4½ years of bimonthly rent already received to Jan 2020, compounded at 6.5%: 215,000 pounds.
>
> […]
>
> 2. For reimbursement of my disbursements made on behalf of the estate since September 30, 2020. An approximate interim listing is attached as submitted to WB LLP [the testator's solicitors]. This 'debit note' includes my half of the rent on 14 Lane End since September 30, 2020. The total rent in disbursements is almost 10,000 pounds. … "

22. I need not consider point 2 in any detail. Every executor has an indemnity out of the estate for proper expenses incurred. It is inherent in the office, and currently given statutory force by the Trustee Act 2000, sections 31 and 35. If questions arise as to whether improper or excessive expenses have been claimed or taken, there are procedures for resolving them. The executor's claim to expenses properly incurred does not disqualify. If it did, no-one could act unless he or she renounced the indemnity in advance, which would be nonsense.

23. The claim under point 1 is different. It is the consequence of a claim to a beneficial interest in 14 Lane End Road, Bognor Regis, a property registered as belonging to the testator. This interest arises under a deed of trust dated 10 March 1993 apparently made by the testator in favour of the defendant. The copy of this deed which I have seen is in a drafting style and format which I would regard as typical of professional lawyers in the period in which it was made, and bears the name and address of a firm of solicitors in Littlehampton, close to where the testator then lived, in Middleton on Sea (a suburb of Bognor Regis).

24. It provides that the testator should hold the net proceeds of sale of the property on trust for himself and the defendant "in unequal shares". The shares are not in fact defined, although a subsequent provision refers to bringing into account in calculating those shares both (i) monies paid by the testator in redeeming the mortgage on the property and (ii) monies lent by their father, who had formerly owned (and was then occupying) the property, to the defendant. In his witness statement, the defendant claims one half of the net proceeds of sale. Whether that is the correct proportion or not is not a matter which concerns me today.

25. During the hearing of his appeal from the order of DJ Watkins before Zacaroli J on 24 June 2022, the defendant said that he would have to step down as executor whilst that dispute was dealt with "due to conflict of interest during that point". He repeated this in substance before me. So there is no doubt that he accepts the existence of the conflict. But he insisted that any such standing down would only be temporary, for just so long as it took to resolve that dispute. On the other side, the claimants submitted that there would be little practical value in removing the defendant on a temporary basis. In the meantime, the administration would have to be carried on by the continuing administrator, however, resolution of the defendant's claim would be time consuming and there would be no point in bringing back the defendant after that. The defendant, however, strongly disagrees.

26. The order of 1 October 2021 made by DJ Watkins also provided that, if the defendant intended to advance a claim against the estate in respect of the property known as 14 Lane End, Bognor Regis, he was to send a letter of claim, and, if he did not issue his claim by 4 PM on 1 February 2022, he would be debarred from doing so without the permission of the court. The defendant did not in fact issue such a claim by that date, and accordingly the position is he may only bring such a claim if he first applies for and obtains the permission of the court. In a comment on the draft of this judgment, the defendant told me that he had filed such an application on 15 and again on 18 October 2021. Unfortunately, the court file does not contain any such application. I cannot – and do not need to – resolve this question now, but it demonstrates that the potential conflict remains.

Is the conflict due to the testator's own acts?

27. However, there is a further point to consider. Given that the defendant was appointed an executor by the testator's will, and claimed to benefit under a lifetime deed of the testator himself, I suggested during the argument that it might be said that was the testator's own actions that had placed the defendant in a position of conflict. I referred the claimants to two decisions, one of the Court of Appeal in *Sargeant v National Westminster Bank* (1990) 61 P & CR 518 and one of the High Court in *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32. I adjourned briefly to enable the parties to consider them.

28. In the former case, a testator (Henry) let his three farms to a farming partnership comprising his three children. He appointed his wife and his children as executors of the will, and left the farms to the executors as trustees for sale. After the deaths of the testator and his widow, one of the three children (Charles) also died. The administrators of Charles' estate, relying on the rule that a trustee must not put himself in a position where his interest and duty conflicted, contended that the remaining trustees were not entitled to sell the farms so long as their tenancies subsisted. The trustees sought a declaration that they were entitled to sell the farms subject to the tenancies, and were successful at first instance. The administrators appealed.

29. Nourse LJ (with whom Bingham LJ and Sir George Waller agreed), said, at page 523:

> "It cannot be doubted that the trustees have ever since been in a position where their interests as tenants *may* conflict with their duties as trustees to the estate of Charles. But the conclusive objection to the application of the absolute rule on which Mr. Romer relies is that it is not they who have put themselves in that position. They have been put there mainly by the testator's grant of the tenancies and by the provisions of his will and partly by contractual arrangements to which Charles himself was a party and of which his representatives cannot complain. The administrators cannot therefore complain of the trustees' continued assertion of their rights as tenants."

30. In *Re Drexel Burnham Lambert UK Pension Plan*, the plaintiffs were trustees of a pension scheme begun in 1976. The principal employer was the first defendant, which became insolvent in 1990. The trustees were also beneficiaries under the scheme, and until 1990 had been full-time employees of the principal employer. The other defendants fell into four different categories of beneficiary under the scheme. The trust provisions did not include any special provision regulating any conflict between duty and interest in respect of trustees who were also beneficiaries. Following the insolvency, the pension scheme was wound up. The trustees sought directions as to the exercise by them of the discretion invested in them in relation to the winding up of the scheme. The question was whether they were entitled to do so, being both trustees and beneficiaries.

31. It will be seen that this is a different case from *Sargeant*, in that the trustees were not original trustees selected by the settlor. Lindsay J said (at page 41):

> " … given the adaptability of the rules of equity, to which I have referred, and given the examples of exceptions to or relaxations of the general rule which I have cited, I have no hesitation in holding that the rule does not apply with such force as to deny the court even the *jurisdiction* to give directions where the

> scheme in respect of which directions are sought has been proposed by trustees who are in a position of conflict.

32. Later he said (at page 42):

> " … although evidence on the point is not filed, that the likelihood is that, in the sense of *Sargeant v National Westminster Bank Plc* (1990) 61 P & CR 518, the present trustees are unlikely to have put themselves in the position of conflict in the sense of pushing themselves forward to be trustees but rather were selected as persons able and willing to serve their colleagues in such a way."

33. The claimants say that these cases are different from the present. They are cases concerning the exercise of discretion by the trustee which had been conferred by the trust instrument. The present conflict arises from a different source, a hostile claim against the estate from outside the will. In my judgment, it is not enough for the claimants to say that the cases cited are cases concerning the exercise of discretion conferred by the trust instrument. Cases where there is *no* discretion, because a certain interest is conferred upon the trustee by the trust instrument, are all the stronger, but no one suggests that the *Sargeant* principle does not apply to them. Trustee remuneration clauses, for example, are valid, and indeed commonplace in modern times. They do not disqualify trustees from acting.

34. Nor is it enough to say that the claim in the present case arises from *outside* the will. The real problem – and the point emphasised by the Court of Appeal in *Sargeant* – is that it is the actions of the testator himself which created the claim. Moreover, the tenancies granted by the testator in that case long preceded and had nothing to do with the will. For example, if the testator in the present case had many years ago borrowed a sum of money from the defendant, with an obligation to repay with interest, and the loan was still outstanding, I cannot think that that would automatically disqualify the defendant for acting as an executor of his estate. I do not see how a claim to an interest in the Bognor Regis property under the deed of trust, or to an appropriate share in the rents collected in relation to it, can do so either.

35. It might be different if the claimants plausibly alleged that the deed was a forgery, or was vitiated by undue influence (or some other similar factor). So far as I am aware, however, they do not do so. The most that the first claimant says in her witness statement of 13 May 2021 is that

> "The other claimants and I do not know anything about the validity of this claim against the estate, or the basis for the alleged agreement, but we do want an opportunity for it to be properly and independently looked at".

It is fair to say that the deed of trust is not as clear as it might be, because it does not set out the details of the shares. On the other hand, it provides a formula by which they may be ascertained.

36. The first claimant says that the enforceability of the deed "is questioned". This may be a reference to the operation of limitation periods, to which she also refers. She also says that it does not expressly confer a right to share in rents in the meantime, or to interest on unpaid rent. Nor, (she says) does it support the claim to a one-half interest.

The answer to that, of course, is that, until the formula set out in the deed is worked through, that cannot be known.

37. In my judgment, these objections are not enough for an automatic disqualification. On the face of it, the testator deliberately put the defendant in this position, and then appointed him as one of his executors. The defendant has the rights conferred by the deed of trust, and his claim to those rights (whatever they are) does not disqualify him for acting as executor of the will of the maker of that deed. In effect, the testator has licensed him so to act. For these reasons, I decline to pass over or remove the defendant merely on the basis of his making claims arising under the deed of trust.

The defendant as claimant and executor

38. In reaching that conclusion I do not mean to suggest that the defendant, if he continued as an executor, could simply decide to accept his own claim in full and implement the decision. There would need to be consideration of exactly the claim amounted to, by reference to the relevant documents concerned and other information available. If (as at present) there continued to be two or more personal representatives, and those other than the defendant reached the conclusion that the claim was justified, then the claim could be paid, in just the same way as a claim to remuneration under a trust instrument is dealt with, though always subject to the beneficiaries' right to an account, and thus to the process of surcharge and falsification: *Re Fish* [1891] 2 Ch 413, CA.

39. If however those others considered that the claim was not justified, there would be litigation in which the defendant would be claimant and the other personal representatives defendants: *cf Armstrong v Armstrong* [2019] EWHC 2259 (Ch), [8]-[9]. Whether or not the beneficiaries (or a representative beneficiary) needed to be joined would depend on the circumstances: *cf* CPR rule 19.7A and the notes in the White Book at paragraph 19.7A.2. Something of this kind would certainly be necessary if the defendant were the only personal representative.

Other grounds

Intention to challenge the will?

40. However, the claimants also have other grounds for their claim, which I must consider separately. The second point raised by the claimants relates to the defendant's frequently expressed intention to challenge the validity of the will dated 24 September 2020, as "fraudulent" and "bogus". I have already referred to the correspondence between the defendant and Ms Collins in October 2020, in which he had expressed that intention, after she had sent him a copy of the will. He said it again in emails of 1 November 2021 and 21 December 2021. And in an email dated as recently as 14 July 2022 to the claimants' solicitors, the defendant said that

> "Apart from reminding you that I will contest the September 24, 2020 Will - and do much else against chief complainant Pegler - if you do not commit by the 15th to totally unconditionally withdraw the Gahagan suit by then, I demand, request, question, posit etc the following … "

41. The question was therefore raised in argument before me as to whether the defendant still intended to challenge the validity of the will, or (perhaps) reserved the right to do so, or whether he had renounced any intention to do so. The defendant rather cryptically told me that he believed that the will "can be valid", but also believed that it "could not be" (which I interpret as a North American version of "might not be"). Ultimately, he told me that he reserved the right not to make the statement of truth required in order to prove the will of 24 September 2020. I take this as reserving the right to challenge the validity of the will. The defendant certainly did not renounce any such intention. Despite the terms of the order of 1 October 2021, it remains possible for the defendant at any time to apply for permission to challenge the will, and, accordingly, the problem remains.

Inability to get on with others?

42. The third point raised by the claimants is that the first defendant has fallen out with almost every individual involved in the estate, and is unable to work with others. The defendant denied this, telling me that that he got on well with other people, unless they were either incompetent or dishonest. He wanted to stop the claimants from wasting money on useless litigation. He thought there were only two other professionals with whom he had significant disagreements, of which one was Ms Collins. He told me that he was resisting what he regarded as "her incompetent and dishonest behaviour". I emphasise here that I am not in a position to, and do not, make any findings in relation to such matters, nor in relation to the further allegations referred to below.

43. It appears however from the unchallenged evidence before me that the defendant has made

(i) complaints to the police about Philip Samuels (emails 3 and 30 November 2020),

(ii) complaints to the police about their allegedly poor investigation and failure to charge individuals (email 22 May 2022),

(iii) complaints to the broker (email 16 August 2021) and two the insurance company insuring the estate for rejecting claims in respect of alleged thefts of estate assets by Philip Samuels (email 22 August 2021),

(iv) complaints to the Law Society, the Solicitors Regulatory Authority, the Society for Trust and Estate Practitioners, and Solicitors for the Elderly about Ms Collins (see email 27 March 2021 to Julia Gahagan),

(v) complaints to the Solicitors Regulatory Authority about the solicitors for the claimants,

(vii) complaints to Hugh James about its partners and solicitors' conduct,

(viii) complaints to the Legal Ombudsman about its response to his complaints about other regulatory bodies (email 13 December 2021), and

(ix) complaints to the Judicial Conduct Investigations Office about DJ Watkins (3 emails dated 23 December 2021).

It is however right to say that in his witness statements in these proceedings some of these allegations have been withdrawn (in whole or in part) and some have been modified. But many remain in their original form.

44. In relation to DJ Watkins, the defendant asserted in correspondence on numerous occasions (*eg* emails 6 October 2021, 31 October 2021, and 13 December 2021) that a lady called Melanie Watkins of Hugh James was related to the district judge. This was consistently denied, and eventually the defendant backtracked in an email of 23 December 2021.

45. The defendant has also expressed his intention (I do not know whether he carried it through) to complain to the Judicial Conduct Investigations Office about Zacaroli J himself, In an email to the court on 24 August 2022 he described the judge's decisions as "absurd counter-intuitive and counter-precedent judgments motivated again by pro-lawyer bias and ill-will toward an old ex-pat (or due to some form of expected quid pro quo, as with Watkins above)". He also made a further serious allegation in an email of 3 August 2022, where he asserted that Zacaroli J had a "5-10 minute ex parte prehearing meeting with the claimant's barrister Louise Corfield immediately before or soon before the official TEAMS June 24 meeting". However, in a further email of 30 August 2022 he said "if I claimed that Zacaroli J had a pre-meeting meeting with Louise Corfield, I take that back…"

46. As I have already said, I gave a judgment on 1 August 2022 refusing the defendant's applications for an adjournment of the trial of this claim and for a *Beddoe* order. The defendant then made an application for me to recuse myself from hearing the matter, on the grounds of bias (described in a covering email as "obvious oath-breaking bias and ill-will") I refused that application, together with a further application for an adjournment, and an application for summary dismissal of the claim, on 6 September 2022.

47. In an email from the defendant to the claimants' solicitors dated 30 August 2022, the defendant said this:

> "As a rider, I cannot believe that the three judges so far are so incompetent or out to lunch that they made the judgements and statements (Matthews) that they did. The only explanation for their, yes, weirdness, is corruption. Hard to believe but only plausible explanation for such otherwise inconceivable conduct. Is this lack of professional conduct rife with virtually all UK judges? They are all ignoring their oaths for starters. What do you know about this judge malaise?"

Lack of neutrality?

48. The fourth point raised by the claimants is an alleged lack of independence or neutrality in relation to the estate beneficiaries. The claimants say that the defendant "has significantly taken against the claimants, such that he would be unable to act neutrally and impartially in the interests of the beneficiaries as a whole. … " They rely on a number of applications made by the defendant during the course of this litigation which had been dismissed as totally without merit, and say that this amounts to vexatious litigation against the claimants. They also refer to comments made about various of the claimants in correspondence, and to an unpaid costs order against the defendant in favour of the claimants. It appears to be common ground that relations

with the claimants and Philip Samuels have broken down, although there is a disagreement as to the reasons for this. The defendant says that the breakdown in relations would not affect his neutrality.

Acts of the defendant as executor and mistakes made at the outset?

49. The fifth point raised by the claimants relates to acts done by the defendant as personal representative (even before proving the will). These include waiving rent on properties in the estate and giving tenants a "Christmas gift" of £200 out of estate funds, without even consulting his co-personal representative. The defendant accepts that he did these acts. During the hearing, this point was taken together with the sixth point, which is that at an early stage the defendant indicated that he would pay Philip Samuels and himself (both non-professional executors) for their time in administering the estate, although there is no remuneration clause so providing in the will.

50. The defendant says this was a temporary misunderstanding of the relevant law, as the equivalent position in Canada is said to be different. The claimants for their part accept that the defendant no longer intends to do such things. But the fact is that the defendant is an intelligent and experienced former corporate executive, and must have realised that he needed to understand his powers as a personal representative under English law before embarking on the administration of the estate. And yet he did not even consult his (then) co-executor Ms Collins, who as an experienced English solicitor practising in this area of the law could have told him immediately (and gratuitously) what the position was.

The defendant's conduct in these proceedings?

51. The seventh point relied on by the claimants is the defendant's conduct within the present proceedings. He has made four recent applications which have been recorded as totally without merit, and an extended civil restraint order has been made against him in consequence. The claimants say that this feeds into the notion that he cannot work with others, and also say it complicates the administration if the defendant has to seek permission to take proceedings for the benefit of the estate. The defendant told me that he had not made many "contacts with the court", and that he was trying to deal with what he said were misappropriations of estate funds, which was "clearly appropriate" and "totally legitimate". He also sent an email (which I have read, and which was in my view utterly inappropriate) on 7 October 2021 directly to the barristers representing the claimants and the second defendant, apparently in an attempt to "to inform you of some facts and evidence that your clients likely kept from you".

The authority of the court?

52. The eighth point relied on by the claimants is the fact that the defendant has described a still unpaid costs order against him and in favour of the claimants as "not legit". They say that this shows that the defendant has difficulty in accepting the authority of the court. The defendant told me that he was upset at being ordered to pay £6,000 in costs for trying to try to recover the claimants' (*ie* the estate's) money, and that he *did* have a difficulty with the authority of the court, when he saw it going wrong.

53. The defendant's general approach to objective decision-making, seen repeatedly in the papers before me, can be summarised in his words in his witness statement of 24 June 2021, at page 20:

> "As a retired high-level publishing executive with proven unusual powers of perception and recall, strong accreditation including a prize for highest marks in a law exam from a Chartered Accountants Institute, as well as knowledge of the estate and the parties involved, all of which should be obvious from the above, I *know* all my allegations are well-founded" (emphasis supplied).

Comment

54. It is right to say that the fourth, seventh and eighth points urged on me by the claimants were not foreshadowed in the evidence originally filed and served in support of this claim. These however relate to matters occurring after the commencement of the present proceedings, and therefore in the nature of things could not be expected to have been included in that evidence. The claim is for an order for the passing over or removal of the defendant as executor of the estate. That claim has not changed since it was issued. It is the evidence in support which has accumulated.

55. In my judgment, the question whether the order sought should be made, and the defendant should indeed be passed over or removed, is to be decided in the light of the circumstances obtaining, and the material available to the court, at the date of the hearing of the claim: *cf Re Wrightson* [1908] 1 Ch 789, 797-98 (application for removal of trustees). The defendant participated actively in that hearing and took the opportunity to defend himself against the points made by the claimants. Moreover, it is fair to say that his responses to those points were nearly all of the kind "Yes, but…" rather than "No"; that is, explaining why he had acted as he did, rather than denying that he had acted at all. I am satisfied that in reaching my decision I can properly take into account the newer points as well as the original ones.

Assessment

56. In assessing the weight of these points made by the claimants, I bear in mind that I am not required to find wrongdoing on the part of the defendant, and nor am I necessarily required to reach the view that the facts are such that the defendant should not act as personal representative. As Chief Master Marsh said in *Schumacher v Clarke* [2019] EWHC 1031 (Ch), in a passage which I have already set out,

> "18. … If there is a good arguable case about the conduct of one or more of the executors or trustees, that may well be sufficient to engage the court's discretionary power under s.50, or the inherent jurisdiction … The jurisdiction is quite unlike ordinary *inter partes* litigation in which one party, of necessity, seeks to prove the facts its cause of action against another party."

57. Even so, I am quite satisfied on the material before me that the defendant, however well-meaning he undoubtedly is, and however much he believes that he knows what his late brother would have wanted, and that he is capable of implementing this, is unfortunately incapable of acting as a disinterested, objective administrator of this testator's estate. In saying this, I take little account of the sixth point (mistakes made at the outset as to the scope of his powers). Everyone makes mistakes, even judges,

and the defendant has quite properly recognised the ones referred to here. His fault was, as a non-lawyer resident in another country, to assume that he knew the current English law without needing to ask anyone. Fortunately, these errors caused no loss to the estate.

58. I bear in mind also in his favour that it was the testator himself who appointed the defendant, his own brother, as an executor of his will, and that the defendant wishes to fulfil the task laid upon him. Those count for something in the balance. I further accept that this is not a large estate, and that professional fees will unfortunately go to reduce the residue of the estate, in which the defendants' children are interested. In addition, I recognise that it is not enough in itself, in order for his passing over or removal to be ordered, that there is friction or even hostility between personal representative and beneficiaries, or between one personal representative and another. There must be more.

59. But the defendant's equivocal approach to the validity of the will (point 2) is highly troubling. An executor named in a will, and indeed purporting to act as such, ought not to be threatening a challenge to the validity of the will itself. In addition, however, there are the other matters that I have mentioned. These include the falling out with others (point 3), including the inability to recognise that independent and objective judges may reach legal conclusions he does not like, but which he must loyally implement, and the complete breakdown in relations with the other beneficiaries (point 4), including obsessive (and frequently abusive) letter- and email-writing to them. Then there are the actual or potential misapplication (without even consultation with the other executors) of estate assets and powers (point 5), and the lack of judgment shown in pursuing hopeless applications before the court (point 7). There is also his inability to accept the authority of the court where *he* thinks it has gone wrong (point 8), buttressed by his constant reference in correspondence to having once won the law prize of the Ontario Institute of Chartered Accountants.

60. Even though the defendant places some emphasis on the testator's own choice in appointing his executors, this is undermined by the defendant's statement in his witness statement of 6 June 2021, that:

> "I advised my brother Clive not to appoint the … partners of Warwick & Barker as his executors. Given my considerable experience with lawyers and estate administration … I anticipated … that they might be more of an expensive encumbrance than a help. But Clive was nothing if not dogmatic. He was often unreceptive to my advice. In sum, I know his estate and wish to be his only executor."

It is clear that the defendant is used to taking charge, getting his own way, and brooks no dissent from what he decides. All difference of opinion from his is attributed to incompetence or base motive. All of these things to my mind add up to a comprehensive disqualification for his being concerned in the fiduciary administration of assets for the benefit of other people.

61. The defendant may (within the relevant law) do what he likes with his own beneficial property. But he should not, and cannot be permitted to, behave in this way in relation to assets held for the benefit of others. The defendant may have been an excellent corporate executive during his business career. I am no judge of that. But, on the

material before me, including the many hundreds of pages of correspondence that I have read, my judgment is that he does not have the temperament, character or personal qualities needed to act as a personal representative under English law in relation to the estate of his own brother, in which both he and his children have beneficial interests. In this case the welfare of the beneficiaries as a whole will be best served if the defendant is not involved in the administration of that estate.

Conclusion

62. Accordingly, I am entirely satisfied that the matters set out above amount to special circumstances under section 116 of the 1981 Act, so that I am justified in passing over the defendant for the purposes of the grant of administration to the estate of the testator. Even if that were not so, I would be satisfied that it was appropriate to remove him as executor under section 50 of the 1985 Act, on the basis that it would be difficult, if not impossible, for the defendant to complete the administration of the estate or administer the will trusts in accordance with the law, and that the interests of the beneficiaries as a whole would be best served by such removal.

63. I am afraid that, in the wake of the defendant's attempts at administration so far, the testator's choice must be put on one side in favour of the beneficiaries' interests, and the cost of an independent professional personal representative is a price that must be paid to ensure the welfare of the beneficiaries as a whole. I add only that I see no need at this stage to burden the estate with the additional cost of a second personal representative. It will therefore be sufficient for the administration to be carried on by the current second defendant.

Postscript

64. I circulated a draft of this judgment to the parties a few days ago, in the usual way. The claimants had no suggestions for correction. The defendant however sent me (well within the time scale limited by my directions) a nine-page single-spaced document. This did not seek to re-argue the case, but it did contain a considerable number of suggested corrections, many involving the insertion of complete paragraphs of text. I have considered all of these, but have made only a few amendments in consequence of them. Most of the intended additional text would, if adopted, have involved my in effect making numerous, and highly contentious, findings of fact which were not necessary for the purposes of this decision. They may or may not be live issues in litigation hereafter.

65. I mention two other points arising from this document for completeness. The first is that the defendant objected to Philip Samuels being described in the judgment as the testator's stepson, and referring to dictionary definitions. I have therefore consulted a number of dictionaries, and find that the description which I have applied is perfectly proper. The second is that the defendant told me in his comments that there had been another will made by the testator, dated 14 February 2020. However, so far as I can see, this was not mentioned in the papers before me, and there is no copy of this will in the bundle. Since, on the details of this will provided to me by the defendant, it makes no difference, I have not amended my judgment to take account of this.

66. That however was not the end. This morning (outside the time scale limited by my directions) I received a further lengthy email from the defendant. In fact it came

twice, in two slightly different versions. Neither appears to have been copied to the other side, in breach of CPR rule 39.8. Each email covered five pages of single-spaced A4. Unlike the previous submission, this *did* attempt to re-argue the case, in contravention of para 12.87 of the Chancery Guide (2022). But there were other points too. In defence to the defendant's complaint that he was not a "businessman", but a salaried employee, I have replaced that term in [50] above. He objected also to the term "senior publishing executive". However, I did not use that term. In fact, the only similar phrase in the judgment is "high-level publishing executive", and that occurs in the defendant's own witness statement: see [53] above. He also accuses me of "mocking [his] accomplishments". That has never been my intention. Where I have referred (for example) to the defendant's self-descriptions, I have done so to make or illustrate an important point in reasoning my decision, and I am sorry if he has taken it amiss.