



Neutral Citation Number: [2021] EWHC 2861 (Ch)

Case No: PT-2021-LDS-000008

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

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG
Date: 27 October 2021

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

IN THE ESTATE OF ARTHUR BROOKMAN DECEASED
AND IN THE MATTER OF THE ADMINISTRATION OF JUSTICE ACT 1985

Between :

(1) NEIL BROOKMAN
(2) PHILLIP BROOKMAN

Claimants

- and -

(1) STEVEN ERNEST POTTS
(2) KENNETH AUSTIN

Defendants

Ms Fiona Todd (instructed by **Lofthouse & Co**) for the **Claimants**
Ms Nicola Phillipson (instructed by **Ison Harrison Limited**) for the **Defendants**

Hearing date: 21 October 2021

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

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HH Judge Davis-White QC :

Introduction

1. This is my judgement following the hearing of the CPR part 8 claim form issued on 25 January 2021. In its terms the claim form seeks the removal of the defendants as trustees and executors of the will of Arthur Brookman (the “Deceased”) and the appointment of the claimants in their place.
2. The Deceased was married to Sandra Brookman (“Sandra Brookman”) who survives him. They were married on 18 September 1976 and divorced by a Decree Absolute pronounced on 17 August 2017. They continued to live together at what had been the matrimonial home, 49 Hemsby Road, Castleford, West Yorkshire (the “Property”). Sandra Brookman continues to live there.
3. The Deceased died 30 October 2018. His last will is dated 17 January 2011 (the “Will”). By that will he appointed Sandra Brookman, Russell Potts and the defendants to be executors and trustees of his will.
4. Russell Potts predeceased the Deceased. He was a son of Sandra Brookman and the brother of Steven. Steven Potts, the first defendant, is the surviving son of Sandra Brookman. He is the stepson of the deceased. Kenneth Austin, the second defendant, is the brother of Sandra Brookman.
5. Neil Brookman, the first claimant, and Phillip Brookman the second claimant, are children of the Deceased by a former marriage.

Representation

6. The claimants were represented before me by Ms Todd of Counsel. She was instructed shortly before the hearing. She made every point that she could properly do. The defendants were represented by Ms Phillipson of Counsel. I am grateful to both of them for the practical and efficient manner in which they conducted the hearing and for their assistance.

The Will

7. By clause 3 of the Will, the Deceased gave legacies of £2000 to each of his grandchildren living at his death who reach the age of 18.
8. By clause 4.1 of the Will, the Deceased left his legal and beneficial interest in the Property to his trustees to be held upon trust. As that clause confirms, the Property was co-owned with Sandra Brookman. The current position is that 50% of the beneficial interest is owned by Sandra Brookman and 50% is held by the trustees of the will trust on the relevant trusts under clause 4 of the Will (the “Will Trusts”).
9. The trust of the 50% beneficial interest in the Property created by the Will is held on a discretionary trust. Clause 4.2 of the Will, confers a power to appoint capital and/or income upon trust for or for the benefit of relevant “Discretionary Beneficiaries” as the

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trustees in the discretion think fit. The class of Discretionary Beneficiaries is wide. As drafted, the Will included in the class Sandra Brookman, each of the claimants, the first defendant, Russell Potts and six named grandchildren.

10. Subject to the power of appointment, the capital and income of the trust was to be held on trust for claimants, the first defendant and Russell Potts as were living at the date of the Deceased's death.
11. By clause 4.8 of the Will, the Deceased expressed the wish, but without imposing any binding trust or legal obligation that the Trustees should not sell the property without the written consent of any of the Discretionary Beneficiaries for the time being allowed by the trustees to occupy the Property.
12. The residuary estate was to be held on trust for Sandra Brookman and if she predeceased him then each of the claimants, Stephen Potts and Russell Potts as were living at the date of his death.
13. Russell Potts has, as I said, predeceased the Deceased. Further, by reason of the divorce, Sandra Brookman no longer benefits under the Will, which is to be read as if she had predeceased him.
14. Probate in the estate of the Deceased was granted to Stephen Potts, the first defendant, on 29 January 2019, with power reserved to Mr Austin.
15. A letter of wishes dated 17 January 2011 requests that the trustees allow Sandra Brookman to reside in the Property for life and upon her death that the trust fund should be held for the claimants, the first defendant and Russell Potts (or their survivors) in equal shares.
16. The value of the Deceased's half share of the Property has been valued for probate purposes at £80,000. Mr Neil Brookman states in his witness statement that he exhibits a valuation of the Property at £190,000 (rather than £160,000). That valuation is not included in the bundle before me, nor in an earlier bundle for a hearing before the District Judge. Mr Neil Brookman says that that valuation was agreed between the Deceased and Sandra Brookman in the course of divorce negotiations. In paragraph 12 of the Particulars of Claim it is asserted that the Defendants have failed to administer the estate or to carry into effect the Will Trusts properly or in the interests of the beneficiaries. A number of particulars are relied upon. Paragraph (d) refers to the defendants having allowed the Property as a whole to be valued at £160,000 "which is an under value with the Property being worth not less than £190,000". Paragraph (g) asserts that the defendants have permitted the interests of Sandra Brookman to be preferred to the beneficiaries of the estate. Paragraph (f) asserts that they have in consequence "failed properly to value or arrange a realistic valuation of the Property".
17. Before me, Ms Todd, in my view entirely properly, disavowed any reliance on any assertion relating to valuation of the Property.

The evidence

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18. Before me there were, for the claimant, two witness statements of Neil Brookman and an uncompleted witness statement of Phillip Brookman (the statement as to date of birth is followed by “[insert]”), confirming his agreement with the first witness statement of Neil Brookman.
19. There had been no direction for cross-examination. Ms Phillipson indicated that she was in a position to put her case to the claimant’s witnesses if that was required. She also indicated that there were passages in the witness statement of Mr Philip Brookman, particularly regarding the relationship between the Deceased and Sandra Brookman, that were contested. However, neither she nor Ms Todd considered that that factual evidence was relevant to the issues before me. She therefore did not apply to cross examine but indicated that if I thought it necessary she would do so. In the circumstances, cross examination of the claimant’s witnesses did not take place. I should record that Mr Neil Brookman’s evidence regarding the history between Sandra Brookman and the deceased in his later years is contested.
20. For the defendants, I had a witness statement of Mr Steven Potts, one from Sandra Brookman, one each from three of the grandchildren of the Deceased, and one from the mother of two of the grandchildren of the Deceased, expressing her views as to their best interests.
21. In the case of the evidence from the various grandchildren, it was to the effect that Sandra Brookman should be able to reside at the Property for the rest of her life. In the case of the evidence of the mother of two of the grandchildren, it was to the effect that it was her belief that it would be in the best interests of those grandchildren were Sandra Brookman to be able to reside at the Property for the rest of her life.
22. Ms Todd applied to cross-examine Mr Potts and Sandra Brookman. Ms Phillipson did not oppose the application and I granted it.
23. I found both witnesses to be careful in the evidence that they gave and to be doing the best that they could to assist the court. Naturally their recollections were not 100% accurate, but on the whole I accepted their evidence without reservation.
24. Before setting out further factual findings, I turn to the case of the claimants and the applicable law.

The case

25. I have indicated, the case as set out in the particulars of claim was that the defendants should be removed as executors and trustees.
26. In fact only Mr Potts is an executor to whom probate has been granted. Before me, Ms Todd, in my view entirely correctly, ceased to pursue any case regarding the position of the executor(s). I need not go into the detail but the administration of the estate of the deceased is almost complete. As regards the Property, the interest of the Deceased has been transferred to Mr Potts and Mr Austin as trustees of the Will Trusts. Legal title to the Property itself has been transferred into the names of Sandra Brookman, Mr Potts and Mr Austin. The legacies have all been paid and only the residue falls to be

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distributed. As relevant costs and expenses are payable from the residue, and given these proceedings, it has not been possible to make a distribution of residue pending these proceedings. Somewhat surprisingly, it was suggested in correspondence that this in itself showed maladministration.

27. As I have said, the only claim pursued before me was that to effect a change in the identity of the trustees of the Deceased's interest in the Property, or more accurately, the Property Fund as defined in the Will Trusts. The Property Fund includes the Deceased's 50% share of the Property, any realisations of the same, any income arising and so on. Currently, the only asset is the 50% beneficial interest in the Property.
28. As regards this, the Particulars of Claim, complain, as I have said, in paragraph 12, that defendants have failed to carry into effect the Will Trusts properly or in the interests of the beneficiaries. The remaining particulars relied upon regarding the defendants' conduct are as follows:
- (a) They have failed to take steps to realise the half share of the property belonging to the deceased for the benefit of the Beneficiaries by seeking a sale;
 - (b) they have permitted Sandra Brookman to live there without rent being paid by her in respect of her occupation of the property
 - (c) they have failed to account for this rent to the Estate;
 - (d) ...
 - (e) They have consciously or unconsciously permitted the interests of Sandra Brookman to be preferred to those of the Beneficiaries of the Estate and continue to do so.
29. The continuance of the defendants as trustees is asserted to be "likely to be detrimental to the Trust" (paragraph 13 of the Particulars of Claim) and, despite request of the claimants, the Property is said to remain unsold and not to have been marketed for sale (paragraph 14 of the particulars of claim). Accordingly, it is said, the defendants have shown themselves to be unfit to be [Trustees].
30. In her written and oral submissions, as well as focusing on a failure to collect an occupation rent from Sandra Brookman and a failure to procure a sale of the Property, Ms Todd relied upon an alleged conflict of personal interest and duty as trustee and what she said was a failure properly to reach decisions as trustees of the Will Trust as reasons necessitating the removal of the defendants as trustees. As regards the latter point, she said that the evidence showed that the defendants had reached conclusions to favour Sandra Brookman over the discretionary beneficiaries and then worked backwards to find reasons to justify the decisions already taken for improper purposes.

The law on removing trustees

31. Although the claim form refers only to section 50 of the Administration of Justice Act 1985 and the particulars of claim in places conflate the different positions of trustee and

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executor, it is clear that removal of both the executor(s) and the trustees as trustees of the Will Trust was being sought. The applicable law was agreed.

32. Section 41(1) of the Trustee Act 1925 provides:

“41.— Power of court to appoint new trustees

(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable to do so without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustees or trustees, or although there is no existing trustee.

33. Lewison J (as he then was) summarised the position succinctly as follows, referring back to the judgment of Lord Blackburn in *Letterstedt v Broers* (1884) 9 App Cas 371:

“The overriding consideration is, therefore, whether the trusts are being properly executed; or as he put it in a later passage, the main guide must be “the welfare of the beneficiaries”(see paragraph [46] *Thomas and Agnes Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch)).

34. As Ms Phillipson put it in her skeleton argument:

“In making the decision as to whether or not a trustee should be replaced, the general principle guiding the court in the exercise of its discretion is the welfare of the beneficiaries and the competent administration of the trust in their favour. Lewin on Trusts states, at paragraphs 13-064, 13-065 and 13-071:

“In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee’s duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed. In assessing the significance of friction or hostility between original trustees or executors and a beneficiary, it is relevant to have regard to the fact that they were chosen by the settlor or testator and evidence as to his reasons for that choice.

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The court will not remove a trustee at the mere caprice of the beneficiary without any reasonable cause shown or because the trustee has refused from honest motives to exercise a power at the request of a tenant for life, or because a dissension has arisen between the trustee and a beneficiary. ...”

35. It was common ground before me that the tests for removing an executor and removing a trustee are largely the same and based on the same principles (see e.g. *The Thomas and Agnes Carvel Foundation v Pamela Carvel* [2007] EWHC 1314 (Ch) per Lewison J (as he then was) at para. [44], and *Kershaw v Micklethwaite* [2011] WTLR 413 per Newey J (as he then was) at para.[9]).
36. Ms Todd reminded me of the relevant passages in *Letterstedt v Broers* (1884) 9 App Cas 371. She also reminded me of the often cited passage from the judgment of Chief Master Marsh in *Harris v Earwicker* [2015] EWHC 1915 (Ch) (regarding removal of personal representatives) and which I do not need to set out in full here but which I have well in mind.

Further Facts

37. As will be apparent, one, if not the main, complaint, is that the Property has not been sold so as to realise the Deceased’s half interest in the same and to enable the power of appointment to be exercised. To consider that issue, it is necessary that I set out some more factual findings that I make.
38. First, Mr Potts has confirmed that the Will Trustees consider that the Deceased did intend that the power of appointment should be exercised so as to give effect to the beneficial interests that would arise on expiry of the relevant period under the Will Trusts: namely (as matter stands) a third each to each of the claimants and the first defendant. It should however be stressed that as matters stand the claimants do not have a present interest in the trust fund but are only discretionary beneficiaries (contrary to their stated position in the list of issues).
39. Secondly, I accept the evidence of Sandra Brookman that she is quite ill and unable easily to move from the Property. I also accept her evidence that her state of health has further deteriorated over the last few years since the divorce took place and negotiations for a financial settlement took place. Although she had intended moving to another property after the divorce but before the death of the Deceased that is now a much more difficult undertaking and she would in practice require a bungalow or equivalent one storey ground floor accommodation.
40. Thirdly, the position is that after the divorce the intention had become that Sandra Brookman would move out of what had been the matrimonial home. To that end she had put down a deposit on a new build property. However, when the Deceased was diagnosed with dementia it was decided that she would stay in the erstwhile matrimonial home and look after the Deceased, which she did until he died. She therefore lost a deposit that she had paid on the newbuild property. At all times therefore she has lived at the Property.

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41. Fourthly, the question of equity release to enable the buy out of the Trust's interest by Sandra Brookman and other financial solutions to unlock the Trust's half share in the Property have been looked at but none have proved possible. Ms Todd complained that little detail had been given of these matters. I accept that but there has been no challenge to such matters by way of putting forward other evidence or, for example, by seeking disclosure and challenging the position in the light of the same. I only have to be satisfied on the balance of probabilities that a fact is true before I can make a relevant finding. I do not have to be satisfied to some higher standard or to be satisfied as to precisely what has taken place.
42. Fifthly, I accept that although Sandra Brookman received, before the Deceased's death, a one half share of the proceeds of a property inherited by the him, such share being some £43,000 or so, that money is no longer available to her having been spent on other matters. I accept the evidence as to her limited resources and the evidence that she is unable to find suitable alternative accommodation to buy which would meet her needs from the limited resources that she now has taken together with one half of any sale proceeds from the Property. I also accept that in this respect her needs, flowing from her deteriorating state of health, have become more specific than they were at the time when she was looking to buy the new build property that I have referred to. Again, although Ms Todd complained that chapter and verse as to precisely on what and when the money has been spent, backed up by bank statements and the like, was not before the court, I accept the evidence of Sandra Brookman on this issue.
43. Finally, I do not accept Ms Todd's submission that the evidence demonstrates that the defendants have failed to reach decisions correctly. In essence, her case is that the trustees, motivated by their affection for their mother and sister (as the case may be) have decided, wrongly, to prefer her interests to those of the discretionary beneficiaries (and/or ultimate beneficiaries if the power to appoint is not exercised) and then sought afterwards to justify their conclusion by looking for other reasons after the conclusion was reached. The relevant decisions are said to be the decisions not to pursue an occupation rent and not to sell the property. I shall return to this "trustee reasoning" point later. In this context I would say first that solicitors' letters making various points at various stages are not the same as a letter purporting to set out the entire decision making process or reasoning of the trustees. I do not consider therefore that it is right that such letters show that the reasoning has developed over time to justify a reason already taken. Secondly, the trustees are under a duty to keep things under review. If a decision was justified on the reasoning then employed but is shown also to be justified for legal reasons not appreciated at the time, it seems to me that the decision based on such reasons can stand in any event and not be criticised.

Occupation Rent

44. A key part of the claimants' case is that the trustees failure to demand and procure an occupation rent from Sandra Brookman in respect of her occupation of the Property is one that demonstrates they are not properly administering the trust.
45. The fatal flaw in this complaint is that, as both sides agreed before me, there is no ability for the Will Trustees to obtain such an occupation rent. Section 12 of the Trusts of

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Land and Appointment of Trustees Act 1996 (“TOLATA 1996”) confers on Sandra Brookman a right to occupy the Property. No such right is conferred on the defendants as trustees of the beneficial interest vested in the Trust nor in any beneficiaries under that Trust. Mrs Brookman’s right to occupy may be restricted by the trustees of the land (i.e. the registered proprietors, herself and the defendants) under s13 TOLATA 1996. However, under s13(6) TOLATA 1996 the right to require the person in occupation to pay rent only arises where the rights of another person entitled to occupy have been restricted or removed: in this case there are no other relevant such persons. Accordingly, it was common ground before me that s13 does not confer any ability on the defendants to obtain an occupation rent from Mrs Brookman and that, on these facts, the court does not have power to order the same either.

46. Before this point was appreciated, and even if it is wrong, the position of the defendants has been that Mrs Brookman has been paying substantial outgoings regarding maintenance and insurance of the Property. As regards maintenance, there is fairly clear evidence of some £8,000 or so having been spent and Sandra Brookman gave evidence, which I accept, that she has spent at about £2,000 on top of that. The defendants point out that the trust asset comprises solely the beneficial interest in the Property. There is no cash available for the Will Trusts to pay the half share of maintenance costs attributable to it, nor is there any cash to enable the Will Trustees to bring proceedings to obtain an occupation rent. Further, any claim for rent would have to be set off against such maintenance costs. This seems to me to be a decision within the scope of the Will Trustee’s discretion and one that cannot be said to be irrational or a breach of trust. Ms Todd criticised the absence of evidence before me regarding detailed figures for a potential occupation rent, but equally was not able to bring forward any figures herself to show that the decision was unreasonable or perverse.
47. In the circumstances, I find that there can be no criticism of the failure to obtain an occupation rent.

Sale of the Property

48. What appears to me to lie at the heart of the claimants’ case is a complaint that the Property has not been sold with vacant possession to realise the Will Trust’s half share in it and so enabling the proceeds of that half share to be appointed absolutely to the three discretionary beneficiaries that the defendants have indicated, at the moment, that they would appoint the fund to (in equal shares).
49. However, Sandra Brookman is not prepared voluntarily to leave the Property. Ms Todd submitted that the defendants had failed to ask her this question and that itself showed misfeasance such that they should be removed. I reject that submission in all its parts.
50. In the circumstances an order for sale with vacant possession would have to be obtained. However, the trust of the Property (rather than the Will Trusts of the Deceased’s beneficial half share in it) would likely to be found to have been set up with the intention of providing a home for Mr and Mrs Brookman. After the Deceased’s death, that intention seems to me to be one that would be seen as continuing to provide Mrs Brookman with a home, I reject the submission that that intention ceased because of or following the intention at one time that she move out, but which did not come to

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fruition. Taking that together with Sandra Brookman's needs, the evidence regarding her inability to acquire a suitable alternative property and the absence of any need for the Will Trusts to realise the asset, I consider that any application would be, at the very least, challenging. As I have said, the Will Trusts have no other liquid assets to fund litigation. In all these circumstances, the trustees have decided not to seek an order for sale with vacant possession. It seems to me that that is one within the range of reasonable decisions that they can properly reach. Of course, as they have confirmed through counsel, they will keep matters under review. If for example, Sandra Brookman were to have to move permanently to a care home then that would be a different situation and the position would have to be reviewed, just as it would be if she could no longer afford essential repairs and the Property were to deteriorate. At present, though she has said there are some works she cannot immediately pay for, it is not suggested that the Property is deteriorating.

51. In addition, the trustees of the Will Trusts say that they have had in mind the possibility that Sandra Brookman might commence proceedings under the Inheritance (Provision for Family and Dependants) Act 1975. Of course the six month period for doing so has now expired. However, there is a discretion in the court to extend that time and it cannot be ruled out that there might be a case with a real prospect of success that there should be an extension in the event that the Trustees of the Will Trust were now to seek vacant possession and sale (especially given their stated position hitherto that they were not going to do that). Again, the Will Trusts have no liquid assets to fight such a claim.
52. Accordingly, I do not consider that the underlying matters complained of, namely what is said to be an improper failure to obtain an occupation rent from Sandra Brookman and/or an improper failure to apply for an order for sale of the Property are ones that are made out.
53. As regards the complaint that the Will Trustees have allowed themselves to be put in a position where there is a conflict between their duties as trustees of the Will Trusts and their self interest in looking after Sandra Brookman as their mother/sister, it seems to me that that conflict, if there be a conflict, is one that is in effect brought about by and therefore sanctioned by the terms of the Will and the Will Trusts themselves. In my view, only if it could be shown that the decisions made were improper in some way might such a case be got off the ground.
54. As a matter of fact, and having heard the evidence, I am satisfied that the decisions that the trustees of the Will Trusts have made regarding occupation rent and sale are ones that were properly open to them and which were not ones reached because of some motive of benefitting Sandra Brookman in preference to the discretionary beneficiaries under the Will Trust. It also follows that I reject the submission that the decisions made were reached first, improperly for that motive, and then justified by reasons that did not in fact enter their thought processes until later. As regards occupation rent, the decision appears to have been made on the basis that it was legally possible to obtain an occupation rent in the sense that there was jurisdiction in the court to grant it, whereas counsel before me were agreed that that view was incorrect. Nevertheless, on the assumption that the court had jurisdiction to grant an occupation rent, the decision was supported by reasoning that justified the decision taken. If it has emerged that there is

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in fact a stronger reason for the decision that does not invalidate the decision taken or the review of the basis for the decision.

55. In the circumstances, I do not need to consider the suitability of the claimants to be replacement Trustees. It is common ground there are no other candidates and no scope for the appointment of one or more professional trustees given the assets within the Will Trusts. Had the point arisen I would have considered that the wishes of the testator were a material factor. I would also have doubted that the claimants were suitable given their stated position without explanation as to how relevant litigation is to be funded and their stated position that they are absolutely entitled under the Will Trusts even though, as matters currently stand, that is clearly incorrect. In explaining that her clients were not mercenary and unreasonable, as she suggested I might be thinking from the defendants' evidence, Ms Todd told me that the claimants did not really wish to exclude Sandra Brookman from the Property but that what they wanted was her to buy out the half beneficial share vested in the Will Trusts. If the complaint is that this is what the current trustees should achieve and have failed to do, there is no evidence that this is economically feasible. Further, it is not something that any trustees of the Will Trust can force on Sandra Brookman. If there is an economic way in which Sandra Brookman could buy out the half share in the Property of the Will Trusts I am sure that is something that the Will Trusts and Sandra Brookman may well be interested in. There is nothing stopping the claimants providing relevant details to the persons concerned.
56. Accordingly, I dismiss the claim. I invite the parties to agree an order consequential on this judgment but if they are unable to do so there will have to be a further short hearing.