Neutral Citation Number: [2021] EWHC 4 (Ch)

Case No: PT-2019-000849

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5/1/2021

Before:

MASTER CLARK

- -

Between:

MR JAMES JOHN CLARKE-SULLIVAN **Claimant**

- and -

MISS ISLA ROSE CLARKE-SULLIVAN
(a child, by Julia Claire Maile, her litigation friend) **Defendant**

- -
- -

Toby Bishop (instructed by **Bolt Burdon**) for the **Claimant**
David Brounger (instructed by **Bolt Burdon**) for the **Defendant**

Hearing date: 22 April 2020

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Approved Judgment

I direct that this approved judgment, sent to the parties by email on 5 January 2021, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This is an application (made by Part 8 claim) under s.48 of the Administration of Justice Act 1985 ("AJA 1985") in respect of the will dated 15 February 2015 ("the Will") of Katherine Clarke.

Parties

2. The claimant, James Clarke-Sullivan, is Katherine's widower and the executor of the Will. The defendant, Isla Clarke-Sullivan, is the 4 year old child of Katherine and James' marriage, and acts by her litigation friend, Julia Maile. For clarity, I refer to each member of the family by their first name, and to Katherine and James together as "the couple".

Background facts

3. On 27 December 2014, the couple, as settlors, executed a deed ("the 2014 Deed") creating a trust entitled "The JSKC Family Trust" ("the Trust"). This was the second trust created by the couple with this name, but nothing turns on that. The trustees were Katherine, James and New Zealand Trustee Services Limited. The Trust was established to hold property intended to be purchased in New Zealand, but that purchase did not go ahead.

4. The Trust was a discretionary trust, with a wide range of discretionary beneficiaries, comprising Katherine and James, their children, grandchildren and remoter issue, their other blood or adoptive relations, trustees of any discretionary trust of which any of the above were beneficiaries, and any organisation or purpose deemed to be charitable under New Zealand law. It included wide discretionary powers to pay both income and capital to the discretionary beneficiaries. Isla is one (and the only one) of the "Final Beneficiaries" under clause 1.2(d) of the Deed: she is the default appointee if the Trust is wound up under provisions in clause 11.

5. Clause 24.1 provides that:

> "The trusts created by this Deed are established under the laws of New Zealand and that country shall be the initial forum of administration of the Trust."

6. The Will, which, as noted above, was executed on 15 February 2015, leaves Katherine's chattels to James, and forgives any debts owed to her by the Trust. By clause 7(b)(i) ("the Clause"), it directs James as executor to pay her net residuary estate to

> "the trustee of the JSKC Family Trust (the "Trust") created by deed dated 27 December 2014 for the Trust's general purposes."

7. On 17 December 2015 Katherine bought 80 Hemingford Road, London N1 1DD ("the property") in her sole name as a family home.

8. On 1 March 2016, Katherine and James executed a document entitled "Deed Winding Up Trust" ("the 2016 Deed") in respect of the Trust. This was done on advice from a New Zealand lawyer that its existence adversely affected the couple's

non-resident tax status in New Zealand, from where they both originate. This claim is premised on the basis that the 2016 Deed was effective to bring the Trust to an end. That was the opinion expressed by a New Zealand lawyer, Vanessa Robb, in her affidavit dated 22 March 2019 in support of James' application for an English grant of probate of the Will.

9. On 3 September 2016 Isla was born.

10. On 3 February 2019, very sadly, Katherine was killed in an avalanche while skiing.

11. The issue as to the effect of the Clause first arose when James applied for the grant. Ms Robb expressed her view succinctly in her affidavit of 22 March 2019:

> "[the Clause] fails because the JSKC Family Trust was wound up by Deed Winding Up Trust dated 1 March 2016."

12. Katherine's English assets consist of the property (now worth about £1,775,000) and about £21,000 in cash in the bank and shares. Probate in respect of her English assets was granted on 16 July 2019. The grant recites that she was domiciled in New Zealand. She also had assets in other countries: jointly owned properties in Switzerland and Germany, and cash in a joint bank account in New Zealand (NZ$216,563) - which the evidence indicates passed to James by right of survivorship on her death.

13. The claim is also premised on the assumption that, if the gift under the Clause fails, the English rules of intestacy (s.46 of the Administration of Estates Act 1925) would apply to the entire residuary estate (but see para 31 below) would have the following results. The value of the net residuary estate is about £1.8 million. James would be entitled to the statutory legacy of £250,000 plus an absolute interest in one half of the remainder i.e. one half of £1.55 million = £775,000. James' total entitlement therefore would be £1.025 million. I am asked to assume that James would be entitled to the surviving spouse exemption (although HMRC have accepted that James and Katherine were both domiciled in New Zealand at the date of her death), so that no inheritance tax would be payable in respect of this.

14. The remaining £775,000 would be held for Isla on the statutory trusts provided for by s.47 of the AEA 1925, so that she would be entitled to it if she attains 18. Section 47 also provides for that trust to include a statutory power of advancement, and statutory provisions which relate to maintenance and accumulation of surplus income. Inheritance tax is payable on Isla's share, subject to the relief provided for by the nil rate band (£325,000) and private residence relief (£125,000). IHT at 40% is therefore payable on £325,000 = £130,000. Isla's net entitlement would therefore be £645,000.

15. In these circumstances, James seeks the following relief:

> "an order that as executor of the Will he be given permission to distribute the estate of [Katherine] pursuant to counsels' opinion on the footing that on the true construction of the Will, [the Clause] has the effect of settling the residuary estate on the trustees of the [Trust] as defined by [the 2014 Deed],

subject to the terms of the Deed and with a perpetuity period running from the date [Katherine] died, on 3 February 2019 notwithstanding that the trust originally constituted by that Deed was wound up by the acceleration of the distribution date to 1 March 2016 by a further deed."

16. The claim is supported by an initial Opinion of the claimant's counsel, Toby Bishop, dated 16 April 2019. I set out the key passage:

> "**Is clause 7(b)(i) of the Will effective?**
>
> 14. I consider it likely that it is, and the residue is held on trust by James and Ms Maile (as trustees of the Will trust), to be appointed to the trustees of [the Trust] on the terms of the deed dated 27 December 2014.
>
> 15. It appears to me this is a question of English Law in respect of the Katherine's English immoveable estate. Cl. 7(b)(i) provides that the residue will pass: "To the trustee of the JSKC Family Trust (the 'Trust") created by deed dated 27 December 2014 for the Trust's general purposes." The authors of *Lewin* describe: "The "three certainties" which must be found in a declaration of trust are therefore certainty of words, certainty of subject-matter and certainty of objects." The drafting of Katherine's will makes clear she intended trust property to be held on trust; the subject-matter is her residuary estate; and the objects are the Discretionary Beneficiaries identified at clause 1(2)(c) of [the Deed].
>
> 16. If [the Trust] as constituted by the settlement recorded in [the Deed] ceased to exist upon the execution of the 2016 Deed (see sub-heading below), I consider it most likely that a separate trust was created upon Katherine's death incorporating the terms of [the Deed], with the perpetuity period running from the date the new trust took effect."

17. The Opinion refers to Ms Robb's affidavit and suggests that the court is invited to determine the correct interpretation of the Will i.e. by a claim brought for a declaration as to the proper construction, in the events that have happened, of the Clause.

18. Also in evidence is an Advice dated 11 July 2019 of counsel for Isla, David Brounger. He refers to the well-known passage in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912 by Lord Hoffmann as setting out the relevant principles of construction. At para 10, he concludes:

> "In my view, in this case the language of the will would be clear to a reasonable man with a knowledge of the facts; there is no issue of something going wrong with the language and the fact the approach Katherine wished the trustees of [the Trust] to take was revisited on a number of occasions throughout the will simply supports the conclusion that her intention was that her residuary estate was to be paid to the trustees of [the Trust]."

19. At para 17, he turns to the effect of the winding up of the Trust:

> "Finally, there is the issue of potential failure of a gift where the trust is wound up during the testator's life. Returning to *Lewin* [the reference is to para 3-075, 19th edn], the editors draw an analogy with gifts to trustees of unincorporated charitable trusts in which their having been wound up would not necessarily cause the gift to fail (but bearing in mind the difference in approach to charitable trust). In my view, where the intentions of the testator are clear and refer to an existing document which can clearly be identified (as is the situation in this case) and where part of the estate is given to the trustees of the trust created by that document on the terms of that trust, it is very likely that the Court would be likely to give effect to those wishes (bearing in mind the presumption against intestacy). I do not consider that the winding up of the trust should overturn the presumption. The intention set out in the clear terms of the will remains to give the residuary estate to the trustees on the terms set out in the document creating the trust. There is no actual variation of the terms of the trust or appointment to a beneficiary between the date of the will and the date of death. I do not consider that the winding up of the trust between the date of the will and the date of death would amount to a variation of the terms of the trust - the terms remain as set out in the trust deed. Cases such as *Re Edwards* refer to variations by document that do not comply with section 9 of the Wills Act 1837. There is no variation here which would affect how the trustees deal with [the Trust]. In the circumstances I am of the view that the gift of the residuary estate remains valid despite the winding up of the trust. Katherine's intentions remain as set out in will, they are certain, and they may be put into effect. Once again to quote Lord Greene MR in *Re Edwards* (and which in my opinion applies to this case):
>
> > 'The testator makes it quite clear what his testamentary wishes are. He is directing that those concerned with the administration of his estate shall tum to the document, namely, the settlement, in order to find what those wishes are. The identification of that document is a perfectly simple matter. There is no question what the document is, and there is no rule of law which makes it impossible to lead evidence to identify it.'"

20. Finally, the court has a Supplementary Opinion of Mr Bishop dated 10 October 2019. This records that Mr Brounger agrees with his (Mr Bishop's) view as to the effect of the Clause, and advises that in the light of this, the claim should be made under s.48 AEA 1925; and a Supplementary Advice of Mr Brounger dated 11 October 2019.

21. There was also no evidence before me as to either counsel's standing, though that is a remediable matter, if necessary.

Legal principles

Section 48 of the AEA 1985

22. Section 48 of the AEA 1985 provides:

> "**48. - Power of High Court to authorise action to be taken in reliance on counsel's opinion.**
>
> (1) Where—

(a) any question of construction has arisen out of the terms of a will or a trust; and
(b) an opinion in writing given by a person who has a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 has been obtained on that question by the personal representatives or trustees under the will or trust,

the High Court may, on the application of the personal representatives or trustees and without hearing argument, make an order authorising those persons to take such steps in reliance on the said opinion as are specified in the order.

(2) The High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument."

23. The circumstances in which an application is appropriate are discussed in para 29.105 of the Chancery Guide:

> "S.48 is intended for use in clear cases only; it will not provide, and an applicant therefore should not seek, a binding decision on the question of construction which has arisen. In a particular case, the court may consider that, as a matter of discretion, it would be preferable to have the issue finally and bindingly resolved at a substantive hearing, as opposed to its merely being made the subject of directions to the trustees, especially where conflicting opinions have been expressed by different counsel advising the representatives: see *Greenwold v Pike* [2007] EWHC 2202 (Ch)."

24. *Lewin on Trusts* (20th edn) provides further guidance at para 39-081:

> "[The section] is also confined to cases in which there is no dispute which would make it inappropriate to make the order in the absence of argument; but it is not every dispute that excludes the procedure. There may be no dispute at all but the trustees are unable to act without obtaining the decision of the court, e.g. where the interests of persons unborn or not of capacity are affected or there is no one having an obvious interest in opposing the application [referring to *Re Duffy* [2013] EWHC 2395 (Ch)]. Alternatively, there may be a dispute in which one of two competing constructions is obviously wrong or the matter in issue may be too insubstantial to justify more than a summary decision. But where there is a difference of view between well-qualified legal advisers and the assets are significant, the procedure is not appropriate [referring to *Greenwold v Pike*]."

25. *Greenwold v Pike* also establishes that the procedure is confined to questions of construction, and does not extend to rectification, however clear the evidence.

Submissions

26. James' counsel did not refer me to section 48, or to any authorities on that section. His skeleton argument stated that the parties seek the court's direction as to the

validity of the Clause, although that is not the relief sought in the claim. His submissions (with which Isla's counsel agreed) were primarily directed towards

(1) the applicable law governing the validity of the Clause; and
(2) having concluded that English law applied insofar as Katherine's net residuary estate includes the Property, the English law as to the construction of wills;
(3) the outcome of the application of English law to the Clause.

27. I turn therefore to consider these submissions.

Applicable law

Claimant's submissions

28. The claimant's counsel referred me to Rule 155 in *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn, which provides

> "The material or essential validity of a will of immovables or of any particular gift of immovables contained therein is governed by the law of the country where the immovables are situated (lex situs)."

29. He submitted that the issue arising in this case is one as to the material or essential validity of the Will, and is, accordingly, governed by English law insofar as it applies to the property.

30. So far as the cash and shares are concerned, he submitted that Rule 154 applies. This provides:

> "The material or essential validity of a will of movables or of any particular gift of movables contained therein is governed by the law of the testator's domicile at the time of his death."

Accordingly, he submitted, since Katherine was domiciled in New Zealand, the applicable law in respect of these items would be New Zealand law.

31. James' counsel then invited me to proceed on the basis that Ms Robb's view reflected the applicable New Zealand law. If so, then the gift of those items fails. He initially submitted that the disposition of that part of Katherine's residuary estate is governed by the English rules of intestacy. However, in the course of the hearing, he accepted that New Zealand rules of intestacy would apply. This is the settled position: see *Dicey*, Rule 149.

Discussion and conclusion

32. The first question, which was not addressed in any detail by either counsel, is whether the issue arising in this case is one as to the "material or essential validity" of the Will.

33. Guidance as to the meaning of this expression is found in para 2-044 of *Theobald on Wills* 18th edn:

> "Essential validity is to be contrasted with formal validity in that the will in the former case contains provisions to which the law will not give effect.

> Accordingly, the term essential validity includes such questions as whether the testator is bound to leave a fixed proportion of his estate to his wife or children, whether a gift to charity is valid, whether a beneficiary under the will is put to his election, whether a gift to an attesting witness or his or her spouse is void, and whether a beneficiary takes under the will of a testatrix if it is uncertain whether the beneficiary survived the testatrix."

34. Examples of material or essential validity of gifts of immovable property are given in para 2-061 of *Theobald*.

> "what estates can be legally created by will, what are the incidents of those estates, whether the tenant for life of long leaseholds is entitled to enjoyment in specie, whether the interests given infringe the rule against perpetuities or accumulations, whether gifts to charities are valid, and whether the testator is bound to leave a fixed proportion of his estate to his wife or children."

35. Similarly, at para 27-045 of *Dicey, Morris &* Collins 15th edn

> "A will made by a person under no testamentary incapacity and duly executed or formally valid may nevertheless be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect. Thus, English law restricts accumulation for charitable trusts or which vest at too remote a date. The laws of France and of Scotland invalidate, unlike English law, bequests of more than a certain proportion of the testator's property in derogation of the rights of certain next-of-kin or, in Scotland, his widow. Such invalidity, arising from the nature of the bequest, is termed *material* or *essential* invalidity"

36. It is clear from the above, in my judgment, that the issue in this case is not an issue as to the material or essential validity of the Will (or the Clause). It is an issue of interpretation, which does not involve material or essential validity. The central meaning of the Clause is clear: Katherine intended to give her residuary estate to the trustee(s) of the Trust. Since at the date of her death, there were no longer any such trustees, the issue which arises is whether the Clause can be construed more widely (as both counsel contend) as intending to create a trust on the terms of the Deed.

37. However, questions of construction or interpretation are governed by the system of law intended by the testator, which is presumed to be the law of his domicile at the time when the will is made, unless a contrary intention appears from the will: *Theobald*, para 2-064; *Dicey*, Rule 156. The commentary on Rule 156 states, at 27-060 to 27-061:

> "This Rule bears upon three different cases.
>
> …
>
> 2-061
>
> (3) Where he has failed to foresee and provide against certain events (e.g. that one of his residuary legatees might predecease him), and in consequence there is a gap in his dispositions, the gap will (in the absence of indications to the contrary) be filled by the law of his

> domicile. This of course is not construction in the sense that it has any reference to the intention of the actual testator, for *ex hypothesi* he never directed his mind to the events which have happened; but it is construction in the sense that the law supposes that the average testator would wish the gap to be filled in a particular way. Different laws have different views as to what the average testator would desire in particular circumstances; thus, if a residuary legatee predeceases the testator, English law says that there is a lapse and that his share is undisposed of, but French law says that it may in certain circumstances augment the shares of the survivors."

29 The authority for this rule applying to immoveable property is *Philipson-Stow v IRC* [1961] A.C. 727

> "Take next the case where there is a disposition of immovable property by will by means of a direct devise and not a trust for sale. There is no doubt that the proper law regulating the disposition is the law of the country where the property is situate and not the law of the testator's domicile: see *Freke v. Lord Carbery,* 99 *In re Maces.* 100 There is, perhaps, again an exception in regard to the construction of his will: for if a question should arise as to the interpretation of the will, it will normally fall to be construed according to the law of his domicile at the time when he made his will …
>
> The so-called exceptions to what I have referred - about the construction of a will - are not really exceptions at all: for in construing a will, so as to see what a testator meant, every civilised country looks to see what he intended - and for this purpose you may legitimately look at the law he had in mind - but you only do this as a guide to find his meaning. You do not do it so as to find out the law which regulates his dispositions. He has no choice about that."

38. As *Dicey* notes, this is reinforced by s.4 of the Wills Act 1963 which provides that the construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

39. In my judgment, therefore, the law to be applied to the interpretation of the Will is the law of Katherine's domicile at the date she made the Will.

Evidence as to Katherine's domicile at the date of making the Will

40. For reasons that will be apparent, there was no evidence in the claim as Katherine's domicile at the date of making the Will. In addition, the evidence included an email dated 9 January 2015 from Katherine to Jonathan Cron of New Zealand Trustee Services Limited, instructing him in relation to his drafting the Will. In it she states:

> "We are currently non-domiciled [in New Zealand] for tax purposes."

41. In these circumstances, I invited James' solicitors to clarify his position as to as to Katherine's domicile as at the date of the Will. This resulted in their filing a witness statement dated 10 November 2020 by James, which sets out various factual matters relevant to Katherine's domicile. This evidence is not entirely satisfactory, in that it focuses primarily on the position before the couple moved to

London from New Zealand, and after the couple moved back to London from Dubai in December 2015, and not on the position as at the date of the Will. James also states that he has always been domiciled in New Zealand and that he believes that Katherine's domicile was New Zealand. The question of domicile is, however, a question of mixed fact and law. James' view, as a non-lawyer, as to his and his wife's domicile is of very little weight. James' solicitors did not file any submissions as to the legal consequences of the facts set out by him.

42. It is necessary therefore to return to *Dicey* (Ch 6) for a statement of the relevant principles, which for present purposes, are sufficiently settled:

> Rule 4
> (1) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home.
> (2) A person may sometimes be domiciled in a country although he does not have his permanent home in it.
>
> Rule 7
> An existing domicile is presumed to continue until it is proved that a new domicile has been acquired.
>
> Rule 8
> For the purposes of an English rule of the conflict of laws, the question where a person is domiciled is determined according to English law.
>
> Rule 9:
> (1) Every person receives at birth a domicile of origin:
> (a) A legitimate child born during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at the time of his birth
>
> Rule 10:
> Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise.
>
> Rule 11:
> Any circumstance which is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice in that country.

43. As to express statements or declarations as domicile, the court should not rely on these statements unless corroborated by action consistent with the declaration. Thus, *Dicey* states in para 6-051:

> "Direct declarations of intention call for special comment. The person whose domicile is in question may himself testify as to his intention, but the court will view the evidence of an interested party with suspicion. Declarations of intention made out of court may be given in evidence by way of exception to

the hearsay rule. The weight of such evidence will vary from case to case. To say that declarations as to domicile are "the lowest species of evidence" is probably an exaggeration. The present law has been stated as follows:

> 'Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions.'"

44. James' evidence sets out the following facts. Katherine's father was born in Clinton, New Zealand, and lived in New Zealand for all his life. He was clearly domiciled in New Zealand throughout his life. Katherine was also born in Clinton on 24 August 1979.

45. This evidence is sufficient to show that Katherine's father was domiciled in New Zealand, and, accordingly, that Katherine's domicile of origin was New Zealand.

46. The remaining question is whether Katherine later acquired a domicile of choice in another country by living there, and intending to live their permanently or indefinitely. The two candidates are the UK and Dubai.

47. Katherine had a strong connection to New Zealand. She grew up and was educated there, qualifying with a joint LLB and BA (Hons) from Otago University. She was later admitted as barrister and solicitor in New Zealand.

48. She married James (who is also a New Zealand citizen, born in New Zealand) in New Zealand on 6 February 2010. They lived in London from 2006 to 2010, in Dubai from 2010 to 2015, and then in London from December 2015 until Katherine's untimely death in 2019. In each case, they lived in these countries because Katherine's work was based there. Their right to live and work in the UK was granted by sponsorship visa, which did not grant a permanent right to remain. Katherine retained a right to vote in New Zealand, which she exercised.

49. James' evidence is that they always considered New Zealand as their home, and it was always their intention to return there in the future.

50. As to Katherine's statement on 9 January 2015 that she was non-domiciled in New Zealand, James invites me to conclude that she made a mistake and meant to say "non-resident". It would be surprising for a qualified lawyer to make a mistake of this type, and it is unlikely in my judgment that it was an error. However, as noted above, such a statement is not determinative, and has to be evaluated in the context of all the circumstances. I note that Katherine referred to domicile "for tax purposes", and that she did not identify any other country as being one in which she (and James) were domiciled.

51. On the evidence before me, it cannot be concluded that Katherine intended to reside permanently in Dubai, a county with which her only connection was employment

on a time-limited basis. She had not therefore acquired Dubai as a domicile of choice.

52. As for England, the position is more nuanced. Buying the Property, although it occurred after the Will was made, is a factor which points towards a degree of permanent connection with England. However, it is of course not conclusive. However, when she made the Will, Katherine was not resident in England and had not been resident there for 5 years. Taking this into account, together with the other matters set out above, it also cannot, in my judgment be concluded that Katherine had formed the requisite intention permanently or indefinitely to remain in England.

53. James' evidence shows, therefore, in my judgment, that New Zealand remained Katherine's domicile when she made the Will.

Evidence as to New Zealand law on the interpretation of the Will

54. As noted above, Ms Robb's affidavit states that the gift under the Clause fails by reason of the Trust having been wound up at the date of Katherine's death.

55. It is settled law that foreign law must be proved by expert evidence: *Dicey* at para 9-013. Ms Robb appears to be qualified to give such evidence, but evidence of qualifications is not before me. Her affidavit was not prepared to be, and is not, expert evidence compliant with CPR Part 35. In any event, it is not in my judgment credible or reliable evidence as to the relevant New Zealand law: it is unsupported by reference to authority, and contains no reasoning to support its conclusion. I note also that the attendance note of a telephone conversation between Ms Robb and the claimant's solicitor, Alexa Payet, on 23 May 2019 includes the following comments on the claimant's counsel's first Opinion:

> "You may be able to construct the same argument in NZ - but we haven't prepared an opinion like you have in UK looking at all the relevant case law etc so we couldn't say that without having done the similar level of work that your barrister has done. That's really where I was getting to when I said if you wanted us to look at that we'd have to do the work, whether we could construct the argument here and the likely success of the argument."

56. This confirms that the statement in Ms Robb's affidavit was not based on full consideration of the relevant case law.

57. At the hearing, I had, therefore, no or no credible expert evidence as to New Zealand law of interpretation of wills.

58. Having reached these conclusions in the course of drafting this judgment, I sent a Note to the parties setting out in summary form the conclusions set out above, and directing them to either:

    (1) file evidence as to the relevant New Zealand law on interpretation of wills; or

    (2) invite the court to proceed on the basis that the applicable law is English law – and if so, to file written submissions in support of this being a course the

court is entitled to take; drawing their attention to the decisions of *Re Faraker* [1912] 2 Ch. 488 and *Re Roberts* [1963] 1 W.L.R. 406.

59. James responded to this direction by filing an affidavit sworn on 10 July 2020 of a New Zealand qualified barrister and solicitor, Sally Rebecca Morris, which set outs her qualifications and expertise; and exhibits her instructions from James' solicitor, and her report in response to those instructions.

60. I accept that Ms Morris has the appropriate qualifications and expertise to give evidence as to New Zealand law on the interpretation of the Clause.

61. Her report deals with three main areas of New Zealand law:
    (1) Formal validity – she concludes that the Will is a valid will;
    (2) Interpretation – see para 62 below;
    (3) Rectification – as noted above (para 25), whether the Will should be rectified is outside the scope of this claim.

Interpretation

62. As to this Ms Morris' discussion falls into two parts.

External evidence

63. In the first part, she sets out that the New Zealand Court may rely upon external evidence of Katherine's testamentary intentions in order to determine "Katherine's intentions and the effect of her will". This external evidence can, she says, be found in former wills, her instructions regarding drafting her last Will, and her conversations with friends and family.

64. Ms Morris then refers to section 32 of the New Zealand Wills Act 2007, which provides:

> "**32 External evidence**
> (1) This section applies when words used in a will make the will, or part of it, -
> (a) meaningless; or
> (b) ambiguous on its face; or
> (c) uncertain on its face; or
> (d) ambiguous in the light of the surrounding circumstances; or
> (e) uncertain in the light of the surrounding circumstances.
>
> (2) The High Court may use external evidence to interpret the words in the will that make the will or part meaningless, ambiguous, or uncertain.
>
> (3) External evidence includes evidence of the will-maker's testamentary intentions.
>
> (4) The court may not use the will-maker's testamentary intentions as surrounding circumstances under subsection (1)(d) or (e)."

65. Continuing in a section entitled "*Interpretation of Katherine's Will*", Ms Morris says:

"40. In Katherine's Will, the ambiguity and uncertainty arises because it is unclear who the residue of Katherine's estate goes to given the Trust was wound up.

41. It is unclear what Katherine meant in [the Clause] by referring to "*the trustee of the JSKC Family Trust*" given there were three trustees of the Trust, one of whom was Katherine.

42. Further, the language used in Katherine's Will is unclear in the light of the surrounding circumstances. Accordingly, under New Zealand law, external evidence may be used by the Court to determine Katherine's intentions, namely that she wished her estate to be held by James on testamentary trust for his and Isla's use and benefit.

43. James' mirror Will further demonstrates that he and Katherine both intended that the other and any children they had, which now includes Isla, would benefit from their respective estates.

44. In my opinion, the Court may be prepared to use s 32 [of the Wills Act 2007] to interpret the clause as meaning that the residue goes to a trust on the same terms as the JKSC Family Trust or a testamentary trust for the benefit of James and Isla."

66. I have five reservations about this part of Ms Morris' report.

67. First, it would appear that Ms Morris has not been provided with the types of external evidence she refers to. She was provided with the hearing bundle, which includes some instructions as to the Will, but does not include a completed copy of the Will Questionnaire apparently sent to Katherine. It also does not include former wills or any evidence of conversations with family and friends as to the contents of the Will.

68. Secondly, there is no attempt by Ms Morris to analyse such external evidence as she has been provided with to show that that it evidences the intention set out in para 42 of her report. The conclusion in that paragraph that Katherine intended that "her estate to be held by James on testamentary trust for his and Isla's use and benefit" is therefore unsupported by any analysis of the evidence available to her.

69. Thirdly, Katherine' testamentary intentions are expressed in her specific gift to the Trust. Ms Morris does not explain why an intention at a higher level of generality is to be imputed to Katherine in these circumstances.

70. Fourthly, the relevant ambiguity in this case is at least arguably "in the light of the surrounding circumstances" within the meaning of s32(1). If so, s.32(3) and (4) would appear to exclude Katherine's testamentary intentions from being admissible. Ms Morris does not discuss the effect of this exclusion, or seek to explain why it does not apply.

71. Fifthly, Ms Morris does not express a concluded view as to the construction of the Clause, only that the Court may be prepared to interpret the Clause as set out in para 44 of her Report.

72. This part of the report cannot in my judgment be relied upon as justifying the construction of the Clause put forward in the claim.

Testamentary trust

73. As to this, Ms Morris sets out that, whilst there is no New Zealand case law to this effect, there is judicial support in both Canada and the United Kingdom for the finding of a testamentary trust based on the terms of an *inter vivos* trust, where the will maker has specifically referred to an identifiable trust in their last will.

74. The New Zealand courts would be guided by these decisions, she says. She also sets out that under New Zealand law (as under English law), there are three certainties required for a valid trust, and that these are present as follows:

    (1) Intention: the Will (i.e. the Clause) shows a trust was intended;
    (2) Subject matter: Katherine's residuary estate;
    (3) Object: the beneficiaries of the Trust, being James and Isla.

75. On this basis of interpretation, she concludes, James would hold Katherine's estate on testamentary trust to be distributed in line with the directions in the Will and incorporating the terms of the Trust; and that there is a "strong legal basis" for the New Zealand High Court so to hold.

76. This evidence, in my judgment, justifies the English court concluding that under the relevant New Zealand law, the Will is to be so construed.

Discussion and conclusions

77. This claim has developed in a way which means that the condition in s.48(1)(b) of the AJA 1985 is not met, and, in its current form, the claim cannot succeed.

78. However, in order to deal with the claim in the most efficient and cost effective way, I would, as matter of discretion, be willing to grant permission to amend the claim form to claim declarations that:

    (1) New Zealand law is the law applicable to the construction of the Will; and
    (2) on the proper construction of the Will, applying New Zealand law, Katherine's estate is held on testamentary trust to be distributed in accordance with the directions set out in the Will and incorporating the terms of the Trust;

    and, without a further hearing, to make an order containing those declarations.

79. I therefore invite the parties to seek to agree the appropriate amendments to the claim form, and to file a draft order reflecting the above.