

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Property, Trusts and Probate List (ChD.)

Date: 17 December 2025

Before :

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

Between :

(1) ROSEMARY SHUFFLEBOTHAM

Claimants

(2) GWYNETH MILNER

**(As Executrices of the Estate of Alan
Shufflebotham Deceased)**

- and -

SUSAN HEATHER SHUFF-WENTZEL

Defendant

**(As Executrix of the Estate of Alan Shufflebotham
Deceased)**

Mr Jason Perrin (instructed by **Foot Anstey LLP**) for the Claimants

Mr James Poole (instructed by **Helix Law**) for the Defendant

Hearing dates: Hearing and main judgment 14 August 2025; Written submissions on costs dated
23 September 2025 for the Claimants and 9 October 2025 for the Defendant

JUDGMENT on Costs (Draft Judgment circulated 27 November 2025)

This judgment was handed down remotely by circulation to the parties' representatives at
10.30 am on 17 December 2025 and by release to the National Archives

His Honour Judge Charman:

1. This judgment is concerned with the costs of an application by the Claimants as two of the executrices of the estate of Alan Shufflebotham (Deceased) to replace the executrices and trustees of the estate. The Claimants were two of the three executrices appointed by the Deceased's will and the Defendant was the third. She opposed the application to remove her and objected to the professional trustee proposed by the Claimants.
2. I heard that application on 14 August 2025 and gave an ex tempore judgment. The outcome was that the Claimants failed to remove the Defendant as executrix and trustee but were successful to the extent that I permitted the Claimants to resign (which was not opposed) and ordered the appointment of the new professional executor and trustee proposed by the Claimants, to act with the Defendant and a representative of the First Claimant's branch of the family of the Deceased.
3. The question of costs was controversial. I determined that the Claimants' own costs be paid out of the estate pursuant to their indemnity as trustees. I also determined that the Defendant was the successful party overall and that therefore she was entitled to her costs of the application. However, there was significant disagreement between counsel as to the detail of the principles to be applied in determining whether those costs should be paid from the estate or by one or both of the Claimants personally, and if they are to be paid personally, whether they can be recouped by them from the estate pursuant to their indemnity as trustees. I therefore invited sequential written submissions from counsel on that issue. I am grateful to both Mr Perrin for the Claimants and Mr Poole for the Defendant for their very helpful written submissions. I have considered both the submissions and the authorities referred to in them. I mean

no disrespect by not referring to all of those submissions and authorities in this judgment. In the interests of economy and proportionality, I refer only to those matters which are required in order for the parties to understand what I have determined and why.

4. Counsel agree that the issues I need to determine are:
 - (a) Whether the Claimants should pay the Defendant's costs personally or whether those costs should be paid from the estate; and
 - (b) If the Claimants should pay the Defendant's costs personally, whether they should be able to recoup those costs from the estate via their indemnity as executors and trustees.
5. The question of whether to defer a costs order raised in Mr Perrin's submissions was a live issue at the time that he raised it, but is no longer an issue now.

The Parties' Positions When the Application Was Made, After the Application and Prior to the Hearing, and at the Hearing

6. In the application, the Claimants sought to be removed and for the Defendant also to be removed and all three to be replaced by a professional trustee, Mr Taylor.
7. The Defendant did not oppose the Claimants' removal but prior to the making of the application and until a fairly late stage, she did oppose the appointment of Mr Taylor, without providing any proper reason for doing so. She also opposed the replacement of all three lay trustees with a single professional trustee. Her position was that either

she should continue as a trustee alongside another lay trustee or that a different professional trustee chosen by her should be the sole trustee. However, the Defendant never provided consent to act from her suggested professional trustee. The Defendant then significantly changed her position in a without prejudice save as to costs offer contained in a letter from her solicitors dated 5 August 2025, some nine days before the hearing.

8. I will turn to that offer shortly, but it is in my judgment relevant to the issues I have to decide that until nine days before the hearing, the Defendant's case was either she and a new lay executor and trustee should administer the estate going forward, or an alternative professional trustee chosen by her rather than the one proposed by Claimants and in respect of whom no consent to act had been provided to the Claimants should replace the parties.
9. In the letter of 5 August, the Defendant significantly changed her position. She proposed that Mr Taylor replace the parties as sole executor to complete the administration of the estate, which as I found in my judgment, was coming close to completion. She proposed that then she and Mr Taylor be appointed as the trustees of the trust created by the Deceased's will. That continued to be her position at the hearing and was stated as such by Mr Poole in his skeleton argument for the hearing.

The Relevant Legal Principles

10. The starting point is that, as provided in CPR 44.2, costs should follow the event. The successful party's costs should be paid by the unsuccessful and the question of who is the successful party is determined as a matter of commonsense rather than a technical analysis. As I made clear at the hearing, in my judgment, overall, the Defendant was the successful party. Therefore, she should recover her costs.

11. The Claimants were unsuccessful overall and therefore the starting point is that they should pay the Defendant's costs. However, in my judgment that would be an overly simplistic way of analysing the outcome of the application. The Claimants were unsuccessful on the issues which occupied the court at the hearing. However, when their original application is considered, as a matter of commonsense, they were partially successful and partially unsuccessful. As Mr Perrin points out, the Claimants wished to be removed and were removed. They also wished the Defendant to be removed and for all three of them to be replaced with a sole professional trustee, Mr Taylor. A new professional trustee was appointed (but not Mr Taylor as he withdrew his consent to act so another professional trustee has been appointed), together with lay trustees from each side of the family.
12. The Defendant never opposed the removal of the Claimants but she did oppose the appointment of Mr Taylor without providing any reason for doing so. Her proposed way forward was entirely different from the determination reached by the Court until the offer of 5 August, and remained different even after that offer. The Claimants' response to that offer was to lament that the Defendant engaged with a view to compromising the matter so soon before the hearing but then to reject the offer, require that the Defendant not be a trustee and to require her to make a costs contribution. In my judgment, it is against this factual background that both the nature of the dispute and the reasonableness of the Claimants' conduct falls to be judged.
13. Counsel referred me to a number of authorities spanning over 100 years of jurisprudence, from *Re Buckton* [1907] 2 Ch 406 which set out what became the conventional categories of claims by trustees when their costs liability falls to be

considered, to *Hanson v Coleman* [2025] EWHC 116 (Ch) when the authorities were reviewed earlier this year, and many other decisions in between. I agree with Mr Poole that the most helpful and authoritative analysis is that of Asplin LJ in *Price v Saundry* [2019] EWCA Civ 2261 at paragraph [27]. Asplin LJ set out the three categories of cases: (1) what she termed a “trust dispute”, which is a dispute as to the trusts upon which the subject matter of the settlement is held, and which may be either ‘friendly’ or ‘hostile’ litigation, depending upon whether it is concerned with a matter such as the true construction of the trust instrument which is an issue that needs to be determined in the interests of all interested parties or a matter such a challenge to the validity of the trusts which pits the interests of some interested parties against those of others; (2) a “beneficiaries dispute” where there is disagreement as to the propriety of any act or omission already taken or to be taken by the trustees in the future; and (3) a “third party” dispute with persons other than in their capacity as beneficiaries, in respect of rights and liabilities assumed by the trustees as such in the course of the administration of the trust.

14. Asplin LJ also observed that trustees are entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust, including the bringing and defending of proceedings for the benefit of the trust estate, and have a lien on the trust assets to secure such an indemnity. Further, the trustees also have a duty to protect and preserve the trust estate for the benefit of the beneficiaries. However, a beneficiaries’ dispute is usually regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate.
15. The categories identified by Asplin LJ in *Price* are similar to those that were identified by the court in *Buckton*.

16. As Master Brightwell said in *Hanson v Coleman* [2025] EWHC 116 (Ch) at [9], an opposed claim for the removal of a personal representative will frequently be a beneficiaries dispute, but it is necessary to assess the character of the proceedings and the positions adopted by the parties and their conduct in order to assess whether the proceedings should be seen as a hostile beneficiaries dispute or as a claim pursued for the benefit of the trust or estate.
17. It follows from the authorities that in cases which do not fall squarely within one or other of the three categories (and indeed even in some cases which do) it is necessary to examine the character of the proceedings and the positions and approaches of the parties in order to establish both whether the proceedings were ‘hostile litigation’ and whether the trustees acted reasonably in the proceedings and/or acted as they did pursuant to or consistently with their duty to preserve the trust estate.
18. As to the trustees’ right of indemnity, it is stated in *Lewin on Trusts* (20th ed) at 48-004:
- “The general principle is that a trustee is entitled to indemnity in respect of costs and expenses properly incurred by him in connection with the performance of his duties and exercise of his powers and discretions as a trustee out of the assets of the trust in respect of which the costs were incurred.” Further, at 48-005: “Even where he is unsuccessful, he is still in principle entitled to recover from the trust fund any costs he has been ordered to pay to the successful beneficiary.”* A trustee is entitled to recover under such an indemnity unless the court orders otherwise. Accordingly, the question which arises is whether in this case the court should order otherwise.
19. *Lewin* states at 48-006: *The right of a trustee to indemnity in respect of costs extends only to costs properly incurred in the execution of the trust. By this is meant costs*

which have been both honestly and reasonably incurred. A doubt is to be resolved in favour of the trustee, and so the right is sometimes expressed in terms of a double negative, that is, the trustee is entitled to costs not improperly incurred. The right of indemnity can be lost or curtailed by such inequitable conduct on the part of the trustee as amounts to a violation or culpable neglect of his duty as trustee.”

20. Accordingly, a trustee loses her right to the indemnity in respect of costs and expenses which are improperly incurred. An example of such improperly incurred costs is those incurred by a trustee acting for her own benefit or for the benefit of some beneficiaries against others (see e.g. *Lewin* at 48-008).
21. As Mr Perrin submits, the fact that a trustee is ordered to pay the costs of another party to litigation does not mean that the trustee cannot recoup those costs and the trustees’ own costs from the estate. In example of such a case is *Jones v Longley* [2015] EWHC 3362.

Application of the Legal Principles to this Case – Should the Claimants be Ordered to Pay the Defendant’s Costs Personally?

22. I agree with Mr Perrin’s submission that this case does not fall easily into any of those three categories in *Buckton*. I do not consider that it falls squarely within the categories in *Price* either. However, I do not agree that this case is one that ultimately falls within the category of a ‘trust dispute’ brought for the benefit of the estate. Whilst it is right that an application to the court was necessary both to enable the Claimants to be removed as executors and to break the deadlock in the administration of the estate, the form of the application and in particular, the form of the relief sought which included the removal of the Defendant as an executor against her will was properly categorised as hostile litigation. This is apparent from the form of relief

sought, the nature of some of the evidence advanced in the Claimants' witness evidence and the response to the Defendant's belated offer in the letter of 5 August to which I have referred. A central purpose of the Claimants' application was the removal of the Defendant.

23. It follows that in my judgment, whilst these proceedings do not fall squarely within any one of the three conventional categories of claims by trustees, they are closest to a beneficiaries claim, and in my judgment more importantly for the purposes of determining the issues before me, this was hostile litigation. It follows that in my judgment, the Defendant is entitled to a costs order against her opponents rather than the estate.
24. Mr Perrin raises the question of distinguishing between the Claimants and points out that the Second Claimant is not a beneficiary, but was appointed as she had been the Deceased's accountant. Mr Perrin says that she has played no active part in the proceedings and was only joined in order to secure her removal from office. He says that as soon as the relationship between the executrices broke down, she did nothing other than seek her own removal and he says that she has remained neutral.
25. I have some sympathy for the Second Claimant who has no beneficial interest in the estate and I accept that she needed to apply to the court to secure her removal and that it was reasonable in the circumstances for her to do so. However, as Mr Poole points out, she did not need to join in the instant application in order to be removed. She could have made her own application limited to her own removal.
26. Mr Perrin is correct that the Second Claimant made no witness statement in the proceedings. If she had made one stating that her position was that she simply sought her own removal and that she was neutral on the question of removal of the Defendant

then the argument advanced by Mr Perrin would have been compelling. However, as Mr Poole observes, the application made was a joint one with both Claimants seeking the same relief. The response to the 5 August letter was sent on behalf of both Claimants and the witness statement in support of the application was made in support of the application made by both Claimants.

27. The fact is that the Second Claimant chose to join in the single application made and said and did nothing as part of that application to distinguish her position from that of the First Claimant. She put forward the same evidence, was represented by the same solicitors, and the same counsel who advanced arguments on behalf of both Claimants and until the written submissions on costs were filed, did not distinguish between them. In my judgment, it follows that both Claimants must be liable to pay the Defendant's costs of what I have determined was hostile litigation.

Should the Claimants be Entitled to Recoup the Defendant's Costs from the Estate Pursuant to their Indemnity?

28. As Mr Poole points out, the effect of allowing the Claimants to rely upon their indemnity would be to diminish the residuary estate. However, that is usually the case and not of itself a reason to depart from the default position that the indemnity applies. Mr Poole also submits that the Claimants ignored the Defendant's proposals to resolve the dispute before the application was issued, made overblown criticisms of the Defendant and ignored reasonable concerns raised by her, as well as rejecting her reasonable proposals in the 5 August letter.
29. In my judgment, the conduct of the Claimants prior to making the application and in making the application was not unreasonable conduct so as to justify depriving them of their indemnity. Whilst there is some force in Mr Poole's points that they could

have responded to the Defendant's proposals more constructively and that some of their criticisms were overblown, trustees, and in this case lay trustees, should not be held to a standard of perfection. The bringing of the application was a reasonable step by the Claimants. I do regard some of the criticisms of the Defendant's conduct which they advanced as exaggerated but not all of them. There was a breakdown in the relationship between the parties and the Defendant's conduct was part of the cause for the breakdown. Mr Perrin points out that when giving judgment I stated that there were merits on both sides and that the decision whether to remove the Defendant was not an easy one.

30. In my judgment, the Claimants acted honestly and reasonably in bringing the application and in including in it an application for relief which included the removal of the Defendant. The fact that I ultimately decided not to remove her does not establish that seeking her removal at all was necessarily unreasonable. I do not consider that it was. In my judgment, the application was not one brought for the First Claimant's own benefit or for the benefit of some beneficiaries over others. There was a genuine deadlock as a result of the breakdown in the relationship between the Claimants (in particular the First Claimant and members of her immediate family) and the Defendant. The application was necessary.

31. I then need to consider whether after commencing the application the Claimants acted unreasonably in their conduct of it. The only real changes of circumstance occurred when the letter of 5 August was sent and at the commencement of the hearing. I agree with Mr Poole that the Claimants' response to the 5 August letter was to make a counterproposal that was not at all constructive. However, I do not consider that the Claimants acted unreasonably in rejecting the offer contained in the letter. If

accepted, the result would have been that the trustees of the trusts created by the will of the Deceased would have been limited to the Defendant and a professional trustee. The First Claimant's branch of the family would not have been represented at all. The Claimants acted reasonably in concluding that such a situation would not be in the best interests of the beneficiaries generally. That must be so as I concluded that such an outcome was not appropriate.

32. At the commencement of the hearing, I indicated that I considered that the fact that the testator had provided for a representative of each branch of the family and an independent professional as appropriate executors and trustees was an important factor and that an outcome which included a representative of each branch seemed to me to be appropriate. The Claimants did not dispute that general approach but did maintain that the representative of the Defendant's branch of the family should be someone other than her. The fact that I, after argument, decided that point against them, does not mean that their stance was unreasonable. Further, even if it was, by that point all or the overwhelming majority of the Defendant's costs had already been incurred so no further costs were incurred as a consequence. Finally, as indicated in *Lewin* at 48-006 in a passage to which I have already referred, any doubt should be resolved in favour of the trustees.

33. For those reasons, I consider that the Claimants' liability for the Defendant's costs of the application was not the result of unreasonable conduct on their part and that therefore, it is not appropriate to depart from the default position. My order will not make provision that the Claimants' right to call upon their indemnity is lost.

Conclusion

34. For the reasons given, the Claimants shall pay the Defendant's costs of the application and they shall be jointly and severally liable for those costs, but they are entitled call on their right of indemnity from the estate of the Deceased in respect of those costs.