Neutral Citation Number: [2024] EWHC 1711 (Ch)

Case No: PT 2023 001023

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 03/07/2024

Before :

CHIEF MASTER SHUMAN

- -

Between :

CYDLIA ZARA ADLER	**Claimant/ Respondent**
-and-	
CRIPPS TRUST CORPORATION LIMITED (in its capacity as Administrator of the estate of Alexander Klein deceased)	**Defendant**
-and-	
ELENA KLEIN	**Applicant**

- -
- -

MARK BAXTER (instructed by **WITHERS LLP**) for the **Applicant PENELOPE REED KC AND MATHEW ROPER** (instructed by **STREATHERS HIGHGATE LLP)** for the **Respondent**

Hearings dates: 9 and 11 January 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on 3 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF MASTER SHUMAN

CHIEF MASTER SHUMAN :

1. The Applicant, Mrs Elena Klein, has brought two applications against the Respondent and Claimant, Ms Cydlia Adler. I shall refer to the parties to the applications as Mrs Klein and Ms Adler, respectively, not least as this is not the only litigation that they are involved in.

2. The first application notice dated 22 November 2023 seeks orders that: (1) Mrs Klein be joined as second defendant and amendment of the claim form be dispensed with; (2) there be summary judgment for the defendants and/or that the claim form be struck out; (3) in the alternative that the claim be transferred to the Family Division to be case managed and heard with the proceedings in that court.

3. The second application notice dated 8 December 2023 seeks to amend the first application to include an additional sub-paragraph 2 in part 3 of the notice that, "in particular, regardless of whether or not the claim form is struck out, there be summary judgement that upon the true construction of the document described in the claim form paragraph 2(4) as "an untitled document relating to the shares in the 15 companies which was signed by the claimant on 12th July 2011 and witnessed by Simon Nosworthy" the shares referred to therein are held by the claimant on trust for the estate of Alexander Klein absolutely".

4. The defendant, Cripps Trust Corporation Limited, ("Cripps"), does not oppose the joinder of Mrs Klein but is otherwise neutral on the applications.

5. By the claim Ms Adler seeks a declaration that she is the sole beneficial owner of the shareholding in Parygold Properties Limited ("Parygold"), Brongard Limited ("Brongard") and 15 other identified companies ("the 15 companies"). She relies on five identified documents to support her claim:

   (1) A document headed "Disassociation Agreement" dated 21 March 2001, signed by Alexander Klein ("the deceased") and Ms Adler, witnessed by Prodromos Shakallis.

   (2) An untitled document relating to the Parygold shares standing in the deceased's name, signed by the deceased on 16 October 2007 and witnessed by Charles Lerner.

   (3) An untitled document relating to the Brongard shares standing in the deceased's name, signed by the deceased on 16 October 2007 and witnessed by Charles Lerner.

   (4) An untitled document relating to shares in the 15 companies which was signed by Ms Adler on 12 July 2011 and witnessed by Simon Nosworthy.

   (5) An untitled document relating to shares in the 15 companies which was signed by the deceased and Ms Adler on 12 July 2011 and witnessed by Simon Nosworthy.

6. Mrs Klein has brought proceedings in the Family Division of the High Court under case number FD 23F00023 seeking an order for reasonable financial provision from the estate of her late husband, the deceased under section 2 of the Inheritance

(Provision for Family and Dependents) Act 1975 ("the Inheritance Act proceedings"). Cripps is neutral in respect of the claim. Ms Adler opposes the claim.

7. In addition Mrs Klein brought proceedings under claim number PT 2021 000186 against Ms Adler and Leon Klein seeking to remove the former as executrix and trustee under the deceased's last will dated 5 January 2011, and not allow Leon Klein to be appointed by default ("the removal proceedings"). This was resisted by Ms Adler. By order dated 5 November 2021 Deputy Master Rhys made an order removing Ms Adler as executrix, he did not appoint Leon Klein as default executor and instead appointed Cripps as personal representative of the deceased's estate. Ms Adler remains the trustee of the will trusts, that part of the claim being dismissed.

8. There are two bundles of documents before me, including documents filed in proceedings in the Family Division, for which there is permission to rely on. I have also had the benefit of very thorough and detailed submissions by counsel for Mrs Klein and counsel for Ms Adler.

9. I have already made an order joining Mrs Klein as second defendant to the claim. I also informed the parties of my decision on the rest of the application: that I would not strike out the claim form or grant reverse summary judgment, or transfer these discrete proceedings to the Family Division for case managing with the Inheritance Act proceedings. I gave short oral reasons setting out the basis of my decision but said that I would also provide a full written judgment.

THE BACKGROUND

10. The deceased was born on 25 March 1933 in Hungary. He came to live in London when he was 15 or 16.

11. Mrs Klein was born on 2 February 1974 in Belarus.

12. The deceased held property and made investments through various property holding companies, including but not limited to Parygold, Brongard and the 15 companies. The role of Ms Adler is disputed. Ms Adler contended in the removal proceedings that she "played a significant role in the running of the companies over the preceding 50 years" and that she owned "the entirety of the shareholding in [Parygold] and [Brongard]." She stated that she ran the business after the deceased's death although Mrs Klein observed that a number of those companies were subject to a First Gazette notice for compulsory strike-off in 2021, 2022 and 2023, and seven were dissolved via compulsory strike-off. Whilst acknowledging that Ms Adler held certain shares in the companies, she understood from the deceased that Ms Adler was "just the secretary".

13. Certainly the evidence suggests that since the 1960's the deceased and Ms Adler had enjoyed a close personal and professional friendship. Ms Reed KC and Mr Roper on behalf of Ms Adler accept that the property investment business was run in a somewhat unorthodox and informal manner. It was submitted that "financial investment was not always reflected by share transfers and legal documents were routinely drafted by the deceased without seeking legal advice." The business was successful though and the value of their respective shareholdings in the companies was substantial.

14. As to the companies named in the claim form, Ms Adler was a registered shareholder in each of those companies, her shareholding ranging between 5% and 50% of the issued share capital. The only other registered shareholder in each of these companies was the deceased.

15. Ms Adler and the deceased signed a Disassociation Agreement dated 21 March 2001, witnessed by Prodromos Shakallis, which defined the deceased as "the First Party" and Ms Adler as "the Second Party," and provided that,

> "THE SECOND PARTY shall assume Full Ownership of the Entire Assets of BRONGARD LIMITED and PARYGOLD PROPERTIES LIMITED.
>
> THE FIRST PARTY may remain in Name only An Official and Shareholder of the said Companies which shall be in the Capacity of a NOMINEE ON Behalf of the SECOND PARTY until such time as the Second Party shall decide on a Replacement of the First Party.
>
> THE FIRST PARTY AGREES to enter a Covenant to the said effect Should the SECOND PARTY SO WISH."

16. By 21 March 2001, Ms Adler and the deceased held the shares in Parygold and Brongard equally.

17. There are a number of wills, either previously executed or in draft in the deceased's will file of BTMK solicitors. From attendance notes it is stated that Ms Adler always attended meetings between the deceased and his solicitors when he was making and amending his testamentary dispositions. For example, there is an attendance note dated 8 November 2001 for a 50-minute meeting with the deceased, Ms Adler and his solicitor, Fred W Goodson. This records that the deceased said his marriage to Yael Klein, his first wife, had broken down and that he would be seeking a divorce. He wanted to reduce the bequest to his wife, down to £10,000 and wanted to retain the wording that this was made on the understanding that she would make no other claim against his estate.

18. The deceased and Mrs Klein first met on 24 December 2001 in Jerusalem where Mrs Klein was then living and working. They were respectively aged 68 years and 27 years. Mrs Klein's case is that at the deceased's behest she left her job and moved to London in January 2003. They became engaged in May 2003 and married in Jerusalem on 18 September 2003. Prior to their marriage the deceased and Mrs Klein entered into a pre-nuptial agreement dated 7 August 2003. That agreement provided that,

> "IT IS Hereby Agreed that in the event of entering into Matrimonial Relationship by the Aforementioned Parties, the said, ELENA RUDIK, Hereby Declares a Complete Disclaim to Any Assets of the said ALEXAND ER KLEIN and will not make Any FINANCIAL CLAIM, WHAT SO EVER, Neither

> from the Said ALEXANDER KLEIN NOR FROM CYDLIA Z ADLER, the latter who is instructed and authorised by Alexander Klein to manage and deal with all matters and affairs of his Private, Business and respective corporate concerns in accordance with the decision and absolute discretion of the said CYDLIA ADLER."

19. Ms Adler's case is that she was told by the deceased that he had entered into the pre-nuptial agreement in order to protect the business should the marriage breakdown. I have not heard argument on this point, but it does seem to me to be arguable that this is the subjective intention of the deceased and I query whether it is properly admissible for the purposes of construction, although the fact and contents of the pre-nuptial agreement are admissible.

20. In January 2004 the marital home in London NW4 was purchased by the deceased. This property remains Mrs Klein's home.

21. On 5 October 2007 Elliott was born, he is now 16 and lives with Mrs Klein.

22. On 16 October 2007 the deceased signed two documents.

23. The first related to the Parygold shares standing in the deceased's name, witnessed by Charles Lerner. The second related to the Brongard shares standing in the deceased's name, also witnessed by Charles Lerner. They each provided as follows,

> "I ALEXANDER KLEIN…Hereby Confirm that the Shares Registered in my Name, in PARYGOLD PROPERTIES LIMITED …I Hold them on Behalf of CYDLIA ZARA ADLER…Who is truly the Intrinsic Owner of All The Shares in the Company."

and

> "I ALEXANDER KLEIN…Hereby Confirm that the Shares Registered in my Name, in BRONGARD LIMITED …I Hold them on Behalf of CYDLIA ZARA ADLER…Who is truly the Intrinsic Owner of All The Shares in the Company."

The deceased's last will

24. The deceased made a will dated 5 January 2011 ("the 2011 will"). He appointed Ms Adler as his executor and trustee and in default his nephew Leon Klein. The deceased's address is given as the companies' correspondence address in London N3.

25. Clause 2 provided that if Miss Adler acted as executor and trustee she was to be given 10% of all rental revenues dividends and profits from the everyday running of his business.

26. Clause 3 declared that all the shares held by the deceased in Brongard and Parygold are to be held on trust for Ms Adler.

27. Clause 4 appointed Miss Adler as guardian for the deceased's daughter, Rebecca Klein, and declared that during the period of guardianship Ms Adler is to receive a 10% share of all rental revenues dividends and profits from his daughters share of the estate.

28. Clause 5 gifted the sum of £300,000 to Mrs Klein on the basis that she made no claim against his estate.

29. Clause 6 gifted the sum of £100,000 to be held on trust for Rebecca for her lifetime and upon death the balance both as to capital and income was to fall in and form part of the residuary estate.[1]

30. Clause 7 gifted the sum of £100,000 to be held on trust for Elliott for his lifetime and provided for certain sums from the fund to be paid to him on attaining specified ages absolutely, any balance again to fall in and form part of the residuary estate.

31. Clause 8 provided 27 pecuniary legacies including Ms Adler, who was gifted the sum of £200,000 and family members.

32. Clauses 9 to 12 left various pecuniary legacies to the trustee on trust to be distributed among any persons nominated at the sole discretion of the trustee.

33. Clause 13 provided that the residuary estate after payment of debts and funeral and testamentary expenses and inheritance tax shall be held on trust as to 10% to Ms Adler and 90% on a charitable trust to be distributed at the absolute discretion of the trustee but with consideration to be given to 9 specified charities.

34. In 2011 the marriage was in difficulties. The deceased obtained legal advice from Manches LLP. On 27 May 2011 Manches wrote to Mrs Klein recording that the deceased was still recovering from a heart attack some 6 weeks previously, making allegations about recent events and requiring that Mrs Klein's mother vacate the family home and offering to allow her to move into the deceased's flat in Marble Arch for a period of 4 weeks.

35. On 12 July 2011 the deceased signed two key documents.

[1] Rebecca has since died so that the balance of her capital and income has fallen into the residuary estate.

36. One document is signed by Ms Adler on 12 July 2011 and witnessed by Simon Nosworthy, solicitor, and relates to the shares in the 15 companies, ("document A"). It states that,

> "I CYDLIA ZARA ADLER…Hereby confirm that Shares registered in my name in the respective Companies Listed Hereunder…"

After listing the number and percentage of the shares in the 15 companies it continues,

> "I Hold them on Behalf of Alexander Klein…Who is truly the Intrinsic Owner of all the shares in the said Companies."

37. The other document is signed by the deceased and Ms Adler on 12 July 2011, again witnessed by Simon Nosworthy, solicitor, and also relates to the shareholding in the 15 companies ("document B").

> "I ALEXANDER KLEIN…Hereby Confirm that IN THE EVENT OF MY DEATH, THE SHARES HELD IN MY NAME, in the respective Companies Listed Hereunder…"

After listing the 15 Companies but without reference to the number or percentage of the shares therein, it goes on to provide,

> "SHALL BE TRANSFERRED AND VESTED TO CYDLIA ZARA ADLER."

38. Ms Adler's case is that she was told by the deceased that the purpose of these documents was to protect the business and ensure that they passed to Ms Adler on his death. I have not heard argument on this point but again it does seem to me to be arguable that this is the subjective intention of the deceased and I question whether it is properly admissible for the purposes of construction.

39. By 12 July 2011 the shareholdings in the 15 companies were as follows:

a) Circle House Limited as to 50% each;

b) Kelross Investments Limited as to 50% each;

c) Little-House (London) Limited as to 5% for Ms Adler and 95% for the deceased;

d) Middle House Limited as to 50% each;

e) Organised Investments Limited as to 50% each;

f) Parkland House Limited as to 50% each;

g) Patradale Estates Limited as to 10% for Ms Adler and 90% for the deceased;

h) Small House Limited as to 50% each;

i) Taybem Properties Limited as to 5% for Ms Adler and 95% for the deceased;

j) Turnmill Properties Limited as to 5% for Ms Adler and 95% for the deceased;

k) Wadhurst Investments Limited as to 50% each;

l) Westbeech Properties Limited as to 50% each;

m) Westerfield Properties Limited as to 50% each;

n) White House (Clapton) Limited as to 50% each; and

o) Wyndcliffe Properties Limited as to 50% each.

40. On 25 March 2020 the deceased died. The removal proceedings concluded in November 2021. On 31 August 2023 Letters of Administration with will annexed were granted to Cripps. The gross value of the estate in the United Kingdom is said to amount to £9,222,626. The grant was extracted by Cripps LLP.

41. It is clear from the witness statements filed in the 1975 Act claim that Mrs Klein and Ms Adler agree on little in respect of the relationship between the deceased, Mrs Klein and Ms Adler. By way of illustration, Ms Adler asserts that she met Mrs Klein in 2002 and the latter spoke good English. Mrs Klein says that she only met Ms Adler after she had married the deceased, so after September 2003. She says she barely spoke English when she met the deceased and enrolled in a beginner's English class in May 2003, although did not attend many classes over that summer as she was too busy organising the wedding in Israel.

42. It would be fair to describe Mrs Klein and Ms Adler's relationship as hostile. Both make serious allegations against each other and how each of them treated the deceased. Mrs Klein accepts that her marriage to the deceased was not perfect and that he was a controlling person. However she asserts that Ms Adler "presents the Court with a picture of me, my family and my relationship with my husband that is untrue. She makes unfounded allegations of abuse. She describes events that simply did not happen." Whilst much of this will only be relevant for the Inheritance proceedings there is some disagreement as to the events surrounding some of the 5 documents. This is relevant to the factual matrix. Save for a judgment in respect of the removal proceedings, where as is usual, the parties did not give oral evidence but relied on submissions made by their respective counsel, there has been no determination of those issues.

THE CLAIM

43. Ms Adler has brought a claim, issued on 20 November 2023, seeking a declaration that upon the construction of the 5 identified documents she is absolutely entitled to the shareholding in Parygold, Brongard and the 15 companies.

44. At present the residue of the deceased's estate has a value of around £8 million. If Ms Adler's claim succeeds the value of the estate would be reduced to £1.4 million and of that the residue would be around £340,000. The Inheritance Act proceedings are yet to be determined. The extent of the deceased's estate is therefore of primary importance.

THE LAW

45. As to joinder of parties CPR Part 19.2 provides that,

> "(2) The court may order a person to be added as a new party if
>
> (a) it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

46. Ms Adler and Mrs Klein do not take any issue with Cripps' position in this case. Competing interests in respect of an asset which may or may not fall within the deceased's estate are usually categorised as 'hostile trust disputes'. In Alsop Wilkinson v Neary [1996] 1 WLR 1220 Lightman J did not accept the argument that trustees had a duty to defend the trust and at 1225 said,

> "In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and (in the absence of any court direction to the contrary and substantially as happened in Merry v Pownall [1898] 1 Ch 306) offer to submit to the court's directions leaving it to the rivals to fight their battles. If this stance is adopted, in respect of the costs necessarily and properly incurred eg in serving a defence agreeing to submit to the courts direction and in making discovery, the trustees will be entitled to an indemnity and lien."

47. The court has a power to strike out the whole or part of a claim. CPR r. 3.4 provides that,

> "(2) The court may strike out a statement of case if it appears to the court-

> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings…"

48. Mr Baxter emphasised in respect of ground (a) that a claim is suitable for striking out if it raises an unwinnable case and the continuance of the proceedings is without possible benefit to the claimant and would waste resources on both sides. He relied on Harris v Bolt Burdon [2000] CP Rep 70 at paragraphs 27 and 33 to support his point. However this proposition is not controversial. It is effective case management to strike out a claim where it is both unwinnable and there is no utility in the continuation of proceedings. Similarly the court should not shirk from striking out suitable claims.

49. It is also apposite to observe that the Civil Procedure Rules 1998 tasks the court with ensuring that cases are actively case managed. Under CPR 1.2 the court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules. The court is under a duty to further the overriding objective by actively managing cases, CPR r. 1.4. That specifically includes, identifying issues at an early stage, r. 1.4(2)(b), and deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others, r. 1.4(2)(c).

50. Mr Baxter also relies on ground (b). He submits that Ms Adler has presented a different case in the removal proceedings to that being advanced in the claim. With reliance on the notes to the White Book 2023, paragraph 3.4.3, he submits that a claim is an abuse of process if it amounts to use of the Court's process "for a purpose [and] in a way that is significantly different from its ordinary and proper use". He is correct to state that the categories of abuse of process are not closed. It remains though an exceptional jurisdiction. As Marcus Smith J reiterated when sitting in the Court of Appeal in Terry Allsop v Banner Jones Ltd [2021] EWCA Civ 7 at paragraph 44(i),

> "The jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation. It is an exceptional jurisdiction, enabling a court to protect its procedures from misuse. Thus, a court is able to – indeed, has a duty to – control proceedings which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people[2]. "

51. Mr Baxter reminds me that the principle of res judicata, and so an abuse of process, arises when there is an attempt to raise in subsequent proceedings matters which were, or were not but could and should have been raised and decided in related proceedings: Henderson v Henderson (1843) 3 Hare 200.

[2] Marcus Smith J, paragraph 44(i).

52. I was referred by Ms Reed KC to Stuart v Goldberg Linde (a firm) [2008] EWCA Civ 2. S had successfully sued G and L, who were partners in a solicitor's firm, for breach of an undertaking to pay him the sum of US$350,000 in connection with a business venture in Mongolia. Within the limitation period S then sued G and L for damages for misrepresentation and inducing breach of contract. The claim arose out of the same background facts and the particulars of claim repeated many of the assertions made in the earlier claim. G and L successfully applied to strike out the claim on the ground of abuse of process on the basis that all the claims should have been asserted in the earlier claim. Various factors were considered including the weakness of the claims, the claimant's unexplained and lengthy delay in bringing the second claim, a failure to use reasonable diligence to discover the facts relevant to the second claim and the fact that he had not indicated to G and L that he was reserving the right to bring further claims. The appeal was allowed on a second appeal. The court emphasised that there should be a merits-based approach focusing on whether the claimant should have brought his claim as part of the earlier proceedings not on the substantive merits of the second claim unless the case was hopeless and suitable for summary judgment.

53. Lloyd LJ provides a useful summary of the law in this area,

> "21. The origin of the principle invoked by Mr Linde and relied on by the Master and the Judge is generally ascribed to observations of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100. That, however, was a case in which the issue in both the first and the second proceedings was the same, namely the taking of an account of the estate of an intestate who had been in partnership with the defendant. The principle has been developed since then so as to apply to a case in which the objection to the second proceeding is not that it seeks to raise the same issue as has been decided before, but that it raises a different issue, not decided before, but which could have been raised at the same time. In that respect, the law is now set out in *Johnson v Gore Wood* [2002] 2 AC 1, in which coincidentally (not relevantly for the present appeal), on the other point in the case, the House of Lords had to consider another principle driving from a decision of Wigram V-C, namely the rule in *Foss v Harbottle* (1843) 2 Hare 461"
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> 22. Lord Bingham of Cornhill said [2002] 2 AC 1, 31:
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> "*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 early 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."

23. In the same case Lord Millett, at 59-60, said this:

"It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse

and the defendant from oppression. In *Brisbane City Council v A G for Queensland* [1979] AC 411 at 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* is abuse of process and observed that it

'ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.'

There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson could have brought his action as part of or at the same time as the company's action. But it does not at all follow that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed in *Manson v Vooght* [1999] BPIR 376 at 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."

The other members of the House of Lords agreed with Lord Bingham on this point without adding anything which I need to quote.

24. The court's power to strike a claim out is discretionary, but it does not seem to me that on an application to strike out a claim based on the proposition that the proceedings are an abuse of the process of the court, on the principle of *Johnson v Gore Wood*, the case is likely to turn on the exercise of a discretion, at any rate if the court decides in favour of the application. Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out (on this ground) unless the court is satisfied that the claim is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 Lord Diplock spoke of the court's inherent power to prevent misuse of its procedure and of the court's "duty (I disavow the word discretion) to exercise this salutary power". I note that Longmore LJ has

> expressed the same view, agreeing with Thomas LJ, in *Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260 at paragraph 38. Judgment in this case was delivered after we had heard argument, but at our invitation the parties provided additional written submissions about it."

54. Turning then to the principles of summary judgment. The Civil Procedure Rules r 24.3 provides that.

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—"
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

55. This is a negative test. Lewison J, as he then was, set out in Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) the approach of the court to these applications. Whilst this was in the context of a reverse summary judgment application, as here, it remains the same whoever brings the application. At paragraph 15 he said,

> "i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is

> possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

56. As to the burden of proof the commentary in the White Book 2023 at note 24.2.4, says, with reference to ED & F Man Liquid Products v Patel [2003] EWCA Civ 472:

> "… under 24.2 the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and there is no other reason for a trial. … the essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there is no other reason for a trial.
>
> If an applicant for summary judgment adduces credible evidence in support of the application, the respondent then comes under an evidential burden to prove some real prospect of success or other reason for having a trial."

57. The court is not required to suspend scepticism, to treat as credible that which is stated by a party to be true without any evaluation of what is said. It is entitled to consider what evidence could reasonably be expected to be available at trial. However what the court is reminded time and time again is that it cannot conduct a mini-trial. Choosing between issues of fact is the preserve of a trial judge, evaluating the

documentary evidence and having heard the parties give oral evidence and be challenged under cross-examination. Similarly in a construction case the complexity of the matrix of fact may militate against granting summary judgment.

58. Mr Baxter emphasised that the second part of the summary judgment test, that there is no other compelling reason for a trial, is a high bar. It is not sufficient for the court to say that the case raises matters of wider public concern or that there should be a full public trial as a matter of principle. Although these are not specific points being advanced by Ms Adler.

59. As to the construction of documents, Marley v Rawlings [2015] AC 129 makes it clear that bilateral documents are to be construed in the same way as unilateral documents. At paragraphs 19 to 23 Lord Neuberger said,

> "19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. …
>
> 20 When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] 1All ER 667, para 64, No one has ever made an acontextual statement. There is always some context to any utterance, however meagre. To the same effect, Sir Thomas Bingham MR said in Arbuthnott v Fagan [1995] CLC 1396, 1400 that courts will never construe words in a vacuum.
>
> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts …
>
> 22 Another example of a unilateral document which is interpreted in the same way as a contract is a patent … A notice and a patent are both documents intended by its originator to convey information, and so, too, is a will.

> 23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see e g Theobald on Wills, 17th ed (2010), chapter 15 and the recent supplement supports such an approach as indicated in Royal Society for the Prevention of Cruelty to Animals v Sharp [2011] 1 WLR 980, paras 22, 31). Indeed, the well-known suggestion of James LJ in Boyes v Cook (1880) 14Ch D 53, 56, that, when interpreting a will, the court should place [itself] in [the testator's] arm-chair, is consistent with the approach of interpretation by reference to the factual context."

60. The 5 documents in this case are not wills, they do not comply with section 9 of the Wills Act 1837. So the peculiarity afforded to the construction of wills when section 21(1) of the Administration of Justice Act 1982 is engaged, and extrinsic evidence of the testator's intention is admissible, does not arise here. However the 5 documents cannot be construed in a vacuum. In searching for the intention of the parties to the documents the words used must be interpreted in their documentary, factual and commercial context.

61. Finally in respect of the transfer, CPR r. 30.5 provides that proceedings can be transferred to another division of the High Court. This is a discretionary power of transfer to be used to further the overriding objective and by its nature will require a pragmatic approach by the court evaluating whether a transfer will be of benefit to the parties.

THE APPLICATIONS

62. If Ms Adler's claim succeeds it will have a momentous impact on the net estate that would be available in the Inheritance Act proceedings. The size and nature of the deceased's net estate is an issue in those proceedings. Mrs Klein therefore has a significant personal interest in the claim. In contrast Cripps as an independent personal representative has no personal interest in the claim. They quite properly, other than the joinder of Mrs Klein, take a neutral stance. It was therefore correct that Mrs Klein was joined to the claim so that she could oppose the declaratory relief sought.

63. Mrs Klein does not suggest that the claim in respect of Parygold or Brongard should be struck out. Rather her position is that they are irrelevant. Under the terms of the 2011 will Ms Adler is entitled to those shareholdings in any event.

64. Mrs Klein's focus is on document A and document B. Her contention is that the wording of these documents is plain, and absent any evidence to a contrary construction, the claim cannot succeed in respect of the 15 companies. The court should strike out the claim form on a short point of construction, and additionally on

the basis of it being an abuse of process. Alternatively the court should grant reverse summary judgment.

65. In addition it is argued that as document A declares a trust of the shares in the 15 companies held in Ms Adler's name in favour of the deceased absolutely they form part of the deceased's estate. It is submitted that reverse summary judgment should be granted.

Construction

66. Mr Baxter submits that document A is clear on its face. It is a declaration that those shares held in the name of Ms Adler are held on trust by her for the deceased absolutely. In respect of document B he submits that it specifically states that it has no effect until the death of the deceased and uses "shall be", a futurity. Yet it does not satisfy section 9 of the Wills Act 1837 so it has no effect as a testamentary disposition. Further as it only concerns those shares held in the name of the deceased it does not apply to the shares held by Mrs Adler on trust for the deceased.

67. Whilst there is undoubted force in those submissions to construe these documents in this way is to adopt a strict literal construction, purely on the basis of the actual words used. As Lord Hodge stated in Woods v Capita Insurance Services [2017] UKSC 24 at paragraph 13,

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

68. The court is searching for the objective meaning of the words used, and the objective intentions of the parties to it (or in the case of a unilateral document such as a settlement or a will, the settlor or testator) by interpreting the whole of the words used against their documentary, factual and commercial context.

69. Mr Baxter submitted that the value of the shareholding is irrelevant. I do not see how it can be. If his construction is correct Ms Adler was making a declaration of trust in respect of a valuable shareholding in favour of the deceased in connection with companies that she had been involved in running with the deceased for many decades, yet by document A she was seemingly declaring that all the identified shareholding was owned beneficially by the deceased absolutely. I am told that the value of this shareholding is in the region of £2.5 million. Ms Adler's evidence is that "I relied on these documents and have spent my life's work investing in, running and building the companies.[3]"

70. The documents themselves have to be placed in their factual and commercial context. There is an issue of fact between Ms Adler and Mrs Klein about the nature of Ms Adler's role in the business, and indeed their relationship with each other and that of the deceased. Undoubtedly the deceased and Mrs Klein's marriage was in difficulties when document A and document B came to be signed. The deceased had already taken legal advice from a divorce lawyer, and he appeared intent on protecting the business from any claim by Mrs Klein.

71. I also cannot see how document A could and should be construed in isolation to document B. Placing them in context, they were drawn up by the deceased together,

[3] Ms Adler's witness statement dated 2 January 2024, paragraph 13.

signed together but without the benefit of advice by lawyers. Again as was usual for the deceased he had the documents witnessed by a solicitor, both he and Ms Adler believing that "having a solicitor act as witness made documents official and legal"[4]. The deceased had already gone through one divorce, he had required Mrs Klein to enter into the pre-nuptial agreement and his marriage was in difficulties.

72. Ms Reed KC argues that restricting the construction of document B to the shares registered in the deceased's name is contrary to the objective intention of the deceased and makes no economic sense for Ms Adler. She points out some curiosities about the drafting in document A and document B. For example document A refers to the shares "registered" in Ms Adler's name, whereas document B refers to the shares "held" in the deceased's name. It is submitted that document B is more likely to include both the shares in the deceased's name and those in Ms Adler's name which would give rise to a construction whereby the shares were held on trust for the deceased for life. This construction may be supported by the fact that document A identified the specific percentage shareholding whereas document B simply lists the 15 companies, so construing "held" in document B to have the widest meaning. I also note that document B is signed by the deceased and Ms Adler, whereas document A is only signed by Ms Adler. This accords with a disposition of the entire shareholding in document B.

73. I have some sympathy with the submissions advanced by Mr Baxter drawing out the inconsistencies between Ms Adler's position on the application and her conduct and statements historically. He makes the point that Ms Adler now advances that document A was made for tax purposes and that the 15 companies are owned by her. In the removal proceedings Ms Adler did not claim an interest in the 15 companies and in the schedule of the estate's assets the 15 companies were included. Indeed her case in the removal proceedings was that there was no conflict between her position as executor and her personal interest in the estate.

74. He also draws attention to Ms Adler's evidence that the pre-nuptial agreement was entered into to protect "our" business whereas counsel for Ms Adler contends that document A and document B were entered into to protect the business. Mr Baxter makes the point that the latter assertion is contained in the skeleton argument, not in the witness evidence before the court.

75. In the Inheritance Act proceedings Ms Adler asserted in her witness statement dated 31 May 2023 at paragraphs 52 that

> " "I note that Cripps has valued the net Estate in excess of £9m. I believe that this is not a fair reflection of the size of the estate and is a considerably over inflated figure". "

Mr Baxter relied on the fact that Ms Adler did not state that she was absolutely entitled to the shareholding in the 15 companies. However she does go on to say,

> "54. I am taking advice from my solicitors on the issue of the ownership of the shares in various companies. Mr Klein and I had an unorthodox and informal arrangement when it came to business matters which saw both of us invest sums in the

[4] Ms Adler's witness statement dated 2 January 2024, paragraph 11.

> business which were not always rewarded with share transfers.
> …
>
> 55. I appreciate that this an extremely important point which ash a significant bearing on the Claimant's claim."

76. I agree with Mr Baxter that the court should be sceptical about Ms Adler's evidence, that there are inconsistencies over time. He submits that the contents of the witness statements depends on the court and the purpose of the proceedings. Ms Adler seeks to explain some of this in her witness statement dated 2 January 2024 at paragraphs 16 to 17.

> "16. I have found the ongoing legal proceedings extremely difficult to manage, starting with the case to remove me as executor. Despite my age I am very busy managing my companies and do not have assistance to help me with this. … I have not had the time to devote myself to this matter.
>
> 17. I did not raise the issue of my ownership of the 15 companies before because this is an arrangement I had understood to be accepted as fact. Almost all of the witnesses I would call on to assist me in providing evidence to support this fact are sadly now deceased. Mr Lerner who is the companies' former long-standing accountant previously indicated that he would be willing to provide evidence to assist my solicitors. However since the strike out application was issued both myself and my solicitors have been unable to get hold of him to arrange for a witness statement to be prepared. I hope to be able to make contact with Mr Lerner before any trial for him to be able to give evidence in this matter."

77. Mr Baxter has demonstrated fertile ground for cross-examination of Ms Adler. It will be a matter for the trial judge to evaluate Ms Adler's credibility and her assertions as to the documentary, factual and commercial context in which the relevant documents are to be construed. However Mr Baxter is in effect inviting the court to conduct a mini-trial without hearing oral evidence: which is impermissible on a summary judgment application.

78. For the reasons that I have already set out I am not satisfied that the claim satisfies the test under CPR r.3.4(a). I also do not accept that it has only fanciful prospects of success for the purposes of CPR r. 24.3(a).

79. Whilst I consider that the evidence will be limited the court will benefit from evidence from the accountants file and that of Mr Lerner himself. This may form an important part of the factual matrix in which the documents must be construed. Given the fundamental disagreements between Ms Adler and Mrs Klein as to the factual and commercial context it will be necessary to have limited oral evidence from the parties, focused on those matters that are admissible of for the purposes of construction.

Abuse

80. In the removal proceedings Deputy Master Arkush made an order on 14 May 2021 requiring Ms Adler to set out "any legal or beneficial interest she asserts in any estate asset or liability, or in any asset or liability in which the estate has an interest", paragraph 9(b). Ms Adler filed a witness statement dated 10 June 2021 in which she asserted an interest in Brongard and Parygold, but she did not expressly assert an interest in the 15 companies. Moreover when providing schedules of the estate assets the deceased's shareholding in the 15 companies was included.

81. At the disposal hearing counsel for Ms Adler was clear that there was no actual or appearance of conflict between Ms Adler's appointment as executor and trustee and her personal interests, "nothing [in Ms Adler's first witness statement]… was intended to indicate any informal beneficial interests arising in any estate asset, and there has been no assertion of that in [Ms Adler's] evidence". In his judgment Deputy Master Rhys who removed Ms Adler as executor but not trustee said,

> "Other than [Brongard and Parygold] , the 1st Defendant does not claim an interest in any other estate assets. Her second witness statement (made pursuant to the order of Deputy Master Arkush) refers only to these companies."

82. He went on to order that Ms Adler should pay 80% of Mrs Klein's costs of the removal proceedings, which was later assessed in the sum of £132,411.20 plus interest.

83. Mr Baxter went through some of the procedural chronology and the interaction between events, the removal proceedings, the Inheritance Act proceedings and the current claim. He considers that the latter was issued to cause maximum disruption to the Inheritance Act proceedings, it could and should have been issued at an earlier stage.

84. There are two parts to the abuse claim. Mr Baxter treats as irrelevant the declaratory relief sought in respect of Parygold and Brongard. However the issue of what property falls within the deceased's estate for the purposes of the Inheritance Act proceedings and what may be used for administration expenses is an issue that can quite properly be before the court. One matter that the parties can agree on is that Ms Adler has been consistent about her ownership of the shareholdings in Parygold and Brongard.

85. The second part is more problematic for Mrs Klein. This case does not fall squarely within the rule in Hendeson v Henderson. Moreover looking at the crucial question in Stewart v Goldberg it is difficult to say definitively that Ms Adler has "misused" the process of court in the usual sense of the word. That is because of the nature of the removal proceedings.

86. The removal proceedings were brought under section 50 of the Administration of Justice Act 1985. Under this power the court may appoint a personal representative to act in place of one or all of the existing personal representatives. By its nature it is a jurisdiction that needs to be exercised swiftly, whilst it is more analogous to summary judgment it would be wrong to categorise it in that way.

87. The administration of the estate may have come to a standstill because relations between the personal representatives have broken down or relations between the personal representative and beneficiaries or a creditor have broken down, perhaps due to a clash of personalities or a lack of confidence in the personal representative, whether objectively justified or not. Where this has happened the court may appoint a substitute personal representative and no findings of wrongdoing or fault are necessary. In Kershaw v Micklethwaite [2010] EWHC 506 (Ch) Newey J, as he then was, at paragraph 13 observed that,

> "…I do not think that friction or hostility between an executor and a beneficiary will, of itself, be a good reason for removing the executor. On the other hand, a breakdown in relations between an executor and a beneficiary will be a factor to be taken into account, in the exercise of the court's discretion, if it is obstructing the administration of the estate, or even sometimes if it is capable of doing so."

88. Whilst such a claim could be brought under Part 7 or Part 8, it is certainly envisaged in PD 57 paragraph 13 that evidence will be filed with the claim form and the better approach is to bring a Part 8 claim.

89. It is not uncommon in estate disputes for uncooperative and hostile parties to attempt to use this jurisdiction as part of the general litigation warfare. The court is always alive to this and will not permit this process to form part of the general hostile litigation. Otherwise the very objective of the power under section 50 would be defeated. To that end the court determines the application on the basis of the written evidence and submission; it is a rare case for the court to give permission for the parties to be cross-examined. In the removal proceedings Deputy Master Rhys determined the claim on the basis of the written evidence.

90. In that context it would not have been necessary or indeed appropriate for the court to determine within the removal proceedings the nature of Ms Adler's shareholdings in the 15 companies. Ms Adler cannot get around the fact that she failed to identify in the removal proceedings the claim that she now makes. Indeed her assertion that there was no conflict, with the benefit of hindsight, is plainly wrong. However if the court were to then elevate the stance she took within the recovery proceedings, as Mr Baxter invites, to cases that do fall within the abuse of process category the court would be exercising an exceptional jurisdiction where the nature of the proceedings was entirely different, and furthermore no oral evidence given, and no findings of fact made. Ms Adler has not had the opportunity to litigate her claim that she owns the shareholdings in the 15 companies so this would be precluding her from litigating the claim in the first place, not relitigating it. That to my mind would be to open the categories of these cases too widely and would lead to a real injustice in this case.

91. There are undoubtedly aspects of the way in which the claim has been brought and Ms Adler's case in the removal proceedings that are unsatisfactory. That does not mean that it is an abuse of process for her to pursue this claim.

The transfer

92. Mr Baxter argues that the claim should be transferred to the Family Division and case managed with the Inheritance Act proceedings. Ms Reed KC argues that the Inheritance Act claim should be transferred across from the Family Division. I note that Ms Adler has already unsuccessfully sought to transfer the claim from the Family Division to the Chancery Division: the order of Moor J dated 24 November 2023.

93. I do not accept that either route is the correct course. The claim is a self-contained claim, there will be limited disclosure and further evidence. Whilst of course issues of what falls into the estate for the purposes of an Inheritance Act claim is not the sole preserve of the Chancery Division the construction of the 5 documents, and in particular document A and document B, is the daily diet of the Chancery Division.

94. Having regard to the overriding objective and the need to secure just disposition of cases I am satisfied that the claim should remain in the Chancery Division. Upon conclusion of the claim and determination of who is the beneficial owner of the shareholding in the 15 companies, and Parygold and Brongard, the Inheritance Act proceedings can proceed to final determination in the Family Division.