Neutral Citation Number: [2019] EWHC 2 (Ch)

Case No: D31MA058
E30MA399

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (Ch D)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 11th January 2019

Before:

HIS HONOUR JUDGE EYRE QC

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Between :

DEANSGATE 123 LLP	**Claimant**
- and -	
1) IAN GARTH WORKMAN	**Defendants**
2) IAN GRANT WORKMAN	

And Between :

CAROL ANN FORRESTER (as Executrix of the estate of Susan Margaret Workman)	**Claimant**
- and -	
1) IAN GARTH WORKMAN	**Defendants**
2) IAN GRANT WORKMAN	

- -
- -

William McCormick QC (instructed by Hemingways Solicitors) for the First Defendant
Matthew Collings QC and Richard Selwyn Sharpe (instructed by **Clough & Willis**) for the **Second Defendant**
Joseph Wigley (instructed by **Ashfords LLp**) for **Deansgate 123 LLP**
Steven McGarry (instructed by) for **Carol Ann Forrester**

Hearing date: 3rd December 2018

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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 Eyre QC:

Introduction.

1. On 21st November 2011 Ian Garth Workman ("Ian Workman senior") executed a transfer form ("the Transfer Form") purporting to transfer sundry properties ("the Properties") to Ian Grant Workman ("Ian Workman junior"), one of his sons. Carol Ann Forrester ("Mrs. Forrester") and Deansgate 123 LLP ("Deansgate") have brought proceedings (respectively "the Forrester Claim" and "the Deansgate Claim") seeking relief pursuant to section 423 of the Insolvency Act 1986 on the footing that the transfer was a transaction at an undervalue or without consideration entered into for the purpose of putting assets beyond the reach of those with claims against Ian Workman senior. Messrs. Workman senior and junior have applied to have those claims struck out as an abuse of process in reliance on the principles deriving from the judgment of Wigram VC in *Henderson v Henderson* 3 Hare 100, 115.

The Factual and Procedural Background.

2. Ian Workman senior was formerly married to Susan Workman. Divorce proceedings were commenced in 2010 resulting in the grant of a decree absolute dissolving the marriage. Ancillary relief proceedings had been commenced and a final hearing of those proceedings had been listed for 19th May 2011. In the course of those proceedings Mrs. Workman had obtained a freezing order against Ian Workman senior.

3. On 7th April 2011 Ian Workman senior killed Susan Workman. The death of Mrs. Workman caused the matrimonial proceedings to abate together with the freezing order. On 19th December 2011 Ian Workman senior was convicted of the murder of Susan Workman.

4. On 21st November 2011 Ian Workman senior executed the Transfer Form. That execution had the effect of passing Ian Workman senior's beneficial interest in the Properties to his son but the latter did not become the registered proprietor at that time.

5. Mrs. Forrester is the sister of Susan Workman and she obtained a grant of probate in respect of her sister's estate. Together with Nicholas and Benjamin Workman (the other two sons of Susan Workman and Ian Workman senior) she brought proceedings against Ian Workman senior seeking damages for the unlawful killing of Susan Workman ("the Damages Proceedings"). Ian Workman senior was debarred from defending those proceedings and a judgment in default for £1.5m was obtained in January 2013 and subsequently upheld by the Court of Appeal. Mrs. Forrester and her nephews had obtained a freezing order against Ian Workman senior in those proceedings. Although Nicholas and Benjamin Workman are parties to the Damages Proceedings they have taken no part in the various hearings and applications with which I am concerned.

6. Deansgate (then known as Pannone LLP) had acted for Ian Workman senior in his criminal trial. Deansgate brought proceedings in respect of unpaid fees and on 4th October 2013 it obtained summary judgment against Ian Workman

senior in the sum of £145,907 together with costs. By way of enforcement of that judgment Deansgate obtained interim charging orders in respect of the Properties. At that time Ian Workman senior was still the registered proprietor of the Properties. Ian Workman junior was joined to those charging order proceedings.

7. On 20th March 2017 the charging order proceedings came before District Judge Burrow in the Preston County Court with a view to determining whether the charging orders should be made final. The order made by the District Judge recited that Messrs. Workman senior and junior had maintained that the effect of the execution of the Transfer Form was that Ian Workman senior held the Properties on bare trust for Ian Workman junior and also recited that Deansgate had "questioned the validity" of the Transfer Form. The order recorded the view of the court (in which the parties were stated to have concurred) that the Preston County Court was not the appropriate forum for determination of the validity of the Transfer Form in the light of the impact that finding could have on the parties to the Damages Proceedings and having regard to the fact that the claimants in the Damages Proceedings would need to be given notice of any application relating to the validity of the Transfer Form. The order then recited the court's view that the charging order proceedings should be adjourned "pending a determination as to the validity of the [Transfer Form] by way of an application in [the Damages Proceedings]". In the light of those recitals District Judge Burrow adjourned generally the charging order applications and transferred them to the High Court "for further directions following determination of [Ian Workman junior]'s application for a declaration in [the Damages Proceedings] or otherwise on the application of any party."

8. On 25th April 2017 Ian Workman junior made an application in the Damages Proceedings seeking to be joined as a party to those proceedings and seeking declarations that the entire beneficial interest in the Properties had been transferred to him by the Transfer Form; that he was entitled to be registered as the proprietor of the Properties; and that the transfer was not in breach of the freezing order which had been obtained in the Damages Proceedings. Deansgate was not provided with a copy of that application until 19th October 2017.

9. In the intervening period Deansgate's solicitors had asked for confirmation that Ian Workman junior had made an application and had asked for copies of it (in their letters of 19th and 30th May and 23rd August 2017). The solicitors for Ian Workman junior responded (on 22nd May, 6th June, and 24th August 2017) saying that an application had been issued; that a sealed copy had not yet been returned from the court; and that Deansgate would only be provided with a copy once a sealed copy had been provided by the court for service on the respondents to the application (namely the claimants in the Damages Proceedings). In that correspondence Deansgate's solicitors had said (in particular in their letter of 19th May 2017) that even if the validity of the transfer were to be upheld it would be liable to be set aside pursuant to section 423 and that Deansgate would be entitled to make an application under that provision.

10. At the time of the hearing in front of District Judge Burrow it had been Deansgate's intention to apply to be joined as a party to the application by Ian Workman junior. The parties' shared understanding in that regard was acknowledged in the letter of 23rd August 2017 from Deansgate's solicitors and that letter indicated that this remained Deansgate's intention at that time.

11. On 6th November 2017 Mrs. Forrester's response to Ian Workman junior's application was set out in the witness statement of her solicitor, Hefin Archer-Williams. That statement set out a number of matters which it was said should cause the court to conclude that the Transfer Form was not valid and that the purported transfer had been ineffective. The concluding portion of the statement also made reference to section 423. The relevant passage was headed "the proposed application under sections 423 – 425". It said that if the declarations sought by Ian Workman junior were granted Mrs. Forrester would seek an order under those sections restoring the position to that which it would have been if the transfer had not been effected. The statement said that it was expected that a similar application would be made by Deansgate.

12. Deansgate did, indeed, make an application under section 423. That application was issued on 21st November 2017 but it was not served until some time after the Particulars of Claim had been signed on 20th March 2018. On 9th February 2018 Mrs. Forrester's solicitors told the solicitors for Messrs Workman senior and junior that Deansgate's section 423 application had been issued but not served.

13. The hearing of Ian Workman junior's application had originally been listed for 6th December 2017 but that hearing was vacated with the agreement of all parties, including Deansgate, the view having been taken that more court time would be needed to deal with the matter. In the correspondence leading up to that adjournment Deansgate's solicitors confirmed to those acting for Ian Workman junior that it remained Deansgate's intention to apply to join the Damages Proceedings with a view to responding to Ian Workman junior's claim and said that they were in the process of drafting an application to that effect. As will be seen below Mr. Collings QC for Ian Workman junior placed considerable emphasis on the fact that court time had been available on 6th December 2017 at which directions could have been given in this matter.

14. Ian Workman junior's application was then listed for hearing before me on 15th February 2018.

15. Shortly before that hearing Deansgate changed solicitors (notice of change was sent to the other parties on 12th February 2018). That change of solicitor resulted in a change of approach on the part of Deansgate. The changed stance was set out in a letter from the new solicitors sent to the court with copies to the other parties on 14th February 2018. This explained that Deansgate did not intend to take part in the hearing on the following day. Deansgate's position was that it would not be able to assist with either evidence or submissions relating to the question of the validity of the Transfer Form. The letter explained that if Ian Workman junior were to be successful in obtaining the declarations sought then Deansgate would "proceed immediately" with an application seeking relief under section 423 and would do so in separate

proceedings. However, if Ian Workman junior's application were to be unsuccessful then the court would have determined that the transfer of the Properties was invalid and there would be no need for a section 423 application seeking relief in respect of the transfer. The letter said "with a view to saving court time and substantial costs for all parties Deansgate intends to wait until the determination of [Ian Workman junior]'s application before proceeding with a new claim under section 423".

16. On 15th February 2018 Mr. McGarry for Mrs. Forrester sought to persuade me to adjourn the hearing so that the issues of the validity and effect of the Transfer Form could be consolidated with or heard at the same time as Deansgate's section 423 application. Mr. McGarry contended that the two sets of proceedings (namely those in respect of validity and the section 423 application) related to similar issues and to the same subject matter namely the events of November 2011.

17. I rejected that application. I did so without calling upon counsel for Messrs Workman senior or junior though both made it clear that they opposed the adjournment application. However, in the initial exchanges in which he confirmed that adjournment was opposed Mr. McCormick QC (appearing then as now for Ian Workman senior) made the point that if there was going to be an application to adjourn matters to tie up with the section 423 proceedings that should have been made at the time of the adjournment of the hearing listed for 6th December 2017.

18. I gave a short judgment refusing the adjournment application and setting out my conclusion that it was appropriate for the questions of the validity of the Transfer Form and of the granting of section 423 relief in the event that the Transfer Form was found to have been effective to be determined separately. In that judgment I said:

> "10. The argument that is put forward in favour of adjournment and consolidation or hearing together with the 423 proceedings, in short, is this: that both sets of proceedings relate to similar issues. It is said that they relate to the same subject matter, namely the events of November 2011; that in the 423 proceedings there will be disclosure and the normal procedures of inter partes litigation, which will bring to light material about Mr Workman's state of mind and intentions in November 2011. It is also said that this will enable the court better to come to a conclusion about the issues in the current application, namely the validity and effectiveness of the TR5 executed in November 2011.
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> 11 ….
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> 12. I have to address the matter having regard, of course, to the overriding objective and the need for proportionality and effective use of court time. I'm compelled to the view that there is no proper basis for an adjournment and, indeed, that an adjournment to tie up with the section 423 proceedings would be misconceived.
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> 13. An application for relief under section 423 of the Insolvency Act must be predicated on there having been an effective transfer of the First Defendant's beneficial interest. If there was no such transfer, there would be nothing to be

set aside under section 423. The effectiveness of the transfer is the very point in issue in the current application and so, if the matter were tied up with the section 423 proceedings, there would be a risk of a substantial waste of resources because either the 423 proceedings would be totally futile, if it is found that there was no effective transfer, or there would be a risk of the current proceedings being dragged onwards with extra expense and delay.

14. …

15. The section 423 proceedings have not yet been served. It's not certain that they will be served and, indeed, the stance taken by Deansgate is that they will not take any further step in those proceedings until they know the outcome of the current application. That is a logical and sensible approach because the current proceedings and any relief under section 423, related though they might be, are logically distinct and, as I've already said, the 423 proceedings would only have any point if the current application by the Second Defendant, supported by the First Defendant, succeeded.

16. As I have already said, it is noteworthy that Deansgate take a similar view. They want to hold fire until the current matter is determined. That is in accordance with the overriding objective and the need to deal with matters in a cost-effective way, to deal with matters expeditiously and to deal with matters in a logical way, dealing with issues as they properly arise."

19. Having refused the adjournment application I then dealt substantively with the issue of the validity and effect of the Transfer Form. I concluded that it had been effective to constitute Ian Workman junior as the beneficial owner of the Properties and granted him the declarations and orders he had sought. In doing so I rejected the arguments advanced on behalf of Mrs. Forrester that the execution of the Transfer Form had been a sham; that it was to be regarded as having been a failed gift which Ian Workman junior was seeking the assistance of equity to complete; and that it was not properly executed as a deed. I also addressed the contentions made on Mrs. Forrester's behalf that regard was to be had to the motive with which the Transfer Form had been executed and its effect upon the Damages Proceedings and upon any potential compensation claim in criminal proceedings. I rejected those submissions saying in the following terms that such matters might be relevant to an application under section 423 but were not relevant to the issues of the validity and effect of the Transfer Form:

"43. Mr Archer Williams referred to the motive for the execution of the TR5 (and this is paragraph 44.7 of his witness statement) as being that of placing assets beyond the reach of his wife's estate. In my judgment if the transfer was effective to transfer the First Defendant's beneficial interest then in the current proceedings the motive with which the First Defendant effected that transfer is wholly irrelevant. The motive would be, will be, highly relevant if the section 423 proceedings which have been issued are proceeded with. But that is because they are to be on the footing that there was an effective transfer which the court is being asked in those proceedings to set aside.

44. Mr Archer Williams says at 44.3 and 4, that the transfer undermines the estate's claim to damages and the benefit to the estate of Susan Workman. Well, it's right that, if the transfer is effective, it does mean that the First Defendant has

fewer assets and potentially will not be able to satisfy the judgment that was obtained against him and that does affect the claim to damages and does affect the value of Susan Workman's estate. That, again, might be relevant in the proceedings under section 423 but it cannot be relevant to the questions of the validity of the transfer."

20. It is of note that Mr. McCormick referred to the potential section 423 proceedings in his submissions to me on behalf of Ian Workman senior. Mr. McCormick relied on the scope for an application being made under that section as a matter which enabled me to be satisfied that the relief sought by Ian Workman junior could be granted without there being any risk of injustice. Thus he said:

> "The real issue here is, if the estate feels that the transfer has been done to protect Mr Workman Senior and make him judgment proof, the way to deal with this is a section 423 application. Your Lordship can be entirely confident that granting the relief that is sought in this application will not lead to any injustice because the law is not that tunnel visioned. …
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> … the reality here is it's 423 or nothing…
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> And, of course, the reality here is that the estate is trying to have it both ways. It's saying the reason that this transfer shouldn't be taken at face value is precisely because it needed to be taken at face value, because they're saying this is all a device to make Mr Workman Senior judgment proof. He only becomes judgment proof if he divests himself of legal and beneficial ownership and that's why this is really 423 or nothing and why the estate's prevarication is - well, it is difficult to understand. And if Deansgate decide that's the way they're actually going to try and proceed, then we'll have that argument with them."

21. Following my order Deansgate served its section 423 application and on 22nd June 2018 Mrs. Forrester issued her application seeking relief under that section.

22. Messrs. Workman senior and junior issued their applications seeking dismissal of the Forrester and Deansgate claims on the grounds of abuse of process on 25th and 26th July 2018 (in relation to the Deansgate Claim) and 21st August and 16th November 2018 (in relation to the Forrester Claim).

The Applicable Principles.

23. The way in which the *Henderson v Henderson* principles are to be applied was explained thus by Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 30 H – 31F:

> It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in *Henderson v Henderson:* A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in

> litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

24. Lords Goff, Cooke, and Hutton agreed with Lord Bingham’s analysis of the principles. At 59 Lord Millett expressed the core test in substantially the same terms as Lord Bingham but gave a reminder that there are occasions when it is appropriate to adduce particular claims or cases separately even though they could be brought forward at the same time. Lord Millett also gave a reminder that the burden lies on the party asserting that particular proceedings are an abuse of process and he emphasised the seriousness of depriving a party of the right to litigate for the first time a question which has not previously been adjudicated upon. The latter is a point which has been repeated more recently by Lloyd, Simon, and Sales LJJ (see per Sales LJ in *Playboy Club London Ltd v Banca Nazionale Del Lavoro SpA* [2018] EWCA Civ 2025 at [54]).

25. It is of note that in *Johnson v Gore Wood & Co* the House of Lords upheld Sir Richard Scott V-C’s conclusion that in the particular circumstances it had not been an abuse of process for the plaintiff to bring a personal claim arising out of the same subject matter as a corporate claim which had been settled and where a deliberate decision had been taken to hold back on bringing the personal claim.

26. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [17] – [26] Lord Sumption addressed the interrelation between *Henderson v Henderson* abuse of process and the various different legal principles described by the "portmanteau term" of res judicata. At [25] Lord Sumption explained that res judicata and *Henderson v Henderson* abuse of process are "distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation" with the former being a rule of substantive law while "abuse of process is a concept which informs the exercise of the court's procedural powers". There is no suggestion that there is any question of issue estoppel or of cause of action estoppel in the current case. The question here is one of abuse of process.

27. In *Aldi Stores Ltd v WSP Group Ltd* [2007] EWCA Civ 1260, [2008] 1 WLR 748 Thomas LJ, as he then was, at [16], and Longmore LJ at [38], explained that striking out for abuse of process is not matter of discretion but one of judgment. If a proper consideration of all the relevant factors leads to the conclusion that the particular claim is an abuse of process then striking out must follow.

28. At [6] Thomas LJ adopted the summary of the *Johnson v Good Wood & Co* principles which had been set out by Clarke LJ in *Dexter Ltd v Vleiland-Boddy* [2003] EWCA Civ 14 and where Clarke LJ had emphasised that the fact that a particular claim could have been made earlier is not conclusive as to whether it is abusive to bring the claim later. Clarke LJ explained that there can be instances where it is legitimate to bring an action first against one defendant and only later against others and repeated Lord Bingham's point that a finding of abuse of process will be rare if the proceedings in question do not involve "unjust harassment or oppression" of the defendant. In this regard it is to be noted that at [41] Longmore LJ pointed out that it is not sufficient to say that it is "harassing" for a particular party to have to face a second action but such harassment has also to be "unjust". At [18] Thomas LJ explained that "though neither impropriety nor culpability is a necessary finding before a claim can be struck out" it is relevant (indeed Thomas LJ says "important") to consider whether the claimant in question has behaved in a way which was culpable or improper. At [24] Thomas LJ explained that "the public interest extends not only to finality and preventing a party being vexed twice, but also to economy and efficiency in litigation".

29. At [29] – [31] Thomas LJ set out the approach which should be adopted in future in "complex commercial multi-party litigation" where there is a prospect of separate proceedings about the same subject matter. In short the question is to be raised with the court so that the court can give directions if need be and at least "express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation". Thomas LJ said that there could be "no excuse" for not adopting such an approach in future cases. Mr. Collings laid considerable emphasis on the guidance given by Thomas LJ in this regard and contended that Mrs. Forrester and Deansgate had failed to follow it. In due course I will have to consider whether these are proceedings of the kind which Thomas LJ had in contemplation as being covered by the

guidance; whether there was a failure to comply with that guidance; and if so what consequences that should have.

30. In *Clutterbuck & Paton v Cleghorn* [2017] EWCA Civ 137 Kitchin LJ explained the importance which *Aldi Stores Ltd* guidelines attached to a party putting his or her cards on the table and being open with the court and the other parties as to what was intended. Kitchin LJ also adopted the approach to the *Aldi Stores* guidelines which had been set out in *Stuart v Goldberge Linde* [2008] EWCA Civ 2, [2008] 1 WLR 823. Thus he said at [76] – [79]:

> "76. It is clear that Thomas LJ was concerned to ensure that, in future, a party to commercial litigation who wishes to pursue a claim at a later date against the same or other parties in relation to the same commercial matter should put his cards on the table in the first claim so as to give the court an opportunity to consider whether and, if so, how, by appropriate case management directions, the resources of the court may utilised in the most cost effective and efficient way.
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> 77. The importance of parties putting their cards on the table was emphasised by the Court of Appeal in *Stuart v Goldberg Linde*, a case in which the claimants sought to pursue a second claim against the same defendant, albeit raising issues which differed from those raised in the first claim. There Sedley LJ said this at [77]:
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> "Secondly, as the *Aldi Stores Ltd* case again makes clear and as Sir Anthony Clarke MR stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."
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> 78. Sir Anthony Clarke MR put it this way at [96]:
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> "For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated. "
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> 79. He concluded his judgment in these terms at [101]:
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> "I only add by way of postscript that litigants and their advisers should heed the points made by this court in the Aldi Stores Ltd case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the risk of a second action being held to be an abuse of the process."

31. Kitchin LJ then made reference to the approach taken in *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466, [2014] PNLR 11. Summarising the position at [81] he said that:

> "In light of these statements of principle the deputy judge was, in my view, right to say that the *Aldi Stores* guidelines are mandatory and that an inexcusable failure to comply with them is a relevant factor to be taken into account in assessing whether, having regard to the relevant private and public rights and in light of all of the facts of the case, a party is abusing the process of the court by seeking to raise before the court an issue that it could have raised in prior proceedings."

32. An application under section 423 seeking the setting aside of a transfer because of the purpose with which the transferor made it raises issues which are logically and legally distinct from those involved in determining whether the transfer was legally effective. However, determination of the legal effectiveness of a transfer and determination of the purposes with which a transfer was effected will often require a court to consider the same matters of fact. Thus applications under section 423 can be determined at the same time as challenges to the validity or effectiveness of a transfer. I was referred to *Midland Bank plc v Wyatt* [1997] 1 BCLC 242 and *Ali v Bashir & another* [2014] EWHC 3853 (Ch), [2015] BPIR 211 as examples of cases where the court had at the same time considered whether a trust deed was a sham and also whether, even if not a sham, the deed was liable to be set aside under section 423. It is clear that such matters can be dealt with together and that on occasion that may well be the appropriate course. There is no doubt that in the current case it would have been possible to arrange matters so that the questions of the validity and effectiveness of the Transfer Form were determined at the same time as the applications under section 423. The question is not whether that could have been done but whether it should have been done and going beyond that whether in the circumstances here there is abuse of process by reason of Mrs. Forrester and Deansgate bringing applications under section 423 separately from the determination of the validity of the Transfer Form. The authorities to which I was referred showed that the matters could have been dealt with together and demonstrate instances when this was done but I do not read them as indicating that this must be done.

33. For Deansgate Mr. Wigley relied on the decision of Marcus Smith J in *New Media Distribution Company SEZC Ltd v Kagalovsky* [2018] EWHC 2876 (Ch) as an instance where it had not been abusive to bring a section 423 application arising out of the same circumstances as an earlier action. However, I have concluded that the decision there does not (other than through the summary of the relevant principles) assist here. That is because Marcus Smith J's decision was based on his conclusion, at [42 (3)], that the section 423 claim could not have been brought as a part of the earlier proceedings.

34. In the light of those authorities and in short terms the approach I am to take to the applications now made by Messrs Workman senior and junior is as follows. The burden is on a party alleging abuse of process. The court is not lightly to conclude that there has been abuse of process where the point in

question has not already been litigated between the parties. The court must consider whether the point or application could and should have been raised earlier with "could" and "should" being different questions. The core question is whether looking at matters in the round Mrs. Forrester and/or Deansgate are abusing the process of the court. Determination of that question involves a broad merits-based judgment. The procedural conduct of Mrs. Forrester and/or Deansgate is of importance in making that judgment with particular regard being had to the extent to which a party has been open with the court and the other parties.

35. It was common ground before me that the question of abuse of process is to be considered separately in respect of Mrs. Forrester and of Deansgate. There is very considerable overlap in the factors which are relevant in each instance but they acted separately such that it would be possible for there to be differing conclusions as to their conduct and as to whether the section 423 application by one or other was an abuse of process.

Prejudice.

36. Neither Ian Workman senior nor Ian Workman junior provided a witness statement in support of the strike out applications. They instead relied on the matters set out in the boxes at section 10 of their application notices and verified by statements of truth from their respective solicitors. In respect of the Deansgate Claim the applications simply noted the charging order proceedings; Ian Workman junior's joinder and declaration application; and my judgment and order of 15th February 2018. In respect of the Forrester Claim reference was made to those matters together a committal application which had been made and the applications which Mrs. Forrester had made to HM Land Registry asserting an interest in the Properties.

37. On instructions Mr. Collings informed me that his client felt harassed by the section 423 proceedings and that he was being prejudiced by the uncertainty generated and the impact upon his control of the Properties. However, no details were given and there was, in any event, no evidence about these matters.

38. In those circumstances I accept that both Ian Workman senior and Ian Workman junior are subject to the detriment of these matters remaining unresolved and of the need to respond to the section 423 claims if those are not struck out as an abuse of process. I am not able to take account of any harm to either Mr. Workman going beyond that none being put forward in evidence.

The Forrester Claim.

39. Messrs Workman senior and junior say that Mrs. Forrester could and should have put forward her section 423 claim at the same time as she was resisting Ian Workman junior's application for declarations and that there is abuse of process in her making the section 423 application separately now. It is said that Mrs. Forrester is now seeking to cover again the same ground as was covered on 15th February 2018. Mr. Collings contended that the real issue between the parties was the availability of the Properties to satisfy the

judgments against Ian Workman senior. The Properties would be available for that purpose either if the Transfer Form had been found to have been invalid or if it were to be set aside under section 423. In seeking to bring the section 423 application Mrs. Forrester is said to be attempting to relitigate that issue of availability.

40. It is said that Mrs. Forrester failed to comply with the *Aldi Stores* guidelines by failing to bring before the court the question of whether the validity of the Transfer Form and its potential setting aside should be dealt with at the same time. Mr. Collings points to the fact that the matter had been listed on 6th December 2017 and says that in accordance with the *Aldi Stores* approach Mrs. Forrester should have put the matter before the court on that occasion. He says that at the hearing on 15th February 2018 Mrs. Forrester failed to refer me to authorities, such as *Midland Bank plc v Wyatt* and *Ali v Bashir & another,* where the courts had dealt at the same hearing with questions of sham and of section 423 relief. In addition Mr. Collings says that the purpose of District Judge Burrow's order was either not understood or not explained to the court. In Mr. Collings's analysis that order intended that the question of the availability of the Properties to meet Ian Workman senior's liabilities should be determined at one hearing in the context of the Damages Proceedings and by bringing the section 423 application separately Mrs. Forrester is thwarting the purpose of that order.

41. It is also said that it would be artificial to regard Mrs. Forrester as simply having been obliged to respond to Ian Workman junior's application seeking declarations about the validity of the Transfer Form. Messrs Workman senior and junior invite me to look to the reality and to see that application as having been the vehicle for bringing before the High Court the issue of whether the Properties were available to satisfy Ian Workman senior's creditors. In those circumstances it is said that it was incumbent on Mrs. Forrester to put forward all her arguments against such availability. Her argument on the validity of the Transfer Form having been rejected it is not now open to Mrs. Forrester to put forward a separate argument which would, if successful, have the same end result namely making the Properties available for those creditors.

42. I am satisfied that it is not an abuse of process on the part of Mrs. Forrester now to make an application seeking relief under section 423. It is questionable whether this is the kind of case which Thomas LJ had in mind when laying down the *Aldi Stores* guidelines. Certainly unusual though the circumstances here are this is very far from being "complex commercial multi-party litigation". In any event I am satisfied that Mrs. Forrester amply complied with the intention of those guidelines by putting her cards on the table. The statement of Mr. Archer-Williams had been served in advance of the proposed hearing for 6th December 2017. That statement made it quite clear that Mrs. Forrester intended to make a section 423 application if Ian Workman junior obtained the declarations which he was seeking. No such application had been issued at that stage but the statement made it clear what Mrs. Forrester had in mind.

43. However, matters go beyond that. On 15th February 2018 Mrs. Forrester applied for the hearing to be adjourned so that the hearing of Ian Workman

junior's application relating to validity could be combined with the hearing of Deansgate's section 423 application. In that regard it is of note that section 423 is in the nature of a class remedy and that if an order under that section had been made at the instance of Deansgate the reversal of the transfer would have benefited all the creditors of Ian Workman senior. The adjournment application came at a late stage but it was being made and to a considerable degree it was being made at that stage because of the recent change of approach on the part of Deansgate. I refused the adjournment application. It cannot be said that I was misled by Mrs. Forrester as to whether the validity and section 423 proceedings could be heard together. It was Mrs. Forrester's position not only that they could be but that they should be. The issue before me was not whether it was possible for those matters to be heard together but whether it was appropriate for them to be in the circumstances of the case. I concluded that it was not appropriate and set out my reasons for so concluding. I set out my reasons in clear and perhaps somewhat strong terms expressing the court's assessment that the proper course was for the questions of the validity of the Transfer Form and of the potential section 423 relief to be determined separately. In those circumstances Mrs. Forrester cannot be criticised for making her section 423 application after the determination of the validity issue. She was taking the course which the court had said was appropriate and it cannot now be said that in doing so she was abusing the process of the court.

44. In my judgment it is significant that the questions of the purpose of the transfer and its liability to be set aside are not being litigated twice. As was explained in my judgment on 15th February 2018 those questions are distinct from the validity of the Transfer Form which is the matter which was being addressed at that time. It is true that Messrs Workman senior and junior are having for a second time to direct their minds and evidence to the circumstances in which the Transfer Form was executed and there will be a degree (probably a substantial degree) of overlap in the evidence to be put forward but they are not having to address the same issue for a second time.

45. It is true that Ian Workman junior's application was the vehicle envisaged for resolving matters following District Judge Burrow's order. Nonetheless the position remained that Mrs. Forrester was responding to the relief sought in that application and the potential availability of an order under section 423 was not a defence to the application.

46. I have set out above the submissions which Mr. McCormick made at the 15th February 2018 hearing referring to the continuing prospect of an application under section 423 even if the declarations sought were granted. Those submissions do not preclude Ian Workman senior (whom Mr. McCormick represented) let alone his son from arguing that the Forrester Claim is an abuse of process. They do nonetheless give a strong indication of the basis on which the parties were proceeding at that hearing namely that the matter being addressed was the validity of the Transfer Form and that the question of whether or not an order should be made under section 423 was a matter for another day.

47. It is true that the way in which matters were addressed on 15th February 2018 meant that the question of the availability of the Properties to satisfy the claims of Ian Workman senior's creditors was not finally determined (though it would have been if Mrs. Forrester's arguments as to validity had succeeded). However, all concerned knew that the issue had not been resolved and that an application under section 423 was likely to be forthcoming from Mrs. Forrester. Messrs. Workman senior and junior cannot have been under any misapprehension that my judgment on that day was the end of the matter and they were not taken by surprise by the application which was made on 22nd June 2018.

48. It follows that the Forrester Claim is not liable to be struck out as an abuse of process.

<u>The Deansgate Claim.</u>

49. Many of the arguments applicable to the Forrester Claim are also relevant to the Deansgate Claim and I will not repeat them.

50. One area of difference between the position of Mrs. Forrester and that of Deansgate is that Deansgate changed its approach in respect of participation in the hearing of 15th February 2018. Messrs Workman senior and junior placed considerable emphasis on this. Before District Judge Burrow Deansgate had accepted that it would attend at the hearing of Ian Workman junior's application in the Damages Proceedings. Mr. Collings points to the fact that Deansgate made no application for directions alerting the court to the possibility of a section 423 application (again placing weight on the availability of court time on 6th December 2017) and describes the failure to serve the section 423 application until after the 15th February 2018 hearing as a matter of Deansgate keeping its cards up its sleeve. He described this as "private case management" in the sense of Deansgate making its own decisions about case management rather than seeking the court's approval or guidance. He criticised the letter of 14th February 2018 and the stance taken by Deansgate in relation to the 15th February 2018 hearing as amounting to presenting the court with a "fait accompli" and says that to the extent that Deansgate did put its cards on the table it did so at the eleventh hour.

51. In addition it is said that it is artificial to say that Deansgate was not a party to the Damages Proceedings and not a respondent to Ian Workman junior's application. This is because that application had been teed up by District Judge Burrow's order and was envisaged as being the vehicle for resolving the issues about the charging orders which was something in which Deansgate was very much involved. Messrs Workman senior and junior say that Deansgate should have engaged proactively in the application by Ian Workman junior and having chosen not to do so it is not open to it now to bring an application seeking relief under section 423.

52. It is to be noted that the Deansgate Claim is not a fresh challenge to the validity of the Transfer Form. Deansgate is not seeking to go behind the declarations which Ian Workman junior obtained on 15th February 2018. The situation would have been very different if Deansgate had sought to bring its

own proceedings as to the validity or effectiveness of the Transfer Form. It is likely that such proceedings would have amounted to an abuse of process. It would not have been open to Deansgate deliberately to stand aside from involvement in the hearing on 15th February 2018 and to allow a determination to be made as to the Transfer Form's validity as between Mrs. Forrester and Messrs Workman senior and junior and then to seek to make its own challenge to that validity. However, Deansgate is not doing that. It accepts the validity and effectiveness of the Transfer Form and is bringing an application predicated on the Transfer Form having been effective to transfer to Ian Workman junior his father's interest in the Properties.

53. The approach which Deansgate took was appropriate and legitimate. On 15th February 2018 I described it as being "a logical and sensible approach". That remains my view. A different course could have been taken but that does not mean that the approach adopted was in any way illegitimate or improper. It is relevant to note that Deansgate was open about what was being done and the letter of 14th February 2018 gave a detailed explanation to the court and to the other parties of what Deansgate proposed to do and why it was taking that course. That explanation did come at the eleventh hour in respect of the hearing on 15th February 2018 and it would have been better if the information had been given earlier but it cannot be said that this was because of any deliberate decision by Deansgate to keep its cards up its sleeve. I have no reason to doubt the explanation given in the letter namely that a change in legal advisers had resulted in a different view as to the appropriate course to take. Once that change of approach had been adopted Deansgate was open about it explaining what was proposed. In my judgment it is significant that the change of course on the part of Deansgate was not as to whether an application for relief under section 423 should be made but as to the timing of that application and whether to combine it with the application in which the court was considering the validity of the Transfer Form. Messrs Workman senior and junior had not been misled as to the fact that if the validity of the Transfer Form were to be upheld they would ultimately have to address a section 423 application from Deansgate. This had been made clear at the latest in the letter of 19th May 2017 from Deansgate's former solicitors. I have already set out my assessment that this is not the kind of litigation for which the *Aldi Stores* guidelines were intended but in the letter of 14th February 2018 Deansgate was meeting the intention of those guidelines by telling the court and the other parties in plain terms what it proposed doing. I have already noted at [9] above that Deansgate was not served with a copy of Ian Workman junior's application as soon as it was made and that Deansgate's solicitors had had to press for a copy of the application. The stance which Ian Workman junior's solicitors took in that regard detracts from the contention that all involved were proceeding on the footing that Deansgate was inevitably going to be a party to the proceedings before me on 15th February 2018.

54. I remain of the view that the approach taken by Deansgate by way of standing back from the dispute as to the validity of the Transfer Form but being open to bringing a section 423 application if the Transfer Form was found to be valid and effective was a legitimate and appropriate one. In those circumstances it cannot properly be said that the actions of Deansgate amounted to "private

case management" or to presenting the court with a "fait accompli". Deansgate took steps which they were entitled to take and which the court regarded as appropriate.

55. At the time of the 15th February 2018 hearing Deansgate had issued its section 423 application but had not served it. At the hearing I expressed approval of Deansgate's stance. In those circumstances it cannot be said that it was an abuse of process for Deansgate subsequently to serve the application.

56. In those circumstances I have concluded that the Deansgate claim also does not fall to be struck out as an abuse of process.

57. For the sake of completeness I will address briefly an argument made by Mr. Wigley on behalf of Deansgate. He contended that there was a public interest in bringing wrongdoers to justice and that this should be regarded as a factor in the broad merits-based judgment which is required by *Johnson v Gore Wood & Co*. I do not accept that argument. Section 423 provides the court with a discretion to set aside transactions in certain circumstances but it is not to be seen as some form of punishment of wrongdoers – if only because the recipient of a transfer which is ultimately set aside may be entirely innocent of any wrongdoing. There is a public interest in parties being able to bring their disputes and claims before the courts particularly where there has not already been an adjudication on their claim and that interest favours allowing claims to be brought but is to be seen in the light of the public interest in the finality of litigation and of the court's need to ensure its processes are not abused.