JUDGMENT : Mr Justice Briggs : Chancery. 30th April 2008.

1. This is an appeal by the defendants against decisions of Master Campbell made on 1st March, 2nd and 3rd May 2007 in the course of a detailed assessment of costs pursuant to a consent order made by Mann J on 10th May 2006, ("the Consent Order") at the conclusion of proceedings under Part 8 by which the claimants Lucinda and Alexander Newall, being beneficiaries under certain family settlements, sought the removal of the defendants John Lewis, Richard Middleton and Lorna Joicey as trustees of the settlements. Permission to appeal was granted by David Richards J after hearing oral submissions by both sides, on 7th December 2007.

2. After recording the parties' agreement that the defendant trustees should retire, upon being given certain specified indemnities, the Consent Order continued as follows:

   "BY CONSENT IT IS ORDERED THAT

   1. The Defendants do pay the Claimants' costs of these proceedings to be assessed on the standard basis if not agreed

   2. The issue as to whether the Defendants also pay the Claimants' costs incidental to these proceedings be reserved to be dealt with as follows:

   a. On the assessment of the Claimants' costs of these proceedings, the costs judge also identifies any costs which he would have allowed if the order for costs had been that the Defendants do pay the Claimants' costs of and incidental to these proceedings, but which he is not allowing pursuant to paragraph 1 above ("the Incidental Costs")

   b. The issue as to whether, and if so the extent to which, the Incidental Costs should be paid by the Defendants be referred to a single Judge of the Chancery Division for determination."

   The Consent Order then made provision for an interim payment on account, and provided that the defendants should not be entitled to be reimbursed in respect of any costs liability, or in respect of their own costs, out of the settlements.

3. The first of Master Campbell's decisions under appeal concerned a preliminary issue as to the true construction of the costs provisions in the Consent Order. The second and third decisions arose during the process of item by item assessment which began on 2nd May 2007, and which was adjourned without being completed on 3rd May and subsequently stayed pending the outcome of this appeal. It is both logical and convenient to take the preliminary issue decision first, not least because, in the event that the defendants succeed on their appeal of that decision, it is common ground that the process of detailed item by item assessment will have to be begun afresh. Nonetheless, in order to make the learned Master's decisions and the appeal against them intelligible, it is necessary to begin with a brief outline of the history of the dispute which led to the Part 8 proceedings.

4. The claimants are mother and son and are beneficiaries of two settlements of assets comprised in the Blenkinsopp Estate, together with other investments, of which the defendants were trustees. At some time in or shortly before September 2003 the second claimant, who had just reached his majority, instructed Messrs Withers to investigate circumstances in which he contended that a longstanding family tradition that he should inherit the Estate had been departed from by the trustees. This led to correspondence between Withers and the trustees beginning in late September 2003, and the sending of the first of a number of lengthy letters of claim on 1st December 2003, making serious allegations of breach of trust and of fiduciary duty against the trustees, and seeking (1) the setting aside of certain lease transactions in relation to Blenkinsopp Hall, (2) restoration to the trust fund of losses caused by the defendants' alleged breaches of duty, and (3) the replacement of the trustees by new trustees. Proceedings for the pursuit of those claims were threatened if resisted, but mediation was proposed in the meantime.

5. The defendant trustees denied the allegation and resisted the claims, and in that stance were initially supported by other member of the settlor's family. Further allegations and claims were added by a letter of claim dated 3rd December 2004, and in March 2005 the defendants were informed that draft particulars of claim were being prepared on behalf of both claimants in advance of, and for the purposes of, a mediation which was in the event held in May. It is apparent from the draft particulars of claim that, at that stage, the claimants contemplated proceedings not only against the defendant trustees, but against two members of the family, alleged knowingly to have participated for their personal advantage in the alleged breaches of duty by the trustees.

6. The May 2005 mediation went ahead, as between the claimants and the family defendants, but in the absence of the trustees, and this led to a conditional agreement for the compromise of the claims against the proposed family defendants, whereby certain assets which it was alleged had been wrongly disposed of for their benefit were to be returned in exchange for a substantial payment. The conditions included the third defendants' consent, and the replacement of all three defendant trustees. The effect of the mediation appears therefore to have been the obtaining by the claimants of the conditional support for (or consent to) the replacement of the defendant trustees by the other branch of the settlor's family mainly affected by the dispute, and the compromise, again on conditions, of their proprietary claims.

7. On 2nd June 2005 the claimants sent a further letter of claim to the defendant trustees, notifying them of the conditional agreement reached at the mediation, seeking their retirement, and pursuing a substantial number of monetary claims including the amount to be paid to the proposed family defendants under the conditional agreement (in excess of £2 million) and various other amounts mainly referable to costs and expenses including

all the claimants' solicitors costs, the costs of the mediation, and various other amounts which had been or might thereafter be charged against the trust Estate.

8. By letter dated 14th June 2005 the claimants separated out from their other claims, for the first time, their demand that the defendant trustees retire, making it clear that the members of the family with whom they had conditionally settled their dispute supported their retirement demand.

9. Thus far, the demand that the defendants retire as trustees had been based, like all the other threatened claims, upon alleged breaches of duty which, if necessary, the claimants proposed to prove by hostile litigation. But on 5th August 2005 the claimants made clear in a further letter that they proposed to base their retirement demand, if necessary, upon the following passage in the judgment of Lord Blackburn in ***Letterstedt v. Broers*** (1883-84) LR 9 App Cas 371, at 386:

   "If it appears clear that the continuance of the trustee would be detrimental to the execution of the trust, 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 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…."

10. After a further threat on 3rd November to bring proceedings solely for the removal of the trustees, the third defendant notified the claimants of her intention to retire in favour of a Mr Westall. This provoked an almost immediate issue of the Part 8 proceedings, coupled with the obtaining of a without notice injunction restraining the appointment of Mr Westall as a trustee, which was continued *inter partes*. Case management directions were in due course given which contemplated that the proceedings would be determined on the basis of written evidence, without cross-examination. It was implicit in the conduct of the Part 8 proceedings, from start to finish, that the claimants did not consider it necessary to prove that their allegations of breach of duty were well-founded (which the defendant trustees had always denied), but rather to base their case upon a reasonable loss of trust and confidence on the part of the beneficiaries, on the basis that there was a *prima facie* case of breach of duty sufficient to justify their desire for new trustees, without having to prove it.

11. Part 8 proceedings are of course inappropriate for the determination of contested issues of fact: see Lewin on Trusts (18th edition) paragraph 13-53. In a letter dated 25th November 2005 the claimants' solicitors said this:

   "If the trustees wish to make an application to the court for the current Part 8 proceedings to continue as if commenced under Part 7 of the CPR which we would strongly oppose as inappropriate given that our clients' claim is based on loss of trust and confidence which is indisputable, then we expect such an application to be made imminently or not at all."

   In the event, the defendant trustees undertook at the Case Management Conference not to make any such application.

12. In due course the defendants decided not to resist the claim that they should retire, so that the Part 8 proceedings were compromised on the terms reflected in the Consent Order, without needing to be tried.

13. The consensual basis upon which the Part 8 proceedings were ultimately disposed of was arrived at in two stages. By 10th May 2006 the parties had agreed that the defendants would retire upon receiving precisely formulated indemnities, and thought that they had also agreed upon an order for costs, but it emerged during the hearing before Mann J on the morning of 10th May that there had not in fact been a concluded agreement about costs. Mann J expressed the outcome as follows: (as recorded in paragraph 8 of Master Campbell's judgment on 1st March 2007):

   "In the light of that little exchange of correspondence which amounts almost to a student-type problem question on offer and acceptance, it seems to me that there has been a mismatch in relation to what the parties were saying about costs, and unfortunate though it is… it seems to me that there is no binding agreement as to costs in relation to this matter… I understand that the next phase of the operation is not that the parties will be resiling from the compromise but I shall nonetheless be invited to decide what order for costs it is correct to make, in other words whether I should make an order that the costs to be paid should be costs of the proceedings or whether the order should be that the costs should be costs of and incidental to the proceedings."

14. Argument about that continued until the short adjournment, during which the parties settled that outstanding dispute, and announced their agreement to a consent order in the terms which I have described at the beginning of this judgment.

CONSTRUCTION

15. This issue relates to paragraphs 1 and 2 of the Consent Order. At first sight it is difficult to see what the issue might be. As a matter of simple language, a layman would conclude that the costs judge's task was to separate out "costs of" the proceedings for payment by the defendants under paragraph 1 and "costs … incidental" to the proceedings, for further consideration by the Chancery judge under paragraph 2, leaving it to the costs judge to apply his skill, experience and judgment for the purpose of distinguishing between the two and, implicitly, excluding any alleged costs which were neither of nor incidental to the proceedings.

16. The difficulty with this apparently straightforward interpretation, as Mr Browne for the claimants was quick to point out both to Master Campbell and on this appeal, is that it is beyond question that a simple order that one party

pay another party's "*costs of … proceedings to be assessed on the standard basis …*" gives an entitlement to costs both of and incidental to those proceedings. The analysis which leads to that conclusion (which Mr Marven for the defendants did not seriously challenge) is as follows. Section 51(1) of the Supreme Court Act 1981 provides (to the extent relevant) as follows:

"Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in- …

(b) The High Court …

shall be in the discretion of the court."

17. Prior to 1986, one of the bases upon which costs could be ordered was the "common fund" basis. In ***Re Gibson's Settlement Trust [***1981] 1 Ch 179, a case about costs awarded on the common fund basis, Sir Robert Megarry V-C sitting with assessors, said, at page 185F to 186A:

"(3) The power to award "the costs of and incidental to all proceedings in the Supreme Court" is conferred by the Supreme Court of Judicature (Consolidation) Act 1925, section 50(1); and these words are echoed by R.S.C., Ord. 62, r 2 (4), which provides that the power is to be exercised "subject to and in accordance with this Order." By rule 28(2), on a party and party taxation there are to be allowed-

"all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."

By rule 28(4), on a taxation on the common fund basis, "being a more generous basis than that provided for by paragraph (2)," there is to be allowed "a reasonable amount in respect of all costs reasonably incurred," and paragraph (2) does not apply. I think that from the setting in which this provision occurs, it is plain enough that the words "costs reasonably incurred" refer to "the costs of and incidental to" the proceedings in question.

18. Costs on the standard basis were introduced in 1986 and, as now provided for in CPR 44.4, this permits recovery of costs provided that they have not been "*unreasonably incurred or are unreasonable in amount*". The CPR introduced the additional requirement that the court will *"only allow costs which are proportionate to the matters in issue"*. It follows that, subject to the question of proportionality and burden of proof, the modern standard basis of assessment is broadly equivalent to the old common fund basis of taxation, so that, by parity of reasoning, an order for costs of proceedings on the standard basis picks up costs "of and incidental to" those proceedings.

19. Thus, submitted Mr Browne, the ordinary meaning of the well-worn phrase in paragraph 1 of the Consent Order was sufficient to pick up all the claimants' costs of and incidental to the Part 8 proceedings, such that no additional costs would be identifiable by reference to the formula in paragraph 2.a. of the Consent Order once any issue as to the true meaning of paragraph 1 is resolved.

20. The difficulty with that construction, as Mr Marven for the defendants was equally quick to point out both to Master Campbell and on appeal, is that if correct it would render paragraph 2 of the Consent Order wholly redundant. There could not as a matter of definition be costs capable of identification under paragraph 2.a., or consideration by the Chancery judge under sub-paragraph 2.b., if paragraph 1 picked up all the costs of and incidental to the proceedings (subject of course to the overriding requirement of proportionality, about which the Consent Order is silent).

21. For his part, Mr Browne submitted that the possibility that paragraph 2.a. might produce a nil return was sufficiently accommodated by the underlined words in the following phrase "<u>if</u> the costs judge also identifies <u>any</u> costs which he would have allowed …". Since it contained that implicit recognition of its own potential futility, paragraph 2 was in Mr Browne's submission insufficient to displace the ordinary and time-honoured meaning of the standard form phraseology of paragraph 1, which enabled the claimants to obtain an order for payment of all costs both of and occasioned by the proceedings, without recourse to the Chancery judge in relation to costs "occasioned by" those proceedings.

22. As is apparent in paragraph 21 of Master Campbell's judgment of 1st March 2007, those two alternatives were the only ones argued before him. Having concluded (correctly in my judgment) that the ordinary meaning of the phraseology in paragraph 1 of the Consent Order (viewed on its own) was apt to pick up incidental costs, Master Campbell concluded that paragraphs 1 and 2 of the Consent Order were therefore ambiguous. Without objection from the parties he then conducted a painstaking review of the party and party correspondence leading up to the hearing before Mann J on 10th May 2006, and concluded that:

"Having reviewed the correspondence and the skeleton arguments, in my opinion all that the parties meant by "incidental costs" were the investigative costs incurred pre-issue, no more, no less." (paragraph 44).

From this he deduced under the heading "What is this effect of this interpretation of the Order?" as follows:

"First, I consider that for the pre-issue period, the terms of the Order require me to distinguish "incidental costs", by which is meant investigative costs of the type identified in Withers' letters dated 17th March and 11th April 2006, from the costs of removing the trustees and applying for an injunction. The incidental or investigative costs – I use the description interchangeably - fall to be identified and quantified on detailed assessment and thereafter referred to a Judge of the Chancery Division who will decide whether or not the Defendants should pay them.

Second, I consider that <u>all</u> costs claimed by the Claimants post-issue, including any incidental costs, are potentially recoverable, subject to being reasonable and proportionate in amount and reasonably incurred, since they would not

include any investigative costs, the investigative stage now being over. Moreover, there is no requirement for any of these costs to be referred to the Chancery Judge." (paragraphs 51 and 52)

23. On this appeal Mr Marven for the defendants adhered to his submissions before Master Campbell. Initially, not least because no cross-appeal was issued, it appeared that the claimants sought to uphold the Master's construction. Upon analysis, Mr Browne's skeleton argument suggested that he wished also to appeal, in order to contend for his originally preferred construction. Without opposition from Mr Marven, I permitted Mr Browne to cross-appeal so as to pursue that purely legal argument, and in the event, neither counsel sought to argue, even in the alternative, that Master Campbell's construction was correct.

24. In my judgment, the only possible alternative constructions of paragraphs 1 and 2 of the Consent Order are those for which the parties contended, both originally and on this appeal. However well intentioned, as an attempt to give effect to the parties' correspondence, Master Campbell's construction was in my judgment simply not an available construction, for the following reasons.

25. The resolution of any issue as to the true construction of a consent order is to be conducted by reference to the ordinary principles governing the construction of contracts, subject only to the additional consideration that, because the consent order purports to be an exercise of the court's jurisdiction, any construction which appears to exceed that jurisdiction is *prima facie* to be avoided: see Foskett on Compromise (6th edition) at paragraph 5-36.

26. Since the decision of the House of Lords in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1WLR 896, the court is permitted to have regard for the purpose of construction to relevant background facts known to the parties when they made their bargain, whether or not the contract in question discloses a patent ambiguity. But that material excludes the parties' negotiations, for the reasons set out by Lord Wilberforce in ***Prenn v. Simmons*** [1971] 1 WLR 1381 at 1384-5.

27. To this there is or may be a limited exception of uncertain extent, generally known as the "private dictionary principle", first identified ***in The Karen Oltman [***1976] 2 Lloyds Rep 708, and the subject of a number of inconclusive subsequent authorities including ***Chartbrook Ltd v. Persimmon Homes Ltd*** [2008] EWCA Civ 183, on appeal from a judgment of mine at [2007] EWHC 409 (Ch).

28. It is implicit in the decision of Mann J on 10th May that the parties had not reached agreement about the question of costs by the time the matter came before him. The result is that the correspondence to which Master Campbell had recourse consisted of negotiations between the parties about costs which are *prima facie* inadmissible for the purpose of construing their eventual agreement. In my judgment that correspondence fails to show either that the parties agreed a private definition of the phrase "incidental to" as meaning investigative costs incurred pre-issue, or that they were negotiating on the agreed basis that such costs were either to be included or excluded *en bloc* from the costs order. All the correspondence showed was that the focus of the parties' disagreement lay within the general area of pre-issue investigative costs, but it showed no agreement as to the part of those costs which were to be either included (under paragraph 1) or reserved (under paragraph 2).

29. It follows that, because the correspondence fails to show that the parties were negotiating either on an agreed basis, or by the use of language to which they had ascribed an agreed private dictionary definition, the negotiating correspondence between the parties was in truth inadmissible. The evidence of what occurred before Mann J shows that, until the short adjournment, there was no agreement between the parties and that the only document recording their subsequent agreement is the Consent Order itself.

30. I would add that, in the absence of proof of the use by the parties of a precisely agreed private dictionary definition of "incidental to", nothing in the background leads to the conclusion, as a matter of construction, that the words of paragraphs 1 and 2 of the Consent Order actually mean that all pre-issue investigative costs, if costs of or incidental to the proceedings at all, should be placed in paragraph 2 rather than paragraph 1 of the Consent Order. It seems to me that no available meaning of the phrase "incidental to" is to be equated with a distinction between costs which are, or are not, investigative, or between costs which are, or are not, incurred pre-issue.

31. Looking at the matter subjectively, I have little doubt that the parties to the Consent Order each entertained quite separate views as to the true meaning and effect of the drawing of a distinction between costs "of" and costs "incidental to" the proceedings. But the process of construction requires an objective ascertainment of the meaning to be derived from the words used. The parties to a contract take the risk that the meaning ascertained by the objective process of construction differs from their own subjective understanding at the time. If they had a common subjective understanding different from the true construction of the words used, then the contract may be rectified. Otherwise it takes effect in accordance with its true construction.

32. No claim for rectification of the Consent Order is pursued, so I return therefore to the necessary choice to be made between the only two alternative constructions available. As to that, my clear conclusion is that the defendants' construction is to be preferred. My reasons follow.

33. The particular principles of construction most relevant to this issue are in my judgment first, that in construing a contract all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus: see Lewison on the Interpretation of Contracts at paragraphs 7.03; and secondly that a clause must not be considered in isolation, but must be considered in the context of the whole of the document: see Lewison (*op. cit.*) at paragraph 7.02.

34. Applying the first of those principles, the claimants' construction, as Mr Browne was constrained to acknowledge, turns the whole of paragraph 2 of the Consent Order into inoperative surplusage. This is because, on the claimants' construction, all incidental costs necessarily fall, as a matter of definition, within paragraph 1. In my judgment it is no answer that paragraph 2.a. clearly recognises the possibility that the costs judge might not identify any costs by carrying out the exercise there prescribed. While parties might rationally include a provision recognising that possibility when a particular formula comes to be applied to the facts, it is by no means rational to include mere verbiage which yields a nil return on any possible factual analysis.

35. Applying the second principle, it is of course true that, had paragraph 1 of the Consent Order stood alone, it would have been sufficient to capture incidental costs. But it must be read in conjunction with paragraph 2, which discloses the clearest possible intention that paragraph 1 should be construed in this particular context to be limited to costs of, rather than costs of and incidental to the proceedings. The phrase at the end of paragraph 2.a. "but which he is not allowing pursuant to paragraph 1 above" compels that conclusion.

36. It follows that in my judgment the true construction of the Consent Order imposes the requirement on the costs judge (unusual following the abolition of the distinction between party and party and common fund costs in 1986) of separating into distinct categories costs of the Part 8 proceedings, and costs incidental to them. The latter were required to be identified pursuant to paragraph 2.a. and reserved for further consideration by the Chancery judge by reference to paragraph 2.b.

37. That conclusion is, as the parties acknowledged, sufficient to dispose of this appeal, because it is common ground that in the detailed assessment which was commenced but not concluded on 2nd and 3rd May 2007, Master Campbell did not undertake any such process of segregation. It is true that he allocated a very modest amount of costs as falling within paragraph 2.a. rather than paragraph 1, but he did not do so upon the basis of the application of a distinction between "costs of" and "costs incidental to" the proceedings. The result is therefore that the detailed assessment must be begun again for the purpose of applying that distinction, so that the Consent Order, properly construed, can be implemented by way of assessment.

THE DECISIONS ON 2ND AND 3RD MAY 2007

38. Although strictly unnecessary having regard to my decision in relation to construction, a decision on the second aspect of this appeal seems to be nonetheless appropriate, both because it raises issues as to the correctness or otherwise of the learned Master's reasons for those subsequent decisions which go beyond the *"of and incidental to"* dispute, and because when the assessment comes to be re-done applying that distinction, those further issues will nonetheless still arise. They have been fully argued and, if not resolved now, would need to be re-argued before the Master, with wasted expense and yet further scope for appeal.

39. The principal bone of contention leading to the appeal against the decisions on 2nd and 3rd May was the question whether the substantial parts of the claimants' expenditure relating to the investigation, and thereafter the prosecution by correspondence and the preparation of draft particulars of claim, of the allegation of breach of duty by the trustees were recoverable as costs of or incidental to the proceedings. The defendants' submission both before the Master and on appeal was that all or at least the bulk of those costs were neither of nor incidental to the Part 8 proceedings, but rather costs of quite separate, highly contentious contemplated proceedings for proprietary and personal relief based upon proof of those allegations which, as I have described, were threatened but not ultimately pursued.

40. Permission to pursue this aspect of the appeal was given by David Richards J mainly on the basis (which emerged only for the first time during oral submissions before him) that it was well arguable that the process of assessment upon which Master Campbell embarked on 2nd and 3rd May did not apply the construction of the Consent Order which he had identified as correct on 1st March. In particular, all the items assessed by the end of 3rd May were pre-issue (by some months) and a substantial part of them consisted of investigatory work, yet the bulk of them were allowed within paragraph 1 by way of assessment. That basis of pursuing this part of the appeal necessarily falls away in the light of my decision on construction, leaving the quite separate question whether the Master was wrong to conclude that the bulk of what may for convenience be described as the breach of trust costs are recoverable at all in respect of the Part 8 proceedings, whether of or incidental to them.

41. As to this, Mr Marven made three main submissions. First, he said that the Part 8 claim did not involve proof of breach of duty by the trustees, which he suggested was demonstrable by the fact that, such breach having been denied, it would have required contentious Part 7 proceedings, with disclosure and cross-examination, to make good the allegations at trial. On the contrary, he submitted that the preparation and prosecution of those allegations related in reality to a case which was in the event not pursued. He pointed to the apprehension by his clients that the new trustees appointed after their retirement may themselves prosecute those proceedings (after obtaining *Beddoes* directions), possibly with the assistance of the work already done by Withers, albeit using different solicitors, such that the trustees risk paying those costs twice over if breach of trust proceedings are brought against them in the future, which they lose.

42. Secondly, Mr Marven submitted that even if some investigation and analysis of the merits of suspected breaches of trust was appropriate for the purpose of building a case based upon the beneficiaries' loss of confidence in the trustees, of the type eventually pursued by the Part 8 proceedings, nothing approaching the depth and expense of the investigation and preparatory works conducted by the claimants' solicitors could be regarded as costs of or occasioned by proceedings based on loss of confidence, let alone reasonably or proportionally incurred. In that

respect he relied in particular on the draft particulars of claim for breach of trust proceedings of the type originally threatened, the costs of which could not sensibly form any part of the costs of and occasioned by the Part 8 proceedings. The Master's specific decision to the contrary on 3rd May was central to the appeal of the assessment on that day.

43. Thirdly, he submitted that even if some part of the costs of preparing the breach of trust claims might be recoverable in relation to Part 8 proceedings based on a loss of trust and confidence, the Master's decision to allow substantially the whole of the claimants' costs of that work (subject only to deductions attributable to hourly rates and proportionality) demonstrated that the learned Master must have drawn his line in the wrong place.

44. Mr Browne's response was that these were all matters of discretion in respect of which the experienced Master's decision should be respected unless shown plainly to be based upon incorrect reasoning, or beyond any reasonable margin for difference of view, and that the appeal in this respect came nowhere near establishing any such conclusion. He relied also upon the transcript of a submission by Mrs Dawn Goodman, the litigation partner at Withers with the conduct of the proceedings, made to Master Campbell on 2nd May, as explaining why it was in truth necessary to conduct a detailed investigation of the allegation of breach of trust, even if only for the purpose of a removal claim based upon loss of confidence.

45. There is not much reported authority on the potentially difficult question whether preparation for proceedings of one type is properly to be regarded as giving rise to costs of and incidental to subsequent proceedings of a narrower scope. Again the best guidance comes from ***Re Gibson*** (*supra*), in this respect at pages 186C to 188B, which repay reading in full. One principle which emerges is that the court should investigate whether the work product created by the relevant expenditure constitutes "materials ultimately proving of use and service in the action": see page 186D, a principle which Sir Robert Megarry extracted from ***Pecheries Ostendaises v. Merchant Marine Insurance Co*** [1928] 1 KB 750, at 757. More particularly, the following passage seems to me to illustrate the correct approach to the present question, at page 187E:

"It is obvious that the matters disputed before a writ or originating summons is issued, and the matters raised by the writ or originating summons, and by any pleadings and affidavits, may differ considerably from each other. A wide-ranging series of disputed matters may be followed by a writ or originating summons which raises only a few of the issues; or a narrow dispute may be followed by proceedings which seek to resolve wider issues as well. How far does the ambit of the litigation extend or restrict the matters occurring before the issue of the writ or originating summons which may be included in the taxed costs on the common fund basis?

If the proceedings are framed narrowly, then I cannot see how antecedent disputes which bear no real relation to the subject of the litigation could be regarded as being part of the costs of the proceedings. On the other hand, if these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then I cannot see why the taxing master should not be able to include these costs among those which he considers to have been "reasonably incurred."

46. I am not persuaded that it is correct to categorise the decisions appealed against as pure exercises of discretion. If a particular item of expenditure is neither "*of or incidental to*" particular proceedings, then there is simply no jurisdiction to include it within recoverable costs: see section 51 of the Supreme Court Act 1981. Similarly, the effect of CPR 44.4 is that costs which are unreasonably incurred, unreasonable in amount or other than proportionate to the matters in issue, must not (rather than may not) be awarded. The question of whether any particular item of expenditure falls one side or the other of any of those three types of dividing line is ultimately a matter of fact and legal analysis, rather than discretion.

47. Nonetheless costs judges, and Master Campbell in particular, are experienced specialist tribunals, to whose views on such matters the appellate court should pay considerable respect, and from whose decisions the court should depart on appeal only if persuaded that they are clearly wrong. It is not enough that, in the absence of any error in the reasoning, the appeal court might have come to a different view, unless the costs judge's view is plainly not capable of being derived from the reasons given: see in a closely related context ***Able (UK) Ltd v HMRC*** [2007] EWCA Civ 1207, at para 28 per Buxton LJ.

48. On this issue, Master Campbell's reasoning can be found clearly and succinctly expressed in the following extract from his judgment on 2nd May:

"For the receiving Claimants Mrs Goodman has submitted that before her clients, the Claimants and beneficiaries under the relevant trusts, could advance any claim for the removal of the trustees they had to show that they had a well-founded belief that something had gone seriously wrong in the administration of those trusts. To do this, she and her colleagues at Withers had been compelled to investigate what had actually happened and it had taken some 18 months for her firm to discover that the trustees had undertaken various transactions affecting the trust property, in particular the Mansion House at Blenkinsopp Hall, its stable block, some woodlands and sporting rights. As a result of those investigations, Mrs Goodman and Withers concluded that her clients were justified in taking matters further and calling for the trustees to retire and that if they refused that there was sufficient material to justify an application to the Court for their removal.

To my mind, before the Claimants could call for the removal or retirement of the trustees they needed to have material to support their case. That material necessarily begged the question have the trustees exceeded their powers in accordance with their duties and responsibilities as trustees under the terms of the trust or have they abused those powers? The investigations which Withers undertook suggested that the latter was the case. Without having

undertaken those investigations into whether the trustees had or had not acted in breach of trust, Withers, in my opinion, would not have been in a position to advise their clients how to proceed and whether they had a remedy.

Accordingly, I am not persuaded that the costs in relation to the investigation of whether the trustees were in breach of trust can be separated out of the Bill as being work for which the Defendants are not liable to pay. In my judgment, the material unearthed was needed to demonstrate to the Court that the Claimants' belief that the trustees should be removed was well-founded. Accordingly, I decide against the Paying Defendants on this point."

49. With one slight exception, I can find no fault in that reasoning. The exception is that where Master Campbell said:

"That material necessarily begged the question have the trustees exceeded their powers … or have they abused those powers?"

he might for completeness have added that the true question was whether there was a prima facie case to that effect, sufficient to justify a loss of confidence in the minds of the beneficiaries as to the discharge of their obligations by their trustees. But Master Campbell clearly had that test in mind, by his reference to the need for the beneficiaries to show that they had "a well-founded belief that something had gone seriously wrong in the administration of those trusts". In my judgment that slight qualification to the precise correctness of the Master's reasoning detracts in no significant way from the force of his analysis.

50. I would add the following additional reasons why, in my judgment, the Master's decision on this point cannot be faulted. First, he was addressing a submission that the whole of the claimants' costs of investigating and prosecuting the breach of trust allegations should be disallowed. It was, as Mr Browne put it on appeal, an all or nothing submission, and he rejected it without necessarily deciding that every item falling within that general heading could be allowed.

51. Secondly, it is in my judgment very material to bear in mind that the reason why the proceedings ultimately brought against the trustees were much more confined both in scope and in form than those originally threatened was in large measure the result of the partially successful mediation which took place between the claimants and the proposed family defendants, but which the trustee defendants declined (despite invitation) to attend. Prior to the mediation the claimants faced demonstrating grounds for removing trustees in whom the other branches of the family continued to express their confidence. Following the mediation the claimants had the rest of the family (or at least the relevant part of it) on their side, together with a conditional settlement of the underlying family dispute, the implementation of which depended principally upon the removal and replacement of the trustees. Thereafter they decided (with all the attendant risks of failing to prove their case) to proceed upon a less demanding route, capable of being pursued by the less expensive Part 8 route (by comparison with Part 7) which, in the event, succeeded in its objective.

52. It would in my judgment be quite wrong to disallow costs which, at the time they were incurred, were perceived to be reasonably required to establish and then prosecute a cause of action for relief which included the removal of the trustees, merely because a partially successful mediation prior to the issue of proceedings removed the need to prosecute other aspects of the claim then threatened, beyond those which were actually pursued in the proceedings as issued. It is in my judgment nothing to the point that, with the benefit of hindsight, an in-depth investigation and prosecution of the breach of trust allegations may have turned out to be surplus to the strict requirements of the proceedings as issued. At the time when those costs were incurred it seems to me that Master Campbell was right to treat them as falling within the general definition of costs of an occasioned by the proceedings, in particular at a time when the claimants faced a probable defence in which the trustees would rely upon the continuing trust and confidence entertained in their conduct by the other branches of the family.

53. Applying the tests outlined by Sir Robert Megarry J to which I have referred above, the work product created by the breach of trust expenditure was ultimately of some use and service in the Part 8 proceedings, albeit less than originally anticipated. The breach of trust dispute was in some degree relevant to the subject matter of the Part 8 proceedings and, above all, the attitude both of the trustees and the other branches of the family at the time of the relevant expenditure made it reasonable for the claimants to apprehend that the litigation would in due course include that dispute.

54. The final aspect of this part of the appeal concerns the draft particulars of claim. As I have described, they were prepared specifically with the mediation in mind, and although it was unnecessary to prove the allegations contained in them in the Part 8 proceedings subsequently issued, they were annexed to the witness statement in support of those proceedings, as a convenient illustration of the alleged breaches of duty which had given rise to the relevant loss of trust and confidence. Again, the same analysis as that which I have described above leads me to the conclusion that the Master was correct not to exclude them in his decision on 3rd May, for the reasons which he gave.

55. I would add that, on any trial of the Part 8 claim based upon an alleged loss of trust and confidence, the fact that experienced counsel had considered it appropriate to plead the serious breaches of duty to be found alleged in the particulars of claim would of itself be a material factor tending to assist the claimants in demonstrating that their loss of confidence was well-founded, regardless of the proof or otherwise of the relevant allegations.

56. It was common ground before me that questions of proportionality could not sensibly be made a separate issue on this appeal. It therefore follows that this second aspect of the defendants' appeal fails, and that in the detailed assessment which falls to be carried out again as a result of my decision on the question of construction, Master Campbell is entitled to proceed upon the basis that his reasoning for not excluding the investigation and

prosecution of the breach of trust allegations, and the pleading of the draft particulars of claim, was correct and may continue to be relied upon.

57. I say nothing at all however on the question whether such costs are, on the true construction of the Consent Order, to be allocated as falling within paragraph 1 as being *"costs of"* of the proceedings, or within paragraph 2, being "incidental to" the proceedings. That is a matter which the learned Master will have to decide for the first time, by reference to the rather scanty authority on the point, to which he himself referred in his decision on 1st March. The parties before me were agreed that this is a task for him rather than for me, and I also agree.

58. I have been considerably assisted by the experienced advice of my Assessors in this matter. The judgment is however entirely my own.

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