Neutral Citation Number: [2025] EWHC 2829 (Ch)

Case No: PT-2023-BRS-000112

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 3 November 2025

Before :

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

- -

Between :

FIONA JANE BURGESS — **Claimant**

- and -

(1) JULIE ELIZABETH WHITTLE — **Defendants**
(2) ROBERT PAUL ROWELL

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Oliver Wooding (instructed by **Clarke Willmott LLP**) for the **Claimant**
Graham Stott (instructed by **gunnercooke llp**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Judgment on costs

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This judgment was handed down remotely at 10:30 am on 3 November 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archive.

HHJ Paul Matthews :

Introduction

1. I handed down my written judgment on the substantive claim to the parties at an attended hearing on 16 October 2025: see [2025] EWHC 2633 (Ch). That judgment held that the deceased's will dated 6 June 2014 was valid, and that a grant in solemn form of administration with that will annexed should issue to the claimant. At the handing-down hearing, I received oral submissions on the question of costs from both the claimant and the first defendant. In broad terms, the claimant sought her costs of the claim from the first defendant, and on the indemnity basis, to be assessed if not agreed, coupled with an order for a payment on account of those costs in the meantime. The claimant also asked for an indemnity out of the estate for such of her costs as were not ordered or recovered. The first defendant did not ask for her costs, but sought to avoid payment of any costs to the claimant. This is my written judgment on costs. I am sorry that it has been delayed, as a result of pressure of other work.

The rules on costs

General rules

2. As I have said before in other cases, the *general* rules on costs are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). If the court decides to make an order about costs, the "general rule" is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order, and if so what, the court will have regard to all the circumstances, including "the conduct of all the parties" and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

Special probate rules

3. Perhaps less well known are the special rules that apply to *probate* cases. These are sometimes referred to as the first and second rules in *Spiers v English* [1907] P 122, 123, although they date back long before 1907. In the recent decision in *Leonard v Leonard* [2024] EWHC 979 (Ch), Joanna Smith J referred to them as "exceptions". She said:

> "12. There is no question that the general rule applies to contentious probate cases and the question is always whether there is sufficient reason for departing from the general rule. However, it is common ground that, in probate cases only, it is also necessary to consider whether the court should be guided in the exercise of its discretion by two long-established common law exceptions which have survived the introduction of the CPR. These exceptions were summarised in *Kostic v Chaplin* [2007] EWHC 2909 (Ch) and *Perrins v Holland* [2009] EWHC 2556 (Ch).
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> 13. The exceptions 'allow good cause to be shewn why costs should not follow the event' and require the court to ask:

i) whether the litigation was caused by the testator or a beneficiary. If so, the court may order the unsuccessful party's costs to be ordered out of the estate;

ii) whether the circumstances, including the knowledge and means of knowledge of the opposing party, led reasonably to an investigation of the matter. If so, the court may make no order as to costs.

14. I shall return to the specific circumstances in which the exceptions apply later in this judgment, but for present purposes I draw the following propositions (which I did not understand to be controversial) from the cases as to the rationale for, and general approach to be taken to, the exceptions:

i) the exceptions as formulated were 'designed to strike a balance between two principles of high public importance', the first being that 'parties should not be tempted into fruitless litigation by the knowledge that their costs will be defrayed by others', and the other being that 'doubtful wills should not pass easily into proof by reason of the cost of opposing them" (*Kostic* at [10]);

ii) since the advent of the CPR, the exercise of the Court's discretion is governed by the CPR, but 'the considerations of policy and fairness which underlie the two exceptions remain as valid today as they were before the introduction of the CPR' (*Kostic* at [4]);

iii) the exceptions are intended as 'guidelines, not straitjackets, and their application will depend on the facts of the particular case' (*Kostic* at [6]);

iv) a positive case premised on one or both of the exceptions must be made out before the court will depart from the general rule (see *Kostic* at [6] and *Perrins v Holland* at [3]). It is necessary to make out a 'very strong case on [the] facts' if an unsuccessful litigant is to get his or her costs out of the estate (under the first exception) (see *Re Plant Deceased* [1926] P 139 per Scrutton LJ at 152; cited in *Kostic* at [17]);

v) in respect of the first exception, 'the trend of more recent authorities has been to encourage a careful scrutiny of any case in which the first exception is said to apply, and to narrow rather than extend the circumstances in which it will be held to be engaged' (*Kostic* at [21]). This narrowing of the scope of the first exception (reiterated by Henderson LJ in *Royal National Institution for Deaf People v Turner* [2017] EWCA Civ 385 at [17]) is a function of the fact that, firstly, nowadays less importance is attached to the independent powers of the court to investigate the circumstances in which a will was executed than was the case in Victorian times; and secondly, the courts are increasingly alert to the dangers of encouraging litigation and discouraging the settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party (*Kostic* at [21]);

vi) however, the same narrowing of scope does not apply to the second exception because 'there is … still a public interest that where reasonable

suspicions are raised about the validity of wills they should be proved in solemn form' (see *Perrins v Holland* at [17]);

vii) even where one or both of the probate exceptions applies, the point may be reached where the litigation becomes ordinary hostile litigation, from which point the normal rule entitling the successful party to an order for costs comes into effect (see *Walters v Smee* [2008] EWHC 2902 (Ch) per HHJ Purle QC at [8]).

4. Later in her judgment, Joanna Smith J dealt with the two "exceptions" in more detail. I need not deal here with the first exception, as the first defendant did not suggest that it applied. As to the second exception, the judge said this:

> "29. The second exception arises where, even though the testator has not been to blame for what has occurred, 'if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question…the execution of the will or the capacity of the testator … the losing party may properly be relieved from the costs of his successful opponent' (*Kostic* at [8] citing *Mitchell v Gard*). The reasonableness of the conduct of the unsuccessful proponent of the will is important (see *Goodwin v Avison* [2021] EWHC 2356 (Ch) at [39]). Thus, where the unsuccessful proponents of a will have 'taken a view and acted upon it, in circumstances where they stood to benefit if the will was upheld', there is nothing to warrant a departure from the general rule that costs should follow the event (*Kostic* at [15] citing *Twist v Tye*). The second exception is not an all-or-nothing principle – '[i]t may be that an investigation was justified at the outset but that as the case progressed the issues became clearer and, from some point later on, the normal rule that costs follow the event should apply' (*Boult v Rees* [2023] EWHC 972 (Ch) per Zacaroli J at [2]).
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> 30. There was some debate between the parties both at the hearing and in their subsequent notes, as to the extent to which the application of the exceptions was 'unusual' as the Claimants submit, or 'a matter of routine' as the Defendants submit. But I consider this to be a somewhat arid debate which is of no real practical assistance. The question for me is whether one or both of the exceptions applies on the facts of this case. I am not persuaded by the Claimants' submissions that the second exception can never be engaged, save in very exceptional circumstances, in a case where a will has been held invalid on grounds of want of knowledge and approval or capacity. The research carried out by the parties has established that there are cases in which it has been applied when a will has been held to be invalid on other grounds and I can see no good reason for disapplying the exception to all cases involving a finding of invalidity on grounds of want of knowledge and approval or capacity. I bear in mind that, as I have already said, the second exception is not the subject of an accepted 'narrowing' of scope.
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> 31. Furthermore, I agree with the Defendants that there is no principled reason to draw a distinction between unsuccessful challengers of a will and unsuccessful proponents and I can detect no such reason in the cases. In *Smith v Springford* [2007] EWHC 3446 (Ch) at [24], Norris J made it clear that '[w]hilst it is true

> that an Executor is not obliged to propound a will…it is nonetheless the case that an Executor is prima facie entitled to propound the will in which he is named as Executor'.
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> 32. If an analysis of the authorities identified by the parties after the hearing tells me anything, it is that every case must be considered on its own facts … "

5. As I say, the first defendant did not suggest that the first rule in *Spiers v English* applied, but did submit that the second rule applied. In other words, I was being invited to make *no order as to costs* as between the claimant and the first defendant, on the basis that the circumstances, including the knowledge and means of knowledge of the first defendant, led reasonably to an investigation of the matter.

Relevant facts

6. The sequence of events which are unchallenged, established from the documents in the case, or found by me in my substantive judgment, is as follows. The deceased made her will on 12 June 2014, using a will writing business called Future Legal Services. At that time she was living alone and looking after herself. The will appointed Abbotts Wills and Probate Services Ltd as executor. She died on 13 April 2017. By that time, the deceased was in a care home. On 4 May 2017, the first defendant (acting in person) lodged a caveat against probate of the 2014 will. Abbotts Wills and Probate Services Ltd ("Abbotts") applied for probate, but could not obtain it so long as the caveat was in place. But Abbotts did make a *Larke v Nugus* request of Mr Wansbrough, who had taken instructions from the deceased on behalf of the will writers, and obtained full responses to their enquiries. Abbotts was dissolved in late 2020, before the caveat was lifted. A warning to the caveat was entered by the claimant and the first defendant's son Matthew in June 2021, and the first defendant entered an appearance a few days later.

7. In September 2022, Future Legal Services confirmed to the first defendant that they had seen the original will after the deceased's death and enclosed a copy of the signed will. In February 2023, the claimant sent the first defendant at her request copies of the will file and the medical records then in her possession, and provided contact details for the person who had taken instructions for the will. After further months of correspondence between the parties, the claimant issued the present claim on 7 September 2023. The first defendant (still acting in person) served her defence and counterclaim in October 2023. The claimant's reply was served in the same month. In November 2023 the first defendant (again in person) purported to serve a "Second Reply and Further Defence to the Claim".

8. In February 2024 the first defendant wrote to the claimant that she was "prepared to discuss a resolution of this matter through a mediation and suggest a return to the 1984 Will". The claimant pointed out that there was a question mark over the capacity of the first defendant's son Richard to give up his rights under the 2014 will. The claimant reiterated this in July 2024. The first CCMC took place before DJ Markland in August 2024. The judge sought, and obtained, confirmation from the first defendant that she was not seeking to adduce expert evidence on the deceased's capacity. Consequently, no permission was given for such evidence. The costs of the CCMC were costs in the case.

9. In August 2024 the claimant wrote to the first defendant without prejudice, save as to costs, suggesting that the first defendant should file a notice of discontinuance and pay the claimant's costs. The first defendant asked how much the claimant's costs were, and this information was provided the same day (approximately £53,000). The next day, the first defendant offered the claimant £10,000 in respect of costs. This offer was rejected on 5 September 2024. On the same day, the claimant made an open offer to the first defendant whereby the first defendant would consent to a grant to the claimant of administration of the 2014 will with the will annexed, and would pay 75% of the claimant's costs, to be assessed if not agreed. The first defendant rejected this offer a few days later.

10. On 29 September 2024 the claimant received a copy of the GP notes, after a request made under the relevant legislation. (I note in passing that the first defendant could have done the same.) The deadline for exchanging witness statements was 30 September 2024. On 8 October 2024 the claimant disclosed the GP notes to the first defendant, and invited the first defendant to withdraw her counterclaim. A week later, gunnercooke LLP gave notice that they were now acting for the first defendant. On 25 November 2024 DJ Markland heard three applications that had been issued by the first defendant on 31 October 2024.

11. The first was for relief from sanctions (for failure to file and serve witness statements on time). The second was for permission to instruct a joint expert on the deceased's testamentary capacity. The third was for permission to serve notices of the claim on the first defendant's two sons under CPR rule 19.13. The costs orders were the claimant's costs in the case for the first, and costs in the case for the second and third. (There were also two additional applications for third party disclosure orders directed to Primary Care Support England and to Hampshire County Council. These orders were also duly made.)

12. On 31 December 2024, the claimant wrote again to the first defendant without prejudice, save as to costs. Once again, she suggested that the first defendant should file a notice of discontinuance, and consent to a grant to the claimant of administration of the 2014 will with the will annexed, but this time pay £60,000 towards the claimant's costs, the balance of the claimant's costs coming from the estate. At the end of January 2025 the first defendant disclosed to the claimant the records that she had obtained from Primary Care Support England and Hampshire County Council. A few days later, the claimant wrote to the first defendant noting that the further records did not support the claim of lack of testamentary capacity, and inviting the first defendant to reconsider her claim. The claimant's offer of 31 December was withdrawn.

13. On 31 March 2025 the joint expert produced his report, in which he concluded that the deceased had had testamentary capacity at the time of making the will in June 2014. A week later, on 7 April 2025, the claimant wrote to the first defendant, again without prejudice save as to costs, referring to the expert's report and informing her that the claimant's costs now were about £100,000. The claimant proposed that the first defendant should file a notice of discontinuance, and consent to a grant to the claimant of administration of the 2014 will with the will annexed, but now pay £80,000 towards the claimant's costs, the balance of the claimant's costs coming from

the estate. The claimant's letter also warned that, if the matter proceeded to trial, the claimant would seek costs on the indemnity basis.

14. Two weeks later, the first defendant asked the expert various questions about his report. On 22 May 2025 the expert responded to those questions, and made a final report. The day before, the claimant had chased for a response to her offer of 7 April 2025. On 6 June 2025, having heard nothing in the meantime, the claimant withdrew her offer of 7 April 2025, and made a fresh offer, on similar terms but now seeking, not £80,000, but 80% of her costs from the first defendant. On 21 August 2025, DJ Markland heard the balance of the first defendant's third application, together with an application to vary costs budgets. She ordered that the costs of that hearing be costs in the case. I held a pre-trial review on 11 September 2025, when I made the usual order of costs in the case in respect of that hearing.

15. On 6 October 2025 the first defendant made an offer to the claimant, without prejudice save as to costs. This was that the first defendant would consent to a grant to the claimant of administration of the 2014 will with the will annexed, and would pay 70% of the claimant's costs on the standard basis, it being assumed the claimant had not yet incurred the brief fee. (In fact, she already had.) The claimant wrote the next day to the defendant requesting an improvement in the offer, pointing out that the brief fee was already incurred, and asking for a payment on account of £65,000, with the balance to be paid within 14 days of the final order. However, on 8 October 2025 the first defendant wrote to inform the claimant that there would be no further offer. This day was also the deadline for filing and serving skeleton arguments. The first defendant did not comply with it.

16. On 9 October 2025, the claimant left Australia to fly to the UK for the trial, due to begin on 14 October 2025. Also on 9 October 2025, the claimant made a further offer to the first defendant, that the first defendant should consent to a grant to the claimant of administration of the 2014 will with the will annexed, but now pay 80% of the claimant's costs on the standard basis, with a payment on account of £75,000, and the balance of the claimant's costs coming from the estate on the indemnity basis. On Friday, 10 October 2025 the claimant arrived in the UK.

17. On Monday, 13 October 2025, the day before the trial began, the first defendant filed and served her skeleton argument for trial. For the first time, she conceded the question of testamentary capacity, confirmed that the allegation of undue influence was not being pursued, and declared herself to be neutral, both on the question of want of knowledge and approval, and on the question of the admissibility of a copy will. In effect, there was no longer any opposition by the first defendant to the claim being made by the claimant. On the evidence before the court, the deceased had testamentary capacity at the time of executing the will, and the presumption of knowledge and approval of the contents of the will applied in the circumstances of the case. Moreover, the presumption of revocation by destruction did not apply. In the event, the trial lasted less than an hour. The claimant, who had flown from Australia, was tendered for evidence, but was not cross-examined.

The incidence of costs

18. The question I must ask myself is whether the circumstances, including the knowledge and means of knowledge of the first defendant, led reasonably to an

investigation of the matter. If so, then I may decide not to order the first defendant, as the unsuccessful party, to pay the claimant's costs of the claim. In doing so, I will take into account the reasonableness of the conduct of the unsuccessful first defendant. Were reasonable suspicions raised about the validity of the will? If so, when, and for how long? I will also bear in mind that an investigation may be justified at the beginning, and yet, as the case progresses, and matters become clearer, the need for an investigation evaporates, and the normal rule that costs follow the event is appropriate.

19. In the present case, the first defendant was cut out of the deceased's original 1984 will after an estrangement between them in 2009. This is not a ground for suspicion of a lack of testamentary capacity, nor of want of knowledge and approval, nor of undue influence. People fall out. Testators are entitled to change their minds. As Cresswell J said in *Sefton v Hopwood* (1857) 1 F & F 578, 580, capacity to make a will

> "does not mean that [the testator] should make what other people may think a sensible will. or a reasonable will, or a kind will … "

And here there was an estrangement, a reason for the change. Moreover, the deceased gave the share of the estate which under the former will would have gone to the first defendant *to the first defendant's own two sons*. So it was not given out of the family. The will was made professionally, and independently, albeit by a will-writing firm about which the deceased's children originally had their concerns. But these concerns were overcome. In my judgment, there was simply no basis at this stage for any suspicion that the will was not valid.

20. Even if there had been such a basis, the first defendant took no steps for several years to investigate the position. In September 2022, the will-writers confirmed to her that they had seen the original will after the deceased's death. So there was no basis for suspecting that the deceased had destroyed it. In February 2023, the claimant sent the first defendant at her request copies of both the will file and the medical records that the claimant had so far been able to obtain. Neither gave any grounds for suspicion. Although she could easily have done so, the first defendant did not herself seek the deceased's medical records or her social care records until she made an application in the claim for third-party disclosure in October 2024. When the records were produced, they showed no grounds for suspicion.

21. The claimant finally issued her claim in September 2023, more than six years after the death. The first defendant had not investigated anything in the meantime. At the first CCMC, in August 2024, the first defendant expressly confirmed to the judge, at her request, that she was not seeking permission for expert evidence of testamentary capacity to be adduced at the trial. It was only at a subsequent hearing, in November 2024, that she belatedly asked for permission for a single joint expert to give a report. Permission was given. When the report was produced, it confirmed that the deceased *did* have capacity at the time of making the will.

22. Overall, on these facts, and in my judgment, there is simply no room for the application of the second exception in *Spiers v English* to operate. The first defendant had no reasonable basis to suspect that the 2014 will was invalid, and therefore no reason to investigate. In relation to undue influence, the first defendant refers to *Re Gilhooly* [2020] NI Ch 21, [8], but I cannot see that this assists her. In these

circumstances, I can see no reason why the normal costs rule should not apply, and the unsuccessful party, namely, the first defendant, should not be ordered to pay the costs of the successful party, that is, the claimant. I will therefore make such an order, with costs to be subject to detailed assessment if not agreed.

Basis of costs

23. The claimant further asks that the first defendant pay her costs on the indemnity basis. The test for such an award is well known. It is whether the case is "out of the norm". I set out what I thought were the relevant principles in a case called *De Sena v Notaro* [2020] EWHC 1366 (Ch).[9]-[14]. But there are many other recent authorities on the point. The claimant relies on three main matters. The first is categorising the first defendant's case as "speculative, weak, opportunistic or thin". All the evidence which the first defendant had in her possession before the claim was issued pointed in favour of the validity of the will. There was none pointing in favour of its invalidity. The first defendant challenged the will on four separate bases, namely capacity, want of knowledge and approval, undue influence (for which there was simply no evidence whatever) and the absence of the original will. The first defendant did not even seek to obtain evidence supporting her claim of incapacity until more than a year after the claim had been issued. The evidence that she did obtain was also against her case, including the expert report on capacity. This was indeed an entirely speculative and objectively weak case.

24. The second point is that the first defendant effectively conceded the case only on the day before trial, and then by way of a skeleton argument that was overdue. By that time, the claimant had flown all the way from Australia to give evidence at the trial. This should never have happened. Quite apart from the fact that the skeleton argument should have been put in on time, so that the judge would have had the opportunity at least to consider it before the trial began, on the material available, the decision to concede the various points should have been taken months, if not years before. The first defendant was legally represented, by solicitors, from October 2024, but the fact that she was a litigant in person before that cannot excuse her in this respect. Subject to limited exceptions which do not apply in the present case, the procedural rules in the English courts are the same for litigants in person as they are for represented litigants: *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, SC. Representing yourself in court is a *privilege* given by English law to litigants in our courts (unlike the law in some other countries, where litigants are *obliged* to retain lawyers), but it does not confer any exemption from the rules.

25. Thirdly, the claimant made offer after offer to settle the litigation, all of which the first defendant refused. In fact, the offers were flawed, because they involved the first defendant's discontinuing her counterclaim. In probate claims, however, discontinuance is not the act of a party, but is ordered by the court: CPR rule 57.11. The methods of settling a probate claim are set out in CPR PD 57, paragraph 6.1. Despite the flaw in the claimant's offers, if the first defendant had otherwise been prepared to accept one of them, a means would have been found to implement it. I accept that the first defendant made two offers, but neither of these made any sufficient provision for the claimant's costs, and the first did not grapple with the problem of Richard's capacity. I regard the first defendant's conduct overall as grossly unreasonable, taking more than eight years to decide that there was in fact no

basis for challenging the validity of the deceased's will. Overall, I conclude that this is a case where the first defendant's conduct was well outside the norm, and it is entirely appropriate – indeed cries out – for an award of costs against her on the indemnity basis.

Payment on account

26. Under CPR rule 44.2(8), since I have made an order for costs to be subject to detailed assessment if not agreed, I must also make an order for an interim payment on account of such costs, unless there is a good reason not to do so. In *Learning Curve (NE) Group Ltd v Lewis* [2025] EWHC 2491 (Comm). HHJ Russen KC, sitting as a judge of the High Court, said:

> "59. I recognise that, where the receiving party has an approved costs budget, the court now routinely fixes a payment on account by reference to 90% of the agreed and/or approved budgeted sum (and, as the level of incurred costs generally feeds into any agreement upon or approval of the budgeted costs, I think usually without any real distinction being drawn between the incurred and budgeted elements of the total sum): see, e.g. *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch); [2015] 3 Costs LR 463, at [60], per Birss J; *MacInnes v Gross* [2017] EWHC 127 (QB); [2017] 4 WLR 497, at [28], per Coulson J; and *Sheeran v Chokri* [2022] EWHC 1528 (Ch), at [41], per Zacaroli J. However, those cases concerned costs which were to be assessed on the standard basis. It is because CPR 3.18 provides that, when assessing costs on the standard basis, the court will not depart from the approved or agreed budgeted costs unless there is good reason to do so that the practice has been adopted of taking a high percentage of the receiving party's budgeted costs for the purpose of fixing the payment on account. CPR 3.18 provides reasonable confidence that a figure in the region of 90% of the budget is unlikely to amount to an overpayment and should for that purpose be treated as reflecting the payee's likely irreducible minimum entitlement.
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> 60. In this case, and in the absence of agreement upon the recoverable amount, a significant part of the claimant's costs will be assessed on the indemnity basis and CPR 3.18 will not apply to those costs. As Coulson LJ observed in *Burgess v Lejonvarn* [2020] EWCA Civ 114; [2020] 4 WLR 43, at [89]–[93], if there is an order for indemnity costs, then prima facie any approved budget becomes irrelevant. It follows that the reasoning underpinning the approach to a payment on account, which is illustrated by the three cases mentioned above, does not apply to the significant element of the claimant's costs covered by the award of indemnity costs, whether or not they are included in a presently approved budget."

27. Since I have ordered the first defendant to pay the claimant's costs on the indemnity basis, the same reasoning applies to the present case. The originally approved costs budget of the claimant was varied by DJ Markland in August 2025 to a total of £109,133.50, excluding VAT (of which £27,173.50 were incurred costs, and £81,960 were estimated costs). The claimant acknowledges that this budget will include costs which have not been incurred, such as the second day of the trial and disbursements from mediation. But there are also other costs incurred by the claimant which are not

included. She estimates that her total costs incurred are approximately £155,000. In all the circumstances, I will order a payment on account of £109,000 by 4 PM on 17 November 2025.

Interest on costs

28. The court has power to award interest on costs under CPR rule 44.2(6)(g). The claimant seeks interest at 2% above the Bank of England base rate from the date on which she paid the invoices for her legal costs until the date of this judgment. She will be entitled to interest thereafter at the rate of 8% per annum under the Judgments Act 1838. I can see no good reason why the claimant should be deprived of compensation for the loss of the use of her money, and I will make the order sought.

Indemnity out of the estate

29. In successfully propounding the 2014 will, the claimant was not acting as the personal representative of the deceased. She is therefore not within the provisions of CPR rule 46.3, and thereby entitled to an indemnity from the estate. But, in *Sutton v Drax* (1815) 2 Ph 323, Sir John Nicholl, sitting in the Prerogative Court of Canterbury, held that:

> "Where a legatee propounds a paper and establishes it, thereby fulfilling the duty of the executor, the legatee is entitled to have his expences paid out of the estate of the deceased. This is the rule of the court."

This rule was followed in *Williams v Goude* (1828) 1 Hagg Ecc 577, 611 (Sir John Nicholl), and *Thorne v Rooke* (1841) 2 Curt 799, 831 (Sir Herbert Jenner).

30. When the Court of Probate was created, under the Probate Act 1857, the rules of practice and procedure from the Prerogative Court of Canterbury were carried over to the Court of Probate: see section 29. Then, when the Court of Probate was itself replaced by the High Court, under the Supreme Court of Judicature Act 1873, section 23 provided that the High Court was, subject to any rules and orders of court, to exercise its jurisdiction in as nearly the same manner as the courts which it replaced.

31. Thus, in *Wilkinson v Corfield* (1881) 6 PD 27, a case in the new High Court, Sir James Hannen P said (at 28):

> "In this case a legatee having propounded a codicil made in her favour and succeeded, an application was made to me for her costs upon the ground that in propounding the codicil she ought to be allowed those costs, which, if the executor had done his duty, he would have been able to take for himself out of the estate, and I am of opinion that that is a reasonable application."

The judge went on to refer, for authority, to *Sutton v Drax*. (More recently, see also *Worby v Rosser* [2000] PNLR 140, 143D.)

32. In my judgment the claimant, having successfully propounded the 2014 will, is entitled to be put in the same position as the executor would have been in. Just as the executor would have been entitled to costs on the indemnity basis out of the estate, if

not recovered elsewhere, so too is the claimant. I note that paragraph 5.4 of CPR PD 3E provides that:

> "Any party to such proceedings who intends to apply for an order for the payment of costs out of the trust fund must file and serve on all other parties written notice of that intention together with a budget of the costs likely to be incurred by that party."

The expression "trust fund" is defined by paragraph 5.1 to include "the estate of a deceased person". However, the claimant filed such a notice on the issue of the claim, stating her intention to recover costs from the estate.

Conclusion

33. I will therefore order that the claimant is entitled to her costs of the claim, on the indemnity basis, out of the estate, to the extent that they are not recovered from the first defendant. Since the claimant is to be the administratrix of the estate, it will *prima facie* be her duty to seek to recover those costs from the first defendant in the first instance.