Green v Torode & Wright
Royal Court
15th October, 2015

JUDGMENT
51/2015

Judgment re the responsibilities of a professional executor in the administration of an estate.

Approved Text
15.10.2015

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between **GRAHAM ERNEST GREEN**
RUSSELL IAN GREEN
ELLIOTT LUKE GREEN **Plaintiffs**

-and-

MARK ANDREW TORODE **First Defendant**

-and-

SUSAN DEBRA WRIGHT **Second Defendant**

Hearing dates: 19th to 22nd, 27th and 28th May 2015

Judgment handed down: 15th October 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

Jurats: B J Bartie, S M Jones, P S T Girard

Advocate for the Plaintiffs: **Advocate P Richardson**

Advocate for the First Defendant: **Advocate R G Shepherd**

The Second Defendant was excused attendance

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Royal Court (Costs and Fees) (Guernsey) Law, 1969
Newmarket Holdings (Guernsey) Limited v Musa Holdings Limited (unreported, 15 December 2014)
Al-Kazemi v AUB Trustees (Guernsey) Limited (unreported, 5 February 2015)
Maurice v Chief Executive of the States of Alderney (unreported, 18 April 2011)

Loi relative aux Exécuteurs Testamentaires et aux Administrateurs des Successions de personnes décédées (1930)
Williams, Mortimer & Sunnocks, *Executors, Administrators and Probate*, 20th ed.
Turner v Hancock (1882) 20 Ch D 303
In re Spurling's Will Trusts [1966] 1 WLR 920
Lewin on Trusts, 19th ed. (2015)
In the matter of the Representation of K.J. MacKinnon 2010 JLR 508
In re Skinner [1904] 1 Ch 289
The Trusts (Guernsey) Law, 2007
Malcolm v O'Callaghan (1837) 3 My. & Cr. 52
Alhamrani v JP Morgan Trust Company (Jersey) Limited [2007] JRC 053
Alsop Wilkinson v Neary [1996] 1 WLR 1220
Albany Trustee Company Limited v Jeandin (unreported, 10 September 2012)
In the matter of the Carafe Trust 2005 JLR 159
Parujan v Atlantic Western Trustees Limited [2003] JRC 045
In the matter of the Estate of C 2012 (1) JLR 204
In the matter of the Tubuoh Trust (unreported, 11 March 2005)
Public Trustee v Cooper [2001] WTLR 901
Green (as administratrix of the Estate of Peter Maclean Maitland deceased) v Astor [2013] EWHC 1857 (Ch)
Letterstedt v Broers (1883) LR 9 App Cas 371
In the matter of the K Trust (unreported, 14 July 2015)
The Probate (Jersey) Law 1998
Emezie v Secretary of State for the Home Department [2013] EWCA Civ 733
M v Mayor and Burgesses of the London Borough of Croydon [2012] 1 WLR 2607
The Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch)
Heyman v Dobson [2007] EWHC 3503 (Ch)

Introduction

1. Ernest Green died on 31 August 2011. He had executed a will of personalty on 29 June 2010 ("the Will"), by which he appointed Advocate Mark Torode, the First Defendant, as the Executor and Trustee of that Will. The First Defendant proved and registered the Will in the Ecclesiastical Court on 25 November 2011.

2. Ernest Green left four children as his heirs and made them the residuary beneficiaries of his personal estate (which for ease of reference we will call "the Estate"). His three sons (Graham Ernest Green, Russell Ian Green and Elliott Luke Green) are the Plaintiffs. His daughter (Susan Debra Wright) is the Second Defendant. Proceedings between the parties first began with an application to remove the First Defendant as Executor dated 2 May 2012, to which the Second Defendant was subsequently joined (and to which we will refer as "the Removal Application"). The First Defendant then made his own application dated 10 July 2012 for directions in respect of one of the assets within the Estate (to which we will refer as "the Harrier Application", although it is also referred to by the Plaintiffs as "the emergency application"). The First Defendant made a second application dated 17 December 2012 under which he sought the Court's blessing of the basis on which he proposed to wind up the Estate (to which we will refer as "the Winding Up Application"). This Winding Up Application was expressly contingent on the Plaintiff's Removal Application being dismissed.

3. Those three Applications were listed for hearing towards the end of January 2013. However, the trial was vacated at the last moment because the Plaintiffs and the Second Defendant reached an agreement resolving matters in respect of which there had previously been differences, thereby agreeing the distribution of the remaining assets contained in the Estate. The terms of their agreement are contained in a written document dated 28 January 2013 entitled "Beneficiaries' Agreement".

4. In the light of the Beneficiaries' Agreement, the parties appeared before the Court on 29 January 2013. The Plaintiffs withdrew the Removal Application. The First Defendant withdrew the Harrier Application and the Winding Up Application. In each case, there was no agreement as to the appropriate order as to costs, so the costs of each Application were reserved.

5. By an application dated 11 September 2013 (to which we will refer as "the Costs Application"), the Plaintiffs seek orders in the following terms:

> "*1. The Plaintiffs' costs of and incidental to the "Removal Application" (hereinafter referred to as the "Litigation Costs") shall be paid forthwith by the First Defendant on a recoverable basis, such costs to be taxed if not agreed;*
>
> *2. That the First Defendant shall pay their costs in relation to the Litigation Costs, inclusive of the emergency application brought on his behalf on 10 July 2012 (the "emergency application") and the application to wind up the estate (the "winding up application") of 17 December 2012;*
>
> *3. That the First Defendant shall repay any costs taken from the estate of the late Mr Ernest Green (hereinafter referred to as the "Estate Costs") in relation to the First Defendant's fees and/or costs in his role as Executor of the estate*".

It was conceded by Advocate Paul Richardson, on behalf of the Plaintiffs, that they do not suggest that the First Defendant should be required to repay the entirety of his fees and/or costs arising from his administration of the Estate, but that paragraph 3 seeks an order disallowing some (which the Plaintiffs suggest should be a significant proportion) of the costs that have been incurred because they do not fall within the charging clause contained in the Will. The Plaintiffs have not precisely quantified what they suggest the First Defendant is entitled to receive from the Estate for performing his office as Executor.

6. Paragraph 4 of the Beneficiaries' Agreement provides that "*no beneficiary shall make any claim against the other in respect of legal fees/legal costs incurred in connection with the estate or any of the Court applications relating to the Estate*". As a result, the Plaintiffs' Costs Application did not directly engage the Second Defendant, although any overall saving to the Estate arising from paragraph 3 of it would potentially lead to a further distribution from the Estate to her. Accordingly, on 5 May 2015, being satisfied that the Costs Application did not require the Second Defendant to attend as a party, the Deputy Bailiff directed that she was excused from attendance in that capacity.

7. The First Defendant has made a third application dated 20 September 2013, by which he seeks orders against the Plaintiffs to enable the Estate to be finalised. That application stands adjourned to await the outcome of the Costs Application and we say nothing more about it here. This judgment, which has been prepared in accordance with section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008, deals with the issues raised by the Costs Application. Where it records findings of fact made by the Jurats, those findings are unanimous.

Legal principles

8. At the outset, it will be helpful to set out whose task it is to perform the various functions that will lead to the Court's decisions on the Costs Application. Advocate Shepherd, who appears on behalf of the First Defendant, sought to place all matters squarely within the province of the Jurats. Advocate Richardson submitted that paragraphs 1 and 2, which follow the withdrawal of the three Applications referred to therein, were matters of normal procedure to be dealt with at the conclusion of a hearing by the presiding judge alone.

9. The Deputy Bailiff has decided that Advocate Richardson's position is the correct one. When the three Applications were withdrawn, the costs in respect of each were reserved. Paragraphs 1 and 2 of the Costs Application are, therefore, to be viewed in that light. Although it is permissible for the Court to be constituted with Jurats before the presiding judge rules on costs, the actual decision as to what order to make about costs lies with the judge and not the Jurats. Section 1(1) of the Royal Court (Costs and Fees) (Guernsey) Law, 1969 provides that "*The costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the Royal Court and the Royal Court shall have power to determine by whom and to what extent the costs are to be paid.*" Save for an exceptional case, there should be no need for hearings at which a costs order is addressed to involve Jurats. Recent examples of costs decisions being reached by a judge sitting unaccompanied by Jurats, even where the parties disagreed about what the outcome would have been had the matter proceeded to trial, include *Newmarket Holdings (Guernsey) Limited v Musa Holdings Limited* (unreported, 15 December 2014) and *Al-Kazemi v AUB Trustees (Guernsey) Limited* (unreported, 5 February 2015). In both cases, it was considered unnecessary for the Court to be constituted with Jurats for the purposes of conducting a mini-trial. It was clearly not cost-effective to do so. As had been recognised in *Maurice v Chief Executive of the States of Alderney* (unreported, 18 April 2011), "*The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.*" Consequently, had the Plaintiffs not included paragraph 3 of the Costs Application, the hearing of the applications in respect of the costs previously reserved would have proceeded before the presiding judge alone. For that reason, the Deputy Bailiff directed the Jurats that the factual matters with which they were concerned were those relating to paragraph 3 only. However, it was inevitable that, in reaching factual decisions about the conduct of the First Defendant in the administration of the Estate, the Deputy Bailiff would bear those findings in mind when determining paragraphs 1 and 2.

10. Advocate Shepherd further suggested that the approach the Court should take to the costs incurred by the First Defendant is that they all fall within the categorisation of having arisen in the context of the administration of the Estate. In the absence of any clear statement of the law of Guernsey, regard can properly be had to the position in other jurisdictions as offering guidance as to how a professional executor's indemnity in respect of costs is to be applied.

11. The starting point is the charging clause in the Will. Clause 10.1 provides:

> "*Any Executor or Trustee for the time being hereof being an advocate, accountant or other person engaged in any professional or business shall be entitled to charge and to be paid for all their professional or other charges for business done by him or his firm in the premises whether in the ordinary course of his profession or not and though not of a nature requiring the employment of an advocate, accountant or other professional person*".

It is drafted in wide terms. Although it refers to "*all their professional or other charges*", Advocate Shepherd acknowledges that it must necessarily be subject to limitations drawn from the approach that has developed elsewhere.

12. There is little legislation in Guernsey dealing with the administration of estates. Article 2 of the *Loi relative aux Exécuteurs Testamentaires et aux Administrateurs des Successions de personnes décédées (1930)* provides:

> "*Un exécuteur et un administrateur respectivement sera tenu de payer et satisfaire aux dettes, obligations, contrats, torts et legs grévant la succession dont il s'agit jusqu'à concurrence de la valeur et l'étendue des biens de la succession qui viendront entre ses mains ou à sa disposition, mais si tels biens n'y suffisent pas il ne sera pas tenu d'y combler l'insuffisance à moins qu'il ne s'y est personnellement obligé expressément.*
> *Pourvu que lors qu'une demande contre un exécuteur ou un administrateur est poursuivie devant la Cour et qu'il est trouvé par la Cour que tel exécuteur ou*

> *administrateur a fait défaut ou a commis négligence dans le recouvrement, recueillement, conservation, disposition ou allocation des biens de la succession, ou autrement à l'égard de ses devoirs et obligations en sa qualité d'exécuteur ou administrateur ou qu'il a dissipé ou laissé dépérir tels biens, la Cour pourra rendre jugement exécutoire contre lui personnellement pour l'entier ou pour telle partie de telle demande ainsi qu'il paraîtra être juste. Néanmoins lorsque par suite d'erreur ou omission sa responsabilité personnellement serait engagée en vertu des dispositions de cet article, s'il parait à la Cour qu'il a agi honnêtement et raisonnablement et doit en être excusé la Cour pourra l'excuser en tout et en partie de telle responsabilité.*"

The Court may, therefore, conclude that there is no personal liability where the executor has acted honestly and reasonably, even if there might otherwise be some default or negligence in performing the duties of the office as mentioned in Article 2.

13. The position in English law is summarised in Williams, Mortimer & Sunnocks, *Executors, Administrators and Probate*, 20th ed. The authors note that in proceedings involving others, which are of a hostile nature, the usual principles of costs awards apply. Accordingly, the making of a ***Beddoe*** application might be a sensible protective step to take before incurring costs. They then distinguish administration proceedings, where the court will itself decide at the conclusion of the proceedings whether the representative is to be permitted to take the costs out of the estate. In the light of that distinction, they then state (at para. 68-02):

> "*If they have acted reasonably, the representative is not to be deprived of their costs from of [sic] the estate. The charges and expenses of executors or trustees are not costs incident to proceedings in the High Court and are not within the discretion of the court unless misconduct is proven. The "contract" between the author of a trust and his trustees (and presumably between a testator and his personal representatives) entitles them to receive out of the estate all proper costs incident to the execution of the trust. Costs should not be inflicted if they have done their duty or even if they have committed an innocent breach of trust. An administrator is in the same position as a trustee or executor and is entitled to be recouped in the same way. This policy is important for the "safety" of executors and trustees and is beneficial to those who repose confidence in their friends or neighbours in the management of their property.*"

14. The authority cited for the principle that an executor can only lose the indemnity contained in a charging clause is ***Turner v Hancock*** (1882) 20 Ch D 303 and the way it was dealt with by Ungoed-Thomas J in ***In re Spurling's Will Trusts*** [1966] 1 WLR 920 (at page 932A):

> "*This case establishes that, as a matter of contract between a trustee and the author of a trust, the trustee is entitled as between himself and the beneficiaries to receive out of the trust fund "proper costs incident to the execution of the trust," including the costs of litigation, and that this right can only be lost by misconduct.*"

15. The origins of this principle are, therefore, rooted in the law relating to trustees. In *Lewin on Trusts*, 19th ed. (2015), the general principle that a trustee is entitled to indemnity out of the trust fund in respect of costs and expenses properly incurred by him in the connection with the performance of his duties and the exercise of his powers and discretions as that office-holder is qualified as follows (paragraphs 27-112 and 27-113):

> "*The right of a trustee to indemnity in respect of costs extends only to costs properly incurred in the execution of the trust. By this is meant costs which have been both honestly and reasonably incurred. A doubt is to be resolved in favour of the trustee, and so the right is sometimes expressed in terms of a double negative, that is, the trustee is entitled to costs not improperly incurred. The right of indemnity can be lost or curtailed by such inequitable conduct on the part of the trustee as amounts to a violation or culpable neglect of his duty as trustee. Thus if breach of trust causing*

> *loss to the trust fund or misconduct is established against the trustee, the trustee may be deprived of his right of indemnity and further ordered to pay costs of other parties. The word "misconduct" is a strong one, yet it is clear that conduct that might be characterised by milder terms such as caprice and obstinacy, or neglect, negligence or carelessness, suffice to deprive a trustee of the right of indemnity, or justify an order for costs against him. While the mere fact that the trustee has made a mistake is not enough, it is equally clear that dishonesty is not a requisite. Consequently, either "misconduct" should be widely construed so as to cover unreasonable conduct, or in the alternative the "inequitable conduct" on the part of a trustee which causes his right of indemnity to be lost or curtailed includes both misconduct in the sense of dishonesty and unreasonable conduct. We will here use "misconduct" in the wider sense.*
>
> *A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all. If the court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law.*"

The language used here has clear parallels with the terms of Article 2 of the 1930 Law. If costs have been honestly and reasonably incurred, a trustee, and so also an executor on the same basis, should in principle not be deprived of them or ordered by a court to pay costs. There is also a salient reminder in this passage that a decision to make no order as to costs still amounts to the deprivation of a trustee's, and so an executor's, entitlement to be indemnified.

16. The position in Jersey is that these principles from English law have been adopted and applied, as shown in particular by *In the matter of the Representation of K.J. MacKinnon* 2010 JLR 508. This case concerned an application by the brother of the executor of their late mother's estate that the costs of his representation should be paid personally by the executor, and so not out of the estate. The representor had made proposals to the executor in an attempt to avoid the representation having to be heard, but these had been rejected peremptorily, albeit on the advice of English counsel. The Jersey Court of Appeal overturned the decision of Commissioner Bailhache, in doing so finding that the executor, as a layman, was entitled to rely on the advice he had received, whether it was right or wrong, because to do otherwise would be imprudent and he was not acting irrationally in accepting it. In giving the Court's judgment, Beloff JA cited the passage from the paragraph from *Executors, Administrators & Probate* (in an earlier edition, but which is unchanged) quoted above, together with paragraph 66-06 of the 2008 edition:

> "*Once misconduct is proven the court has a discretion as to the costs of a representative in an administration claim. In cases marked by fraud, evasion, or neglect of duty, the court will not merely refuse to allow them their costs out of the assets, but will order them to pay the costs of the action, or of so much of the action as is attributable to the breach of duty on their part.*
>
> *It is impossible to define exactly what will amount to such misconduct as to justify the judge in depriving a representative of their costs. Mere negligence is not sufficient.*"

before continuing (at para. 33):

> "*From these passages I derive the following propositions:*

> *(i) Dishonesty or fraud may be sufficient but is not a necessary basis for either refusing the representative payment of his own costs out of the estate or for fixing him with liability to pay the other party's costs.*
>
> *(ii) The basic test is whether the costs, to justify payment out of the estate, were properly incurred.*
>
> *(iii) Mere negligence or honest mistake will not deprive the representative of payment; but other than that what is sufficient misconduct cannot be precisely described and will be a matter of fact and degree.*
>
> *(iv) The refusal of payment of his costs out of the estate does not necessarily entail as its consequence the fixing him with liability to pay the other party's costs, but the court may penalize him in both ways.*"

Beloff JA also endorsed the approach taken by the Commissioner that "*the executor's conduct must have crossed the threshold of reasonably justifiable behaviour*", noting further, by reference to *In re Skinner* [1904] 1 Ch 289, "*that the unreasonableness required to deprive an executor of the usual order for payment of his legal expenses in his role as such out of the estate is high*" (see para. 40).

17. Because of the clear overlap with principles applying to trustees, Advocate Richardson submits that section 35(2) of the Trusts (Guernsey) Law, 2007 can be applied by analogy to the First Defendant:

> "*A trustee may pay from the trust property, and may reimburse himself from the trust property for, all expenses and liabilities properly incurred in connection with the trust.*"

This provision implies that the test to deprive a trustee of his costs may be lower than the high test to which Beloff JA referred in the *MacKinnon* case. Given that the First Defendant has fiduciary duties as the executor of the Estate, Advocate Richardson suggests that it is incumbent upon the First Defendant to satisfy the Court that any fees and expenses in respect of which reimbursement is sought have been properly incurred. If fees have been incurred unnecessarily, they cannot reasonably be recovered out of the Estate (see, eg, *Malcolm v O'Callaghan* (1837) 3 My. & Cr. 52). As was stated by the Royal Court of Jersey in *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JRC 053, having indicated that decisions will need to be reached on a case-by-case basis (at para. 8):

> "*Nonetheless, it may be worth repeating that a trustee is entitled to his indemnity out of the trust fund only in respect of costs and expenses reasonably incurred. If a judge has real cause for concern that certain costs may not have been reasonably incurred, that might well cause him to engage the court's supervisory jurisdiction and take appropriate action.*"

18. As has been helpfully set out in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 (at page 1223H):

> "*Trustees may be involved in three kinds of dispute. (1) The first (which I shall call "a trust dispute") is a dispute as to the trusts on which they hold the subject matter of the settlement. This may be "friendly" litigation involving e.g. the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or "hostile" litigation e.g. a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or addition to the beneficiaries specified in the*

> *settlement. The line between friendly and hostile litigation, which is relevant to the incidence of costs, is not always east to draw: see In re Buckton; Buckton v. Buckton [1907] 2 Ch. 406. (2) The second (which I shall call "a beneficiaries dispute") is a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future. This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and /or damages for breach of trust. (3) The third (which I shall call "a third party dispute") is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities e.g. in contract or tort assumed by the trustees as such in the course of administration of the trust. …*
>
> *A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate: see per Hoffmann L.J. in McDonald v. Horn [1995] I.C.R. 685, 696.*"

This approach to categorising disputes in which trustees are involved has been adopted by this Court previously (see, eg, *Albany Trustee Company Limited v Jeandin* (unreported, 10 September 2012)). It is appropriate to have regard to it when considering the various Applications made. In particular, it demonstrates that the Plaintiff's Removal Application falls to be regarded as hostile litigation.

19. An example offered by Advocate Richardson where a trustee was held to be unable to recover the legal fees it incurred is *In the matter of the Carafe Trust* 2005 JLR 159. The distinction was drawn (at para. 40) between acting so as to defend its own interests and acting in the interests of the trust and the beneficiaries: "*Time spent on defending a trustee's position against its beneficiaries is not recoverable out of the trust fund. Such time is spent looking after the trustee's own interests rather than those of the beneficiaries.*" The principle was put in plain terms in *Parujan v Atlantic Western Trustees Limited* [2003] JRC 045 as follows (at para. 5): "*It is a clear breach of trust for a trustee to use the trust fund to pay its own legal fees in circumstances where it is engaged in hostile litigation with the beneficiaries of the trust.*"

20. The Plaintiffs have also been critical of the First Defendant's decision not to seek directions from the Court earlier in the administration of the Estate than he subsequently did. In doing so, Advocate Richardson has highlighted that the possibility of an executor seeking directions from the Court during the course of the administration of an estate had been recognised in Jersey in *In the matter of the Estate of C* 2012 (1) JLR 204 (at para. 64):

> "*All parties accept that, just as in the case of trusts, the court has a general supervisory jurisdiction in relation to estates. Executors may seek directions from the court as to how they should act in a particular case. The position is conveniently summarized in Williams, Mortimer & Sunnocks, Executors, Administrators & Probate, 19th ed., para. 60-01, at 925 (2008):*
>
> > *"Where problems or disputes arise in the course of administration that cannot be resolved by agreement, it may be necessary to seek the assistance of the court. The cases fall broadly into two classes. The first is where the representatives do not know how to act and need the directions of the court. This may be because the legal or factual position is unclear, and there are minor, unborn or unascertained beneficiaries, so that the representatives are unable to protect themselves by obtaining the consent of their beneficiaries. The representatives will therefore bring proceedings to have the matter determined. Or it may be because there is disagreement between the beneficiaries who hold conflicting views on what is to be done, so that the representatives are unable to act with safety without the protection of a court order. Again, the representatives (usually) will bring proceedings to have the*

> *matter determined, but sometimes a beneficiary will take the initiative and bring the proceedings.'*"

The date of this judgment was 13 March 2012, which was shortly before the Removal Application was commenced.

21. Advocate Richardson has also drawn attention to a passage from ***In the matter of the Tubuoh Trust*** (unreported, 11 March 2005), in which this Court offered guidance to trustees and their legal advisers (at para. 9):

> "*The Court will always seek to protect innocent Trustees, carrying on legitimate business in Guernsey, from unjustified attack and the incurring of unnecessary expenditure in the furtherance of such disputes. However, there must also on the other side be a duty on Trustees to be pragmatic and to be conscious that the Trust funds are not there for them to draw on at will [in] purportedly protecting their position. They and their legal advisers must think carefully, before taking any steps which is going to cause a likely depletion of the Trust funds in substantial legal expenses.*"

On the basis of the close parallels already mentioned between trustees and those administering estates, this guidance is equally applicable to professional executors.

22. Drawing together the principles to be derived from this review of the cases, the Deputy Bailiff directed the Jurats that the following propositions should be borne in mind when they considered the evidence in the present case:

(i) The indemnity afforded to the First Defendant by clause 10.1 of the Will is set out in wide terms and this provision forms the basis on which Ernest Green chose to appoint the First Defendant as the Executor of his Estate.

(ii) By analogy with the fiduciary position of a trustee, the First Defendant is entitled to draw from the Estate all expenses and liabilities properly incurred by him in the administration of the Estate.

(iii) The burden lies on the Plaintiffs, on the usual civil standard of the balance of probabilities, to establish why the First Defendant should be deprived of any aspect of his indemnity.

(iv) In doing so, a distinction must be drawn between costs of and incidental to proceedings before the Court and the other day-to-day expenses associated with the performance by the First Defendant of his duties as Executor. It is the second type of expenses which does not normally fall within the discretion of the Court unless a challenge such as paragraph 3 of the Costs Application is instituted.

(v) The right of indemnity extends to costs and expenses honestly and reasonably incurred (as set out in the 1930 Law), so the Plaintiffs' burden can be described as entailing them proving that the costs and expenses in question were improperly incurred.

(vi) To prove this, although the term cannot be precisely described, the Plaintiffs are required to demonstrate "*misconduct*" on the part of the First Defendant, which is something more than mere negligence or honest mistake, but does not necessarily require proof of actual dishonesty or fraud.

(vii) Misconduct is to be construed widely so as to encompass such inequitable conduct on the part of an executor amounting to a breach of duty or culpable

neglect that the entitlement to take costs and expenses from the Estate should be curtailed or lost.

(viii) Whether or not the First Defendant should be deprived of any of the costs or expenses he has taken from the Estate is ultimately a matter of fact and degree, taking into account all of the circumstances relevant to how the Estate has been administered, and considering whether the Plaintiffs have shown that the First Defendant's conduct or omissions "*crossed the threshold of reasonably justifiable behaviour*".

23. The Deputy Bailiff also gave the Jurats the general directions about their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them. The Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Whilst the burden of proof rested on the Plaintiffs, insofar as the First Defendant sought to establish any fact, the burden of proof rested on him to prove that fact to the same civil standard. The Jurats were to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. They might take account of the arguments in the speeches they heard, but are not bound to accept them. If at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts relevant to paragraph 3 of the Costs Application, it is the Jurats' judgment alone that counts.

Evidence

24. The Court heard from the First Plaintiff, who has acted as spokesman for his brothers throughout. As the eldest son, he described himself as his late father's "*consigliore*". He had sworn five Affidavits and elaborated on the contents of them. He was the only witness on behalf of the Plaintiffs.

25. The Second Defendant gave evidence on behalf of the First Defendant pursuant to a witness summons. She painted a picture of a family that had never been close, but she also accepted that some years ago, at around the time of their mother's death, efforts had been made to build bridges between her and the First Plaintiff. Shelagh Mason also gave evidence on behalf of the First Defendant. She had been approached by the First Defendant to join the Harrier Board of Directors and, because of the uncertainties surrounding the level of commitment required, had proposed she receive fees at an hourly charge out rate. She recognised that Harrier should have been taking proactive steps to negotiate to see if the break clause provision in the lease could be removed. The letting market in the United Kingdom at the time was at an all-time low. The final witness was the First Defendant himself. He also relied on his five Affidavits and expanded upon how he had conducted the administration of the Estate in his oral evidence.

Facts

26. The First Defendant had known Ernest Green since the late 1990s and began representing him in legal matters since at least 2004. Ernest Green wished to appoint him as the executor of his personal estate from that time. Ernest Green's wife, May, also appointed the First Defendant as her executor. When May Green died on 13 September 2007, the First Defendant administered her estate as her executor. The First Defendant regarded Ernest Green as not only a client but also a friend.

27. The First Defendant was a good friend of the Second Defendant in the 1990s and into the early 2000s. More recently, however, their contact had lessened significantly, to the extent that they communicated only on professional matters from the summer of 2010 onwards.

28. It was on 21 June 2010 that the Second Defendant and her partner, Geoff Wherry, met with the First Defendant at the request of Ernest Green. They spoke more about what would happen if Ernest Green became unable to manage his own affairs rather than inheritance issues. The principal assets of Ernest Green were mentioned. On 23 June 2010, the First Defendant met with Ernest Green to discuss matters further. Ernest Green's concerns centred more on what would happen if he became unable to manage his own affairs. The relationship between his four children was acknowledged to be poor. On the one side were the three brothers, the Plaintiffs, and on the other his daughter. At that time, Ernest Green was closer to his daughter than he became over the following year. Ernest Green was troubled that the Plaintiffs would attempt to impose their collective will on the Second Defendant and make decisions about his future care that were not what he wished to happen. The possibility of Ernest Green indicating that he preferred to have Mr Wherry as his guardian, should that step need to be taken, was discussed. The First Defendant tendered advice about the option for Ernest Green to settle some of his assets into trust, but was informed by Ernest Green that he did not wish to employ complex legal structures. However, because his will at that time dated from 2004, Ernest Green wished to make changes, in particular to reflect that his wife had died in the meantime. The First Defendant has acknowledged that he was aware at that time that the assets to be dealt with in the Will were relatively few and straightforward. He understood that a property in Norwich, Elliott House, was to be sold.

29. The instructions from Ernest Green were incorporated into the Will that he executed on 29 June 2010. The First Defendant had taken two staff members with him to witness the Will. He went through the same procedure he adopted as usual in such circumstances, running through the terms clause by clause to ensure that the client is content. The First Defendant was satisfied that Ernest Green was absolutely lucid. On the same date, Ernest Green also executed another document, described as a Living Will. In it he expressed his solemn wish that Mr Wherry should be appointed as his guardian should one be required. He explained that he did not wish any of his children to be appointed as his guardian because none of them understood his affairs and, as the First Defendant noted, "*because any such appointment could be divisive between them*".

30. Following contact with his office from both Ernest Green and then from the First Plaintiff, Graham Green, the First Defendant arranged to meet with Ernest Green on 6 October 2010. The three Plaintiffs were also in attendance at Ernest Green's home, La Chanterelle. By that time, the physical health of Ernest Green was such that his sons were providing care for him on a rota basis. The First Defendant saw Ernest Green alone to take his instructions. He was satisfied that he understood what he was saying. There had been a cooling in Ernest Green's relationship with the Second Defendant. Ernest Green considered that his Living Will needed re-drafting because Mr Wherry was less involved in his affairs. The sale of Elliot House had fallen through and the sale of his previous home, The White House, had been completed. Instead of Mr Wherry being considered his first-choice guardian and instead of reference being made to living with the Second Defendant, Ernest Green was adamant that he wanted to stay at La Chanterelle, whatever the cost, and that the First Defendant might be a suitable guardian for him. As regards his Will, Ernest Green was content with its terms but wished to add two further specific monetary bequests, one of £100,000 to a longstanding friend in Kent and £25,000 to his Guernsey housekeeper. In relation to his property in France, Ernest Green wished to give an opportunity to the Second Plaintiff, who had built it, to purchase it from the others after his death. The file note recording this meeting ends by referring to the First Defendant's concerns about the manner in which the property in Norwich was being managed on behalf of Ernest Green because correspondence to the company was still being sent to the Second Defendant or Mr Wherry. The First and Second Plaintiffs, who were mistakenly understood by the First Defendant to be directors of the company concerned, agreed to investigate further.

31. The First Plaintiff sent to the First Defendant a letter dated 28 October 2010 in which the instructions given by Ernest Green, who countersigned the letter, were largely repeated. That letter indicated that the Second Defendant was able to pop into La Chanterelle whenever she wished. It purported to come from Ernest Green "*as: Harrier Investment and Trading*

Corporation S.A." In it concern was expressed about the delay in producing fresh documentation giving effect to Ernest Green's most recent instructions.

32. On the same day, the First Defendant received a copy of a letter from the Second Defendant's Advocate to the Greffe indicating that the Second Defendant wished to commence guardianship proceedings in respect of Ernest Green. That letter admitted that "*there is considerable difficulty amongst Mr. Green's children*" meaning that there was unlikely to be an uncontested application. The First Defendant recognised that this proposed guardianship application brought into question Ernest Green's capacity to provide instructions for the further amendment of his Will, so he sought to meet with Ernest Green in early November 2010. On two occasions, appointments were cancelled by one of the Plaintiffs because Ernest Green was too unwell to meet with the First Defendant.

33. On 14 December 2010, Ernest Green was placed under guardianship by this Court. The Plaintiffs and the Second Defendant were all members of the Family Council. Advocate Peter Atkinson was appointed as Ernest Green's guardian. As a result, the First Defendant had no further dealings with Ernest Green during the latter's lifetime. During the guardianship, the First Plaintiff had discussions with Advocate Atkinson about Ernest Green's affairs on a handful of occasions only. By way of example, there was an e-mail exchange about taxation matters in June 2011.

34. Relations between the Second Defendant and the Plaintiffs became even more strained in 2011. The Second Defendant refused to attend at La Chanterelle if Russell Green, the Second Plaintiff, was present. She had made allegations to the Police about him, although no formal action was taken as a result of those allegations.

35. Ernest Green died on 31 August 2011. The First Plaintiff informed the First Defendant of this fact on 1 September 2011. The First Defendant was fully aware of the difficulties between Ernest Green's children and that these problems had escalated. As a result, the First Defendant was initially reluctant to accept the appointment as Executor of the Will and so requested a short time to consider whether or not to do so. He discussed his position with two of his partners, Advocates Bainbridge and Prentice. It was pointed out to him that it would be most unusual for an Advocate to renounce appointment as an executor. In the light of what was already known about the Estate, they considered that matters should not be so complicated that the hostilities between the beneficiaries would be sufficient reason to renounce. Moreover, it had been Ernest Green's express wish that none of his children administer his Estate, which was why he had chosen to appoint a neutral professional to the office of executor. The First Defendant believed he should respect Ernest Green's wishes. He could not identify a viable alternative executor. As a result of his discussions, the First Defendant agreed to act and so informed the First Plaintiff on 2 September 2011. They agreed to meet to discuss the Estate on 5 September 2011.

36. The First Defendant was aware that Ernest Green's personal estate comprised the shares in Harrier Investment Trading & Corporation S.A. (to which we will refer as "Harrier"), which owns Elliot House, shares in East Hangarage Limited, which owns an aircraft hangar at Guernsey Airport, various bank accounts, monies held by Advocate Atkinson in his role as guardian, various motor vehicles, and other items of personal property to be found at La Chanterelle and at Ernest Green's property in Caulnes, France, known as La Ville Couvé. At clause 13 of the Will, the whole of Ernest Green's non-Guernsey Real Estate was bequeathed to the three Plaintiffs and the Second Defendant in equal undivided shares. The First Defendant understood that the passing of La Ville Couvé would be subject to French law and believed the applicable inheritance principles to be that this property would devolve to the four heirs anyway. Similarly, La Chanterelle passed in this way under the terms of the conveyance to Ernest Green. Neither of these properties fell within the Estate he was required to administer as Executor.

37. At their meeting on 5 September 2011, the First Plaintiff and the First Defendant ran through the provisions of the Will and discussed the specific bequests listed. They also discussed the

remainder of the Estate. The First Defendant indicated that he had relatively recently met with Advocate Atkinson and been informed that the affairs of the Estate were in reasonably good order and that he would ask Advocate Atkinson to pass to him the accounts and documents he required as Executor. Specific reference was made to Elliot House, which was managed on behalf of Harrier by Bidwells, and the desirability of disposing of it as soon as possible. The First Defendant was informed by the First Plaintiff that the Second Defendant had requested that an autopsy be performed on Ernest Green's body to ensure that there had been no foul play. The First Defendant indicated that he would read the Will to the Plaintiffs on 12 September 2011 but that the Second Defendant had indicated that she would not attend with her brothers, so he would see her shortly thereafter separately. The First Plaintiff sent the First Defendant a long e-mail on 16 September 2011 setting out what he recalled had been discussed and providing updated information.

38. In late September 2011, the three Plaintiffs each sent to the First Defendant lists of items, together with the valuations they placed on them, which had been taken by them from La Chanterelle.

39. On 4 October 2011, the First Defendant sent the same letter by e-mail to each of the other parties setting out the issues that had been raised in discussions with them. One problem that had arisen was that an incorrect name had been used when registering the death of Ernest Green, something the First Plaintiff has acknowledged was an error on his part in a letter to the Greffe dated 27 October 2011, so that a new death certificate needed to be issued. On behalf of the First Defendant, Stephanie Setters, a colleague of the First Defendant working at Mourant Ozannes, requested in an e-mail to the First Plaintiff on 21 October 2011 that he provide them with copies of documents relating to Elliot House to assist in the valuation they were in the process of obtaining. That request was repeated by telephone on 27 October 2011.

40. The First Defendant met with the First Plaintiff on 4 November 2011 to discuss matters further. It is apparent that the First Plaintiff brought with him a significant amount of paperwork in respect of Harrier and Elliot House. (Although the First Defendant had contact from time to time with the Second Plaintiff as well, and communicated with the Third Plaintiff, the First Plaintiff has throughout been conducting matters as spokesman on behalf of his two brothers.) The First Plaintiff subsequently sent a further long e-mail to the First Defendant a week later setting out his understanding of what had been discussed. He set out in some detail the position in respect of Harrier and Elliot House as he understood it to be. He also touched on the Plaintiffs' concern at the cost element of the administration of the Estate "*running uncontrolled*".

41. The First Defendant obtained a grant of probate from the Ecclesiastical Court on 25 November 2011. The estimated value of the Estate was put at £6.75 million. There was a further meeting between the First Defendant and the First Plaintiff on 30 November 2011. It largely covered the same topics as previously but was the first occasion they had met following the formal grant of probate. The First Plaintiff sent the First Defendant an e-mail on 12 December 2011 providing further information. He then sent another lengthy e-mail on 16 December 2011. It mentioned that doing something in respect of Elliot House was "*of the greatest urgency*" and explained in some detail the Plaintiffs' perception as to why the sale of Elliot House previously negotiated fell through as a result of the Second Defendant's interference.

42. Having got in the funds of the Estate from the banks and from Advocate Atkinson in respect of the guardianship, the First Defendant made a first interim distribution to the Plaintiffs and the Second Defendant on 21 December 2011. He made a second interim distribution on 29 December 2011. There was a third interim distribution made on 24 January 2012. Together, the amounts distributed represented in excess of half of the value of the Estate. Specific bequests were also dealt with during the first phase of the administration and the gifts that Ernest Green wished to make, but which did not find their way into a revised Will, were eventually resolved by the heirs taking action outside the strict terms of the Estate.

43. On 22 December 2011, the Second Plaintiff attended at the First Defendant's offices for the purpose of executing a power of attorney in respect of the sale of La Chanterelle. During the course of that meeting, an issue surrounding the disposal from the Estate of a Peugeot motor vehicle was raised. This vehicle had already proved problematic between the Second Plaintiff and the Second Defendant. As with a telephone conversation between the Second Plaintiff and the First Defendant on 8 December 2011, the Second Plaintiff used trenchant terms when describing the potential outcomes for the Second Defendant if she thwarted his wishes. The Second Defendant also described the Second Plaintiff in disparaging terms in an e-mail to the First Defendant on 16 December 2011.

44. As a result of his meeting with the First Defendant, the Second Plaintiff attended upon Advocate Richardson, who wrote to the First Defendant. Further correspondence passed between the lawyers over the Christmas period. In the absence of the First Defendant, who was ill, Advocate Shepherd sought to distinguish between his firm's role acting on behalf of the four heirs in respect of the sale of La Chanterelle and acting on behalf of the First Defendant in his capacity as Executor of the Estate. This was done to clarify any confusion that may have arisen in the minds of the Plaintiffs. The planned sale of La Chanterelle was aborted in early January 2012, although a different purchaser subsequently completed the sale at the same price in March 2012. It was at around this time that the First Defendant decided to involve his firm in giving him advice about the administration of the Estate, because matters seemed to him to have become more contentious, particularly as a result of the Second Plaintiff's aggression. The First Defendant chose to engage Mourant Ozannes on a time basis without setting any parameters on the extent of the work the firm would undertake. He said he did this because he knew the people involved and that they would not be spending time at a cost to the Estate unreasonably.

45. In relation to Harrier's bank account, the First Defendant has explained that there was some confusion. He gave instructions to the bank to transfer the funds to his firm so that they could be distributed as part of the Estate. Quite why the separate monies of the distinct legal entity of Harrier were to be dealt with in this way rather than be decisions of the company itself was not adequately explained (ie, there was no evidence of there having been any decision to pay a dividend). The bank, however, took it upon itself to close the account. This occurred at around the beginning of 2012. As a result, Harrier did not have a bank account thereafter and it was operated out of the Estate accounts through any receipts from the agents, Bidwells coming into the Estate (eg, the £130,000 received on 2 May 2012) and any expenses of Harrier being paid out of the Estate monies.

46. On 18 January 2012, the Second Plaintiff requested from the First Defendant access to La Ville Couvé. The next day, Ms Setters met with the Second Defendant and Mr Wherry. There were bills to be paid to EDF in respect of electricity, although the Second Defendant and Mr Wherry indicated that they thought these should not be paid because they had not been calculated properly. The Second Defendant also indicated that she would refuse to consent to the sale of La Chanterelle because it gave her leverage in respect of sorting out other issues, such as the French property.

47. Advocate Shepherd wrote to the Plaintiffs and the Second Defendant on 23 January 2012. The First Defendant had decided that, until he was advised any differently, as a result of clause 13 of the Will he would treat La Ville Couvé as jointly owned by the four heirs. Acting in the best interests of the Estate, he would pay the outstanding EDF bill because it would be disproportionate for time to be spent investigating why it was as large as it was. Pragmatically, although La Chanterelle passed to the four heirs on Ernest Green's death, the residuary personal estate was to be split equally four ways, so outstanding bills in respect of that property could be settled from the Estate. Although not within the terms of the Will, the proposed gift to Ernest Green's housekeeper had been made through agreement between the four heirs. Advocate Shepherd invited them to agree similarly to make the gift mentioned to the long-standing friend in Kent. The shares in the aircraft hangar had been advertised for sale. In respect of Harrier, the letter stated:

> "*We are in correspondence with Bidwells who are managing your father's property in Norwich. It is in the best interests of the estate that this property be sold at the earliest opportunity if a reasonable price is offered. Alternatively, if an agreement cannot be reached, we would be minded to transfer the shares in Harrier Investments Limited, into your names. Again, we invite your views which will need to be unanimous.*"

The letter concluded by inviting the four heirs to reach decisions on the issues to which answers were sought by the First Defendant and then to revert to him, adding that "*If agreement cannot be reached, I reserve the right to make the appropriate application to Court.*" On the same day, an invoice for services in respect of the executorship from 5 September 2011 to 19 January 2012 was rendered by Mourant Ozannes to the First Defendant in the amount of £36,865.10.

48. The substantive response to this letter sent by Advocate Richardson on behalf of the Plaintiffs is dated 26 January 2012. It addressed the matters raised and sought further information about some of them. However, in respect of Harrier, it noted that this is a Panamanian company where the interest of Ernest Green should pass equally to the four heirs and so requested the immediate transfer of the shares to enable the owners to proceed with marketing Elliot House for sale without delay. Letters dated 24 and 26 January 2012 were sent by the Second Defendant.

49. Advocate Shepherd responded on 1 February 2012. He stressed that correspondence should be sent to him rather than directly to the First Defendant because many of the difficulties experienced in the administration of the Estate derived from the heirs' inability to agree. Again, this letter addresses the issues that were outstanding at the time and being raised in this exchange of correspondence. In relation to Elliot House, it stated:

> "*We are unable to transfer the shares of Harrier Investments & Trading Corporation S.A. into the names of the four heirs without the agreement of all four of them. It is expressly not agreed by Ms Wright that the shares be transferred into the names of the four heirs. As with the shares in East Hangarage Limited in absence of any agreement between the four heirs, we will arrange for these shares to be sold.*"

Once again, Advocate Shepherd invited the heirs to reach agreement because "*If they do not, the estate will not be resolved and we may need to make an application to the Court.*" The First Defendant, however, did not regard this as the time to be going to Court. He believed that agreement between the heirs was still possible. Advocate Shepherd sent a further update of the position in relation to the administration of the Estate by e-mail directly to each of the Plaintiffs and the Second Defendant on 21 February 2012.

50. Bidwells provided to Mourant Ozannes a report dated 3 February 2012 about Elliot House. In it, an up-to-date analysis was given of the occupancy, income and charges relating to this property. Given that part of the building was vacant, the recommendation was to market the available space at a reduced asking rent. It indicated that the Norfolk Primary Care Trust (or, more accurately, the Norfolk Community Health and Care NHS Trust) (to which we will refer as the "Primary Care Trust" or "the PCT") had informed them that the break clause would be exercised as at 15 January 2013. In relation to the potential sale of the property, reference was made to the sale instructions received from Advocate Atkinson as Ernest Green's guardian in 2011, but Bidwells painted a bleak outlook because of the prevailing market conditions in Norfolk. At the end, the possibility of seeking planning permission for an alternative use as residential, student accommodation or a budget hotel was mentioned.

51. Advocate Richardson replied to Advocate Shepherd's letter of 1 February 2012 (and to the e-mail to the Plaintiffs of 21 February 2012) on 24 February 2012. This letter runs to 15 pages and provides a full summary of the position in relation to each of the matters that had been

identified by then as needing to be resolved. The frustration felt by the Plaintiffs was expressed quite explicitly. The concern at the likelihood that the value of Harrier would continue to reduce because of the position of one of the lessees, the PCT, which had a break clause available to it in March 2012, was highlighted. In relation to the prospects of agreement between the four heirs being possible, the letter commented:

> "*... given that relations between Ms Wright and our clients clearly disintegrated some months before Mr Ernest Green's death, our clients are frustrated as to why Advocate Torode did not take more assertive steps as to the management and distribution of the estate in order that the legal costs were not permitted to inflate. Again, our clients feel that this is yet another example of Advocate Torode's inability to effectively manage the estate.*"

The letter set out what were perceived as failings on the part of the First Defendant, as a result of which the Plaintiffs "*feel they have lost all trust and confidence in Advocate Torode's ability to administer their father's estate and at present are considering what necessary steps they would take to have him removed as executor.*" In an attempt to avoid litigation, a meeting was proposed at which the legal advisers might assist the parties to reach a compromise. The First Defendant regarded this letter as unduly long-winded and not at all constructive as a means of resolving how the Estate should be finalised.

52. On 2 March 2012, William Jones of Bidwells forwarded to Ms Setters a copy of an e-mail sent on 21 February 2012 by David Boshier on behalf of the Primary Care Trust proposing that, instead of exercising the break clause, revised terms might be agreed between it and Harrier. Mr Jones had added the recommendations from Bidwells to these proposals and requested a response within a week. By letter dated 5 March 2012, Advocate Shepherd forwarded copies to the Plaintiffs and the Second Defendant. The First Defendant intended to consent to the proposed lease variations unless any of them notified him of objections by return. The response from Advocate Richardson on behalf of the Plaintiffs indicates that the letter of 5 March 2012 was only received at his offices on 7 March 2012 and that there was insufficient time in which to respond, especially because the Second Plaintiff was away from the Island. However, Advocate Shepherd responded on 9 March 2012 that the advice from Mr Jones was that a response was needed by close of business that day otherwise the position of Harrier would be weakened, so the First Defendant had given instructions to agree the proposals made on behalf of the PCT. He indicated further that the Second Defendant was content with this proposal and that they understood that the First Plaintiff had been in direct contact with Mr Jones expressing his wish that a positive response be given. Advocate Richardson's letter of 16 March 2012 rejects that contention and indicates instead that contact was made with Mr Jones who was content for there to be a slight delay whilst the Plaintiffs considered their positions. The First Plaintiff confirmed that he had spoken to Mr Jones for perhaps one hour on 9 March 2012, during which he explained the position, as he saw it, to him. He wished to retain the tenant on realistic terms, but did not have sufficient information about the revised terms to offer any conclusions. However, Mr Jones confirmed his recollection of the conversation he had with the First Plaintiff in an e-mail to Ms Setters sent on 19 March 2012.

53. The response to Advocate Richardson from Advocate Shepherd on 20 March 2012 enclosed an Estate Administration Report and indicated that it was the First Defendant's intention to produce these fortnightly thereafter. It was suggested that "*Given the size and complexity of the estate, one could reasonably expect the administration to take at least 18-24 months to complete.*" Further, under the heading "*Ongoing Work*", it was stated:

> "*Mindful of both the family conflict and the complaints your clients' have made, if Mr Torode remains as the executor (after any application you might make), we are conditionally instructed to make an application to Court for directions as to the management and disposal of the remaining estate assets.*
>
> *The Court would then also be invited to approve this firm's professional fees for acting in the administration of the estate and you would then have the opportunity to make any representations you considered fit in relation to those fees.*

> *The costs of that application and all related costs will be claimed as a deduction from the estate.*
>
> *Such an application might be avoided if the proposed meeting succeeds and agreement is unanimously reached amongst the four residuary beneficiaries as to how the estate should be finally administered and the assets managed in the meantime.*"

54. On 28 March 2012, Ms Setters wrote to Advocate Richardson and the Second Defendant explaining that it had just come to the First Defendant's attention as a result of contact from the Income Tax Office that Ernest Green had been in receipt of three pensions. It referred to information received from Advocate Atkinson suggesting that the First Plaintiff had documentation relating to this matter (and also to Harrier) and asked that it be provided to the First Defendant. A response was sent on 3 April 2012, in which it was said that the First Plaintiff did not recall a third pension and, because the documentation was split between him and the Second Plaintiff, a response would have to await the latter's return to the Island. The request from the First Defendant for documentation was repeated in a letter dated 12 April 2012 and also in a letter dated 15 June 2012.

55. The First Defendant had arranged with PKF (Channel Islands) Limited, to obtain advice on the devolution of La Ville Couvé. Indeed he and Ms Setters met with an Associate Director on 22 June 2011 in anticipation of Ernest Green dying, but the engagement of the company at that time was with Advocate Atkinson as Ernest Green's guardian. Following the grant of probate, Ms Setters had sent an engagement letter on 6 December 2011. Following some correspondence with a Notaire in late 2011 and early 2012, each of the four heirs was written to in this regard on 11 April 2012. Some documentation for them to execute was enclosed. The position following the death of May Green needed first to be regularised. Thereafter, the four heirs would each own one quarter of the property in joint ownership. However, the matter was put on hold in May 2012, because none of the heirs seemed to want to engage with the company directly, save for the Second Defendant who did not wish to appoint the company personally. Matters only resumed in November 2012.

56. The First Plaintiff swore his First Affidavit in support of the Removal Application on 12 April 2012. He suggested that in place of the First Defendant the four heirs should be appointed as joint executors.

57. In a letter dated 16 April 2012, Mourant Ozannes provided Advocate Richardson with an updated Estate Administration Report. Some proposals from the Second Defendant as to how to deal with certain outstanding matters were incorporated into it and the Plaintiffs' comments prior to the meeting then scheduled for 27 April 2012 were invited so that the First Defendant could consider them beforehand. That meeting did not, however, take place.

58. On 11 May 2012, the First Defendant accepted the Second Defendant's offers to purchase two of the motor vehicles in the Estate (a Peugeot 306 and a Ford Ka).

59. On 31 May 2012, the First Defendant accepted the Second Plaintiff's bid for the shares in East Hangarage Limited. He gave notice to the company's secretary that he wished to transfer the shares to the Second Plaintiff. This was the culmination of a bidding process in which another party had participated. Although the First Defendant formed the view that other shareholders were entitled to consider exercising pre-emption rights, the Secretary of East Hangarage Limited indicated that they did not apply to these shares as the transfer was to an heir. The First Defendant has continued to maintain his opinion that this view was wrong. Ms Setters informed Advocate Richardson on 18 June 2012 that, in the light of this, the sale of the shares to the Second Plaintiff was, therefore, fully agreed. On 5 July 2012, Advocate Richardson suggested in a letter to Advocate Shepherd that the one quarter value of the purchase price for the shares in East Hangarage Limited could be taken from the undistributed part of the Estate to be paid to the Second Defendant, with the shares being jointly owned by

the Plaintiff, rather than the Second Plaintiff making a cash payment to his two brothers. Advocate Shepherd's response was that the full purchase price was due from the Second Plaintiff however he decided to fund it and reserved the First Defendant's position in the event that the monies were not paid across that day. The Plaintiffs' position in relation to these matters was set out in an e-mail from Advocate Richardson to Advocate Shepherd on 2 August 2012, to which the First Defendant's response on 6 August 2012 was to raise questions as to whether Advocate Richardson's firm was properly able to advise the Second Plaintiff in relation to this matter given that it was also acting for the other Plaintiffs.

60. On 1 June 2012, the First Defendant accepted the Second Plaintiff's offer to purchase the Nissan Micra vehicle from the Estate.

61. The First Defendant provided an updated Estate Administration Report dated 14 June 2012. He also provided a Statement of Account, running from 20 December 2011 up to 11 May 2012.

62. The First Defendant swore his First Affidavit in respect of the Removal Application on 2 July 2012.

63. On 10 July 2012, the Court convened late in the afternoon to hear the Harrier Application as a matter of urgency. The Application itself was only dated 10 July 2012. It was supported by the First Defendant's Second Affidavit sworn the same day. The First Defendant, as Executor of the Estate, sought an order that he be authorised to enter into a new lease with the Primary Care Trust in respect of Elliot House on substantially the terms set out in the draft Heads of Terms dated 22 May 2012. In doing so, the First Defendant invoked the inherent and/or supervisory jurisdiction of the Court. The First Defendant regarded the decision he was faced with making as a momentous one for the Estate, thereby invoking the Court's jurisdiction on analogy with the well-known basis set out in ***Public Trustee v Cooper*** [2001] WTLR 903. The Application also sought an order that the costs of making the Application be taken on the indemnity basis from the Plaintiffs' share of the Estate, or alternatively from the Estate generally.

64. The evidence in support of this emergency application clarified that Ernest Green had owned the single share issued in Harrier. The draft Heads of Terms set out the bases on which a Deed of Variation would be entered into by Harrier and the PCT. The break clause as at 13 January 2013 would be removed. The rent would be reduced. The PCT's obligations to pay into the sinking fund and carry out certain works on vacating the premises would be removed. The service charge would be capped. The target completion date was 24 June 2012. In response to a letter dated 21 May 2012 raising some issues about the content of the latest Estate Administration Report and also seeking further information about Harrier and the exercise by the PCT of the break clause, Advocate Shepherd wrote to Advocate Richardson on 29 May 2012 explaining that the First Defendant had received advice from Bidwells that the draft Heads of Terms represented the best deal available to Harrier to retain the tenant. That letter also explained that Mourant Ozannes were corresponding with Mossack Fonseca in Panama to obtain all the corporate documents for Harrier. It also touched on the proposal of the Second Defendant that the Plaintiffs buy out her quarter share of Harrier made in April 2012, to which no response had been received. A meeting of all parties was proposed. Advocate Richardson's response of 7 June 2012 requested that further information be supplied to enable the Plaintiffs to determine their position in respect of Elliot House and sought urgent confirmation that the PCT would not exercise its break clause leaving the premises vacant. They agreed to the proposed meeting. The reply on behalf of the First Defendant enclosed the draft Heads of Terms, which still needed to be agreed by the legal advisers. On 13 June 2012, Advocate Shepherd agreed to meet on 18 June 2012. Again, the meeting did not take place as planned, but did take place several days later.

65. On 12 June 2012, following earlier telephone contact, Ms Setters sent an e-mail to Luis Quiel of Mossack Fonseca, attorneys-at-law in Panama, in which she sought information about Harrier's shareholders and directors and "*Confirmation as to who has the authority to bind*

the Company (i.e. who can instruct the lawyers to enter into negotiations for the updated lease and also who can execute the updated lease on its behalf)." Mr Quiel's response on 15 June 2012 explained that Harrier had been registered in 1984, so he did not have immediate access to who the shareholders are. He identified the directors as being Ernest Green, President, Graham Green, Treasurer and Susan Wright, Secretary. He also explained that:

> "*Generally speaking, the Directors of the company are entitled to engage the company in transactions for the benefit of the corporation and can instruct third parties to negotiate on behalf of the company, however, if the company wants to sell its assets or rights it needs authorization from the shareholders. In this case, as Mr Ernest Green has passed away, preliminarily, I would say that Mr. Graham and Susan should pass on the respective resolution. However, just allow me to review the physical articles of incorporation to make sure there are no special restrictions and/or power of attorneys granted.*"

66. By a letter dated 27 June 2012 to Advocate Richardson and the Second Defendant, Ms Setters set out a summary of the information provided by Mr Quiel and sought confirmation that the First Plaintiff and the Second Defendant would sign the resolution to enable Harrier to enter the re-geared lease. The First Defendant, believing himself to be the sole shareholder, took the view that it was in the best interests of Harrier to do so.

67. Advocate Shepherd wrote to Advocate Richardson on 2 July 2012 commenting that there were issues on which the Plaintiffs needed to indicate whether there was agreement or not to what was being proposed. After various postponements due to other commitments and unavailability, there had finally been a meeting on 21 June 2012. In relation to Elliot House, the First Defendant was not prepared to transfer the single share into the joint names of the four heirs. He preferred the Second Defendant's proposal to the Plaintiffs that they buy out her quarter share. In the absence of agreement, he proposed to take advice from Bidwells and make an appropriate application to the Court, intimating that the costs of doing so would be taken from the Estate. In relation to the shares in East Hangarage Limited, he noted that the Second Plaintiff had entered into a binding agreement to purchase these so that, if he failed to complete the purchase, the First Defendant would have to consider whether to take proceedings against the Second Plaintiff.

68. Advocate Richardson replied on 6 July 2012 querying why the First Defendant continued to involve himself in the day-to-day management of Harrier when the shareholding should simply have been devolved in accordance with the Will. On behalf of the First Plaintiff, it indicated that he could not reach any decision as a director of Harrier without sight of all the relevant documentation, and requesting sight of it on an urgent basis. Until that time, the Plaintiffs as the holders of 75% of the beneficial interest were unable to consent to the proposed re-gearing of the lease. Approximately one hour thereafter, Advocate Shepherd e-mailed back, copying in the Second Defendant and her Advocate, inviting the First Plaintiff to deal with these matters as a director by convening a board meeting, but querying whether that would be fruitful when it appeared that he and the Second Defendant were deadlocked in their approach to the question of the re-geared lease. He also enclosed two e-mails received that day. The first was from Bidwells, in which Mr Jones passed on that the PCT knew it needed to serve notice under the break clause on 11 July 2012 in order to protect its position, adding that they all wanted the matter sorted out because the revised terms had been agreed. The second was from the firm of solicitors being used by Mourant Ozannes to assist with the new lease, explaining the anxiety of the PCT expressed by its solicitors about the need to complete the Deed of Variation before needing to serve the break notice to be effective on 13 July 2012.

69. The Second Defendant gave her views on the situation relating to Harrier on 8 July 2012. She confirmed her instructions "*as both director and company secretary*" to the First Defendant urgently continuing to make every effort to get the amended lease signed. She understood that the majority of shareholders of a Panamanian company to have the right to instruct the directors and queried whether, as Executor, the First Defendant substituted for Ernest Green

as both President and director. She held the First Plaintiff responsible for wasting time and money, and wished that the First Defendant had been permitted to perform his duties as Executor "*without constant obstructiveness, harrassment [sic] and bickering*". In the light of that response, and having heard nothing from Advocate Richardson on behalf of the Plaintiffs, Advocate Shepherd informed all parties on the afternoon of 9 July 2012 that he had sought a not before 3 pm hearing for the following afternoon and that the Application and supporting Affidavit would be provided as soon as possible.

70. Mr Quiel (on behalf of Bufete MF & Co, ie, ex-Mossack Fonseca) provided a fuller opinion on relevant Panamanian law dated 9 July 2012. He drew attention to Article 49 of Law 32 of 26 February 1927, being Panama's Corporation Law, which provides that there should be at least three directors. Article 68 of that Law gives authority to a corporation to lease its assets on terms and conditions deemed by the Board of Directors to be expedient "*provided that they are authorized to do so by a resolution of the holders of the majority of the shares with voting rights in the matters*" adopted either at a meeting convened as prescribed by Articles 40 and 44 of the Law "*or by the written consent of said shareholders*". He gave his opinion that "*a resolution of the holders of the majority of the shares with voting rights in the matter, adopted in a meeting duly convened for the purpose must be issued for approval in entering into a variation of a current lease of one of the Company property. There will be no need to have a Board of Directors resolution after having a Shareholders resolution approving to engage the Company into a variation of a current lease of one of its property.*" He proceeded to analyse the First Defendant's position under Law No. 1 of 5 January 1984, being Panama's Trust Law, as it has effect with Article 35 of the Corporation Law, enabling a shareholder to agree in writing to transfer the right to vote to one or more Trustees. By further reference to provisions of the Panamanian Civil Code dealing with executors, Mr Quiel gave his view that the First Defendant "*was validly appointed as a trustee and under the Panamanian law, he is entitled to convene a shareholder meeting, to vote in the name of Mr. Ernest Green (deceased) and to provide a shareholders resolution approving to engage the Company into a variation of a current lease, as long as this transaction is in the best interest of the Company.*" The First Defendant acknowledges that the trust provisions in the Will (at clauses 8 and 9) had not become operative and so he was aware that this interpretation of his position by Mr Quiel was a misunderstanding, but he did not question it further.

71. The First Defendant explained in his Second Affidavit that he had "*recognised for some time that, given the division of views between the beneficiaries, there was going to come a time when [he] would have no option but to apply to Court to consider and, if thought appropriate, approve, a number of different decisions in relation to the assets of the Estate*". He had been attempting to find common ground and regarded such an application as a final resort.

72. In the event, the Court convened at approximately 4.30 pm on 10 July 2012. Advocate Richardson appeared for the Plaintiffs and Advocate Fooks on behalf of the Second Defendant. At the end of an hour, it was apparent that there was insufficient information provided to the Court on which to grant any order in the terms of the Harrier Application. The Deputy Bailiff had no choice but to adjourn the hearing to see what further information could be elicited overnight from all parties, particularly on questions of Panamanian law.

73. On the evening of 10 July 2012, Advocate Shepherd suggested to Advocates Richardson and Fooks that the PCT might be prepared to agree a deed of variation of the lease reducing the period for service of the break notice from six months to five months, which would remove the urgency of the situation. The following morning, they both indicated that their clients agreed to an adjournment of the Harrier Application. The Court was subsequently informed that the parties no longer wished to proceed with the Harrier Application at the adjourned hearing because the urgency had been affected by the break notice having been served by the PCT on 11 July 2012. The Harrier Application therefore stood adjourned and was further adjourned by consent between the parties, culminating in it being adjourned sine die on 3 August 2012. It did not return to Court until it was formally withdrawn on 29 January 2013 with the costs being reserved.

74. On 11 July 2012, Advocate Shepherd put a further proposal to Advocates Richardson and Fooks that, in order to break the impasse on the Board of Directors of Harrier, rather than the shareholder, the First Defendant, dismissing the current directors and appointing an entirely new board, which was acknowledged would be inflammatory, he was minded to appoint Shelagh Mason, who has a good working knowledge of Panamanian companies, as a third director. More details about that proposal were set out in Advocate Shepherd's letters of 17 and 19 July 2012. Advocate Richardson responded on 23 July 2012, querying the bases on which the decision to accept the proposed variation of the lease of Elliot House had been made. Advocate Shepherd pointed out in his letter of 26 July 2012 that the First Defendant was acting on the basis of the expert advice he had received from Bidwells. This letter noted that, as a director of Harrier, the First Plaintiff could take his own advice on what was being proposed.

75. The Second Defendant's position in respect of the proposal to appoint Mrs Mason as a new director was set out in a letter from Advocate Fooks dated 20 July 2012. The Second Defendant did not agree to the appointment considering it "*an unnecessarily expensive way of resolving matters*". She took the view that the First Defendant could resolve matters more directly by taking decisions himself or not appointing a professional thereby incurring the costs of that professional person acting. She subsequently modified her position and recalled accepting in a discussion, rather than putting it in writing, that Mrs Mason should be appointed as a third director of Harrier.

76. An Extraordinary Meeting of the Shareholders of Harrier took place on 27 July 2012 at 2 pm, at which Mrs Mason was appointed as director and President of Harrier in place of the late Ernest Green. A further Extraordinary Meeting of the sole shareholder of Harrier was convened for 4.30 pm on 30 July 2012. The First Defendant resolved to authorise two directors of Harrier, Mrs Mason and the Second Defendant, to enter into the Deed of Variation with the PCT, to authorise Mourant Ozannes and Bidwells as agents to negotiate that Deed of Variation on behalf of Harrier and to authorise Hatch Brenner to advise on it.

77. A meeting of the Board of Directors of Harrier was convened for 5 pm on 30 July 2012. The Minutes of that meeting record that "*Notice of the meeting was waived by all persons entitled thereto*". Mrs Mason and the Second Defendant were present. They passed resolutions authorising themselves to enter into a lease agreement over Elliot House and for Harrier to authorise Mourant Ozannes, Bidwells and Hatch Brenner in the same terms as the resolution of the sole shareholder. The First Defendant explained that no notice was given to the First Plaintiff because it was already apparent that he would oppose the course of action being proposed. The Second Defendant explained that it was Mrs Mason who advised them that the First Plaintiff did not need to be given notice and she did not question that advice. However, Ms Setters asked Mr Quiel whether the articles of incorporation of Harrier required notification to be given to the First Plaintiff and, if so, whether the shareholder could ratify what had happened. Mr Quiel's response on 31 July 2012 described the giving of notice as a "*gray area*". A decision of the Civil Branch of the Supreme Court in 1994 suggested that resolutions passed by a majority of directors attending the meeting meant that this authorised "*passing resolutions in a meeting that has not been previously served notice*", but his own view was that the Law did not permit the giving of notice to be waived. As such, notice of the meeting was required. He offered two solutions. The first was to ratify what had happened at the meeting of the Board of Directors by a shareholder resolution, but that might not be regarded as satisfactory because the Board meeting might be regarded as void due to lack of notice and so incapable of ratification. Accordingly, the second solution was "*the safest one and will eliminate any gray area*". This involved issuing a new shareholder's resolution granting authority to execute the lease and give any ancillary instructions. On 2 and 3 August 2012, Ms Setters sought further clarification from Mr Quiel that what he was advising was what he had previously set out in his earlier opinion of 9 July 2012 and involved no further action from the Board of Directors.

78. In the meantime, on 31 July 2012, the Second Defendant swore her Affidavit in relation to the Removal Application. In it, she expressed her strong opposition to the Removal Application

and, in particular, indicated that she did not wish to be a Joint Executor of the Estate with her brothers because, as Ernest Green had envisaged, it would be divisive and so unworkable. Further, she did not want to be in joint ownership of the Harrier share with the Plaintiffs, believing she would be marginalised and suffer prejudice. Come what may, she considered that the issue of Harrier would have to be resolved by the Court. She clarified that it was not her, but Ernest Green's GP, who had requested that an autopsy be performed. She considered that the First Defendant had been slow and noted that she did not agree with all his decisions, but considered that the Plaintiffs had been obstructive and that the First Defendant had been taking appropriate advice and trying to find solutions so as to finalise the Estate.

79. On 2 August 2012, Mrs Mason e-mailed to Advocate Richardson a copy of the Bidwells report dated 3 February 2012. A differently formatted version was sent the following day. Advocate Richardson already had a copy of this report because he referred to it in his letter dated 16 July 2012. Quite when it was first seen is unclear, but was most likely only in July 2012, although reference to the valuation of Elliot House contained in it was made in the Estate Administration Report dated 16 April 2012.

80. By a letter dated 3 August 2012, Advocate Richardson raised a number of issues about Harrier. He also disclosed to Advocate Shepherd some documentation relating to Harrier, including two opinion letters about how directors could sign on behalf of a Panamanian company, which had been received from Mossack Fonseca some years earlier. In particular, in relation to the proposal from the Second Defendant that the Plaintiffs acquire her share of that company, he commented that the Plaintiffs could not really respond to an unquantified suggestion. Until there was a more detailed proposal accompanied by a valuation of the quarter share, the Plaintiffs were unable to instruct him as to whether this was acceptable to them or not.

81. The Second Defendant made proposals to the Plaintiffs in an open letter from Advocate Fooks dated the same day. In doing so she confirmed that she did not wish to be co-owner with the Plaintiffs of the shares in Harrier because it was "*obvious that that situation would only lead to conflict, litigation and expense*". She gave her valuation of Elliot House/Harrier at £1.5 million (derived from Bidwells' valuation of 30 March 2011 and not referring to the lower valuation contained in the February 2012 report) and proposed that the Plaintiffs pay to her £375,000 representing her quarter share. In relation to the shares in East Hangarage Limited, there had been an accepted valuation at £450,000, so she proposed that the Plaintiffs pay her one quarter of that amount. In relation to the French personalty, she similarly proposed that one quarter of the value of them be paid to her, leaving the Plaintiffs to sort out how to deal with them between themselves. Whilst disputing the value of items taken by the Plaintiffs from La Chanterelle, her approach was also to receive a quarter share of the true value of them. Finally, in relation to a Nissan Micra car in the possession of the Second Plaintiff, she was content for him to retain this subject to the allocation of the undistributed share of the Estate being adjusted appropriately to reflect its value. She further considered that the First Defendant's costs associated with resisting the Plaintiffs' Removal Application, which was "*wholly misconceived and unnecessary*" and approximately half of the fees and expenses incurred in administering the Estate, which were "*attributable to her brothers' unreasonable conduct*", should be added back into the Estate before her quarter share was calculated.

82. Also on 3 August 2012, at 4.30 pm, a further Extraordinary Meeting of the sole shareholder of Harrier was held at which the First Defendant resolved to grant authorisations in exactly the same terms as the meeting of the Board of Directors on 30 July 2012. The First Defendant did not consider that holding a properly convened meeting of the Board of Directors would have produced any different outcome because the First Plaintiff was opposed but the Second Defendant and Mrs Mason were in favour and their majority view would have prevailed. The Deed of Variation in respect of Elliot House was duly completed on 24 August 2012. This meant that the break notice that had been served by the PCT was withdrawn.

83. In relation to the Second Defendant's proposals of 3 August 2012, the First Defendant encouraged the Plaintiffs to give them serious thought in Advocate Shepherd's letter of 23 August 2012. (An update on the progress of the negotiations between the heirs was subsequently sought by Advocate de Nobrega in her letter of 25 October 2012.) At this time, the Plaintiffs made a "without prejudice" counter-offer through Advocate Richardson directly to Advocate Fooks. Despite Advocate Fooks intimating in her letter of 24 August 2012 that she was content for this to be shared openly, Advocate Richardson objected to the content of that counter-offer being disclosed to the First Defendant or Advocate Shepherd, so neither of them had sight of this.

84. The First Defendant provided an updated Estate Administration Report dated 30 August 2012 reflecting the Second Defendant's revised position.

85. Mrs Mason wrote to Advocate Richardson on 11 September 2012 answering the enquiries about Harrier he had raised in his letter of 17 August 2012. In particular, she set out Harrier's rationale for deciding to enter into the Deed of Variation. As an asset-holding investment company, preservation of the value of Elliot House was the paramount concern. In circumstances where the Primary Care Trust, being the principal tenant of the premises, had exercised the break clause in its lease and recognising that no other tenants were immediately available to replace it were the PCT to vacate Elliot House, agreeing to the Deed of Variation maximised the value of the property.

86. The First Plaintiff swore his Second Affidavit on 19 September 2012, responding to the First and Second Affidavits of the First Defendant and the Affidavit of the Second Defendant.

87. A review hearing took place before the Court on 21 September 2012. The Court encouraged the parties to see whether some mutually acceptable agreement could be reached to enable the First Defendant to finalise the administration of the Estate.

88. The First Defendant provided a further updated Estate Administration Report dated 8 October 2012.

89. A meeting of the Board of Directors of Harrier took place on 10 October 2012. Advocate Richardson was appointed as the First Plaintiff's proxy, whilst at the same time reserving the First Plaintiff's position that Mrs Mason had not been validly appointed as a director of Harrier, which had been covered in exchanges of correspondence between them previously. The Second Defendant was initially in attendance but then appointed Mr Wherry as her proxy to continue in attendance at the meeting. The Board considered a Management Report in respect of Elliot House from Bidwells. The meeting agreed to appoint Bidwells to carry out a valuation of Elliot House. The report dated 18 October 2012 valued Elliot House, assuming a sale subject to the existing leases, at £900,000. (Through the remainder of 2012, there continued to be a flow of correspondence between Advocate Richardson and Mrs Mason relating to her appointment to the Board of Directors of Harrier and the business of that company, which falls outside the issues raised by the Costs Application.)

90. On 25 October 2012, Advocate de Nobrega wrote to Advocates Richardson and Fooks on behalf of the First Defendant, referring to the comments made by the Court on 21 September 2012 and asking them to confirm by 1 November 2012 the state of the heirs' negotiations.

91. In the light of that reduced valuation of Elliot House, although being disappointed by it, the Second Defendant pragmatically modified her proposals for settlement in a letter from Advocate Fooks dated 30 October 2012. She still sought payment to her from the Plaintiffs of one quarter of the value, but the amount had reduced from £375,000 to £225,000. She also indicated her agreement with the proposal that the Second Plaintiff have the shares in East Hangarage Limited transferred to him on payment to her of £112,500, with the other Plaintiffs renouncing their entitlement to their shares. However, the other two Plaintiffs had not formally agreed to that proposal by that time.

92. On 31 October 2012, Advocate de Nobrega again wrote to Advocates Richardson and Fooks. In relation to an invoice from Bidwells in respect of its report on Elliot House, this letter indicated that Mrs Mason was content for it to be settled from funds in the Estate. It sought copies of the Harrier documentation from the First Plaintiff, pointing out that these had been expected for some months by then. The questions relating to tax liabilities in Guernsey and in France, which were still unresolved, and the ongoing issues of how to deal with the personalty at La Ville Couvé, which required finalisation of the ownership of that property, were also touched upon. In respect of the ongoing negotiations among the heirs to try to settle their differences, the letter indicated that the First Defendant had begun drafting an application and supporting affidavit in relation to the distribution of the Estate in view of the likelihood of the impasse reached continuing. Even if those negotiations bore fruit, the First Defendant would still need the information sought in order to conclude the winding up of the Estate. He gave a deadline of 16 November 2012 for provision of the information, failing which he would proceed with making his application to the Court. Also on 31 October 2012, the parties were informed of the listing of the trial for hearing commencing on 28 January 2013.

93. Advocate Fooks responded on 5 November 2012. The position of the Second Defendant was that she had done what she could and wanted to see matters concluded. Advocate Fooks was troubled at the depletion of funds within the Estate, presumably as a result of fees incurred by the First Defendant being taken from it, and considered that the First Defendant needed to be more proactive in the negotiations or needed to progress the application to Court previously mentioned.

94. On 7 November 2012, Advocate de Nobrega wrote to Advocates Mallett and Fooks providing an update on the issues that remained outstanding. She again indicated that the First Defendant was awaiting the expiry of his deadline of 16 November 2012 before progressing his application to the Court. A full response was provided to Advocate de Nobrega by Advocate Mallett on 16 November 2012. In relation to the potential application of the First Defendant to the Court, Advocate Mallett expressed the Plaintiffs' concerns that work had already commenced on this prior to the expiry of the deadline fixed by him. Accordingly, the Plaintiffs indicated that they did not regard those costs as something for which they should be responsible.

95. The First Defendant provided an updated Estate Administration Report dated 12 November 2012.

96. On 28 November 2012, Advocate Fooks responded to Advocate de Nobrega, informing her that, as far as the Second Defendant was concerned, "*negotiations have broken down and there is no realistic prospect of settling this matter*". The letter also stated that the Second Defendant:

> "*… is increasingly concerned at the costs being incurred by your firm in relation to the Estate when in fact no real progress is being made towards its resolution. In your letter of 7 November you made it clear that a decision would be taken on 16 November as to whether an Application should be made. It is now the 28th November and we have yet to hear from you in that regard. Meanwhile we are receiving huge amounts of paperwork from you no doubt resulting in huge expenses to the Estate. My client reserves all rights in relation to the costs which are being incurred in the winding up of the Estate.*"

97. There was a further letter from Advocate de Nobrega to Advocates Mallett and Fooks on 7 December 2012. The First Defendant had concluded that the deadlock between the heirs was continuing so that, as a last resort, he needed to make his application to the Court. He further explained in evidence that the Application was a response to having sight of Advocate Fooks' letter of 28 November 2012.

98. The First Defendant swore his Third Affidavit on 17 December 2012 in support of his Winding Up Application of the same date. He explained that the momentous decision he was

seeking to have blessed was the distribution of the remainder of the Estate to the Plaintiffs and the Second Defendant. He recognised that normally this would not involve an application to the Court but felt that "*these are no ordinary circumstances*". Because he took the view that one or other of the heirs would disagree with whatever he decided to do, he was faced with no option but to make the Winding Up Application. As at 14 December 2012, the amounts charged to the Estate in respect of the Removal Application, the general administration of the Estate and both the Harrier Application and the Winding Up Application combined were £41,834, £161,901.58 and £56, 947 respectively. The First Defendant had taken these amounts from the Estate at that time.

99. The terms of the Winding Up Application were that, in the event that the Plaintiffs' Removal Application were dismissed, to seek the Court's approval of the First Defendant's proposals to administer the remaining elements of the Estate in the manner set out. In respect of Harrier, his principal position was to pay to the Second Defendant out of the Plaintiffs' shares of undistributed funds the value of one quarter of the share and to transfer the share in Harrier to the Plaintiffs jointly or, if the Plaintiffs did not agree to that within 14 days of the order, to sell the share for the best possible price and distribute the net proceeds to the four heirs equally. In relation to the shares in East Hangarage Limited, he had decided to proceed with the sale to the Second Plaintiff on the terms already agreed or, if the Second Plaintiff failed to complete within 14 days, to treat that as a repudiatory breach entitling the First Defendant to market and sell the shares for the best possible price and distribute the net proceeds to the four heirs equally. In relation to the personalty at La Ville Couvé, the First Defendant proposed to sell the items and distribute the net proceeds equally between the four heirs on condition that they finalise their joint succession to that property or, if that were not done within 14 days, to seek legal advice and to follow it. The motorhome at the French property should be transferred to the Second Plaintiff for the price he had indicated, the net proceeds being distributed equally between the other three heirs or it should be sold and the net proceeds distributed equally, alternatively advice be taken and followed as to how to dispose of this asset. The Application also dealt with, among other matters, the Nissan Micra, Peugeot 306 and Ford Ka motor vehicles, seeking confirmation that what had previously been agreed should be performed with corresponding adjustments to the Second Plaintiff's and Second Defendant's allocated shares in the undistributed funds. The Application proposed to distribute to the Second Defendant one quarter of the estimated value of the items taken by the Plaintiffs from La Chanterelle or to seek a valuation of those items and sell them for the best price possible and distribute the net proceeds equally between the four heirs. Once the outstanding liabilities of the Estate had been settled, the balance of the Estate would be distributed equally between the four heirs. The First Defendant explained in his Third Affidavit that he made some of these proposals in the alternative because he considered it unlikely that the cooperation of heirs would be forthcoming.

100. On 17 December 2012, Advocate Mallett wrote to Advocate Fooks, to Advocate de Nobrega and to Mrs Mason setting out the Plaintiffs' latest position in respect of the matters on which they had been corresponding. In particular, the Plaintiffs expressed their concerns that they were being blamed for the breakdown in the negotiations amongst the heirs when they took the view that the Second Defendant had been uncompromising in her stance throughout refusing to allow certain aspects of the Estate to be resolved in a piecemeal fashion and insisting on there being an all or nothing outcome. On 20 December 2012, the Plaintiffs' Advocates queried why the Winding Up Application was even being instituted at this time on the basis that if the First Defendant were to be removed, it would fall away, and if his continuance in office were confirmed, he could use his discretionary powers to reach decisions for the finalisation of the Estate anyway. The appropriate direction, therefore, would be to stay the Winding Up Application pending resolution of the Removal Application.

101. Following the Court hearing on 21 December 2012, Advocate Richardson wrote to Advocate de Nobrega on 4 January 2013, highlighting some comments made during the hearing and encouraging the First Defendant to progress certain aspects of the administration of the Estate. The response from Advocate de Nobrega on 14 January 2013 took issue with how the Court perceived the administration of the Estate to be capable of being resolved. Advocate

Richardson responded on 21 January 2013 commenting on the issues that the First Defendant had raised in the Winding Up Application and querying why some were included where there was already agreement as to what to do about certain assets within the Estate. By a letter dated 8 January 2013 to Mrs Mason, it was suggested on behalf of the First Plaintiff that the meeting of the Board of Directors of Harrier scheduled for the following day be deferred until after the Court hearing listed for later that month. Mrs Mason agreed to this proposal.

102. The First Defendant provided an updated Estate Administration Report dated 16 January 2013 and also an updated Statement of Account to that date.

103. On 23 January 2013, the First Plaintiff swore his Third Affidavit as a response to the First Plaintiff's Winding Up Application. Also on 23 January 2013, Mrs Mason swore her Affidavit in the context of the Plaintiffs' Removal Application. In it she sets out her involvement with Harrier.

104. There was a flurry of correspondence between the Advocates in the run-up to the trial listed for 28 January 2013. At the request of the Advocates, the Court convened at short notice on the morning of 25 January 2013 with the Deputy Bailiff sitting alone. The parties indicated that there was a prospect of settlement. The Jurats were stood down.

105. On 28 January 2013, the four heirs reached agreement on how the remainder of the Estate would be administered as set out in the Beneficiaries' Agreement. The First Defendant was not a party to this agreement, but had seen a copy of it and was "content" to go along with its terms as a means of avoiding a four-day trial. This Agreement involved payment to the Second Defendant out of the monies in the Estate held by the First Defendant of an agreed amount and her entitlement to a quarter share of any balance when the Estate was finalised. As previously agreed, she would continue to own the Peugeot and Ford motor vehicles and also take some items of personalty from La Chanterelle. The Plaintiffs would become the owners of Harrier, East Hangarage Limited, the French property, the Nissan and a smaller amount of money, plus have an entitlement to three-quarters of any balance remaining when the Estate was finalised. Each heir would retain what had previously been received by them from the Estate. They agreed to be equally responsible for settling the Guernsey tax liability of their late father (and the accountant's fees in finalising that tax position), the costs of a memorial to him and the further agreed fees of Mourant Ozannes of no more than £2,000. They authorised the First Defendant *inter alia* to transfer the share in Harrier to the First Plaintiff (as agreed among the Plaintiffs) and to transfer the shares in East Hangarage Limited to the Second Plaintiff, as previously agreed, and to pay to Mourant Ozannes any further fees "*agreed in advance in writing by those beneficiaries who will pay them*".

106. As a result of the Beneficiaries' Agreement, the Removal Application, the Harrier Application and the Winding Up Application were all withdrawn, with leave of the Court, on 29 January 2013, with only the question of costs being reserved. Each set of proceedings was initially adjourned to 22 March 2013 in the hope that the parties might achieve settlement of their differences on these questions.

107. Mrs Mason resigned as a director of Harrier on 30 January 2013. In her evidence she described her time as a director as being very difficult. There had simply been no relationship with the First Plaintiff. He had not attended in person the one meeting of the Board of Directors held during her term of office but had sent his proxy, Advocate Richardson. He had asked her not to contact him by e-mail. In her experience, this level of unwillingness to engage was unique.

108. On 20 February 2013, the First Defendant transferred the share in Harrier to the First Plaintiff. He informed Mr Quiel and requested that the company's records be amended accordingly. The two shares in East Hangarage Limited were also transferred to the Second Plaintiff at around that time. On 8 March 2013, Advocate de Nobrega provided to Advocate Richardson

some keys in the First Defendant's possession for items in France and also the logbook for the motorhome in France.

109. On 15 March 2013, Advocate de Nobrega suggested that the question of costs of the proceedings withdrawn should be further adjourned by consent of the parties to enable the tasks that needed to be completed to be performed. An adjournment of three months was agreed. Correspondence about the few remaining issues to be resolved continued to be exchanged from April to September 2013, at which time the Plaintiffs made their Costs Application dated 11 September 2013. The First Defendant expressed his concern at the time taken by the Plaintiffs to perform the tasks relating to the finalisation of the Estate he had agreed to delegate to them.

110. On 10 September 2013, the First Plaintiff swore his Fourth Affidavit, in which he summarised what had been stated in his three previous Affidavits (and exhibited them). This Affidavit set out the Plaintiffs' basis for bringing the Costs Application.

111. Although it is not something directly relevant to the Costs Application, on 20 September 2013, the First Defendant made the application for orders against the Plaintiffs to enable the Estate to be finalised. It does, however, provide further information about the overall administration of the Estate. This application was supported by the First Defendant's Fourth Affidavit sworn the same day. The First Defendant took the view that the delay in the Plaintiffs doing what they had agreed to do was inexplicable. He was unable to finalise the Estate until the Plaintiffs completed the tasks they had agreed to perform. In particular, although a small part of the Estate, the personalty at the French property could only be dealt with once the heirs had sorted out their ownership of La Ville Couvé. On 17 December 2013, the First Plaintiff swore his Fifth Affidavit in response to the First Defendant's application for directions dated 20 September 2013. He exhibited tax returns in respect of Harrier made for 2010-2012 in Guernsey and for the corresponding tax years in the United Kingdom.

112. The Court gave directions in respect of the Plaintiffs' Costs Application on 27 September 2013. (It also dealt with the First Defendant's application for directions.) The timetable fixed was subsequently varied by consent. The parties continued to correspond through the remainder of 2013 about compliance with the timetable and the adequacy of the information being provided from both sides about progress in resolving the matters that still needed to be finalised.

113. As a result of notices of assessment sent on behalf of the Director of Income Tax on 10 October 2013, the outstanding tax liability of Ernest Green was settled by the First Defendant on 3 November 2013. An additional surcharge was settled by him on 3 February 2014.

114. Although it is another matter not directly related to the Costs Application, on 14 January 2014, on behalf of Harrier, Advocates AFR sent a letter before action to the First Defendant making claims about the First Defendant's conduct in the management of Harrier during his executorship. Similar letters were sent to the Second Defendant and Mrs Mason about their roles. Responses were sent on behalf of the Second Defendant on 16 January 2014, by Mrs Mason on 20 January 2014 and on behalf of the First Defendant on 21 January 2014. Advocate Richardson wrote again to the others on 14 April 2014. No proceedings have since been issued.

115. On 19 February 2014, Advocate Richardson wrote to Advocate Fooks about how to finalise the succession to La Ville Couvé. He subsequently explained to Advocate de Nobrega that the documentation forwarded had only been received on 3 February 2014. The documentation appears to be the same as had been circulated in April 2012. In a further letter sent to Advocate de Nobrega on behalf of the Plaintiffs dated 26 March 2014, it records that the Second Defendant did not wish to become co-owner with her brothers of La Ville Couvé, even though this was simply to facilitate the transfer by them to the Second Plaintiff, and so was researching whether there was a mechanism by which she could renounce her interest

prior to its transfer. This was explained in more detail by Advocate Fooks in her letter dated 27 March 2014. The concern was that an indeterminate period of co-ownership might expose her to some claim or form of liability.

116. On 25 April 2014, the First Defendant swore his Fifth Affidavit in response to the Plaintiffs' Costs Application. He indicated that the Estate had effectively become insolvent because of the amount of time taken to resolve matters and the fees incurred by reason of the Plaintiffs' unreasonable conduct. The First Defendant exhibited a table showing the charges he had made, or proposed to make, to be taken from the Estate in respect of the different matters with which he had been involved as at 24 April 2014. The total amount across all the files opened at Mourant Ozannes was £433,295.85. In respect of the Removal Application, £106,420.80 had been billed. In relation to the Winding Up Application, £37,523 had been billed. In respect of general administration of the Estate, approximately £200,000 had been billed.

117. An updated Estate Administration Report as at 13 May 2015 has been prepared in readiness for the trial. Similarly, the Court has seen a Statement of Account to the same date. Finally, as at 13 May 2015, the amounts billed to the Estate by the First Defendant have been updated and are very roughly the same for the specific matters set out above as at 24 April 2014. The principal difference relates to the unbilled costs in respect of this Costs Application. The total costs the First Defendant has taken from the Estate are put at a little over £485,000.

General costs of administration of Estate

118. In the light of the Deputy Bailiff's direction that the Jurats should consider the general administration of the Estate with a view to making findings to resolve paragraph 3 of the Costs Application, they have considered all the evidence in the case carefully and concluded that none of the witnesses has deliberately set out to mislead the Court. They gave their accounts, sometimes in difficult circumstances, honestly and to the best of their recollections. Where there were differences between the witnesses, these arose as a result of their differing perceptions about how the event on which they were commenting should be regarded. For a professional person, such as the First Defendant, to have his integrity questioned in the way it was is never easy and the Jurats consider that he responded to questioning by Advocate Richardson in a careful and measured way, which is consistent with their overall impression of how he performed his functions as Executor.

119. One thing on which the witnesses agreed is that there has been a total breakdown of communication between the Plaintiffs on the one hand and the Second Defendant on the other. This disharmony among the siblings has exacerbated the position in which the First Defendant found himself. He was aware of it before he accepted the office of Executor. However, that awareness does not automatically mean that his task was any the easier once it came to taking steps in the administration of the Estate. Another matter on which the parties agreed is that Ernest Green, when alive, tried to keep matters simple so as to avoid incurring what he regarded as being excessive amounts spent in professional fees. He was a cautious man when it came to money. One sad aspect of these proceedings is that he would probably be horrified if he knew how much the administration of the Estate has cost.

120. The breakdown in the relationships between the Plaintiffs and the Second Defendant is abundantly clear to the Jurats. There is, however, no need for the Court to make any findings attributing blame to anyone for how this situation developed. The tone of the First Plaintiff's evidence demonstrates that he and his brothers were very suspicious of the Second Defendant's motivations. He spent time rehearsing what happened when Ernest Green was still alive, but that is of no direct relevance to any of the matters now in issue relating to the administration of the Estate. The Second Defendant clearly had a real fear as to what the Second Plaintiff might do to her. Her insistence on giving evidence in a manner which ensured she did not come into contact with any of her brothers was perhaps the clearest example of how deep the divisions between them have become. As Advocate Shepherd explained, there was a degree of suspicion, fear, anger and resentment permeating everything that took place. It is quite apparent, and the Jurats consider that it must have been apparent to

the First Defendant, that there was no real prospect of an amicable discussion between the four of them ever taking place face to face. He knew this from the outset by making arrangements to read the Will to the Second Defendant at a separate time. Such discussions as there were had to be conducted through Advocates. This situation inevitably made seeking to reach some consensus significantly harder than would be the case where family members are at least moderately civil to each other.

121. The fractured relationships among the heirs, however, did not extend, at least initially, to their individual relationships with the First Defendant. Each recognised that their late father had chosen to appoint the First Defendant as a professional person to act as the Executor of his Estate. In principle, therefore, any person would have been faced with the same problems arising from the disharmony within the family. As such, the Jurats accept that the First Defendant took the sensible course of action in discussing whether to accept the office of Executor with his partners before recognising that there was no viable alternative and accepting the office to which Ernest Green had wished to appoint him.

122. The Jurats accept the evidence of the First and Second Defendants that, by the time the administration of the Estate commenced, their friendship had become more distant. The First Defendant had been the Advocate for Ernest and May Green and had known the Second Defendant well for some years. However, in the time prior to and during the course of the administration of the Estate there had been little contact, all of which had been professional. To the extent that the Plaintiffs alleged that the First Defendant had demonstrated bias in favour of the Second Defendant, the Jurats reject that contention. The past friendship had no bearing on the manner in which the First Defendant administered the Estate. In any event, Advocate Richardson described this as a side issue.

123. Prior to Ernest Green's death, the First Defendant expected that Harrier, or at least Elliot House, would be sold. However, this was not completed during the guardianship of Ernest Green. The Jurats consider that too little evidence was adduced about the state of affairs in the estate of Ernest Green at the time of his death for them to be able to comment about whether Ernest Green's affairs were in such a clear state that the task of the Executor was a simple one. They can infer from the absence of any suggestion that the affairs were in a mess that there was nothing particularly problematic for the First Defendant to address. They note that, despite Ernest Green being placed under guardianship, the officers of Harrier, with or without assistance from the guardian, had not taken any particular steps to re-constitute the Board of Directors. It seems to them that Ernest Green effectively ran the company and sought confirmation from his co-directors as to the decisions he had reached and that this state of affairs continued when he was placed under guardianship, to the extent that Advocate Atkinson liaised with the agents, Bidwells, and was in the process of marketing Elliot House for sale. This was the position to which the First Defendant came when taking out probate.

124. As is apparent from the statement of the fees taken by the First Defendant from the Estate at the time he swore his Third Affidavit, three distinct files had been created and expenses allocated to each. The first relates to the day-to-day administration of the Estate and corresponds to paragraph 3 of the Costs Application. The second relates to the Plaintiffs' Removal Application and the third to the other two applications, ie, the Harrier Application and the Winding Up Application. Although other files have since been opened, this allocation by Mourant Ozannes of the various streams of work undertaken has assisted to reflect what has to be considered by the Jurats.

125. The First Defendant acknowledged that at the beginning of the administration of the Estate, including the time between Ernest Green's death and the grant of probate, the First Plaintiff's input was helpful. However, he described it as having "*undertones*". He was, however, clearly concerned when informed that the Plaintiffs had appointed Advocate Richardson to advise them. He viewed this as meaning that matters were becoming contentious. That is an area of legal practice he has moved away from, so it led to him seeking advice from within his firm. As a consequence, matters escalated in a way that had not previously been envisaged. The Jurats recognise that this step moved the administration of the Estate into a different

phase from that operating in 2011. The threat of litigation made the position of the First Defendant more complicated than it would otherwise have been. The length and nature of the correspondence being sent on behalf of the Plaintiffs diverted attention and resources away from where they might more sensibly have been directed. Accordingly, they take the view that some of the negative impact on the administration of the Estate has arisen from the Plaintiffs' decision to engage their Advocates at this time.

126. Although there was comparatively little evidence about the steps taken by the First Defendant between Ernest Green's death and the grant of probate in November 2011, the Jurats are satisfied that he took appropriate steps to acquaint himself with the assets in the Estate in readiness for getting them in prior to distribution to the heirs. The Jurats have taken into account that the monetary assets were obtained and largely distributed in the three tranches paid away in December 2011 and January 2012. The receipt of the large amounts distributed should have been regarded by the heirs as relieving some of the pressure on the First Defendant to finalise the Estate. Having managed to deal with those assets in a timely fashion, the First Defendant was left with the more complicated elements of the Estate, being the settlement of various liabilities and the two shareholdings. In relation to Harrier, the First Defendant sought documentation from the First Plaintiff. The Jurats consider that the First Plaintiff might have assisted the First Defendant in this regard more than he did, particularly at the end of 2011 and into early 2012, which is the time at which the Plaintiffs say the First Defendant should have been transferring the Harrier share or seeking directions from the Court. Equally, though, the First Defendant does not say he turned to the Second Defendant, knowing that she was Harrier's Secretary, at that time for documentation and simply states in his Third Affidavit that he was by then aware that she did not hold any such documentation.

127. By early 2012, the issues remaining to resolve in the Estate had crystallised into a small handful. The First Defendant was, in the Jurats' views, entitled to be hopeful that the heirs would reach agreement on these matters, making such use of their Advocates as they saw fit. The First Defendant was taking steps in relation to Harrier. He commissioned the report from Bidwells provided on 3 February 2012. He was taking appropriate advice about the options, following the process that Ernest Green had begun when alive and which had been continued through Advocate Atkinson's guardianship. This was the response of a reasonable executor. He was entitled to rely on this advice. Eventually he took legal advice about Panamanian company law. The Jurats consider that, with the benefit of hindsight, this advice should have been sought at an earlier stage. It would have been better for all concerned had the advice about the authority to bind the company by a shareholder's resolution been obtained at or before the time that the First Defendant took decisions about Elliot House and the re-gearing of the PCT's lease. The Jurats take the view that the First Defendant's tardiness in obtaining advice from Mr Quiel was a poor aspect of his administration of the Estate but do not regard it as taking him across the threshold of reasonably justifiable behaviour.

128. At around this time, in the first quarter of 2012, the First Defendant had to spend time explaining to the Plaintiffs that their criticisms of him strayed into matters that properly had to be separated from his administration of the Estate. The Plaintiffs appear to have regarded all the work being undertaken for them by the First Defendant as rolled into one. However, their joint instruction (with the Second Defendant) of the First Defendant, or perhaps more accurately Mourant Ozannes, in respect of the sale of La Chanterelle needed to be viewed separately; as did his preparedness to assist the heirs with their obligations to sort out the inheritance to La Ville Couvé, which fell outside the Estate he was administering as Executor. The levels of dissatisfaction between the Plaintiffs on the one hand and the Second Defendant on the other were increasing rather than decreasing. Because of the possibility of the heirs ultimately agreeing how to divide the assets between them, this inevitably meant that the First Defendant had to wait longer. Had the Plaintiffs not threatened his removal, and then acted upon that threat, the Jurats consider that the scope for resolution, or alternatively for the First Defendant recognising that an application to the Court was needed, would have occurred earlier than actually happened. However, whether in March or April of 2012, an application for directions by the First Defendant about the Estate generally would, in their view, have been premature.

129. The Jurats accept, though, that the First Defendant took the wrong decisions in relation to Harrier at this time. The decision as to whether to sell Elliot House or to negotiate terms for a re-geared lease with the Primary Care Trust was clearly something that should have been taken by the Board of Directors of Harrier and not by the Executor. The Jurats are unimpressed by the steps taken prior to the closure of the bank account of Harrier because this meant that Harrier's business, which should have been kept separate, was brought within the Estate. The First Defendant should have been communicating with the directors of Harrier and not with the heirs. In this regard, the First Defendant failed to draw a distinction between the First Plaintiff as a director of Harrier and the First Plaintiff as the nominated spokesman for the Plaintiffs. Had the First Defendant dealt with the directors, in his capacity as the legal owner of the share in Harrier, and then discovered that the business of Harrier was being frustrated by the inability of the two directors to be willing to deal with Harrier's business, he could then have taken the advice he subsequently took and so been proactive in appointing a third board member in good time before decisions had to be taken to avoid the break clause being exercised, rather than leaving these matters until it became too late to do anything about it. Whilst the Jurats accept that the First Defendant had the obligation to preserve the assets of the Estate, the asset in question was the share, which was not at risk in any event, whereas the business of Harrier, ie, Elliot House, was something that should have been recognised as being distinct and he should have left the management of Harrier's business to its directors and only sought to intervene when he had to.

130. That said, neither the First Plaintiff nor the Second Defendant took steps to fulfil their responsibilities to Harrier at this time. Their inaction put the onus on the First Defendant to look for solutions. Accordingly, the Jurats accept that it was a sensible course of action for the First Defendant to approach Mrs Mason to become a director of Harrier so as to break the deadlock that had arisen. Indeed, they consider that he should have taken this step earlier than he did. By acting in this way, in accordance with the powers that he had as the shareholder and knowing that the directors would be split, these actions of the First Defendant do not cross the threshold of reasonably justifiable behaviour.

131. In summary, there have been errors of judgment in the First Defendant's approach to how to deal with the Harrier share. In particular, he allowed its business to be drawn into the general administration of the Estate rather than being treated as something distinct. The Jurats accept, however, that he was approaching matters in a similar fashion to Ernest Green and Advocate Atkinson. In doing so, the First Defendant thought he was carrying out the wishes of Ernest Green. Therefore, despite the errors of judgment, the conduct of the First Defendant is not such that the Jurats find it crosses the threshold of reasonably justifiable behaviour.

132. The Jurats also bear in mind the timing and content of the Plaintiffs' Removal Application. As previously stated, there was no realistic alternative solution for the administration of the Estate being advanced by them. At the time this Application was made, only a short time had passed since the completion of the first phase of the Estate's administration, which involved getting in the assets and making substantial distributions to the heirs. The Jurats are satisfied, therefore, that it was justifiable for the First Defendant to resist this Application rather than simply to accede to it. They recognise the truth in what the First Defendant has pointed out, namely that the effect of what the Plaintiffs proposed was precisely what Ernest Green had sought to avoid. This was a further reason for resisting the Removal Application.

133. Once the impact of the Harrier Application and its immediate aftermath had settled, the Jurats further find that it was reasonably justifiable for the First Defendant to allow the heirs some time to see if they could reach a settlement. In doing so, they reject Advocate Richardson's submission that the level of conflict between the heirs meant that it was an unrealistic or forlorn hope on the part of the First Defendant that some agreement would be forthcoming. The time permitted could not be open-ended, so it was sensible for him to identify a time by which settlement needed to be reached before he considered whether the time was right to seek the Court's blessing on what he proposed to do. In a general sense, therefore, the Jurats do not regard his decision to make the Winding Up Application as being something that

crosses the threshold of reasonably justifiable behaviour. In reaching that view, the Jurats have borne in mind that a number of the issues that still fell to be resolved had already really been agreed. It was open to the First Defendant to have made distributions from the Estate in a piecemeal fashion, but equally he could sit back and wait to see how the final allocation of assets would appear before taking those steps. What was needed was some resolution of the more significant assets remaining, such as Harrier. The First Defendant was entitled to take into account that the Second Defendant had made proposals that the Plaintiffs buy out her quarter share in Harrier and that steps had been taken, perhaps a little more slowly than would have been ideal, to obtain a revised valuation of Harrier so that the detail of that offer could be considered by the Plaintiffs. This happened at the end of the time taken up addressing Harrier and the re-geared lease of the PCT. As a result, permitting the heirs to continue their negotiations into the autumn of 2012, especially when the Plaintiffs would not let the First Defendant be privy to them, did not entail the First Defendant being responsible for delaying approaching the Court. The fact that the heirs were able to agree settlement terms is indicative of the confidence the First Defendant had that this was always possible.

134. Advocate Richardson suggested that the Winding Up Application should have been made earlier than it was. For example, it could have been made in March 2012 in response to his letter of 24 February 2012. In his submission the First Defendant should have realised at that point that he needed directions from the Court as to how to deal with the Estate. Indeed, the letter indicated that there had been conditional instructions given to take this step, although the First Defendant was then unable to recall what the conditions attached to his instructions were. On the First Defendant's own case, making the Application would in any event have procured the settlement between the beneficiaries. The Jurats, however, accept that the First Defendant was justified in deferring any approach to the Court at this time because the Removal Application was set into motion. The indication of him having given conditional instructions was linked to him remaining in office after the disposal of the Removal Application. Finalising the Estate could, therefore, be delayed until the position in relation to that Application became clearer. Thereafter, decisions relating to Harrier impacted on the First Defendant's choice of timing to make such an application. In the autumn of 2012, the First Defendant gave time for the heirs to engage in their negotiations. When viewed collectively, the Jurats are satisfied that choosing not to make an application to the Court for directions was not an act or omission crossing the threshold of reasonably justifiable behaviour.

135. The final stage of the overall administration of the Estate was entered following the Beneficiaries' Agreement. The Jurats have noted the terms of that Agreement and that comparatively little has been done by the First Defendant since. The purpose of the Agreement was to simplify what the First Defendant needed to do to finalise the Estate. They also note that the First Defendant has indicated that he will abide by the terms of that Agreement and honour the capping of the fees for carrying out the tasks identified as being for him. They do not regard the fact that the heirs, and particularly the Plaintiffs, have been unable to complete what needs to be done as lending any support to the suggestion that the Estate is a complicated one. It is not, and never has been, a complicated Estate as such, but the total unwillingness on the part of the Plaintiffs and the Second Defendant to co-operate on even the slightest thing for fear of the possible repercussions involved is what has caused the inordinate delays that have been experienced and the large amount of costs and expenses that have been incurred. The tasks that still need doing are largely matters outside the hands of the First Defendant so they cannot, in the Jurats' view, be regarded as taking his conduct since January 2013 across the threshold of reasonably justifiable behaviour.

136. The conclusion the Jurats have reached in relation to the overall conduct of the First Defendant of the administration of the Estate is that, whilst not perfect, the errors made by him are not of a type that meet the test they were directed to apply. Ernest Green chose to provide an indemnity to the First Defendant as Executor in clause 10.1 of his Will, thereby enabling the First Defendant to draw from the Estate all expenses and liabilities properly incurred by him in the administration of that Estate. The level of unreasonableness required to be shown is a moderately high one and more than mere negligence or honest mistake. In

relation to the general expenses of the administration of the Estate, the Plaintiffs have failed to discharge the burden on them of establishing that the First Defendant should be deprived of any aspect of his indemnity by reason of misconduct, as that term is to be construed in a wide sense. In the light of the Jurats' findings, the Court does not find that the First Defendant's conduct or omissions cross the threshold of reasonably justifiable behaviour. Accordingly, subject to what follows, paragraph 3 of the Costs Application is dismissed.

Costs of proceedings

137. The approach to the costs involved in the three Applications that have been before the Court previously is different from that applying to the entitlement of the First Defendant to take his charges from the Estate pursuant to clause 10.1 of the Will. It involves a first stage of deciding where the costs fall as between the parties to the various Applications. Once that preliminary issue has been determined, it is then a further question of whether the First Defendant is entitled to have recourse to the Estate in respect of the costs he has incurred. In reaching his conclusions as to the orders to make in respect of the proceedings that were withdrawn on 29 January 2013, the Deputy Bailiff has borne in mind the findings of the Jurats in relation to the general administration of the Estate.

The Removal Application

138. The costs of the Removal Application fall first to be determined under the usual categorisation of such an application. As what is termed a "*hostile application*", the usual principles apply as to how to deal with the costs of it. Given the close analogy to the position of a trustee facing an application to remove him, the Court has considered the summary offered in *Lewin on Trusts* (at paragraphs 27-191, 27-192 and 27-193):

> "*If a trustee is removed on the ground of misconduct, even if some of the charges of misconduct are rejected, the trustee who is removed will normally be ordered to pay the costs of the successful applicant as well as bear his own costs, though the court will consider whether the costs of discrete issues on which the trustee was successful should be treated differently. If a trustee is removed on the ground of conflict of interest and duty, the court might normally be expected to make an order for costs against the trustee, though might allow the trustee his costs in special circumstances, for example where the conflict is expressly authorised by the terms of the trust, but the court nevertheless considers that the trustee should be removed. If a trustee is removed on other grounds, the trustee is at less risk of being ordered to pay the applicant's costs, and will obtain an order of costs from the trust fund if he acted reasonably in defending the claim for removal. A beneficiary who persists in seeking the removal of a trustee on grounds of misconduct, but secures the removal on other grounds, may be ordered to bear his own costs.*
>
> *A trustee who is faced with a claim for removal at the instance of beneficiaries who have animosity towards him, but base their claim on allegations relating to his conduct of the trusteeship which are not or may not be well founded, though he may not be anxious to continue in office, will be concerned that if he fails to defend and refute the allegations, he will be taken as acknowledging the allegations. In such circumstances, the trustee would be well advised to consider making an offer of settlement under Part 36 of the Civil Procedure Rules including positive proposals for the appointment of a new independent trustee of good standing in his place, with whom the beneficiaries might enjoy a better relationship, without in any way conceding the allegations of misconduct, and thereby protecting his position as to costs so far as possible.*
>
> *Beneficiaries who unsuccessfully seek the removal of trustees will normally be ordered to pay their costs.*"

The Deputy Bailiff is satisfied that these principles can properly be adapted for use in relation to an application to remove an executor (see, eg, *Green (as administratrix of the Estate of Peter Maclean Maitland deceased) v Astor* [2013] EWHC 1857 (Ch)).

139. Advocate Shepherd referred to the test for removing a trustee derived from *Letterstedt v Broers* (1883) LR 9 App Cas 371 (at pages 386, 387 and 389):

> "*... 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. ...*
>
> *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. ...*
>
> *It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.*"

It is apparent from the analysis of how this test has been applied in other jurisdictions that the jurisdiction to remove a trustee (or a protector), and so also by analogy an executor, is not to be exercised lightly (see, eg, *In the matter of the K Trust* (unreported, 14 July 2015)). Because it is a significant step, the Court should adopt a cautious approach. The evidence needs to demonstrate that the execution of the trusts, or in the present context, the administration of the Estate, is being hampered. As Advocate Fooks had pointed out in her written submission, article 17 of the Probate (Jersey) Law 1998 provides that an application to remove an executor or administrator from office must be "*on exceptional grounds*".

140. The difficulty in the present case, though, is that the Court did not proceed to determine whether the Removal Application should be granted. Instead, it was withdrawn. In those circumstances, the Court is left to consider what the outcome would have been. As explained in the *Al-Kazemi* case (*supra*), by reference to what had been set out in *Emezie v Secretary of State for the Home Department* [2013] EWCA Civ 733 (at para. 4), "*The starting point now is whether the claimant has achieved what he sought in his claim.*" Guidance is also offered by Lord Neuberger MR in *M v Mayor and Burgesses of the London Borough of Croydon* [2012] 1 WLR 2607 (at para. 63):

> "*... the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.*"

That position has previously been reflected by this Court (eg, in *Maurice v Chief Executive of the States of Alderney* (*supra*), in which referenced was made to the fall back position of there being no order as to costs).

141. The First Plaintiff suggested that the relationship of him, on behalf of the Plaintiffs, with the First Defendant deteriorated through lack of communication. In his mind, he also linked this to what happened in relation to the sale of La Chanterelle. Strictly speaking, these are, of course, separate matters. The four heirs instructed the First Plaintiff to act on their behalf in respect of the sale. This was outside his functions as Executor of the Estate. It was, however, the time at which communications started to be conducted almost exclusively through Advocates. This was not a helpful stance for the Plaintiffs to have taken. It had the effect of polarising the parties' positions. This loss of confidence in the First Defendant came about in early 2012, although it is unclear what impact it had on the administration of the Estate until the Removal Application had been made and the Harrier issues crystallised.

142. Advocate Shepherd's suggestion that the Removal Application was doomed to failure because of the time at which it was brought cannot be accepted without further enquiry. The speed with which an estate can be administered depends on many things, but principally relates to what the assets are, how readily they can be recovered by the administrator, what the liabilities are and how quickly they can be settled, and how readily the assets left can be distributed. As shown by the speed with which the assets in cash or convertible to cash were got in by the First Defendant and distributed equally to the four heirs, some estates can be finalised within months of obtaining probate. However, the sticking point in the Estate was Harrier and how to deal with the shareholding in it. In that regard, as noted in the Jurats' findings, the hostility was between the Plaintiffs and the Second Defendant; none of it was directed towards the First Defendant, at least initially. The First Defendant has suggested that no decisions could be reached because the First Plaintiff and the Second Defendant were deadlocked. It was in those circumstances that he took it upon himself to act to preserve the value of the asset in accordance with his duties as Executor. This was less apparent at the time the Removal Application was made, but came into sharper focus during the summer, arising particularly from the Harrier Application.

143. Advocate Shepherd also suggested that the Removal Application was doomed to failure because the Plaintiffs failed to identify replacement executors who would be willing to accept office. By proposing the Second Defendant as a joint executor, who had clearly indicated that she would not accept office, the Plaintiffs were not adopting the approach identified from cases in England and Wales such as *The Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch) and *Heyman v Dobson* [2007] EWHC 3503 (Ch). Whilst it would be preferable in any case where the removal of an office-holder is sought to identify clearly someone who has agreed to act, it is not going to prevent the Court ordering the removal of an office-holder if this is not done. If necessary, the effect of the order can be stayed, possibly on appropriate terms, to enable a suitable alternative to be found. What is more important is to reach a decision about whether the office-holder should be removed or permitted to continue in office. In other words, had the Removal Application been heard in January 2013, the Jurats would have been invited first to concentrate on whether the test for removal had been established and, if it had, whether the proposal to have one or more family members as executors was feasible or whether to adjourn to enable the Plaintiffs to offer a viable alternative.

144. The withdrawal of the Removal Application did, of course, mean that the First Defendant remained in office. To that extent, it did not succeed. However, this outcome must be looked at in the context of the Beneficiaries' Agreement. It is clear from the terms of that Agreement that the role of the First Defendant as Executor was simply to give effect to the decisions taken by the heirs. It was, therefore, unnecessary for the Plaintiffs to proceed with seeking the First Defendant's removal because he was no longer in a position to do anything other than the heirs' bidding. The costs associated with what he still had to do were also capped. To that extent, it could be said that the Application succeeded.

145. Looking at the evidence in 2015, the findings of the Jurats suggest that in 2013 the Court may also have concluded that the Plaintiffs had failed to establish that their Removal Application should be granted, again suggesting that it would not have succeeded. However, whether that would have been the outcome is less clear if one bears in mind, as the Court must, that there

would have been no Beneficiaries' Agreement concluded. That is a significant factor because it is apparent that the ability of the heirs to reach agreement was what stopped the Removal Application being heard that week. If there had been no agreement for the First Defendant to remain to perform the handful of formal tasks left for him, there may have been a less clear-cut outcome to ensure that the administration of the Estate was not hampered thereafter. Given this degree of doubt about the possible outcome, the Deputy Bailiff does not regard the conclusions of the Jurats on paragraph 3 of the Costs Application as determinative of the costs order to make on the Removal Application.

146. In the light of these factors pointing in different directions, the Deputy Bailiff has concluded that it is impossible for him to gauge whether the Removal Application would have been successful or not. Which outcome would have prevailed is not tolerably clear. The consequence of that conclusion is that rather than award the Plaintiffs their costs on the recoverable basis, as sought, there will be no order as to costs on the Removal Application itself. That outcome is consistent with the position reached between the Plaintiffs and the Second Defendant under the Beneficiaries' Agreement. Paragraph 1 of the Costs Application is, therefore, also dismissed.

147. Having reached that decision in respect of the costs that were reserved on 29 January 2013, the question of whether or not the First Defendant is entitled to rely on the indemnity in clause 10.1 of the Will also arises. In that regard, the findings of the Jurats might be regarded as having some relevance. They have concluded generally that the First Defendant has not acted in such a way that there has been misconduct of a type depriving him from being entitled to rely on the indemnity. In particular, they have found that his decision to resist the Removal Application was a justifiable one. In these circumstances, the costs the First Defendant has incurred in resisting the Removal Application could fall to be viewed in the same way as the general costs of his administration and the Jurats' conclusions could apply to them in relation to paragraph 3 of the Costs Application.

148. The Court is conscious, however, that the approach in ***Parujan v Atlantic Western Trustees Limited*** (*supra*) (see, in particular, paragraph 15: "*It is a clear breach of trust for a trustee to use the trust fund to pay its own legal fees in circumstances where it is engaged in hostile litigation with the beneficiaries of the trust.*") rather implies that the First Defendant was wrong to take the fees he incurred in resisting the Removal Application from the Estate before now. Instead, he should have funded those expenses himself until such time as the Court made an order in respect of the costs.

149. Because the Removal Application is categorised as a "*hostile*" one, any suggestion that the First Defendant could only be protected in respect of the costs he incurred by making a ***Beddoe*** application is rejected. Resisting an application for removal is, in the first instance, an example of an executor acting for his own benefit. That is why the first stage of the consideration is how to deal with costs in respect of the Removal Application. An executor would not get an order predetermining the question of recovery of costs in a removal application from the estate he is administering where the allegations are that he has misconducted himself to such an extent that he should be removed from office and his right of indemnity should be lost. Accordingly, this was not a case where, before proceeding to draw the fees and his expenses he would incur in defending the Removal Application, the First Defendant had a duty to seek relief by way of a ***Beddoe*** application. Indeed, it would have been a misuse of Estate funds to have made such an application. The proper approach has, therefore been followed. The First Defendant remained at risk that the Court would order that costs followed the event so that, in the event of his removal, he would potentially have been personally responsible for paying the Plaintiffs' costs, ie, the order the Plaintiffs sought by paragraph 1 of the Costs Application. Once the costs of that action following its withdrawal are determined as being that both sides bear their own costs as a litigation outcome, the question of the First Defendant's indemnity pursuant to the Will still falls to be determined by reference to the test for other costs he seeks to take from the Estate.

150. As a consequence of the decision that there be no order as to costs on the Removal Application, it means that both sides will have to bear their own costs. In the light of the Jurats' findings, the Deputy Bailiff's ruling is that, despite para. 27-113 of *Lewin on Trust* and the ***Parujan*** case (*supra*), in the context of the 1930 Law, the First Defendant acted honestly and reasonably in resisting the Removal Application because the eventual withdrawal of it meant that he remained in office. Strictly speaking, though, he should not have taken the costs and expenses he incurred from the Estate whilst the proceedings relating to his removal were underway. At that stage, in the light of the ***Parujan*** case, the First Defendant was defending his interests rather than those of the Estate. Until the costs of that Application were decided, he had no entitlement to look to his indemnity under the Will. Accordingly, by taking his costs from the Estate earlier than he was entitled to do so, he has deprived the Estate of the interest that would have accrued had the amount taken remained in the Estate until now. Accordingly, that step of drawing his costs and fees from Estate monies before the Court has confirmed that he is permitted to do so amounts to misconduct of a type covered by the authorities. The First Defendant is, therefore, ordered to make good that loss to the Estate by reimbursing to it an amount representing the interest that would otherwise have been earned had the amount withdrawn remained in the interest-bearing account used in relation to the Estate.

The Harrier Application

151. The first part of paragraph 2 of the Costs Application relates to the Harrier Application. Because it is a distinct matter from the Winding Up Application, it makes sense to deal with each separately.

152. The most significant asset left to be dealt with by the First Defendant from the beginning of 2012 and certainly from the time of the Plaintiffs' Removal Application was the share in Harrier. It is now apparent that, when the Court appointed Advocate Atkinson as guardian of Ernest Green in 2010, no one gave any real thought to the requirements of Panamanian company law about how to operate Harrier. Ernest Green was no longer capable of performing his duties as President of Harrier, yet no steps were taken to appoint a further director. Advocate Atkinson appears to have taken steps to market Harrier, or at least Elliot House, for sale, but without success. The two other directors, the First Plaintiff and the Second Defendant, appear to have had no real involvement in the management of Harrier over the months preceding their father's death, nor in the months following it. Their stance appears to have been to continue how matters were when their father was alive. They left Harrier's affairs largely in his hands and so left matters largely in the hands of Advocate Atkinson through the guardianship.

153. Matters did not change radically following Ernest Green's death. The First Plaintiff highlighted to the First Defendant that some steps needed to be taken in respect of Elliot House and the timing involved in them. He should, as a director of Harrier, have addressed these concerns to the Second Defendant as the other director. The First Defendant wished initially to sell Elliot House, along the lines previously determined by Advocate Atkinson and also because that had been in Ernest Green's mind, or to transfer the share in Harrier to the four heirs. When he suggested this to them in the letter of 23 January 2012, the Plaintiffs were happy to have the share transferred in this way but the Second Defendant was not. Bearing in mind the report prepared at that time by Bidwells, although this was not immediately shared with the four heirs, or at least with the two heirs who were directors of the company, which is a decision for which no satisfactory explanation was offered, the First Defendant was aware of the significance of the Primary Care Trust's potential exercise of the break notice available to it under its lease. It was open to him to have sought guidance from the Court at that stage, but he did not do so. He eventually made his emergency application, ie, the Harrier Application, when it was really too late to do anything other than react to the service of the break notice.

154. The sequence of events following the Court hearing on 10 July 2012 shows that the First Defendant decided to proceed with the re-geared lease of the PCT's area of Elliot House without seeking blessing from the Court. However, there are inconsistencies in the approach

he took. He identified that Mrs Mason could be appointed as a third director to break the deadlock on the Board of Directors. In taking that step, it seems as though the First Defendant firmly intended for the Board of Directors to take over the management of Harrier from that time and that his role as holder of the share would cease. However, as soon as he realised that what was done by the Board was open to question, because the First Plaintiff had not been properly notified of the meeting at which decisions in respect of the proposed Deed of Variation were taken, which the First Defendant acknowledged was a mistake, he reverted to taking it upon himself to reach decisions binding Harrier as its shareholder. In doing so, the First Defendant confirmed the position he had already taken in that capacity, but without seeking any blessing of such a momentous decision from the Court. Because the implication of him having taken this step without seeking the Court's blessing is that he did not consider it necessary or desirable to do so, the Deputy Bailiff considers that this supports the conclusion that the step taken by the First Defendant in making the Harrier Application in the way he did in July 2012 was one that was unreasonable conduct on his part.

155. When seeking the blessing of a momentous decision it is incumbent on the person making that application to have reached a decision and put before the Court all the relevant material he considered when reaching the decision. The Court then considers whether, on the material reviewed, the decision is one to which blessing should be given. In doing so, the Court is not taking the decision in place of the applicant, which is the position where a fiduciary surrenders his discretion to the Court (ie, the established distinction between categories (2) and (3) derived from *Public Trustee v Cooper* (*supra*)), but rather approaching the issue to decide whether the decision was one that is lawful and within the powers of the fiduciary decision-maker and that it does not infringe the duty to act as an ordinary, reasonable and prudent fiduciary might act, ignoring irrelevant, improper or irrational factors. Where, as in the Harrier Application, the information on which the decision was based appears to the Court to be incomplete, it will not be able to bless the decision. That was effectively the position on 10 July 2012. Put another way, the reason given for having to adjourn the hearing of the Harrier Application was that the First Defendant had not acquired all the information he required before taking a decision, which meant that it was irrational for him to have reached the decision he had made prior to making his Application to the Court.

156. Thereafter, of course, the First Defendant stepped back from taking decisions in respect of Harrier and left them to the Board of Directors. This demonstrates that a timely decision to have re-constituted the Board of Directors before matters became as pressing as they were in July 2012 was a potential solution to the deadlock between the First Plaintiff and the Second Defendant. The deadlocked position was known by the First Defendant from no later than late May 2012, when the First Plaintiff intimated that he had concerns about approving the re-geared lease of Elliot House. Despite that, no steps were taken by him in the six or seven weeks from that time until the Harrier Application was made to seek guidance from the Court. The speed with which he sought advice on Panamanian company law is a further factor in reaching the conclusion that the steps taken leading up to the making of the Harrier Application were inadequate. Whilst it is true that the First Defendant sought copies of relevant information relating to Harrier from the First Plaintiff, when these were not forthcoming within the requested time period, it was necessary for him to seek that information from elsewhere. In short, Mossack Fonseca should have been contacted much earlier than happened so that any decision taken by the First Defendant in his capacity as the holder of the share in Harrier was taken against the background of clear advice as to the lawfulness of what he was doing.

157. For these reasons, the Deputy Bailiff concludes that the timing of the Harrier Application and the incomplete information provided at that time has taken the First Defendant beyond the threshold of reasonably justifiable behaviour. Whilst appreciating that the Application itself was made in rather a rush, it was poorly presented. The Skeleton Argument in support of it was only prepared at the Court's direction on 11 July 2012. Before then, it was not very clear as to why the Application was being made. The relief sought by the Application was that "*the First Defendant be authorised to enter into a new lease … on substantially the terms set out in the draft Heads of Terms*". It did not say in terms that he had already decided that this was in

the best interests of the Estate, although this was covered in the Affidavit in support. There was a level of confusion as to why the Application was being made in the way it was which should have been sorted out and so clarified for the benefit of everyone convened to the Court before the Application was presented. Further, the costs aspect of the Application also left the impression that the First Defendant attributed the blame for him needing to seek relief from the Court to the Plaintiffs, because he sought to take the costs of the Application "*on an indemnity basis out of the Plaintiffs' share of the Estate, alternatively the Estate*". If the Application arose because of the deadlock between the First Plaintiff and the Second Defendant, quite why the Second and Third Plaintiffs could be held responsible for this state of affairs remains a mystery. The implication, therefore, is that this Application might even be categorised as being hostile rather than an administration application. In short, because of the way the Application was presented, it was inevitable that the relief sought could not be granted at the first hearing. Further, subsequent events have shown that decisions have been taken for which no blessing has been sought. As Advocate Richardson put it, if it was justifiable to come to Court in July 2012, it would have been justifiable to come to Court at the time of taking the decision in August 2012. (It would similarly have been justifiable in March 2012 when the First Defendant first took the decision.) This was an Application that should not have been brought in the way it was and the Plaintiffs should not have been put to the expense of responding to it. Accordingly, in respect of paragraph 2 of the Costs Application, the Court awards the Plaintiffs their costs of the Harrier Application on the standard recoverable basis against the First Defendant.

158. Adopting the approach of how to deal with costs in respect of a matter withdrawn from the Court but with costs reserved (and treating it as if it were hostile), this was an Application where the withdrawal can, in the Deputy Bailiff's view, be treated as conceding that the relief sought had not been granted. The purpose of seeking the Court's approval without surrendering the decision-maker's discretion is that no beneficiary, or heir, may thereafter complain that the exercise of the power was a breach of duty. The non-pursuit of relief in respect of the decisions taken regarding Harrier points towards it being sufficiently clear that for this Application the costs should effectively follow the event on withdrawal.

159. A further consequence of that order is that the First Defendant is not permitted to rely on the indemnity in the Will. Having been found to have improperly incurred the costs in bringing the Harrier Application in the manner it was made, the First Defendant is obliged to repay to the Estate the costs he has taken from the Estate in that regard. Further, because the First Defendant has taken those monies from the Estate there should be interest added to that the reimbursement to the Estate puts it back into the position it would have been in had the amounts taken remained in the Estate's interest-bearing account throughout. In this way, all of the heirs benefit equally from the enhancement to the Estate, which is a fair and equitable outcome for them. There is, of course, no suggestion here of any dishonesty on the part of the First Defendant but, as the authorities demonstrate, misconduct includes unreasonable conduct, which extends to the bringing of an application before the Court which was flawed in the way it was. To that extent, some relief pursuant to paragraph 3 of the Costs Application is granted.

The Winding Up Application

160. Given the contentious aspects of the First Defendant's decisions, the Winding Up Application can properly be classified as a category (2) application under the *Public Trustee v Cooper* categorisation. There is no suggestion here of any hostile element. In principle, therefore, the costs of this Application fall to be dealt with in accordance with the indemnity in the Will and subject to the same test as described above as to when an executor may be deprived of his entitlement to recover his fees from an estate.

161. Advocate Shepherd has suggested that there is some causal link between the making of the Winding Up Application in December 2012 and the Beneficiaries' Agreement in January 2013. Aside from the relative proximity in time, none of the evidence pointed in that direction. The timing of the Beneficiaries' Agreement appears to the Court to be more closely related to the four-day hearing listed in January 2013 than the making of the First Defendant's Application. Had the making of the Application played a clearer part in bringing

the heirs to their Agreement, the Court would have expected this to have been achieved before the time at which the costs associated with preparing for the hearing would have been incurred, ie, at the latest some days previously, and more closely linked to the making of the Application in mid-December 2012.

162. The issues in relation to the decision to make the Winding Up Application are those of timing and content. Advocate Richardson has suggested that an application of this nature should either have been made much earlier in the administration of the Estate or should have been deferred until the Court had decided whether the First Defendant should be removed or continue in office.

163. Looking at the terms of the Winding Up Application, the First Defendant's primary proposal to resolve the principal issue outstanding was to transfer the Harrier share to the Plaintiffs with them each contributing equally to the value of the Second Defendant's quarter share in it. This was a proposal first put by the Second Defendant in April 2012. An approach to the Court earlier than December 2012 on this issue may have broken the deadlock within the Board of Directors of Harrier before any of the matters that led to the Harrier Application arose. However, by including in the Application an alternative solution, it seems that the First Defendant was not nailing his colours to the mast sufficiently by advancing a decision he had taken in respect of which he sought the Court's blessing. Instead, it appears that he was putting forward the only realistic options open to him and indicating his preference.

164. In relation to the sale of the shares in East Hangarage Limited, the First Defendant properly recognised that the Estate had contracted to transfer them to the Second Plaintiff for value. The purchase price was £450,000. Each of the beneficiaries would be entitled to one-quarter of that amount, net of any costs of the sale. The Plaintiffs' proposals in this regard were set out in Advocate Richardson's e-mail of 2 August 2012. From paragraph 87 of the First Defendant's Third Affidavit, it appears that he misconstrued what was being proposed. All that needed to be done was to switch from the portion of the undistributed Estate passing to the Second Plaintiff £112,500 to be added to the undistributed share to pass to the Second Defendant. The First Defendant was unhappy that the effect of the arrangement was that the First and Third Plaintiffs were making a gift to the Second Plaintiff on which they should have taken independent legal advice. In the circumstances of the family dynamics at that time, this was an unproductive stance to take. It made no difference to the Estate and it was quite clear that the Plaintiffs were presenting a unified front. His unwillingness to accept a straightforward arrangement produced prejudice to all the heirs. If this was something about which he had concerns, he should have been seeking directions from the Court in a timely fashion.

165. The Second Defendant has disputed the value of the items of personalty taken by the Plaintiffs from La Chanterelle. There have been some independent valuations undertaken of some of the items. The Second Defendant estimated the value to be £40,000, but the First Defendant's proposal for finalising the Estate was that the figure of £20,000 should be used. He proposed to distribute to the Second Defendant one-quarter of that amount, ie, £5,000. This is an example of where the First Defendant has chosen to be pragmatic. For example, he has made no attempt to reconcile the different values of items taken by each of the three Plaintiffs. If he was prepared to do that in relation to the removed contents of La Chanterelle, it begs the question why he was not similarly pragmatic about the shares in East Hangarage Limited.

166. The value of the personalty in France was approximately £34,000. There were also potential liabilities. Matters could only realistically be concluded after the heirs had regularised the succession to La Ville Couvé. It was entirely appropriate for the First Defendant to remind the Plaintiffs and the Second Defendant that this fell outside his responsibilities as Executor of the Estate. He could have taken a view as to what a reasonable amount would have been to set aside to meet these liabilities and proceeded to finalise the Estate subject to this one area being left. Given the amounts involved, it really required a cost-effective approach so that the value of the Estate was not unduly diminished.

167. All of these matters had been left open rather than being tackled by the First Defendant one by one. They were all likely to have been raised by the Plaintiffs in relation to the Removal Application as evidence that the proper administration of the Estate was being frustrated by the First Defendant's unwillingness to grasp the nettle and take some decisions. In those circumstances, and with the Removal Application listed for just a little over one month later, there is a real question as to whether this Application should be viewed as being unnecessary, in the sense of needlessly increasing the costs to the Estate (see by analogy, eg, para. 27-11 of *Lewin on Trusts*).

168. Reverting to how to deal with an Application such as this that is then withdrawn, it is, in the view of the Deputy Bailiff, more difficult where the application is clearly not hostile and where ordinary costs orders are not usually made because the principle tends to be that the costs are taken from the pool of assets in respect of which the application is being made. However, to the extent that it is appropriate to consider whether the effect of the withdrawal of this Application is indicative of one side or the other succeeding, it is noted that the Winding Up Application was expressly stated to be dependent on the Removal Application not succeeding, because it could not have been pursued by the First Defendant had he no longer been in office. The withdrawal of the Removal Application meant that the First Defendant remained in office and so was in a position to continue with the Winding Up Application. It is further noted that the Beneficiaries' Agreement largely reflects the principal way in which the First Defendant proposed to finalise the Estate. In that way, it can be said that the Application was successful. The withdrawal of this Application was not, therefore, a concession that the Application was going to fail, but arose because it was clear that it no longer needed to be pursued because terms of settlement had been agreed. Therefore, unlike the Harrier Application, this is not a case where, on the reservation of the costs, there should be any costs order made in favour of the Plaintiffs against the First Defendant. Accordingly, this aspect of paragraph 2 of the Costs Application is dismissed.

169. Turning to the second stage of the consideration of the costs incurred by the First Defendant in making the Winding Up Application and whether they should be ordered to be repaid by him to the Estate, the Court has to consider again whether this was conduct that crossed the threshold of reasonably justifiable behaviour. The starting point for this analysis is the overall conclusion of the Jurats that the general conduct of the administration of the Estate by the First Defendant has not taken him outside the ambit of the indemnity in the Will. There is a presumption, therefore, that he is entitled to rely on his indemnity in respect of the making of the Winding Up Application. The Court notes, however, that a separate file was opened at Mourant Ozannes in relation to this Application and that the costs allocated to it as shown in the First Defendant's Third Affidavit in support of it were put at £56,947, although the First Defendant further explained that these costs included those spent on the Harrier Application. He appended to his Fifth Affidavit a similar table, where the billed costs in respect of the Winding Up Application were £37,523. The same figure appears on the updated table dated 13 May 2015, in which the previous unbilled costs of £108 have disappeared. The Court takes the view that this is an extraordinarily large amount of costs to incur at a time when the very question of the First Defendant incurring any costs was open to question. It is essential that executors remember that the monies in the Estate are not theirs from which to draw as they please (see, eg, the comments in the ***Tubuoh*** case (*supra*)).

170. The Affidavit in support of the Winding Up Application runs to 915 pages including the appendices and the exhibit. Some of the material had already been provided to the Court, whereas some of it was new. Some of the new material appears to have been included as a means of explaining how the First Defendant had administered the Estate to date. Accordingly, it was arguably more relevant for the purposes of resisting the Removal Application than it was for the Winding Up Application. As mentioned earlier, the purpose of seeking the Court's blessing of a momentous decision is to demonstrate to the Court that the decision being taken is lawful and does not take the decision-maker outside the scope of how an ordinary, reasonable and prudent office-holder might act. The Court needs to understand what the decision is and why it has been taken. In the context of the particular decisions

forming the basis of the Application, the Court takes the view that a more straightforward approach would have been a reasonable one to take.

171. The First Defendant might have decided that he did not actually need to make an application to the Court at all at this stage, and could have confined himself to forewarning the heirs of what he would do if he remained in office. He could have set out his reasons for reaching the decisions he would seek to have blessed without needing to rehearse the full history, with which they were all familiar. Therefore, whilst the Court is not minded to rule that the First Defendant should not have made the Winding Up Application at all, it does regard the way in which it has been prepared as being unduly paper-heavy and so not cost-effective. For example, there was no need in this Application and the Affidavit in support to go into detail about what had happened in respect of the Harrier share. The asset to be devolved to the heirs was the share. The proposal was to transfer that share to the Plaintiffs jointly with a compensating payment out of the undistributed funds to the Second Defendant. The steps taken in relation to the corporate affairs of Harrier and the appointment of Mrs Mason as a director are quite irrelevant to the transaction for which blessing was sought and the rationale for reaching that decision.

172. Looked at in the round, the Court is not satisfied that the entirety of the costs associated with making the Winding Up Application can be said to have been reasonably incurred. The approach to the Court at that time should have been to put in a clearly focused application with evidence tailored to the reasoning underlying the decisions reached. In many instances, what was proposed by the First Defendant was what had already been agreed. There simply was no need to rake over every step in the processes leading to those agreements. Duplication of materials should have been avoided. In the absence of a detailed breakdown of the time spent in respect of what has been taken from the Estate, the best the Court can do is to take a broadbrush approach. A discount of approximately half the amount spent on this Application strikes the Court as fair, equitable to all the heirs and proportionate. In round terms, therefore, as part of its order under paragraph 3 of the Costs Application, the Court orders the First Defendant to repay to the Estate £20,000 taken in respect of this Application. This amount should similarly carry interest from the time when it was taken from the Estate to reflect the overall loss to the Estate.

Conclusions

173. This was far from being a straightforward case. It has raised novel questions for the Court about the conduct of the administration of an estate by a professional executor. The First Defendant has had to contend with a deeply divided family. Whilst that is not as uncommon as we might all wish it to be, the family divisions have spilled over into matters that properly should have been kept quite distinct from the administration of the Estate. In particular, the First Defendant was unwise to descend into managing the business of Harrier and should have left it to the directors. If either director had wished to turn to the legal owner of the share in the company, that was his or her prerogative, just as it was for them to take their own advice as directors about how to deal with the company's business. The asset in the Estate was the share and not Elliot House. Had the First Defendant shied away from the detail of Harrier's business, it is possible that other aspects of the administration of the Estate would have been resolved in a simpler way. That said, the inability of the heirs to handle the tasks delegated to them under the terms of the Beneficiaries' Agreement speaks volumes and explains why the costs of administering the Estate have been as large as they have been.

174. For the reasons set out, paragraph 1 of the Plaintiffs' Costs Application is dismissed. Instead of there being an order that the First Defendant pay the Plaintiffs' costs of and incidental to the Removal Application, there is no order as to costs as between the parties to that Application. In relation to paragraph 2 of the Costs Application, the First Defendant is ordered to pay the Plaintiffs' costs of and incidental to the Harrier Application on the standard recoverable basis, to be taxed if not agreed, but in respect of the Winding Up Application there is no order as to costs between the parties to it. As regards paragraph 3 of the Costs Application, in general the First Defendant is entitled to rely on his indemnity pursuant to

clause 10.1 of the Will. However, he is ordered to repay the costs he took from the Estate in respect of the Harrier Application and also £20,000 as being a rough estimate of the costs he has taken from the Estate in relation to the making of the Winding Up Application which have been assessed to have been unreasonably incurred by him. Both repayments will also carry interest at the rate prevailing on the interest-bearing account in which the Estate monies were being held to reflect the overall loss to the Estate. Similarly, the First Defendant is ordered to pay into that account an amount equivalent to the interest lost through taking from the Estate his costs and expenses in respect of the Removal Application, which should not have been taken from the Estate until the costs of that Application were resolved. To that limited extent only, paragraph 3 of the Costs Application is granted. The Advocates are requested to liaise over the drafting of an Act of Court containing these orders.

175. In the light of those orders, the costs of the Costs Application (paragraph 4) are formally reserved. If the Advocates are able to agree what this order should be, they can submit an appropriate Consent Order. However, if agreement cannot be reached, the Advocates should either list the case for an Interlocutory Court before the Deputy Bailiff or liaise with the Greffe to seek an appointment for the hearing of argument relating to those costs.

176. Finally, the Court wishes to express its thanks to all the Advocates involved for the way in which the case has been dealt with and to apologise to the parties for the delay in giving this judgment.