Neutral Citation Number: [2014] EWCA Civ 1632

Case No: A3/2014/1279

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Sales J
[2014] EWHC 653 (Ch)
[2014] EWHC 1683 (Ch)
IN THE MATTER of the ESTATE of SIR JAMES WILSON SAVILE deceased

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2014

Before :

LORD JUSTICE PATTEN
LADY JUSTICE GLOSTER
and
LORD JUSTICE BEAN

- -

Between :

NATIONAL WESTMINSTER BANK plc	Claimant/ Respondent
- and -	
(1) LUKE LUCAS **(2) ROGER BODLEY** **(as trustees of the Jimmy Savile Charitable Trust)**	Defendants/ Appellants
(3) PI **(4) DENISE COLES** **(5) AMANDA McKENNA** **(6) BRITISH BROADCASTING CORPORATION** **(7) SECRETARY OF STATE FOR HEALTH**	Defendants/ Respondents

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Mark Cunningham QC (instructed by **Osborne Clarke**) for the Claimant (National Westminster Bank plc)
Robert Ham QC and **Teresa Rosen Peacocke** (instructed by **PWT Advice LLP**) for the Trust
Keith Rowley QC, Piers Feltham and **Justin Levinson** (instructed by **Slater & Gordon (UK) LLP)** for the 3rd and 4th Defendants
Neil Block QC (instructed by **Capsticks LLP**) for the 6th Defendant
Andrew Warnock QC (instructed by **DAC Beachcroft LLP**) for the 7th Defendant

Hearing dates : 4 and 5 November 2014

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Approved Judgment

Lord Justice Patten :

Introduction

1. Sir James Savile, better known as Jimmy Savile, died on 29 October 2011. Under his will dated 24 July 2006 he made a number of small gifts and pecuniary legacies and gave lifetime interests to eight named beneficiaries in a fund of £600,000. The residue of his estate (including the interest in remainder in the settled fund) was given to the Jimmy Savile Charitable Trust ("the Trust") which had been set up in 1984 to benefit a wide range of charitable objects. His estate was sworn for probate at a value of £4,366,178 gross (£4,298,160 net). National Westminster Bank plc ("the Bank") was named as the executor of the will and obtained a grant of probate on 8 March 2012.

2. For many years Jimmy Savile enjoyed a successful career as a television presenter and personality for the BBC and during this time became associated with a number of NHS hospital trusts and other charities such as Barnardo's and Mind. But on 4 October 2012 ITV broadcast a programme entitled "*Exposure: The Other Side to Jimmy Savile*" which accused him of having been a serial child abuser and sex offender. As a result of this programme, the Bank began to receive letters from a number of potential claimants seeking compensation from the estate.

3. On 5 January 2012 the Bank had placed the usual form of advertisement for claims in accordance with s.27 of the Trustee Act 1925 which would have left it free in due course to complete the administration of the estate and to transfer the net assets (after payment of expenses and any creditors) to the various beneficiaries including the Trust. But the receipt of claims for compensation based on alleged assaults by Jimmy Savile created particular complications. It was impossible as of late 2012 for the Bank to know what was likely to be the number, scale and value of the claims or how many of them were likely to be substantiated. What it did appreciate was that if the claims were numerous, significant in value, and genuine then there was a serious possibility (even a probability) that, together with legal costs, they would, if successfully pursued to judgment, exhaust the assets and render the estate insolvent. With this in mind, the Bank instructed counsel to advise on the estate's potential liability for the claims and on 24 January 2013 it applied *ex parte* to Sales J. under CPR Part 64 for various forms of relief including an order pursuant to s.284(1) of the Insolvency Act 1986 (as modified by the Administration of Insolvent Estates of Deceased Persons Order 1986) ratifying its past expenditure in respect of the administration of the estate.

4. In the application notice the Bank also sought permission pursuant to CPR Part 8.2A to issue a claim form without naming the defendants. The claim form was framed in broad terms and seeks the determination of "all questions that arise for determination arising out of the administration of the estate". Paragraphs 2 and 3 of the claim form ask for the Court to give all necessary directions for that purpose and, if and so far as necessary, for the administration to be carried out under the directions of the Court.

5. In the application notice the Bank also sought an order that if permission were granted for the issue of the claim form then the Court should determine who should be the defendants to the proceedings.

6. It is important to stress that at this stage in the history of the matter no legal proceedings had been issued against the estate, let alone pursued to judgment. Moreover most, if not all, of the claims were or were likely to be out of time having regard to the three year limitation period applicable to tortious personal injury claims under s.11 of the Limitation Act 1980 ("the 1980 Act"). The problem, however, for the Bank and the estate was that the decision of the House of Lords in *A v Hoare* [2008] 1 AC 844 that claims for personal injuries resulting from sexual assaults fell within s.11 rather than s.2 of the 1980 Act meant that the three year period specified by s.11(4) could be disapplied by the Court under s.33(1) of the 1980 Act having regard to the degree to which the application of the limitation period would prejudice the claimant in question. Although the exercise of the Court's discretion to allow the action to proceed involves a consideration not only of the position of the claimant but also of the effect which an order under s.33(1) would have on the defendant, the Bank was understandably advised that in the case of meritorious claims made by vulnerable claimants who had been unable to come to terms with the abuse they had suffered, it was not unlikely that the Court would be persuaded to exercise its discretion in their favour. The Bank had therefore to proceed on the assumption that s.11 of the 1980 Act was not necessarily a complete answer to the claims and it is common ground on this appeal that they were right to do so.

7. On 1 April 2014 Sales J. made an order in the Bank's Part 8 proceedings, following a three-day hearing in February, under which he approved the entry by the Bank into a scheme ("the Scheme") negotiated between solicitors and counsel acting for those to whom I will refer as the PI claimants, for the Bank, and for bodies alleged to be vicariously liable in respect of the claims, including the BBC and Secretary of State for Health. The purpose of the Scheme is to provide a mechanism under which a PI claimant may submit his or her claim to the Bank so that the Bank, on a consideration of the supporting evidence, can decide whether to admit or reject the claim. It also contains provisions for resolving claims for contribution by other would-be defendants such as the BBC, the Secretary of State for Health (representing the NHS Trusts in whose hospitals many of the assaults are alleged to have occurred) and Barnardo's. I will come to some of the detail of the Scheme later in this judgment but, in broad terms, the PI claimant must fill in a claim form containing details of the alleged assault, particulars of any corroborating evidence relied upon, in the case of larger claims based on the more serious types of alleged assault a psychiatrist's report, a brief statement of the reasons relied upon to disapply the limitation period, and particulars of any special damages claimed.

8. The Scheme contains a list of eight categories of assault, ranging from rape to indecent assault involving touching over clothing, and provides a tariff rate of damages for each category. The evidence is that the rates agreed represent a discount from the amount of damages which could be awarded by the Court in such cases and that the figures represent the product of negotiation between the Bank, the PI claimants, the BBC and the Secretary of State for Health. The tariffs are not, however, discounted to reflect the risk to a PI claimant of failing (in court proceedings) to obtain an order under s.33 of the 1980 Act. The likelihood of the limitation period being disapplied is a matter for the Bank to consider in deciding whether or not to admit the claim for payment under the Scheme. Importantly, the Scheme also provides for existing PI claimants whose claims are agreed to receive £10,000 for their costs up to the approval of the Scheme and for further costs (for all

agreed claims) to be paid in fixed amounts varying from £6,000 to £3,500 depending on whether a psychiatric report was obtained and by whom. The costs to the executor of operating the Scheme are to be paid out of the estate on an indemnity basis.

9. Although the Scheme as drafted and approved does not specify the method by which the Bank will scrutinise the PI claims, the judge had evidence in the form of a note from Mr Henry Witcomb of counsel who has been instructed by the Bank to review the claims submitted under the Scheme. He says in that note that counsel of an appropriate level would be instructed to assess the merits of the claim and to advise on whether the Court would be likely to disapply the limitation period. Counsel would then advise whether the Bank should reject the claim and, if necessary, defend it in any subsequent proceedings; should settle the claim but at a level of compensation below the tariff rates; or should settle the claim within the Scheme. In the latter two categories of case the Bank would also receive advice on the likely value of the claim.

10. As at 31 October 2014 the Bank has processed 68 claims under the Scheme and a further 131 remain to be considered. Of the 68 claims, 11 have been accepted at a value including costs of £353,125. A further 11 PI claimants have been offered reduced settlements amounting in total to £303,500; 36 claims (to the value of £1,144,250) have been rejected and further information has been requested in the remaining 10. The value of the 131 remaining claims is some £2,275,950 and their allowable costs under the Scheme would amount to about £1,068,500. There are also claims where MIND and the BBC are additional defendants which if meritorious and successful will lead to claims for contribution against the estate.

11. It is important to emphasise that the Scheme, although contractual, does not in itself produce a binding compromise even of those of the PI claims which the Bank accepts are well founded. Even if accepted under the Scheme, the PI claimant retains a right to pursue the claim by way of action and paragraph 8 of the Scheme provides that the payment of a claim by the Bank has first to be approved by the Court. However, once such approval is given, the amount of the agreed payment will stand as a judgment and bear interest at the Judgment Act rate. Mr Cunningham QC for the Bank confirmed that Court approval for the settlement of claims within the Scheme will only be sought once the Court can be satisfied that all likely claims have been processed by which time it should be possible to assess whether there are claims proceeding outside the Scheme which need to be taken into account and whether the estate remains solvent.

12. In addition to approving the Bank's entry into the Scheme, Sales J. made other significant orders:

    (i) he ratified £392,511.46 worth of expenditure by the Bank pursuant to s.284(1) of the Insolvency Act. Most of this consists of bills for work carried out by Osborne Clarke, the Bank's solicitors, in connection with the PI claims;

    (ii) he dismissed the Trust's application for the removal of the Bank as executor and for its replacement by PennTrust as administrator of the estate; and

    (iii) he ordered the Trust to pay the Bank, the PI claimants and the Secretary of State their costs of the removal application on an indemnity basis and to pay

> 80% of the Bank's costs and all of the costs of the PI claimants of the application for the approval of the Scheme, again on the indemnity basis.

13. The adverse costs orders in respect of the Bank's application for approval of the Scheme were made to reflect what the judge described as the unreasonable conduct of the Trust which lay:

> "outside the norms of regular and appropriate conduct of litigation which the court would expect. The aspect of this part of the case to which I attach the greatest weight in relation to the Trust's conduct is the Trust's failure to engage with the parties which had negotiated the terms of the Scheme in the period from June 2013, when the Trust was informed of the terms of the Scheme then under negotiation, and in particular in correspondence from 19 November 2013.
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> 20. In my view, the Trust can fairly be said to have kept up its sleeve until this hearing the various points which it later sought to take on the Scheme in the course of the hearing."

14. The Trust appeals with the permission of this Court against the order sanctioning the Bank's entry into the Scheme; the dismissal of the removal application; the s.284(1) order in respect of expenditure; and the orders for costs. In summary, it contends that:

(1) the Bank, in its administration of the estate, failed properly to distinguish between the interests of the PI claimants and those of the beneficiaries under the will treating their respective claims to the estate as of equal value notwithstanding that the PI claims were, at the relevant date, unsubstantiated and, at best, contingent;

(2) that the judge, in approving the Scheme, also failed to take into account the duty of the executor to ensure that the interests of the beneficiaries and other established creditors were not unnecessarily reduced or diluted by adverse claims to the estate and was wrong to regard the approval of the Scheme as no more than a dispute between rival claimants to the estate with equal interests;

(3) that the Bank failed to provide the Court with evidence on which it could be satisfied that the Scheme as drafted was one which the Bank could reasonably and properly enter into having regard to the interests of those entitled to the due administration of the estate and the judge was therefore wrong to approve the Scheme on the material before him;

(4) that the Bank, in deciding to enter into the Scheme, had failed to give proper consideration to alternative methods of scrutinising the PI claims such as early neutral evaluation and mediation and the judge was therefore wrong to reject the Trust's complaints that the Bank had a misguided view of its role as executor and had embarked on costly and unnecessary negotiations with the PI claimants leading to the formulation of the Scheme at an expense to the estate of some £500,000;

(5) that the Bank had failed to keep the Trust properly informed about the progress of the negotiations for the Scheme; had excluded the representatives of the Trust from those negotiations and had not disclosed to the Trust all relevant material (including legal advice) to which the Bank had access in agreeing to the terms of the Scheme;

(6) that the Scheme, as approved by the judge, was entirely voluntary, created no advantage for the estate and had in fact prejudiced its interests because it enabled the PI claimants to participate in the Scheme process at no risk as to costs whatever the outcome of the claim; did not oblige the PI claimants who made claims through the Scheme to accept the outcome; operated entirely at the expense of the estate; and made no provision for the effect of any limitation defences;

(7) that the judge was wrong to allow the PI claimants to participate in the Trust's application for the removal of the Bank as executor, wrongly regarding them as having a legitimate interest in the outcome when their involvement in the hearing was entirely for their own personal benefit which lay in the approval of the Scheme and the retention of the Bank as executor;

(8) that the judge took inadequate notice of the breakdown in confidence between the beneficiaries and the Bank; the Bank's earlier agreement to retire in favour of PennTrust; and the Bank's increasing hostility towards the Trust which resulted in its exclusion from negotiation about the Scheme and the unfair criticism of the Trust for seeking to protect its own interests as a beneficiary in relation to the formulation and approval of the Scheme;

(9) that the Bank should have been required to justify the expenditure for which it sought a validation order under s.284(1); and

(10) that the judge erred in principle in ordering the Trust to pay the costs of the removal and the approval application.

Background history

15. The relevant background history to the making of the order of 1 April 2014 really begins with the original Part 64 application for directions about the form of the Part 8 proceedings. The application which came before Sales J. on 24 January 2013 was supported by a witness statement from a solicitor at Osborne Clarke, the Bank's solicitors, which explained that the Bank as executor had received 62 claims for compensation since 4 October 2012 and was concerned about the possible insolvency of the estate. It therefore sought ratification of the invoices which it had already paid on behalf of the estate and the Court's approval for prospective expenditure identified in a schedule of anticipated costs. The past expenditure was largely uncontroversial and included payments of inheritance tax, funeral expenses and utility and other charges relating to property of the deceased. It did, however, include bills rendered by Osborne Clarke for work carried out by them in relation to the PI claims. The total amount of the past expenditure was £1,024,065.20.

16. At the hearing on 24 January 2013 the judge gave the Bank permission to issue the claim form without naming any defendants and directed that copies of the claim form

and the application notice with the evidence in support should be sent to the solicitors acting for the Trust (PWT Advice LLP), and two firms of solicitors who acted for a number of the prospective claimants (Pannone LLP and Russell Jones and Walker LLP). The documents were to be accompanied by a letter asking whether their clients wished to be joined as defendants to the Part 8 claim. Letters were also to be sent to the individual beneficiaries under the will inviting them, if they wished, to attend the adjourned hearing of the application. In her witness statement in support of the application, Ms Mudie of Osborne Clarke had identified the Trust, the individual legatees and beneficiaries, and the PI claimants as the persons whose interests would need to be represented at the hearing of the Bank's Part 64 application.

17. The result of the letters which the judge had directed to be sent was that all three of the firms of solicitors mentioned above indicated that their clients wished to be joined as defendants to the proceedings. Of the individual beneficiaries, only Mrs Amanda McKenna, who is the niece of Jimmy Savile, indicated that she wished to attend and be heard at the adjourned hearing of the application which had been fixed for 20 February 2013. In a further witness statement made on 18 February Ms Mudie stated that, by then, the Bank had received a further 18 PI claims (a total of 79 after discounting one duplicate claim) and had been advised by specialist counsel that the value of the claims (assuming they were genuine and could be substantiated) might be as much as £3.2m. Pannone LLP had by then issued a claim form in the Queen's Bench Division against the BBC and the Bank in respect of one of the PI claims and was seeking a group litigation order.

18. The Trust's evidence for the application was contained in a witness statement of Ms Summers of PWT Advice dated 11 February 2013. In paragraph 18 of that witness statement she said:

> "The trustees also remain particularly concerned to ensure that all steps dealing with claims against the estate are taken in the most efficient and cost-effective manner, with all due cooperation between the estate, the claimants and the other prospective defendants to the claims, which I understand include the BBC and the NHS. The trustees believe that without this necessary focus on sparing costs wherever possible, the estate will be unnecessarily depleted by legal costs incurred in an uncoordinated and piecemeal fashion."

19. At the hearing on 20 February 2013 Sales J made an order that the Trust, Mrs McKenna, and the PI claimants (one from each of the two groups I mentioned earlier) should be joined as defendants to the Bank's Part 8 claim. He also ratified the schedules of past expenditure with the exception of two items of income tax but, in the case of the solicitors' bills, he made it a term of his order that the bills should remain open to challenge by the defendants at a later date. The judge also approved under s.284(1) the schedule of anticipated expenditure which included work carried out by Osborne Clarke on the sale of two properties and in preparation for the hearing of the Part 8 claim. Again, the approval was given subject to a reserved right to object to items in the bills. The costs of all parties to the application were directed to be paid out of the estate.

20. There was no challenge to this order either at the hearing or as part of this appeal and the joinder of the defendants, including two representative PI claimants, is consistent with CPR 64.4(1)(b) which includes as proper parties to an application by an executor or administrator "any persons with an interest in or claim against the estate". At the hearing the Trust and the other would-be defendants were each represented by solicitors and counsel. The transcript of the proceedings records that Mr Cunningham QC told the judge that his client, the Bank, intended to conduct the administration of the estate "transparently, neutrally and with the court's informed approval and consent for every significant step taken". It recognised the desirability of minimising costs and of "preserving the largest possible pot for the benefit of those who are in the end entitled to the estate".

21. These latter sentiments were echoed by Mr Richard Lissack QC who appeared with Mrs Rosen Peacocke for the Trust and supported the judge's exhortation that the parties should think imaginatively around the issues with a view to resolving the disputes. He did not oppose the s.284(1) ratification of general expenditure sought by the Bank but (along with the PI claimants) suggested that the validation order should not extend to Osborne Clarke's bills. After hearing argument the judge decided that the Bank was entitled to the protection of a validation order but that the right of the defendants to object to particular items on the ground that they were unnecessary, excessive or even not bona fide incurred could be preserved by a suitable proviso to his order.

22. During the course of the 20 February hearing the judge raised as one possibility the idea that the Trust might take on the responsibility of actively defending any claims against the estate on behalf of the Bank on the basis that it had the greatest financial interest in preventing the depletion of the estate. This was at best a very tentative proposal but even at the hearing it was evident that it might lead to a duplication of costs as between the Trust and the Bank which would still have ultimate responsibility for the management of the claims.

23. The judge left the parties to consider and, if possible, agree what was the best way forward but by 28 February the Bank had rejected the idea of delegating the defence of the PI claims to the Trust. One of the Bank's concerns, repeated during the hearing of this appeal, was that it would not be appropriate for the Trust to be given an indemnity from the estate in respect of its costs when the PI claimants would have to bear the costs risks of the litigation against the estate. Mr Cunningham's skeleton argument makes repeated reference to what he calls the collective legitimacy of the PI claims. In my view, this objection was misconceived. The Trust has an established entitlement under the will to its share of the estate after payment of the debts and other liabilities to creditors. Any PI claimant who can substantiate and obtain judgment for his or her claim will become entitled to be paid out of the estate the amount of any damages together with their costs. But, as at 28 February 2013, none of the PI claims had been substantiated and the Bank could not therefore treat them as anything more than contingent. If the process of substantiating the claims (some of which could and have turned out to be unfounded) was to be by way of hostile litigation against the estate, the Bank had no duty to treat the PI claimants as being on an equal footing with the Trust and the other named beneficiaries nor could it be criticised for seeking to defend those claims at the expense of the estate. If the Trust was to have day-to-day conduct of the litigation in the name of the Bank then it

would, for the same reason, have been entitled to be indemnified out of the assets for the expense involved.

24. Although the proposal that the Trust should take over any litigation came to nothing, the Bank's reasons for not implementing that solution raised an issue about what should have been the correct approach to the handling of the PI claims which is central to much of the Trust's appeal. Its case is that the Bank was wrong to elevate the status of the PI claimants to that of creditors of the estate so as to treat them as having an equal interest with the beneficiaries in the available assets and that this misconception has pervaded the entirety of its administration of the estate. Although the duty of the Bank as executor was not confined to protecting the interests of the beneficiaries but can be expressed more generally as a duty to preserve and administer the assets for the benefit of all those interested in the estate: both creditors and beneficiaries: the mere fact that a person makes a PI claim is not enough in itself to place them in the same position vis-à-vis the assets as the Trust, the other beneficiaries and any established creditors.

25. I will need to return to this question later in this judgment when considering the approach of the Bank to the negotiation and formulation of the Scheme. But it is, I think, important to focus at the outset on what the Scheme was and was not designed to achieve. Although for the reasons I have given I believe that the Bank was mistaken in its view that its obligation to be even-handed as between those interested in the estate required it to treat the PI claimants *ab initio* as having the status of creditors, it was not in my view wrong to accept that it could not ignore the existence of the PI claims or fail to take proper steps to process them. The Trust is obviously right in its submission that the PI claimants are at best only contingent creditors and, in the cases where their claims were fraudulent or unsustainable, not even that. But many of the claims are doubtless meritorious and would be successful if litigated. The primary function therefore of the Scheme was to provide a process for scrutinising the claims and for sifting out those which the Bank as executor should resist. Everyone at the 20 February hearing was agreed that a process of this kind was essential and unavoidable. The advantage of the Scheme, according to its proponents, is that it also provides a strong inducement for PI claimants to settle within the agreed tariffs and costs which the Scheme provides rather than running the risks of litigation. This has advantages in costs terms not only for the PI claimants but also for the estate which thereby avoids what was described as the feeding frenzy for lawyers which would inevitably follow. It is, however, important to emphasise that the Scheme was in large part an exercise in scrutiny which, as a function, was undoubtedly part of the executor's due administration of the estate. One of the primary questions therefore on this appeal is whether any other viable and more cost-effective alternatives ought to have been considered by the Bank and whether any useful purpose would be served by this Court now removing court approval for the Scheme given that it has been in operation since April and has already processed, or is in the course of processing, over 200 claims.

26. On 12 March 2013 the Bank issued an application with a return date of 25 March 2013 seeking directions from the Court that it should defend the PI claims against the estate and should rely upon the limitation period in s.11 of the 1980 Act. It asked for an order that it should be indemnified out of the estate for the costs of defending the claims and for validation orders in respect of those expenses. The application notice

asked that the application should be dealt with by Sales J. on paper. In conformity with PD 64B 7.1 and 7.2, Ms Mudie of Osborne Clarke in her evidence in support of the application said that the Bank had received legal advice that the PI claims were all statute barred under s.11 and that the claimants should therefore be required to seek s.33 orders disapplying the limitation period.

27. The response of the PI claimants was to press the Bank in correspondence to adjourn the 12 March application and to consider a draft scheme which had been prepared by Slater & Gordon and Pannone LLP. This provided for compensation to be paid to the PI claimants at agreed tariff rates provided that it could be achieved within a period of 6 months. Claims which could not be settled within that period would be pursued through a claim in the High Court. The PI claimants were to submit a claim form containing details of the alleged assault and particulars of any special damage. The Bank was then to respond setting out its defence and negotiations for a settlement would then ensue.

28. One can see in this draft many of the features which were in due course incorporated into the Scheme which Sales J. eventually approved in April 2014. But the Bank's initial response was that it would not consider any settlement proposals until the full extent of all claims was known. To this end, Osborne Clarke were anxious either to agree or to obtain from the Court a cut-off date for the notification of claims and the stay of the Queen's Bench proceedings in the meantime.

29. At this time the attitude of the Trust to the Bank's application of 12 March seems to have been somewhat ambivalent. It was keen that the Bank should take the limitation point against the various PI claimants in the litigation but was also anxious that the 12 March application should not be dealt with by the judge until after a meeting had taken place on 27 March to discuss the proposals for a scheme. Faced with pressure from both sides to postpone any consideration by Sales J. of the application, the Bank eventually agreed that a provisional date for an oral hearing (fixed for 25 March on the basis that the application was contested) would be vacated and the matter adjourned until after the 27 March meeting. In an e-mail of 20 March PWT Advice asked Osborne Clarke whether there was any objection to the Trust being represented at the meeting. They were told that the Bank had no such objection.

30. Judged from what was said in correspondence, the Trust's position at this time seems to have been that it did not oppose the Bank's request for directions that it should defend the PI claims but considered that there were substantial costs savings to be made. Points are taken about the scale of Osborne Clarke's fees and their failure to provide information about the details of the proposed defences and breakdowns of future costs, but there is no concrete suggestion by the Trust's solicitors of what costs savings they have in mind or how the Bank could be expected accurately to assess the levels of future costs in advance of knowing the number and scale of the claims they would have to deal with. Mr Ham QC for the Trust submitted that his clients were effectively excluded from the 27 March meeting because the Bank refused to pay its costs of attending out of the estate. I do not accept this. Mr Akram in his e-mail of 20 March did not ask for his costs of attending to be paid nor is there any evidence that the Trust (whose solicitors were actively engaged in correspondence with the other parties at the time) would not have offered to pay for their attendance had they so wished. The Bank, however, went into the meeting with the Trust, on the one hand, supporting the defence of the PI claims but querying the cost and with the PI

claimants threatening litigation if no agreement could be reached on the Scheme. What, however, Ms Summers of PWT Advice did tell Osborne Clarke in a telephone conversation on 26 March was that Mr Lissack QC had advised, as she put it, that the limitation argument was not going to get them anywhere. What the Trust wanted to explore was whether there was a way in which the claims could be settled leaving some money for the Trust and the other beneficiaries.

31. The PI claimants were represented at the 27 March meeting by solicitors and leading counsel **(**Elizabeth-Anne Gumbel QC) who said that their clients' priority was to ensure that there was recovery against the estate. They were amenable to a cut-off date for claims but said that only after the cut-off date would the parties meet to finalise and agree the Scheme. In the meantime, they wished to avoid the estate being distributed or dissipated in unnecessary costs. They were, however, unwilling to agree a cut-off date unless the estate agreed in return to ring fence an agreed amount to meet the claims. The meeting was followed by letters to the Bank from the PI claimants' solicitors saying that the limitation defence had no prospect of succeeding in most cases and that the Scheme represented the only means available to the estate of avoiding insolvency. They asked for £3.25m to be ring-fenced to meet the claims. At that time the assets of the estate were thought to be about £3.5m so that the Trust and other beneficiaries were unlikely to receive much, if anything, once the claims were satisfied under the Scheme. Pannone LLP wrote on 2 April to say that they estimated that the costs of litigating the claims would be at least £7m and that they would seek third party costs orders against the Bank if it decided to litigate and was unsuccessful. This threat revealed, of course, a complete misunderstanding of the Bank's position as executor and ignored the fact that the 12 March application was to obtain directions from the Court that the Bank should defend the actions at the expense of the estate. But it was enough, say the Trust, to lead to the abandonment of the 12 March application and for the Bank to concentrate exclusively thereafter on agreeing a compensation scheme with the PI claimants to the exclusion and detriment of the Trust and the other beneficiaries.

32. On 17 April the Trust's solicitors wrote to Osborne Clarke to remind the Bank that its first duty was to act for the benefit of the estate and those interested under the will. They complained that the Bank had disclosed to the PI claimants the fact that there had been discussions with the Trust about who should have conduct of any litigation and warned the Bank that it had no authority to disclose confidential or privileged information without its consent. The letter also criticised the Bank for refusing to take up the judge's suggestion that there should be discussions about the conduct of the litigation with a view to minimising costs and for the excessive expenditure it had incurred in dealing with the PI claims thus far. The solicitors expressed the view that no sum could be ring-fenced to meet the claims of some only of the prospective creditors of a potentially insolvent estate.

33. A meeting between the solicitors for the Bank and the Trust was arranged for 30 April. At the meeting the Bank indicated that it would consider retiring as executor and being replaced as an administrator by a trust corporation called PennTrust set up by Penningtons, the firm of solicitors. Penningtons would act as solicitors to the administrator and liaise with the Trust and other beneficiaries to minimise costs. The Trust also told Osborne Clarke that it wished to attend future meetings with the PI claimants about the proposed Scheme.

34. The Bank was not resistant to this idea but the solicitors to the PI claimants were. In the end, however, the Trust was represented by solicitors and counsel (Mrs Rosen Peacocke) at a meeting with the PI claimants held on 14 May and after the meeting PWT Advice wrote to the other firms involved setting out what they considered to be serious flaws in the proposed Scheme. These were that it did not provide for all claims for compensation to be dealt with or for contribution claims. Without making such provision the Scheme would not, they said, be approved by the Court nor did it address the possibility that the estate would be rendered insolvent by such claims so that its assets would have to be distributed *pari passu* amongst the creditors:

> "As we indicated at the meeting, it is absolutely crucial that all claims notified to the estate, after suitable advertisement, be included in any proposed compromise. There can be no "first come first served" settlement. It is also crucial that claims for contribution and costs be included in any proposed Compromise, as such claims would rank equally with compensation claims as unsecured debts of the estate. This includes the Executors' costs. It can thus be seen that there is no point in seeking to negotiate a scheme with some but not all claimants, dealing with some but not all unsecured liabilities of the estate.
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> ….
>
> It will soon to be too late to address the resolution of claims against the estate without the burden of legal costs crushing any prospect of an acceptable compromise. We urge all those involved to take account of the limitations on the courses available to the estate and reconsider the procedure that is required to deal with the considerable problems that have beset this estate through, we suggest, no fault of those interested in it."

35. Mr Ham says that at the 14 May meeting the Trust (through Mrs Rosen Peacocke) made suggestions that the totality of the claimants should be ascertained and that there should be a cap applied to the costs of the Scheme. These proposals were roundly rejected with the result that the PI claimants objected to the Trust attending future meetings to discuss the terms of the Scheme. But the evidence put before Sales J. at the February 2014 hearing by Mr Collins of Pannone LLP was that they (and others) found it difficult to understand and engage with the points taken at the meeting on behalf of the Trust which he said distracted the meeting from making constructive progress. Mr Cunningham QC put it more bluntly to the judge by saying that Mrs Rosen Peacocke was the problem. It is clear from the costs judgment given by Sales J. which I quoted from earlier that he too found the presentation of the Trust's case at the February hearing to be open to serious criticism. But he rejected in terms any suggestion that Mrs Rosen Peacocke had behaved improperly or was at fault at the 14 May meeting. He went on:

> "34. Unfortunately, however, whilst Mrs Peacocke undoubtedly acted in a professionally proper way at the meeting, the robust line which she sought to take on behalf of the Trust was

> perceived by the other parties as unhelpful and unconstructive. The negotiations to construct a scheme which could be agreed by the range of parties directly concerned with the personal injury claims - which included the Bank on behalf of the estate, but did not include the Trust – were complex, difficult and sensitive on all sides. The PI Claimants, for example, have emphasised that they have in the event finally been persuaded to make major concessions and compromises agreeing the Scheme, particularly in relation to the tariff of compensation and the provisions for recovery of costs which it sets out, in the interests of trying to achieve speedy resolutions and payments at least cost. The Third Party Defendants also made significant concessions in order to achieve an agreed Scheme, as did the Bank.
>
> 35. In my view, just as Mrs Peacocke did nothing improper at the meeting on 14 May 2013 and the Trust was fully entitled to take a robust line at that meeting, the other parties involved in these difficult and sensitive negotiations were also entitled to take the view that they would be more likely to make real progress towards agreeing a scheme, and would be able to minimise the costs of achieving that end, if they did not thereafter try to involve the Trust until the final Scheme had been agreed between them and could be presented to the court for approval. Their decision to proceed in this way cannot be impugned as unnecessarily or improperly hostile to the Trust. Rather, it was a legitimate, pragmatic and reasonable approach to the handling of a difficult negotiation.
>
> 36. In fact, when the Bank made the arrangements for the meeting on 30 September 2013, it did not unilaterally decide to exclude the Trust. It sought the views of those then representing the PI Claimants. Mr Collins of Pannone and Ms Dux of Slater & Gordon, for the PI Claimants, both asked that the Trust should not be invited to the meeting. In the circumstances, the Bank acted reasonably and without hostility to the Trust, and was entitled to arrange for the meeting to be held without the Trust being invited to attend."

36. I think that the judge was fully entitled to reach this conclusion. The Trust was able to make clear its objections to the draft Scheme both at the meeting on 14 May and in the correspondence I have referred to. No useful purpose would be served by its continued attendance simply to make the same points. The more practical solution was for the Bank and the PI claimants to endeavour to agree on a form of Scheme which the Bank could recommend to the Court for approval and for the Trust to be heard by the judge and any remaining objections considered at the approval hearing. For this reason, the real focus has to be on the form of the Scheme as finally agreed towards the end of 2013 and the Trust's response to it at that time.

37. The continuation of the negotiations about the Scheme ran parallel with the continued efforts of the Trust to have the Bank replaced by PennTrust. Despite its initial

indication that it was willing to consider stepping aside as executor, the Bank and its solicitors took no further steps in that direction notwithstanding the Trust's persistent attempts to change the administration of the estate. During May 2013 the Trust's solicitors produced draft letters to be sent to the beneficiaries informing them of the impending change and chased the Bank to approve them, only to be told in June that the question of a change of administrator was best considered in conjunction with the application for the approval of the Scheme. The Bank's position was that it was not appropriate for it to retire until the Scheme negotiations had been completed.

38. The approval application was originally scheduled to be heard on 21 October but was adjourned because the Scheme was not yet agreed. Mr Ham said that by then there had been a complete breakdown in confidence between the Trust and the Bank. The Bank, he said, had taken no action to progress the earlier agreement that it should stand down as executor in favour of PennTrust; it had failed to consider any alternative methods of resolving the PI claims such as mediation, early neutral evaluation or a hearing on limitation of some sample cases; and it had become hostile to the Trust. In particular, it had failed to provide the Trust with information about expenditure and had aligned itself with the objections by the PI claimants to the Trust's attendance at the meetings held to discuss and negotiate the terms of the draft Scheme.

39. Against this background, the Trust sent to the Bank on 22nd October a draft application seeking its removal and replacement by PennTrust and asked for a meeting to discuss the points it raised. The Bank's position was that it could not retire without the Court's approval and that the judge would need to take into account the views of all relevant parties including the PI claimants. Osborne Clarke told PWT Advice that they should be made parties to the removal application, just as they had been to the Part 8 claim. The suggestion was resisted. The application was issued on 6 November. The Bank and Mrs McKenna were the only named respondents. On 17 December the Bank issued its own application to which all the Part 8 defendants were made respondents seeking approval of the Scheme and the ratification of the Bank's expenditure under s.284(1). As mentioned earlier, most of this consists of the payments made or due to Osborne Clarke for its work in dealing with the PI claims.

40. In her witness statement in support of the removal application, Ms Summers of PWT Advice confirmed that the principal reasons underlying the application were the breakdown in relations between the Trust and the Bank caused by the Bank's failure to address the issue of the estate's potential insolvency, its disclosure to the PI claimants of confidential information and the rise in its costs from £80,000 to more than £300,000 between February and June 2013 notwithstanding the lack of any real progress in the administration of the estate. She said that the Bank had failed properly to assess all the PI claims and their impact on the solvency of the estate by advertising for claims so as to enable the liabilities of the estate to be assessed in the interests of the beneficiaries and the creditors of the estate as a whole. To this, Mr Ham added during the hearing of the appeal that the advertising which was eventually carried out was of the existence of the Scheme rather than for possible claims thereby possibly encouraging claims to be made which might not otherwise have been pursued. According to Ms Summers, the Bank had incurred very substantial costs in pursuing a compromise scheme that was "unworkable and futile" particularly in the absence of

any determination about the insolvency of the estate. The Trust objected to those costs being met out of the estate.

41. Mr Ham said that the Trust had become increasingly concerned about the increase in the Bank's legal costs. Up to February 2013 it had spent some £65,503 dealing with about 65 existing PI claims but by February 2014 (when the claims had doubled in number) it had incurred a further £340,000 in costs even though not a single claim had been resolved. Its total expenditure as of February 2014 was in excess of £500,000, of which about £200,000 related to the February 2014 applications.

42. The PI claimants indicated through their solicitors that they were opposed to the removal application and would, if not joined as parties, apply to the Court to be joined and heard on the application. The Bank filed a witness statement from Ms Nicole Buncher of Osborne Clarke dated 13 December 2013 which provided its explanation of the financial position of the estate; its response to the removal application; and its own position in relation to the approval of the Scheme. Ms Buncher said the value of the estate as at 6 December 2013 was some £3.2m. She produced schedules of expenditure relating to both the pre-20 February 2013 position (which the judge had considered at that hearing) and to subsequent expenditure some of which was included in the schedules of anticipated costs which the judge had also dealt with at the earlier hearing. There were now 135 claims which had been notified to the Bank.

43. In response to the removal application, Ms Buncher produced the correspondence between solicitors leading up to the issue of the application and repeated the Bank's view that all interested parties including the PI claimants should be heard on the application. The Bank, she said, did not accept that it had behaved in a hostile way towards the Trust. She outlined the differences of view about whether the Trust should take over the defence of the claims on behalf of the Bank that I described earlier in this judgment and referred to the 12 March application. Negotiations on the Scheme took over, she said, and rendered the hearing of the application unnecessary. In the context of the negotiations which Sales J. had encouraged at the February 2013 hearing, it was necessary to make reference to and disclose some of the correspondence and other documents to the solicitors acting for the PI claimants. But counsel's advice to the Bank had never been shared with any party other than the Trust. The Bank therefore denied that it had wrongly disclosed confidential or privileged information to the PI claimants.

44. As to the Scheme itself, Ms Buncher said that the Bank had entered into the discussions to seek the most cost effective and pragmatic approach to dealing with the claims. The Scheme could not be implemented without the sanction of the Court but nonetheless provided for the:

> " scrutiny of the Claims and a mechanism to challenge any claim that seeks to be included within the Scheme.
>
> 62.3 It is intended that the Bank, and/or other defendants will be able to decide whether claims should be settled or defended based on the evidence that is provided in support of the claim. In addition, it will still be open for the Bank, or any of the other defendants, to decide not to allow a particular claim to be included within the Scheme

> and for it instead to be dealt with through the normal Court process.
>
> 62.4 It is envisaged that the Scheme will deal with any claims that are to be settled by reference to a "tariff", which sets out the maximum amount of compensation that could be awarded to a claimant in respect of a specific allegation.
>
> 63. The Bank has always made clear in its negotiations with the other parties that any Scheme could only be entered into by the Bank if it were specifically approved by the Court. In addition, the Bank has also always asserted that it considered the Court will necessarily take into account the views of the Trust and the individual beneficiaries when deciding whether such a Scheme should be implemented."

45. Later in her witness statement she said that the Bank had tried to be proactive in finding a way to resolve the current situation in the most cost effective manner. It had no personal interest in the Scheme but sought the Court's directions as to whether it should be implemented. Evidence was put in on behalf of both sets of PI claimants referring to the evidence of sexual abuse by Jimmy Savile and the nature of the alleged offences. Mr Collins of Pannone LLP said that the Scheme in its final form represented the result of a process of tough but reasonable negotiation down from the PI claimants' starting position and that the level of damages available to the PI claimants from the Court was likely to be significantly higher than the tariff rates agreed. The original proposal for the ring-fencing of a sum to provide compensation had been dropped.

46. The PI claimants made it clear in their evidence that they therefore supported the Scheme as a proper means of processing the PI claims and opposed the removal application. It was necessary for that process to be managed by an objective third party. The points taken by the Trust at meetings were difficult to understand and unconstructive.

The approval application

47. Against this background I now turn to the various orders under appeal beginning with the judge's order approving the Bank entering into the Scheme. Mr Ham for the Trust criticised the judge's order in two different respects. His first and principal line of attack was to say that the approval application was defective because although the Bank had asked the Court to give directions as to whether it should proceed under the Scheme, it did not provide any evidence that it had actually formed the view that the Scheme was beneficial to the estate. Nor did it provide the Court with any material upon the basis of which the Court could conclude that its decision to support the Scheme was a proper one. No legal advice was disclosed on the limitation issue; there was no cost/benefit analysis of the pros and cons of adopting the Scheme as opposed to any alternatives; there was no assessment of the costs of operating the Scheme; and there was no explanation of why the sum of £10,000 had been agreed for the pre-scheme costs of each claim.

48. Sales J. could not and ought not therefore, he says, to have approved the Scheme on the evidence available at the February 2014 hearing. He should at the very least have adjourned the application and directed the Bank to file evidence dealing with these points. His second line of criticism, not really foreshadowed in either the grounds of appeal or the skeleton argument but prompted by points which arose during the course of argument, was to say that the Scheme was in any case defective in its drafting and did not make clear, for example, that its purpose was not to provide compensation to the victims of assaults by Jimmy Savile but rather to assess the validity of the claims and, if possible, to agree compensation for the valid claims. Similarly there is nothing in paragraph 4 of the Scheme or elsewhere which specifies the procedure or method for scrutinising the claims. None of the steps outlined in the note from Mr Witcomb I referred to earlier forms part of the Scheme. Nor does the Scheme contain a provision which makes it clear that the acceptance by a PI claimant of compensation under the Scheme is to be in full and final settlement of all claims against the estate.

49. To illustrate these points, Mr Ham produced a draft of the Scheme amended to include these and other points of drafting about which he expressed concern. Although this was a helpful guide enabling us to see what an amended Scheme would look like, our task on this appeal is not in my view to re-draft the Scheme. If the points of drafting are ones without which the judge should not have approved the Scheme then our only course is to set aside the Court's sanction for the Scheme and allow the Bank to consider whether it wishes to seek approval of a form of scheme amended to take account of our reasons for revoking the judge's order. I shall therefore return to these points of detail, so far as necessary, after dealing with Mr Ham's primary arguments as to why the Scheme should not have been approved.

50. There is no doubt that the usual type of application in which a trustee or other fiduciary seeks directions and approval from the Court for a particular course of action involves the trustee articulating a proposal and the reasons why the trustee is minded (usually on advice) to take that course. In *Public Trustee v Cooper* [2001] WTLR 901 Hart J. adopted the categorisation of the types of case in which the Court is likely to be invited to express its own views on a trustee's proposed course of action which is contained in the unreported decision of Robert Walker J. in *Re Egerton Trust Retirement Benefit Scheme*. In that case Robert Walker J. said:

> "At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).
>
> (1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to … [He then gave an example].

> (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.
>
> (3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential though it sometimes occurs. It may be that ultimately all will agree on some particular course of action or, at any rate, will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.
>
> (4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court. I mention that fourth category, obvious though it is, for a reason which will appear in a moment."

51. Without in any way qualifying this description of the various types of trust application which the Court can entertain, one needs also to bear in mind that the Court has jurisdiction under what is now CPR Part 64.2(b) to make an order for the

administration of an estate to be carried out under the direction of the Court and that the original Part 8 claim form sought such relief as one of several alternatives. But a full administration order is a comparatively rare beast not least because after the making of the order the personal representatives can only exercise their powers with the sanction of the Court. Where an administration order is sought by a creditor or beneficiary as a means of coercing a recalcitrant or ineffective personal representative or trustee into action, the Court will usually seek to resolve the difficulty by appointing a new administrator.

52. The approval application was not an application for the administration of the estate by the Court but rather a category 2 case of the kind described above. In such a case, where there is no question of a surrender of discretion, the Court's determination that the proposed course of action by the trustee is one which the trustee can properly pursue having regard to the scope of its powers and the material circumstances then prevailing must necessarily be preceded by a decision on the part of the trustee as to what it intends to do. Otherwise there is no exercise or proposed exercise of discretion by the trustee for the Court to review and adjudicate upon. For this reason, Hart J. said in the *Public Trustee* case that, after scrupulous consideration of the evidence, the Court had to be satisfied that the trustee had in fact formed the requisite opinion or intention to proceed in a particular way; that the view taken by the trustee was one which a reasonable trustee in the circumstances could have taken; and that the decision was not vitiated by any conflict of interest.

53. It also follows from the fact that the Court's approval of the transaction or proposed course of action will bind the beneficiaries (and in this case the representative creditors of the estate) that the Court will need to be appraised of all the material relevant to the decision under review. In *Tamlin v Edgar* [2011] EWHC 3949 Sir Andrew Morritt C. at [25] said:

> "The very fact that the decision of the trustees is momentous, taking that word from the description of the second category, and that the decision is that of the trustees, not of the court, makes it all the more important that the court is put in possession of all relevant facts so that it may be satisfied that the decision of the trustees is both proper and for the benefit of the appointees and advancees. It is not enough that they were within the class of beneficiary and the relevant disposition within the scope of the power. It must be demonstrated that the exercise of their discretion is untainted by any collateral purpose such as might engage the doctrine misleadingly called a fraud on the power. They must satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees. All this requires the full and frank disclosure to the court of all relevant facts and documents. The court is not a rubber stamp and parties and their advisors must be astute not to appear to treat them as such.

54. The onus is therefore on the trustee or other fiduciary to provide the Court with the evidence to enable it properly to carry out this task. But the level of information required will obviously vary according to the nature of the decision under review. As mentioned earlier, Mr Ham's first criticism of the Bank's evidence on the approval

application is that it did not confirm that the Bank was in fact supportive of the Scheme. Ms Buncher made it clear in her witness statement that the Bank would not agree to any course of action being undertaken without the express sanction of the Court but was neutral as to the benefits of the Scheme. This is confirmed by what she said in [69] of her witness statement where she refers to the fact that the Bank's position was that it was appropriate for the PI claimants to seek approval of the Scheme because it arose out of the Queen's Bench action commenced by one of Pannone LLP's clients. It was only when the PI claimants were not prepared to make the application that the Bank did so, as she put it, in order to progress matters.

55. The most troubling aspect of this disclosure is the implication that the real focus and purpose of the approval application was seen by the Bank not as the need to obtain the Court's approval of the Bank's decision to implement the Scheme, but rather as an exercise akin to the compromise of a personal injury action in which the judge's only function was to decide whether the Scheme properly provided for the interests of the PI claimants. The Bank, in suggesting that the PI claimants should make the application, seems to have lost sight of the fact that what it needed to obtain was ratification of its own actions in promoting the Scheme which it had carried out and continues to carry out at the expense of the estate. I do therefore find it surprising to say the least that the Bank's solicitors, in preparing the evidence, did not see fit to explain its own thinking as to why the Scheme represented the most preferable option of the alternatives available and, in relation to the possibility simply of litigating the claims, what advice it had received on the question of limitation. Any potential difficulties caused by the need to disclose privileged or confidential material of this kind to the PI claimants could have been dealt with by excluding them from sight of the relevant evidence or from part of the hearing which is a common occurrence in many *Beddoe* applications.

56. That said, it is still necessary to consider whether the judge was in any way misled by the way in which the application was presented and whether he did have sufficient information to enable him to decide that the Bank's application for approval of the Scheme should be granted. The application sought a direction as to whether the Scheme was a suitable mechanism for dealing with the PI claims which can be read as suggesting that the Bank was neutral on the issue. But Mr Rowley QC, who appears for the PI claimants, is, I think, right in his submission that it was apparent from Ms Buncher's witness statement when read as a whole and from Mr Cunningham's skeleton argument on the approval application that the Bank was asking the judge to approve its decision to enter into the Scheme and that the judge fully understood that this was what he was being asked to consider. At [62] Sales J. said:

> "Having made these points, however, I wish to emphasise that in my view the relevant question is not so much whether the court thinks that the making of the Scheme is a good idea in the circumstances (which I do), as whether an executor and personal representative faced with the practical problems confronting the Bank in administering the estate could reasonably and lawfully assess that it should enter into the Scheme. The further question, then, is whether in light of that assessment the court should give its sanction for the executor to do so. I discuss the relevant legal test below."

57. The real issue therefore in relation to the approval application is whether Sales J. was in a position to reach a properly informed decision on this issue. This in turn requires some consideration of the alleged merits and demerits of the Scheme and of whether the Bank properly considered what are said to be possible alternatives to the Scheme before deciding to seek approval for it as its preferred means of dealing with the PI claims.

58. I can begin with what are said to be the defects of the Scheme as drafted. For this purpose, I will leave out of account the detailed points of drafting raised by Mr Ham in the form of his amended draft scheme because these are, for the most part, defects in the drafting of the Scheme rather than in the Scheme itself. Mr Rowley says that it was obviously intended that any ultimate payment of a claim under the Scheme would be in full and final settlement of all claims and that, on a proper reading of clause 4, the Scheme did and was intended to enable the Bank to reject claims which it assessed had no merit even if the precise wording was not spelt out. For the moment, however, I want to concentrate on the reasons why the Trust contends that the Scheme, even if more accurately drafted, is, as Mr Ham put it, intrinsically flawed. In summary, they are that:

(i) the Scheme is entirely voluntary and not comprehensive;

(ii) it operates entirely at the expense of the estate with no costs consequences for the PI claimants whose claims are either rejected or withdrawn;

(iii) there is no saving in time. The Scheme contains no provision for claims falling outside the Scheme either by choice or exclusion;

(iv) there is no cap on the costs of operating the Scheme; and

(v) the approval of the settlement of claims could be better and more economically dealt with by a Queen's Bench master rather than a judge of the Chancery Division.

59. The first riposte to these and many of the Trust's other objections to the approval of the Scheme is that not all of these points were relied upon or pressed by the Trust in front of the judge which explains why Sales J. did not adjourn the application for further evidence or refer to them in his judgment. Both Mr Cunningham and Mr Rowley referred to Mr Lissack's statement at the 20 February 2013 hearing that there should be "*some form of scheme ... or something of that sort to determine (a) which claims are valid; and (b) which claims should therefore be settled and at what rate and by whom*". At the February 2014 hearing Mrs Rosen Peacocke agreed (indeed submitted) that, whether solvent or insolvent, the first duty of the Bank as executor was to determine the liabilities of the estate. When the judge suggested that this was what they were in fact trying to do through the medium of the Scheme, Mrs Rosen Peacocke changed tack and criticised the Bank for not advertising for claims much earlier than it did. But even if that had been done in the way she suggested the Bank would still have been faced with numerous claims which required to be assessed. By the end of her submissions Mrs Rosen Peacocke had confirmed to the judge that although the Trust took the view that the terms of the Scheme should be modified in various respects, it agreed that there should be a scheme to deal with the PI claims:

> "MRS PEACOCKE: We are not supporting the court's approval of this particular Scheme which we think has flaws that we would like your Lordship to address, but we were certainly not suggesting, because it has been said that the only alternative is litigating 137 claims, we have never suggested that that is our proposed alternative and we have certainly not suggested that the independent administrator would not assume the same role as the Bank in the administration of either the Scheme approved by your Lordship or some modification of it.
>
> MR JUSTICE SALES: So your position, is this right, comes down to there should be a Scheme. You say it should be in different terms than the one that is put before the court, but if the court is willing to approve a Scheme, then you say that another replacement executor could act as administrator in relation to that Scheme?
>
> MRS PEACOCKE: Absolutely."

60. Similarly Mr Andrew Cosedge, counsel for Mrs McKenna on behalf of her and the other beneficiaries, told the judge that, although they also sought improvements in what was proposed, they had no intention, as he put it, of scuppering the Scheme.

61. It was therefore common ground before the judge that whatever differences there might be about the best method of scrutinising and (if possible) settling the PI claims, none of the beneficiaries was suggesting that the Bank should simply defend the claims in Court using the Limitation Act as a defence which was the proposal contained in the now-abandoned application of 12 March 2013. On this basis, the judge would not have been assisted by evidence about the legal advice which the Bank had received about limitation. It was accepted by all concerned that the Court would be likely to disapply s.11 in favour of meritorious claimants. The task for the Bank was therefore to devise a scheme which enabled it to identify the unmeritorious claims which undoubtedly would be statute barred.

62. Mrs Rosen Peacocke told the judge on the first day of the February 2014 hearing that she had agreed with Mr Cosedge that he would address the judge on the merits and weaknesses of the Scheme including the alternatives that might be available and that she would deal with the removal application. The judge therefore heard Mr Cosedge on these issues and he raised four main points about the Scheme. The first was to draw the judge's attention to the judgment of David Richards J. in *MF Global UK Ltd (No. 3)* [2013] EWHC 1655(Ch) in which the Court gave directions which allowed the administrators in that case to distribute the client money which they held without providing for claims which were rejected and not appealed. Mr Cosedge submitted to Sales J. that the insertion of similar provisions with a time limit into the Scheme would introduce an additional degree of finality by permitting the executor to distribute the estate without regard to PI claims which had either been rejected under the Scheme or had not been made within the Scheme at all. This is Mr Ham's point that without such a mechanism the Scheme is entirely voluntary and not comprehensive.

63. But Mr Cosedge also made it clear that he was making the suggestion for a possible tightening of the Scheme only as an amendment which the Bank and the PI claimants might wish to consider and not as an objection to the approval of the Scheme:

> "MR JUSTICE SALES: If they are not attracted by it, you do not oppose the sanction of the existing Scheme?
>
> MR COSEDGE: I am not going to say that the Scheme is unworkable….".

64. A point put to counsel by the judge and carried forward by Sales J. in his judgment is that even without the further specific amendment proposed by Mr Cosedge based on the scheme in *MF Global*, the reality was that a PI claimant who failed to make a claim under the Scheme within the advertised time limit or at all or whose claim was so made but rejected is likely to be without recourse given that the Court is likely to sanction the distribution of the remaining assets in the estate once all the Scheme claims have been either rejected or approved. Paragraph 2.3 of the Scheme provides for the executor to advertise the Scheme in various specified newspapers in a specified form which requires notice of any claim to be given within 6 months of the date of the advertisement. The judge said:

> "50. If the Scheme is approved and given sanction by the court on the Bank's application, it will have two main effects so far as the Bank's position is concerned. First, it will mean that the Bank can incur legal expenses in operating the Scheme with reasonable assurance that the court will find that it is entitled to recoup those expenses out of the estate (subject to possible scrutiny later of the reasonableness of the amounts of those expenses). Secondly, it will mean that, if the quantum of those personal injury claims found to be valid can be assessed by means of the Scheme procedures (or by means of those procedures and prompt resolution of any other claims pursued outside the Scheme), it is likely that the court will give sanction and approval at the final stage for payments to be made out of the estate to claimants, the Trust and the individual beneficiaries, as the case may be. The giving of such approval will provide the Bank, as executor and personal representative, with protection in respect of any later claims brought forward against the estate after it has been distributed: cf *Re Yorke (deceased); Stone v Chataway* [1997] 4 All ER 907.
>
> 51. It is because of this second effect that there was some debate at the hearing about the form of the advertisement which would be required to be given under clause 2.3 of the Scheme, if the Scheme is approved. I was concerned to ensure that any advertisement would give potential personal injury claimants who have not yet intimated claims against Jimmy Savile's estate fair notice that they might in practice lose the opportunity to make claims against the estate after a certain period of time, after which it is proposed that the Bank will apply for the sanction of the court to make payments out of the estate and to

wind up the estate, leaving no further money to meet later claims. I am satisfied that the form of the proposed advertisement as finally agreed is appropriate. It is in terms which will give fair warning that it is intended that the estate will be fully paid out within a year after the date of the advertisement or as soon as possible thereafter and it will contain an explicit warning that if notice is not given of a claim before such distribution, all right to recover from the estate will be lost.

…

57. The Trust submitted that the Scheme was defective for a number of other reasons. Ms Summers, in her first witness statement, complained that the Scheme is "unworkable and futile", and that costs to negotiate it and operate it should not be recoverable out of the estate.

58. I do not accept this criticism. It is true that claimants are not required to claim under the Scheme and that those who do are not obliged to settle at the level which might be indicated under the Scheme. Until they settle, claimants retain the right to launch proceedings in court. However, there are considerable potential benefits for claimants in using the Scheme and it is likely that claiming under the Scheme will be attractive to many or all of them. Use of the Scheme will provide a good opportunity for their claims to be quickly and inexpensively scrutinised by a barrister, so that they have a reasonable chance of reaching a settlement at an agreed level which can be regarded as fair. Agreement about that will in turn help the Bank to get to a position in which the full amount of valid claims is known, so that it can decide whether and in what amounts they can be paid out of the estate and whether and in what amounts the claims of the Trust and the individual beneficiaries upon the estate can be met. This will allow the Bank to come to court for sanction of payments out of the estate, so that those who are entitled to the money remaining in the estate can actually receive what is due to them.

59. Personal injury claimants who do not claim or settle under the Scheme will have a difficult choice. They can go to court, but that may involve them in expense which may prove to be irrecoverable; they may fail in their claim and receive nothing; they will be on risk for an award of costs being made against them in favour of the estate if they lose, or if they have failed to apply under the Scheme without good reason; and taking that step will be likely to lead to the Bank being forced to incur legal expenses which will deplete further the balance remaining in the estate, so diminishing whatever recovery they might hope to obtain (in contest with all the other personal injury claimants) at the end of the day. Even if some claimants do

> pursue this course, despite the risks they will face, it is reasonable to think that the numbers are likely to be comparatively small and easier to deal with than if the Scheme was not put in place."

65. I am not persuaded that the Trust has any real answer to this analysis. Costs aside, no scheme can avoid the possibility of operating subject to some form of insolvency regime should it transpire that the quantum of admitted claims and costs will exceed the value of the available assets. But the Scheme was promoted as a possible means of limiting the scale of the PI claims thereby preserving at least the possibility that there will remain a surplus available to meet the claims of the beneficiaries. Even if insolvency is inevitable, some process for verifying and quantifying the contingent claims will have to be introduced. But that is not the exercise which the judge was asked to perform.

66. Mr Cosedge's next point (among a number of small drafting points) was that the Scheme did not incorporate the scrutiny procedures outlined in Mr Witcomb's note. This was one of the drafting points mentioned earlier which feature in Mr Ham's amended draft. The judge said that he had to proceed on the basis that the Scheme would be operated in the way indicated by Mr Cunningham based on Mr Witcomb's note. On that basis, Mr Cosedge was content not to press the point further. It has not been suggested to us that the Scheme has been operated in any different way.

67. The next two points concern the tariff rates in Schedule 6 of the Scheme. Mr Cosedge's first point was that the status of the tariff rates was not made clear in the Scheme but the point was quickly abandoned. His second point, which Mr Ham has referred to as part of his submission about lack of evidence, was that the beneficiaries had received no explanation of how the tariff rates were arrived at. The judge, I think wrongly, suggested to Mr Cosedge that the executor had no obligation to share its legal advice with the beneficiaries. But Mr Cosedge told the judge that he was not suggesting that approval of the Scheme should be refused on this ground and, in those circumstances, the judge can hardly be criticised for proceeding on that basis.

68. Mrs Rosen Peacocke also addressed the judge in relation to the approval application although much of her time seems to have been taken up with a lengthy explanation of how her clients had only comparatively recently received a copy of the final version of the Scheme. In terms of substance, her submissions were that the Scheme was not properly balanced in the interests of the estate. It did not provide for the estate to recover from the PI claimants its costs of dealing with any of the rejected claims nor did it properly take into account the availability of the limitation defence. No points were, however, taken about the need for a cap on the costs of the Scheme (although the costs in general were criticised); about whether approval of the settlement should be dealt with by a Queen's Bench master as opposed to a Chancery judge; and, more importantly, about whether there were alternative and more cost-effective ways of achieving the same result. Although Mr Ham mentioned alternatives such as mediation and early neutral evaluation, no arguments were addressed to the judge or to us to suggest that these were serious and effective alternatives. The Trust's position seems to be that the onus was on the Bank to explain why such alternatives would not work rather than on the Trust to show that they were viable. But this seems to me too formalistic. Once the Bank had agreed the Scheme and was seeking the Court's approval for it, the judge could reasonably have expected the beneficiaries at

least to identify what cheaper but equally effective ways might exist for processing and settling the valid PI claims. Mrs Rosen Peacocke did not submit to the judge that he could not proceed to approve the Scheme without considering these alternatives. Her arguments largely concentrated on the voluntary nature of the Scheme and the absence of any costs penalties for unsuccessful claims.

69. The judge dealt with Mrs Rosen Peacocke's criticism in this way:

> "60. Mrs Peacocke also developed certain other criticisms of the Scheme in her submissions. In my view, there was no substance in any of these criticisms that should lead the court to refuse to approve the Scheme. She suggested that the court should withhold approval and require the parties to the Scheme to negotiate some more to see if it could be improved, from the point of view of the estate. However, to do so would increase the cost of negotiating with the PI Claimants and the Third Party Defendants in circumstances where there is no evidence to suggest that there is any prospect that the Bank could achieve better terms than those in the Scheme.
>
> 61. Since Mrs Peacocke made criticism of the proposed Scheme part of her complaint about the behaviour of the Bank as executor, it is relevant at this juncture to express a view about it. In my judgment, the proposed Scheme is a sensible and pragmatic attempt at a solution to the complex situation which confronts the estate. It seeks to strike a fair balance between the objectives of providing for reasonable objective scrutiny of claims made against the estate whilst minimising the costs of dispute resolution and seeking to maximise the scope for distributions out of the estate to those who are really entitled to it (whether personal injury claimants, the individual beneficiaries or the Trust). It is a feature of the Scheme that it provides for comparatively summary and truncated scrutiny of the merits of the personal injury claims under it, as compared with a Rolls-Royce type examination of those claims at trial in court proceedings. But the problem with Rolls-Royce trial procedures to resolve such disputes is that they are expensive, and are such as would be likely to exhaust the estate in payment of legal expenses if every claim were pursued in that way. In my view, the provisions of the Scheme allow for proportionate and sufficient objective scrutiny of the merits of the claims consistent with the proper administration of the estate. I do not accept the Trust's further criticism of the Scheme, that it is unfairly generous to the personal injury claimants."

70. Since the judge went on (in [62] quoted earlier) to apply the right test in deciding whether to approve the Bank entering into the Scheme, this Court can only set aside his order if we are satisfied that he was obviously wrong in his assessment of whether the executor could properly have taken the decision to process the PI claims in this way. It has therefore to be shown either that the Scheme was so inherently unsuitable whether in terms of its efficacy or cost as to take it outside the range of what the

executor acting prudently and in the best interests of the estate as a whole could agree to or that the judge simply had insufficient material upon which to carry out that assessment. Neither of these contentions has been made good on this appeal.

71. The estate is faced with a significant number of PI claims which, if successfully pursued in litigation, will undoubtedly exhaust the estate. Although a number of these claims may be exaggerated or even fraudulent, a significant number are undoubtedly genuine and well-founded. The estate cannot be fully administered until the scale of the genuine claims is determined and the claimants in question will be creditors of the estate who have a prior claim on the available assets in priority to the beneficiaries.

72. Given that no one now suggests that the Bank should simply have contested the claims relying on a limitation defence, the only alternative was to devise a scheme for the scrutiny and assessment of the claims which was as comprehensive as possible. Neither the Bank nor the Court could compel the PI claimants to abandon their rights of access to the Courts but the Bank as executor could in practice achieve this result by obtaining the Court's approval to a distribution of the estate once the PI claimants had been given an opportunity of submitting their claims for consideration by the Bank under a suitable scheme.

73. The Scheme negotiated with the solicitors for the PI claimants (admittedly at considerable expense) has the added advantage that it not only provides machinery for the scrutiny of claims but also fixes the levels of compensation at sums which are likely to be below those potentially achievable in civil litigation. One can say that the allowance for historic costs was over-generous and that there is no costs penalty for an unsuccessful claim but these provisions were the result of a process of negotiation in which there was inevitably a certain amount of give and take. They do not make the Scheme an impermissible one.

74. Although Mr Ham suggested in his written submissions that some form of mediation or early neutral evaluation would have been equally effective as a means of assessing the PI claims, that would have given the executor insufficient protection unless it was carried out as part of a larger scheme designed to take in all possible claims. The Bank needed to be able to demonstrate to the Court that it had given the PI claimants a proper opportunity to advance their claims under the Scheme. Otherwise it is likely that many of them would have issued proceedings in the Queen's Bench Division and there would be no real prospect of the Court permitting the executor to distribute the estate prior to the termination of those proceedings. The suggestion made about alternative methods of scrutinising the claims in the end goes only to the costs of administering the Scheme.

75. The point taken about the use of a Queen's Bench master as opposed to a Chancery judge to approve settlement of the claims is again no more than a point of detail but I am also unconvinced by it. The process of assessment of the PI claims which began with Sales J's April order will lead in due course to a single application before a judge for the Court's sanction to payment of the agreed claims out of the estate. At that point the judge will know what other (if any) claims have been pursued outside the Scheme. The judge can then decide whether to allow the executor to distribute the estate without regard to such claims or whether some form of retention needs to be made. If the estate is by then insolvent, given the number of successful claims, the judge will have to factor in some kind of *pari passu* distribution into the orders which

he makes. This is an exercise best performed by a High Court judge of the Chancery Division.

76. For these reasons, I reject Mr Ham's submissions that the Scheme was intrinsically flawed or that it was one which no reasonable executor could have promoted. No credible alternatives were advanced to the judge, none of the points of detail identified by Mr Cosedge or Mrs Rosen Peacocke were advanced as or were capable of justifying a refusal of approval; and the judge had enough material before him to enable him to deal with the points which were in fact raised as objections to the Scheme.

77. One of the points taken on this appeal was that the PI claimants should not even have been heard on the approval application and that the judge was wrong to take into account their views in deciding whether the Scheme was beneficial to the estate. They were therefore able to advance their own personal interests by supporting the Scheme and to do so at the expense of the estate. There is no doubt, of course, that having negotiated and agreed the Scheme, the PI claimants were bound to support its approval by the Court and their presence added to the costs of the application. But the time for that objection to be made was at the hearing.

78. As mentioned earlier in this judgment, the PI claimants were made parties to the Part 8 claim without apparent objection by the Trust and by paragraph 2 of his 1 April order Sales J. ordered the PI claimants to represent all persons who had made PI claims against the estate. There is no appeal against that part of the order nor, I think, could there be, given that the joinder of the PI claimants to the Bank's approval application and the representation orders were not themselves opposed by the Trust at the time. But, in any event, the PI claimants as contingent creditors as a class did have an interest in the administration of the estate if insolvent given that a significant proportion of them had claims which if progressed through litigation were likely to result in judgments against the estate. The judge was perfectly well aware of where their interest lay but this was an unusual situation and the judge was entitled to conclude that they had a sufficient interest in the administration of the estate to make them proper parties to the approval application. The genuine PI claimants have as much of an interest in the scrutinisation and rejection of false claims as do the beneficiaries.

79. One serious criticism which the Trust did make both at the hearing and in correspondence when the Scheme was being negotiated was that both the negotiations for the Scheme and the processing of the PI claims under it has been extremely expensive. As I have already noted, much of the criticism of the detail of the Scheme really comes to saying that it has proved to be an excessively costly way of scrutinising and managing the claims. The judge, however, recognised this to be an issue in the order which he made. Although he considered that the Bank should have the benefit of validation orders for the expenditure considered at the February 2013 hearing and for the future legal costs dealt with in the order under appeal, he specifically preserved the rights of all interested parties to challenge the content and amount of Osborne Clarke's bills. The Bank has not charged for its own time as executor so the proviso to the judge's order enables the Trust, if it wishes, to conduct a detailed assessment of the solicitors' bills. So far therefore as cost is an issue, this has been provided for. I would therefore reject the Trust's challenge to the judge's order approving the Scheme on these terms.

The removal application

80. The appeal against the dismissal by Sales J. of the removal application involves a challenge to the judge's assessment that the Bank had not acted either unfairly or incompetently in relation to its handling of the PI claims:

> "76. In my view, no good case has been made out by the Trust or the individual beneficiaries to indicate that, in negotiating the Scheme and in now asking the court for approval to implement it, the Bank has acted or will act in any way unreasonably or without fair and proper regard to the interests which ought to be taken into account in deciding how the estate should be administered. The Bank has been at pains to negotiate a scheme which allows for fair scrutiny of the claims made against the estate and which seeks to contain the extent of any sums due and the costs of such scrutiny within reasonable and proportionate bounds."

81. At the hearing in February 2014 Mrs Rosen Peacocke did not base the application on any allegation of misconduct even though the evidence of Ms Summers in support of the application contained the allegations about the unauthorised release to the PI claimants of confidential information and the Bank's failure to prioritise the protection of the estate and the beneficiaries under the will which I referred to earlier. The case was put to the judge on the basis that relations had broken down between the Bank and the beneficiaries so that they no longer retained confidence in the Bank's ability to administer the estate. Since PennTrust remained available and ready to take over the administration, the Court should require the Bank to step down in favour of a new and impartial administrator.

82. There is no doubt that executors are sometimes removed on these grounds. The judge was referred to the leading case on the removal of trustees, *Letterstedt v Broers* (1884) 9 App Cas 371, in which Lord Blackburn (at pages 386-7) said:

> "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.
>
> The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his

> argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.
>
> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case."

83. But, as Lord Blackburn indicated in this passage, the direct intervention by the Court in the administration of a trust or an estate by the removal of the trustee or personal representative has, for the most part, to be justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardise the proper administration of the trust or estate. This is something which requires to be objectively demonstrated and considered on a case-to-case basis having regard to the particular circumstances.

84. In this case, there is not unanimity as to whether the Bank should be replaced by PennTrust. Although the Trust says that relations with the Bank have broken down, this is not the position of the PI claimants. It is also necessary to consider whether a change from the Bank to PennTrust is in anybody's interest given that the Scheme is in operation and is one which in my view the judge was right to approve. If the outcome of the Trust's challenge to the approval of the Scheme had been that a new or significantly revised arrangement for the processing of the claims was necessary then the case for a new administrator would have been much stronger. As it is, a

change would risk disrupting the operation of the Scheme leading to unnecessary costs and delay.

85. The judge's finding that the Bank has acted and will continue to act fairly and with proper regard to the interests of the beneficiaries in its administration of the Scheme is therefore in my view determinative of this aspect of the appeal unless it can be demonstrated that those findings were not open to the judge on the evidence.

86. The judge summarised the history leading up to the removal application in these terms:

> "82. Mrs Peacocke submitted that the Bank has shown unacceptable and improper hostility to the Trust in the manner in which it has dealt with the estate's affairs. I reject this submission. It is true that there have at various points been conflicting views between the Trust and the Bank about how to proceed, but it cannot be inferred from this that the Bank has adopted an improperly hostile attitude towards the Trust or that there is any real risk that the Bank will not carry out its duties as executor and personal representative in a proper and lawful manner. The points on which there have been conflicts of view or in relation to which the Trust has felt badly treated (such as its exclusion from the latter phases of the negotiation of the Scheme) have not been the product of hostility by the Bank to the Trust, but the result of proper and reasonable judgments by the Bank about the best way to proceed to administer the estate, having proper regard to the interests of all those who may prove to have an entitlement in respect of it.
>
> 83. There are many contexts in which trustees or those in equivalent positions, such as personal representatives of a deceased person, have to make judgments which involve striking a balance between different competing interests and which may thus adversely affect some persons claiming under the trust or in respect of the estate of the deceased. It is to be expected that in such cases there will often be an element of friction between the trustee or personal representative and those disappointed by their decisions. This is not in itself a good ground to remove the trustee or personal representative from their office."

87. He therefore acquitted the Bank of any improper hostility towards the Trust treating the disagreements as to how the handling of the PI claims should proceed as legitimate differences of opinion. I have set out the history of those matters in some detail earlier in this judgment and, against that background, I propose now to consider the principal points of dispute which Mrs Rosen Peacocke raised with the judge as justifying the Bank's removal and which have been pressed by Mr Ham on this appeal.

(1) The failure to advertise for claims in advance of the formulation of the Scheme

88. I have already explained the relevance of this point as a criticism of the Scheme in [40] above. The advertisements provided for under the Scheme will have the effect of drawing out most, if not all, of the possible PI claims in advance of any payment out of the estate. It may be that the advertisement of the Scheme rather than for claims *simpliciter* has encouraged some exaggerated or false claims to be made and has therefore generated some unnecessary cost to the estate. But there is no hard evidence to support this concern and, as Mr Ham realistically accepted, it is now water under the bridge. I do not see how a failure to advertise earlier can now justify the removal of the Bank.

(2) The offer to allow the Trust to manage the litigation of the claims

89. As explained earlier, this was a suggestion by the judge which the Bank decided not to implement. Its reasons for not doing so disclosed a misconception about the funding of the litigation which I have set out in [23]. This of itself led to disagreement with the Trust's solicitors, whose contrary views on that issue were, I think, justified. But the idea of resolving the PI claims through litigation was quickly abandoned and rightly so. This is, again, a largely historical matter. It has no relevance unless it can be demonstrated that it engendered a feeling of animosity on the part of the Bank towards the Trust which continues. The judge rejected this.

(3) The Bank's failure to retire in favour of PennTrust

90. The suggestion that the Bank should retire in favour of PennTrust was made at the meeting on 30 April 2013 at a time when negotiations with the PI claimants about a possible scheme had just began and the Trust had particular concerns that in those negotiations the Bank should take a firm line that its primary duty lay in protecting the interests of the beneficiaries. Before the judge Mrs Rosen Peacocke relied on the fact that the Bank had failed to keep its promise to retire which in due course prompted the removal application. But that fact alone could not be conclusive. Although the Bank, understandably, may have been willing to exit from an increasingly hostile environment back in April 2013, it retained an obligation to administer the estate. Once the scheme negotiations were under way it could justifiably decide that any question of retirement should be postponed until the negotiations were complete and its subsequent refusal to retire has, I think, to be judged by reference to the position then obtaining. If, as the judge found, the Scheme did properly balance the interests of the beneficiaries and the PI claimants and the Bank would continue to administer the Scheme in an even-handed way, then the plea that the Bank had failed to honour a promise made back in April 2013 becomes increasingly hollow.

(4) Hostility towards the Trust

91. Although the Trust cited the breakdown in relations with the Bank as one of the grounds for seeking its removal as executor, the evidence in support of the removal application attributed this to a failure by the Bank to act in the interests of the beneficiaries rather than to any overt hostility on its part. The conduct complained of was the Bank's failure to address the consequences of the estate's potential

insolvency; its disclosure of confidential information to the PI claimants; and the legal costs incurred in its administration of the estate.

92. Mrs Rosen Peacocke did, however, rely on what she said was an unduly hostile reaction by the Bank to the removal application and Mr Ham submitted that the Bank's change of attitude in relation to its retirement indicated, in the absence of bad faith, at least a failure of rational and reasonable consideration by the Bank and its advisers.

93. The judge rejected the allegation of hostility. He held that the Bank was entitled to reject in the robust way it did an application which, as framed, amounted to an allegation of misconduct. But it was not, he said, possible to infer from this:

> "… that the Bank has formed an attitude of inappropriate hostility to the Trust which is likely to impede it in fulfilling its duties as executor and personal representative in due and proper manner. The Bank was entitled to point out, as it did, that the court would wish to supervise any question of replacement of the executor and that the views of others, including the PI Claimants, would be relevant matters to be taken into account in relation to such a question."

94. Mr Ham has failed to persuade me that we can interfere with this finding. The judge considered all the evidence and reached a conclusion which was fully open to him. In particular he was right, I think, to support the Bank's position that any change of executor was properly a matter for the Court to consider when it came to decide whether to approve the Scheme. That was the occasion for the Trust to raise its objections to the Scheme and for consideration to be given as to whether the Bank was in the position to take the matter forward. A particular difficulty faced by the removal application was that if the Scheme was to go ahead in substantially the form which had been agreed then much of what followed was largely mechanical in nature. The PI claims are professionally vetted as described and any further negotiation on quantum in individual cases is a matter for the Bank's solicitors. It is difficult to see how, in the operation of the Scheme, the Bank's views about the Trust can have any material effect. In any event, the payment of the Scheme claims cannot be made without the sanction of the Court which affords a yet further opportunity for the Trust to be heard if there are real concerns as to how the Scheme has been operated.

(5) The Bank's view about the status of the PI claimants

95. The Trust's concern that the Bank operated under a misconception about the status of the PI claimants is a recurrent theme in both the approval and the removal applications. In the instances I have identified, the Bank did, I think, take too neutral a line in considering what courses of action were properly open to it. But the Trust's position on this point was also too extreme. Without repeating what I have already said, it was simply incorrect to say that the Bank had no obligation to consider the interests of the PI claimants. Nor did this argument lead anywhere. The Bank could not ignore the PI claims which, if not pursued through the machinery of the Scheme, would have led to litigation. It is therefore difficult to identify what different position it is said that the administration of the estate should have reached if the Bank had given more priority than it allegedly did to the beneficiaries under the will. By the

same token, unless the Trust could persuade the Court to withhold approval of the Scheme on the ground that it was biased in favour of the PI claimants and consequently to disallow as a matter of principle the costs incurred by the Bank in negotiating it, the basis for alleging that the Bank cannot be relied upon to be even-handed largely disappears.

(6) Disclosure of confidential information

96. This was a question of fact for the judge. He said:

> "The Bank has shared information of various kinds with the PI Claimants with a view to encouraging them to agree the terms of the Scheme. The decision to do this fell well within the scope of the decision-making discretion allowed to the Bank as executor and personal representative. Even if it had information in its hands which was protected by legal professional privilege of the Bank or was confidential, in the sense that the Bank could have chosen to withhold it from the PI Claimants, the Bank could properly decide to provide such information to the PI Claimants if it judged that this would assist in the negotiation of the Scheme, even if in some respects it might be unhelpful to the Bank if litigation later ensued. In fact, however, Mrs Peacocke did not show me any information in the hands of the Bank which might have any significant detrimental impact upon its ability to defend the personal injury claims, which the Bank disclosed to the PI Claimants."

97. We have been shown nothing which is capable of displacing this finding.

98. For these reasons, the Trust has not established any grounds upon which this Court can properly interfere with the judge's conclusions as set out in [76] of his judgment. In these circumstances, I would dismiss its appeal against the judge's own dismissal of the removal application.

The validation orders

99. As I explained in [15] to [19] above, the judge made a s.284(1) order on 20 February 2013 which included as part of the schedule of anticipated expenditure the estimated future legal costs of Osborne Clarke in dealing with the PI claims. Paragraph 7(3) of the April 2014 order under appeal was therefore in essence an updated version of the earlier order which took into account the known legal costs at that time. Both orders provide that the ratification of the Osborne Clarke bills (which is the controversial expenditure) is made without prejudice to the rights of whoever is entitled to challenge those bills at a later date.

100. The Trust's argument, contrary to the direction of some of its earlier submissions, is that the power contained in s.284(1) should so far as possible be exercised so as to avoid preferring pre-liquidation creditors at the expense of the other unsecured creditors. The Trust relies on the decision of Mr Registrar Baister in *Re Vos* [2006] BPIR 348 which concerned the ratification of the payment of legal expenses incurred in (unsuccessfully) defending the insolvent estate of a Lloyd's name against claims by

Lloyd's for payment of their calls. The Registrar accepted that where there was a doubt about the solvency of the estate, it should be administered as if insolvent. This meant that care should be taken not to incur future expenditure without first seeking the approval of the Court.

101. Mr Ham submitted that the situation in the present case is analogous to that in *Re Vos* and that the Bank should therefore have sought directions from the Court before incurring the expenditure it did in negotiating the Scheme. Moreover, the Bank has adduced no evidence of how or precisely on what the relevant fees were incurred and whether the sums were reasonable.

102. These arguments need to be broken down a little. The absence of evidence about the scale and reasonableness of the estate is in large part the consequence of the judge's refusal to use either of the two hearings as an occasion for a detailed scrutiny of Osborne Clarke's bills. Since the provisos to his orders preserve the rights of the Trust in this respect, the Bank cannot be criticised for failing to perform an exercise which the judge perfectly reasonably was not prepared to adjudicate upon. Mr Cunningham for the Bank was alive to the fact that the Bank may ultimately be unable to recover all of its legal expenditure should items be disallowed on a subsequent assessment of the bills. But the judge thought that it was more proportionate to postpone any assessment until later and the Trust makes no complaint about this. The only issue therefore on this part of the appeal is whether the judge should have refused any ratification order on the basis that the expenditure should have been authorised in advance.

103. Sales J. rejected Mrs Rosen Peacocke's reliance on *Re Vos* on the basis that the facts and circumstances were not the same:

> "… the Chief Registrar makes the important point that a person administering an estate has an obligation to be fair to those who may have good claims against the estate. It should, however, be noted that one cannot transpose everything he said to the circumstances of the present case. Since, as explained above, the rights of claimants against the estate and the rights of beneficiaries under the will cannot be known with any certainty at the moment, depending as they do upon the contingency referred to, it cannot simply be said that the estate should be administered as if it is insolvent and the beneficiaries under the will have no relevant interest. Mr Feltham correctly acknowledged that the Bank should have regard not only to the interests of claimants against the estate but also to the interests of the beneficiaries under the will."

104. I think the judge was entitled to proceed on this basis. On the figures then available to him, the estate was not actually insolvent in that its assets far exceeded its proven liabilities. Although the PI claims and their associated costs could not be measured with any accuracy, there was a reasonable possibility that many of the claims would ultimately be rejected (as they have been) with the result that the liabilities to creditors would be discharged in full.

105. There is, however, a more general answer to the Trust's submissions on this point. Once one excludes debts such as tax, funeral expenses and legal costs associated with the sale of properties and the realisation of other assets (none of which are or could be challenged on these grounds), the only other unsecured creditors are the PI claimants as a class. Since the Scheme was agreed with the representative PI claimants as an appropriate means of processing the meritorious PI claims, it is difficult to see how such claimants as a class can properly object to the costs of the Scheme being paid in priority to their claims. Moreover if, as the decision in *Re Vos* suggests, the proper course for the administrator of a possibly insolvent estate is to obtain court sanction for any significant expenditure in advance, this was done when the Bank made the original Part 64 application in January 2013 seeking ratification of its past and future expenditure. The April 2014 order was simply a continuation of the original s.284(1) order. This is not a case where in my view the Court ought to have refused to make a validation order out of regard for the interests of the unsecured PI claimants. I would therefore dismiss this part of the appeal.

The costs of the litigation

106. The judge ordered the Trust to pay to the Bank and the other parties (other than Amanda McKenna and the BBC, the latter not having sought any costs) all of their costs of the removal application on an indemnity basis and, in the case of the approval application, to pay 80% of the Bank's costs and all of the costs of the PI claimants, again on the indemnity basis.

107. Mr Ham submits that these orders were inconsistent with the usual practice in cases involving the Court's determination of a question arising in connection with the administration of an estate. He referred us to the decision of Kekewich J. in *Re Buckton* [1907] 2 Ch 406 where the judge said (at p. 414):

> "In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate ...
>
> There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the

> administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
>
> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."

108. CPR 46 PD.1 preserves the rule that a trustee or personal representative is entitled to an indemnity out of the trust fund or estate for costs properly incurred but makes no express provision for the costs of the other parties to an application for directions falling within the first two classes described in *Re Buckton*. But there is no doubt that the costs of any necessary parties to such an application will ordinarily be paid out of the fund or estate. The application is designed to allow the trustee or personal representative to obtain the sanction or guidance he needs for the proper administration of the estate and the Court's determination of that issue necessarily involves a consideration of the position of those affected (beneficiaries or creditors as the case may be) taking into account any objections or other submissions which they make. Indeed the exclusion of the Trust from the negotiations about the Scheme was justified on the basis that it could raise any objections or suggestions for improvement once the Scheme was agreed and could be presented to the Court for approval: see the judgment at [35] quoted in paragraph 35 above.

109. There can, of course, be exceptions to this general rule. Even in the context of an application which is necessary for the proper administration of the estate, the Court retains the power to disallow particular items of costs where the party in question has, for example, launched an unjustified personal attack on one of the other parties or has raised issues which make its conduct of the litigation deserving of moral condemnation: see *Grender v Dresden* [2009] EWHC 500 (Ch). The Court has in such cases to distinguish between genuine points pursued in argument which are germane to the issue under consideration but which ultimately fail and points taken or applications made for no good or proper reason or which are motivated out of animosity towards the other parties. Applications for directions in relation to the administration of a trust or an estate should be critical but also constructive.

110. Sales J. in a separate costs judgment ([2014] EWHC 1683 (Ch)) accepted that the *Re Buckton* principles continue to apply subject to the Court's power to make specific costs orders in accordance with the CPR. No one on this appeal challenges that or suggests that the *Re Buckton* categories are intended to be exhaustive. This Court has made it clear that they are not: see *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 at [75].

111. But the judge's decision to order the Trust to pay 80% of the costs of the approval application was intended to reflect the additional costs generated by the Trust's opposition to the application. Mr Cunningham accepted that 20% of the costs would have been incurred any way in connection with what was an unavoidable application for the Bank's own protection.

112. The judge's order on the approval application did not merely deny the Trust any recovery of its costs out of the estate. It extended to requiring it to pay the costs of the Bank and the other parties by treating the application as if it were ordinary *inter partes* litigation. In my judgment, opposition by a beneficiary to a proposed course of action by a trustee or personal representative is not, without more, sufficient to justify a departure from the general rule that the costs of all necessary parties to a *Buckton* class 1 or class 2 application should be borne by the trust fund or estate. Strong opposition is often encountered, in my experience, in applications for directions by, for example, the trustees of pension funds particularly where the proposed course of action will either cast additional financial burdens on the employer or reduce the fund available to a particular class of member. Nobody has ever suggested that the often lengthy proceedings which this leads to should give rise to adverse orders for costs of the kind made in this case.

113. The judge in [19]-[20] of his costs judgment (quoted earlier in paragraph [13]) said that he was particularly influenced by the Trust's failure to engage with the parties to the Scheme in the period from June 2013. But this seems to me to be inconsistent with his acceptance that Mrs Rosen Peacocke had not behaved improperly at the 14 May meeting and that it had been agreed that the Trust should be excluded from the negotiations until the final Scheme was agreed and could be presented to the Court for approval. The judge's view that this was a legitimate, pragmatic and reasonable approach for the Bank and the PI claimants to take carries with it an obligation to accept that the Trust could not reasonably be expected to continue to participate in the process of formulating the Scheme and that any correspondence from June 2013 is likely to have been ignored or met with the obvious response that the Trust's comments would be considered once the Scheme was in its final form.

114. I therefore consider that the judge's start date of June 2013 was unrealistic. The Trust was excluded against its will from the 30 September meeting and by late October the Scheme had not yet been agreed. The judge refers to a letter sent by the PI claimants on 19 November 2013 which asked the Trust to confirm that it did not object to the Scheme as negotiated. It replied on 28 November referring to Ms Summers' written statement of 5 November which raised the issues about advertising and the failure of the Scheme to encompass all possible claims against the estate. The judge noted that the letter did not refer to the various points of drafting subsequently taken at the hearing, which is correct, but most of those points were in fact argued by Mr Cosedge for the other beneficiaries against whom the judge made no adverse order for costs.

115. I am not persuaded that what the judge referred to as the drafting points added significantly to the length or complexity of the hearing or that the time they took to argue can justify the costs order which he made. There was no evidence that the articulation of the points ultimately taken at the hearing would have led to a consensus and an agreed amendment to the Scheme. But my principal reason for considering that the judge's order on the approval application cannot stand is that it is wrong in principle. The matters relied upon by the judge do not on analysis justify a departure from what would be the usual order for costs on an application of this kind which should be treated as falling within class 1 or 2 of the *Re Buckton* categories. Although the judge was entitled to reject most of the objections raised by the Trust and the other beneficiaries, he was wrong in my view to treat them as anything but genuine concerns about the form and terms of the Scheme. On that basis, an adverse *inter partes* order was not justified whether on a standard or an indemnity basis. The order which the judge should have made was that the Trust's costs of the approval application should be paid out of the estate on the indemnity basis.

116. That leaves the costs of the Bank and the PI claimants. The judge's analysis was that the Bank should be entitled to take the balance of its costs of the approval application out of the estate subject to the right of the other parties to scrutinise the amount of the legal costs. It follows from what I have said that the right order is that the Bank should take the entirety of its costs of that application out of the estate on the same terms. The more controversial issue is what order should be made in respect of the costs of the PI claimants. As I have mentioned, they recovered their costs from the Trust on the basis that the approval application was in reality an adversarial piece of litigation between them and the Trust falling within class 3 of the *Re Buckton* classification. The Trust was therefore ordered to pay the costs of the PI claimants whom the judge treated as the successful party.

117. Largely for the reasons already stated, I do not accept this analysis. It ignores the nature and purpose of the application which was one by the Bank as executor to obtain the Court's approval of the handling of the PI claims under the Scheme. The Bank was not and should not have been a neutral party. It was seeking the ratification of its own decision to administer the estate in accordance with the Scheme. The judge was therefore wrong in my view to treat the application as *inter partes* litigation between the PI claimants and the Trust and to order the Trust to pay the former's costs.

118. In the course of his judgment Sales J. said that he would not have been prepared to order the payment of the costs of the PI claimants out of the estate had they not been payable by the Trust. The PI claimants could have relied upon the position taken by the Bank without taking up a positive position of their own:

> "36. So far as the due administration of the estate was concerned, the Personal Injury Claimants could simply have relied on the position being adopted by the Bank and the Bank's willingness to present a positive case to the court that the court should respect the Bank's judgment as executor that, in the interests of the proper administration of the estate, the Scheme should be entered into. Their substantive involvement beyond that on the Bank's application was for the predominant purpose of furthering their own interests rather than the interest of the

> due administration of the estate for the benefit of all who might have claims against it. In my view, whilst the Personal Injury Claimants were entitled to come and to seek to be heard in court on the Bank's application, in doing so they were seeking to promote their own self-interests rather than making a direct contribution to the due administration of the estate such that it would be just and appropriate to make an order requiring the estate to meet their costs of doing so.
>
> …
>
> So far as the due administration of the estate was in contemplation in these proceedings, it was the Bank making the relevant application seeking approval for the Scheme and which was the party which had assumed responsibility on behalf of the estate for arguing for that outcome. The Personal Injury Claimants were, as I have said, necessary and proper parties, as were the Trust and the beneficiaries, but they did not need to come to court to present arguments in the interests of the estate in order to secure the court's approval for a scheme which was said by the executor to be in the interests of the administration of the estate. It was always clear that, once it launched its application, that was a role that the Bank would be taking on and pursuing so far as the interests of the estate were concerned. Accordingly, in the unusual circumstances of this case, I do not think it can be said that the Personal Injury Claimants, by their participation in the proceedings relating to the Bank's application, have made a separate contribution to the due administration of the estate such that it is just and appropriate that the estate and all those claiming under it should *prima facie* bear their costs on an indemnity basis."

119. Mr Ham relied on this part of the judge's analysis for his submission that it would be wrong in any event for the costs of the PI claimants to be paid out of the estate. Their submissions, he said, duplicated those of the Bank and added costs for no purpose.

120. There is no respondents' notice served by the PI claimants which seeks (in the alternative) an order that their costs should also be paid out of the estate. But Mr Rowley did advance these submissions in his skeleton argument and if we are to set aside paragraph 7(4) of the judge's order then we are, in my view, obliged to look at the consequences of doing so. If the costs are at large so that we have to exercise our own discretion in the matter then I would order that the costs of the PI claimants should, along with those of the Trust, be paid out of the estate on the indemnity basis. Although it can be said that their position was largely supportive of the Bank and the Scheme, they were necessary and proper parties in the rather unusual circumstances of this case and were entitled to be heard on the application. I think that the judge took too narrow a view of their role in the approval application. Their attendance at the hearing did assist him in deciding whether to approve the Scheme and they are entitled to their costs out of the estate.

121. That leaves the costs of the removal application which I can deal with much more shortly. This was a hostile application against the Bank based on grounds which the judge rightly rejected as having no real foundation:

> "In my view, the Trust adopted an unreasonable and misconceived stance on its application. Its arguments failed to accord any proper recognition to the discretion of an executor and administrator in deciding how to proceed in administering an estate, as recognised in the authorities, and unreasonably sought to assert that the Bank owed no responsibilities to the Personal Injury Claimants or other claimants who might come forward against the Savile estate or that those responsibilities should simply be overridden in favour of the interests of the Trust and beneficiaries under Jimmy Savile's will in the course of administration of his estate. As Mr Cunningham emphasised, the Trust lost - and I would say, lost clearly and badly - on every single one of the nine points relied on by Mrs Peacocke in her argument in support of the removal application."

122. Mr Ham accepts that the application should be treated as a class 3 *Buckton* application. Although an application of this sort does not necessarily lead to an adverse order for costs against the beneficiary in question, much will depend upon the grounds of the application and the way in which it was conducted. The removal application was, at least in part, a direct attack on the conduct and good faith of the Bank as executor which the judge held was unfounded. I think the judge was entitled to conclude that the Trust should pay the costs on an indemnity basis to prevent any part of those costs falling upon the estate. Mr Ham submitted that the costs should have been awarded on the standard basis but he has not succeeded in persuading me that there are grounds on which it would be right to interfere with the judge's exercise of discretion in respect of the costs of the Bank.

123. The costs of the other parties are, I think, a different matter. Neither the PI claimants nor the Secretary of State were parties to the Trust's removal application. Although the judge allowed them to be heard, it is also clear from what the judge says in paragraph 46 of his costs judgment that he would not have been persuaded to order that their costs should come out of the estate. The Bank was well able to defend the attack on its own conduct. The costs of these third parties are therefore only recoverable if the judge was in some way justified in making costs orders against the Trust in favour of non-parties to the application. In my view, he was not. Even if he had jurisdiction to do so, he was wrong to do so in this case.

124. The judge based his order on the PI claimants and the Secretary of State having what he described as a direct interest in the application:

> "11. …. The Personal Injury Claimants and the Secretary of State had their own direct interest in the outcome of the removal application brought by the Trust, not least because an important part of the Trust's argument was that the Bank was behaving improperly by giving weight to their interest in the administration of Jimmy Savile's estate by negotiating and

> agreeing the Scheme with them. Also, the Trust, as already mentioned, kept the full scope of its objections to the Scheme, as it had been negotiated by the Secretary of State and the Personal Injury Claimants with the Bank, up its sleeve until the hearing of its application.
>
> 12. I consider the contest regarding the removal of the Bank was in substance as much a contest between the Trust and the Personal Injury Claimants and the Secretary of State as a contest between the Trust and the Bank in the unusual circumstances of this case, so that again costs should follow the event as between the Trust and those parties."

125. But that is not enough to justify the order he made. They were not necessary parties. The removal application did not concern their conduct or the approval of the Scheme. A new administrator would have been obliged to implement it. The thrust of the application was directed at the Bank. The third parties were not needed for that debate. The judge was entitled to allow them to be heard but it should have been at their own expense.

Conclusion

126. In summary, therefore, I would dismiss the Trust's appeal against the judge's order in respect of the approval application, the removal application and the s.284(1) order but allow the Trust's appeal against the orders for costs. I would order the costs of the Trust and the PI claimants of the approval application to be paid out of the estate on the indemnity basis and for the Bank to take its costs out of the estate as provided for under paragraph 9 of the order. I would order the Trust to pay the Bank's costs of the removal application on the indemnity basis but make no order in respect of the costs of the PI claimants and the Secretary of State of that application.

Lady Justice Gloster :

127. I agree.

Lord Justice Bean :

128. I also agree.