Neutral citation number: [2024] EWHC 6 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. PT – 2023 - 000286**
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY TRUSTS AND PROBATE LIST

MASTER MARSH (sitting in retirement)
Rolls Building =
Fetter Lane
London EC4A 1NL

BETWEEN

SHARAS ALEXANDER CHANGIZI

Claimant

and

(1) ROBIN DONALD MAYES
(2) PAMELA KATHLEEN CHANGIZI
(executors of the Estate of Parviz Changizi)

Defendants

JUDGMENT

The **CLAIMANT** appeared in person

LINA MATTSSON instructed by Berry & Lamberts LLP appeared for the **Defendants**

Hearing 29 and 30 November 2023

Judgment handed down remotely on 8 January 2024

Introduction

1.This claim relates to the estate of Parviz Changizi ("Mr Changizi") who died on 18 September 2010. His domicile of origin was Iranian but by the time of his death he was a Spanish national living in and domiciled in Spain for English succession and Inheritance Tax purposes. He left a will dated 1 March 1985 which was limited to dealing with his estate in England.

2. The claimant ("Sharas") is one of Mr Changizi's four children. The first defendant ("Mrs Changizi") is his widow. The second defendant ("Mr Mayes") is the joint executor and trustee with Mrs Changizi of Mr Changizi's will. Although 13 years have passed since Mr Changizi died it has not been possible for either his English or his Spanish estate to be fully administered and distributed.

3. This judgment arises after hearing over two days two applications made within this Part 8 claim. Sharas appeared in person. The defendants were represented by Lina Mattsson.

4. In the Part 8 claim Sharas is seeking orders against the defendants for disclosure of documents and the provision of information. Sharas states explicitly that he wishes to hold the defendants to account and he intends to bring a claim based upon a breach or breaches of trust and/or devastavit. His witness statement made in support of the claim lists the documents and information he seeks which fall into 10 broad categories and comprises 55 individual requests. Although this judgment does not deal with the disposal of the claim, I note that Sharas has made 16 requests for documents relating to his father's will and its drafting albeit that probate was granted 9 years ago. Furthermore, it is not in doubt that some other categories of documents have already been supplied by the defendants.

5. At a directions hearing on 24 July 2023 Master Brightwell made an order providing:

> "3. The Defendants shall have permission to make an application in relation to the unpaid costs orders they have obtained against the Claimant/[Sharas] in other proceedings relating to the estate of the late Parviz Changizi and/or whether the proceeds of the sale of real property within the estate constitute movable or immovable assets under English Law (without prejudice to the question as to whether that is relevant to the proceedings which have been issued in Spain), any such application to be made by 4.00pm on 7th August 2023.
> …
> 5. The disposal hearing shall deal with both the issues raised in the claim form and the question of whether the proceeds of sale of real property within the estate constitutes movable or immovable assets under English Law (without prejudice to the question as to whether that is relevant to the proceedings which have been issued in Spain)."

6. Subsequently the two applications were issued:

> (1) The defendants applied on 7 August 2023 seeking a stay of the claim until previous costs orders totalling £115,959.22 are paid. It also indirectly requires the court to decide whether the sale of two properties by the executors has the consequence that what was for conflict of law purposes immovable property at the

date of Mr Changizi's death has become movable property and therefore falls to be distributed in accordance with Spanish rules of succession.
(2) Sharas' application 22 August 2023 seeks the distribution of his share of the estate or at least £115,959.22 so he can pay the costs that are due.

7. On 26 September 2023 Master Brightwell made a further order in the following terms:

> "1. The Defendants' Application and Sharas' Application shall both be listed for hearing on 29 November 2023 in place of the disposal hearing previously listed.
> 2. The Defendants shall file and serve a witness statement setting out (a) their position in relation to the status of assets as movable or immovable under English Law as it pertains to the Estate of the late Parviz Changizi, and (b) any response to the Sharas' Application, by 4pm on 10 October 2023. For the avoidance of doubt the Second Defendant should set out her position both as an executor and in her personal capacity."

8. The Part 8 claim is not being progressed pending disposal of the applications. However, I note that the defendants have offered Sharas access to the documents he is seeking, other than privileged documents, provided it is at his cost. This offer was made in a letter dated 7 August 2023 and has been repeated more recently. There has been no reply from Sharas to the offer.

Background

9. There has been a lengthy and involved history since Mr Changizi's death in 2010. Before dealing with the two applications, it is necessary to provide the background and a summary of the previous proceedings in some detail.

10. Mr and Mrs Changizi had four children; Gheeve, Sarah, Lara and Sharas. Mrs Changizi and the children were the main beneficiaries under Mr Changizi's will. The terms of the will are uncontroversial. Put in summary form:

(1) Under clause 3 Mr Changizi made a specific bequest of his jewellery to be divided between his children. It is accepted that the items of jewellery fall to be distributed in accordance with the Spanish laws of succession.
(2) Under clause 4 he devised and bequeathed "all my estate both real and personal in England" to his trustees upon trust for sale.
(3) Under clause 5 his executors and trustees were required to hold the net proceeds of sale and, after paying his debts and funeral expenses, they were to divide the estate in three equal shares with two shares to be divided equally between his surviving children and one share for Mrs Changizi.

11. Mr Changizi's residuary estate principally comprised the legal estate in two long leasehold properties.

(1) 19 Wetherby Mansions London SW5 9BH which was held jointly with Lara on the basis of an express declaration of trust to the effect that they held it as tenants in common as to 80% for Mr Changizi and 20% for Lara. The property was ultimately sold after a dispute between the executors and Lara had been resolved and the estate received £556,000 for its share. This was considerably less than the market value of the property at the time of sale.

(2) 105 Barkston Gardens London SW5 0EX was held in Mr Changizi's sole name. It was sold by the executors on 18 September 2019 for £1,380,000.

12. A third property, 105 Coleherne Court London SW5 0ED, was held in the joint names of Mr and Mrs Changizi as joint tenants and passed by survivorship to her outside his estate.

13. Mrs Changizi was unhappy about the terms of the will and in 2012 Gheeve, Sarah and Lara executed a deed dated 17 July 2012 varying its terms so that that their shares in the residuary estate were gifted to their mother. Sharas declined to join in with that arrangement. Sadly, by the date the deed of variation Sharas had fallen out with the rest of his family. In October 2011 he rather wildly suggested that his mother had destroyed the 1985 will. In an email sent by him on 25 February 2012 he accused his siblings of being "selfish, spiteful and bloody-minded" and made it clear that he would seek to run down the estate in England so that no one ended up with any part of it.

14. Sharas challenged the validity of the will by filing a caution. He says he had good reasons for doing so, that the will was a surprise to everyone and he was suspicious about its validity. At this remove, Sharas' motivation at the time he made the challenge has no relevance. What is of importance, however, is how the subsequent probate proceedings were conducted and their outcome.

15. Mrs Changizi, in her capacity as a beneficiary under the will, brought a probate claim seeking a pronouncement in favour of the 1985 will. Sharas and Mr Mayes were defendants. The claim itself was entirely straightforward. However, Sharas defended the claim on a number of grounds including allegations that:

(1) The 1985 will had not been duly executed.
(2) The Mr Changizi's signature had been procured by undue influence.
(3) Mr Changizi lacked capacity.
(4) If the will was valid, it had been revoked by one of two documents produced by Mr Changizi in 1994.

16. These allegations were not fully particularised and at a case management conference held on 7 August 2013 Deputy Master Matthews made an order requiring Sharas to give full particulars of his principal allegations and to provide comments on 10 issues that were set out in a schedule annexed to the order. Sharas did not appear before the court when that order was made.

17. The claim came back before the court on 24 October 2013. Sharas had made an application for summary judgment based upon his case that the will had been revoked. However, once again he did not appear and his application was dismissed with costs. Deputy Master Rhys also made an unless order requiring Sharas to comply with the requirements of the order made by Deputy Master Matthews or in default he would be debarred from defending the claim.

18. Sharas made an application for relief from sanctions which came before Deputy Master Clark on 27 February 2014 (in Sharas' absence) which was refused. She directed that the claim be tried on written evidence and made an order for costs against Sharas.

19. On 23 June 2014 the claim was tried by Mann J and the court pronounced in favour of the 1985 will and made an order for costs against him. The order also provided that the executors

were entitled to retain from Sharas' share of the estate the costs he was required to pay. The costs were assessed in accordance with a Default Costs Certificate dated 12 May 2015 in the sum of £66,883.38. That sum was of course additional to the costs which had been summarily assessed as the claim had progressed. The total costs payable by Sharas in the probate claim exceed £85,000. No payment has been offered or made toward those costs which have been treated by the executors in the estate accounts as a debt due to the estate.

20. Although strictly the award of costs must have been made against Sharas in favour of Mrs Changizi personally in her capacity as a beneficiary of the estate, in view of the provision charging Sharas' share of the estate with payment of the costs, she is entitled to recoup those costs from the estate upon a grant being made leaving a debt due from Sharas to the estate.

21. On 30 July 2014 the defendants obtained a grant of probate in respect of Mr Changizi's estate. This was nearly four years after his death and after Mrs Changizi had been forced to bring proceedings to meet objections to the 1985 will that proved to be groundless.

22. Although it is not an essential part of the defendants' case to establish abuse in the conduct of the probate proceedings, it is clear that Sharas' conduct of the probate claim was abusive for a number of reasons including:

(1) Sharas' grounds for saying the 1985 will was invalid were baseless.
(2) He failed to particularise his case when required to do so.
(3) He made applications that were dismissed, including one application which was declared to be totally without merit.
(4) He did not engage with the claim which was brought as a direct consequence of him filing a caution and he then failed to comply with orders made by the court.
(5) He failed to pay the costs ordered against him during the claim.

23. In 2016 proceedings were commenced by the executors in the County Court against Lara seeking an order declaring the title to 19 Wetherby Mansions was held 80:20 and an order for sale of the property. The proceedings were prompted by the necessity of the executors paying IHT of approximately £121,000 and cash had to be realised for that purpose. Lara had asserted in 2014 that the property had been bought by Mr Changizi as a home for her on the basis of an agreement by him that she could buy the property from him for 80% of the price at which it had been purchased, namely £556,000 (80% x £695,000). The executors recognised that the agreement was not binding as a contract but based upon advice from counsel they decided to offer Lara an opportunity to buy it at what was by then a concessionary price. The property had been valued in 2014 at between £1,250,000 and £1,595,000. Lara did not respond to the offer and therefore proceedings seeking an order for sale were commenced.

24. Sharas was concerned about Lara being offered the property at a concessionary price and applied to be joined as a party to the proceedings. His application to be joined was dismissed on 30 October 2017 and he was ordered to pay costs of £6,315. No payment or offer of payment has been made. Ultimately in the County Court proceedings the executors accepted that they were unable to deny the agreement and the claim went to a trial for three issues to be resolved. First, whether the price Lara should pay was £695,000 or £556,000; secondly whether Lara should pay interest; and, thirdly whether Lara could no longer rely upon the

agreement due to delay. She was successful on all three issues and she later purchased the property at the concessionary price.

25. Unlike the probate claim, I do not consider that Sharas's conduct in the County Court claim can be criticised as being abusive. As a beneficiary he was entitled to express concern about an agreement being honoured that was clearly unenforceable as such.

26. I note in passing two points. First, nothing was said by Sharas at that stage about the effect of selling 19 Wetherby Mansions upon the distribution of his father's estate. His application to be joined was based upon the implicit premise that the proceeds of sale would form part of his father's English estate. Secondly, at the time Sharas was making his application to be joined, Berry & Lamberts LLP acting for the executors wrote to Michelmores LLP, who were then acting for Sharas, on 7 July 2017 drawing attention to his liability to pay IHT on the Potentially Exempt Transfer (PET) he had received from his father during his lifetime. He was requested to pay the tax. He did not answer and did not pay the tax. He was also asked to pay the outstanding costs of the probate claim.

27. The third set of proceedings in which Sharas has been involved were brought by him in 2020 against Lara and the executors which he described as a derivative claim brought on behalf of the estate. He sought a declaration that the estate was entitled to a 100% beneficial share of 19 Wetherby Gardens. The executors applied for summary judgment and the claim was dismissed by Deputy Master Francis on 5 July 2021. Sharas was ordered to pay costs of £24,000 to the executors. The executors were given permission to deduct these costs from Sharas's share of the English estate. His application for permission to appeal was dismissed by Falk J at a renewed oral hearing on 10 December 2021.

28. Sharas is due to pay costs awarded against him totalling £115,959.22. He does not dispute his liability to pay this amount which does not include interest at the judgment rate of 8%.

The defendants' application

The law

29. The defendants submit that the court has an inherent jurisdiction to stay a claim until Sharas has paid the outstanding costs of the earlier related claim. They rely upon a line of authority starting with *Budge v Budge* (1849) 12 Bevan 385 and in more recent times principally comprising decisions in the Court of Appeal in *Sinclair v British Telecommunications plc* [2000] EWCA Civ 6; and *Investment Invoice Financing Ltd v Limehouse Board Mills Ltd* [2006] EWCA Civ 9.

30. However, the defendants' application is not quite on all fours with this line of cases. In those cases, the claimant commenced a new claim which was the same or substantially the same as a previous claim in which there was an unpaid order for costs. In this case, Sharas was the defendant in the Probate claim, although the proceedings came about because he challenged the validity of the will by filing and refusing to remove a caution that blocked a grant of probate. In an indirect sense he was the claimant challenging the will albeit that the proceedings seeking a grant under the will were brought by his mother as a beneficiary. He did not bring a counterclaim. He was later the applicant seeking to be joined in the

proceedings brought by the executors against Lara and the claimant in the derivative claim and so never became a party to the claim. It is also right to note that the Probate claim, which concerned the validity of the will, is of a different type to the two later claims. The probate claim concerned whether there was a valid will and whether a grant of probate could be made to the defendants. The later proceedings concern the administration of the estate after the validity of the will had been established and a grant of probate had been obtained.

31. In *Investment Invoice Financing Ltd* the Court of Appeal upheld an order staying the second claimant's claim until the costs awarded against the first claimant had been paid, confirming that the Court has an inherent jurisdiction to make an order staying a claim until costs awards made in previous proceedings which were "substantially" the same have been paid. The purpose of making an order staying the proceeding is to prevent an abuse of the court's process and to do substantial justice between the parties.

32. Although the circumstances in the current proceedings are not on all fours with cases such as *Investment Invoice Financing* , where there is a close relationship between the subject matter of Claim 1 and Claim 2, it is clear from the judgment of Moore-Bick LJ that the power to stay is a wide one and it is not essential for the two claims to overlap precisely. On the facts before the Court of Appeal, the court was able to conclude that the second claim was substantially the same claim as the first. However, in light of further observations made in the judgment and later decisions, the court's power to stay a claim is not limited to circumstances in which the second claim is substantially similar to the first. The core criterion for making an order to stay can be seen from the following passage:

> "*39. ... it is necessary to have regard to the considerations which underlie the court's approach to the commencement by the same person of a second set of proceedings while the costs of the first remain unpaid, as reflected in the authorities to which I have referred. In all the cases the court was moved to act by a sense that it would be unjust to allow a claimant whose action had failed for one reason or another in circumstances in which he had been ordered to pay the defendant's costs to put the defendant to the further expense of a second action until those costs had been paid. To pursue a second action in those circumstances can properly be regarded as an abuse of the court's process. In my view what matters is not the precise nature of the former proceedings but whether, having regard to the nature of those proceedings, their outcome and the claimant's failure to satisfy an order for costs against him, the second proceedings can be regarded as abusive.*" [my emphasis]

33. In different circumstances in *Powel Entertainment v Ryder* [2011] EWHC 2957 (Ch) Briggs J (as he then was) expressed the basis of exercising the jurisdiction as follows:

> "*10. The question, therefore, is whether I should exercise my discretion to order a stay, and the governing criterion is whether, in all the circumstances, it would be unfair and unjust to require the defendants to undertake the cost of defending the SAFCOs' claims while the costs of successfully resisting CFL's derivate claim remains unpaid.*"

34. The question for the court to consider is whether it is abusive for the claimant to be able to proceed with a new claim without having discharged costs orders made in previous proceedings to persons who were parties to the previous claim, or claims. The court must have regard to:

(1) The nature of the earlier proceedings and their degree of connection with the later proceedings.
(2) The outcome of the earlier proceedings.
(3) All the surrounding circumstances.
(4) The fact that the power to stay is discretionary. The court should ask itself whether it is unjust to require the defendants to incur the costs of defending the proceedings whilst earlier costs orders have not been met.

35. It is not essential for the court to decide whether:

(1) The claimant will be able to pay the costs of the current proceedings: *Investment Invoice Financing* at [47]. The inherent power is not an alternative to security for costs.
(2) The conduct of the first claim was abusive although abuse in the earlier proceedings will be a circumstance to be taken into account.

36. It is also open to the court to impose a deadline for the payment of the outstanding costs failing which the new claim will be struck out – see *Investment Invoice Financing* at [47] and Briggs J in *Wahab v Khan* [2011] EWHC 908 (Ch) at [19].

37. The final element of the jurisdiction concerns the claimant's ability to meet the outstanding costs and whether or not a stay and/or striking out would stifle the new claim. This issue was considered by HHJ Walden Smith (sitting as a High Court judge) in *JEB Recoveries LLP v Binstock* [2017] EWHC 1123 (Ch) [22]

> *"If the party responding to such an application were impecunious, then the court would be particularly concerned that litigation was not being stifled by reason of costs orders. Consequently, it is important for the court, hence the importance of ensuring that a party is not paying because it is made a decision not to pay rather than the party not paying because it simply is not in a position to pay…".*

38. The hearing proceeded on the basis that this extract from the judgment is an accurate summary of the law. It is only necessary to add that the burden of establishing stifling falls upon party the putting it forward. This is the approach adopted on dealing with an application for security for costs and there is no reason why that approach should not apply in this analogous situation. I adopt the well-known statement of principle in *Al-Koronky v Time Life Entertainment Group Ltd [2005] EWHC 1688 (QB)* where Eady J said at [31]:

> *"… it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a*

particular order will have the effect of stifling. The test is whether it is more likely than not."

Disposal

39. I propose to approach the disposal of the defendants' application in three principal stages:

(1) What is Sharas' share of the English estate? It is necessary to answer this question first because by orders made in both the Probate claim and the derivative claim the executors were permitted to deduct the costs Sharas was ordered to pay from his share of the estate. In order to answer this first question the court may have regard to the estate accounts but there are two additional matters which need to be considered:
    a. Under English law do the proceeds of sale of English properties forming part of the estate constitute movable or immovable assets under English Law; do they retain their status as immovable assets within the English estate or do they become movable assets which pass under the law of Spain?
    b. Was Sharas liable to HMRC for Inheritance Tax and interest on a potentially exempt transfer made by Mr Changizi from a UK sterling bank to Sharas within 7 years of his death and, if so, is Sharas liable to the estate for the tax and interest paid to HMRC as a party having secondary liability after the tax had been unpaid for 12 months?
(2) Would the grant of an order staying the claim and/or striking out the claim stifle his ability to pursue the proceedings? Another way of putting this question is has Sharas made a decision not to pay the costs rather than not paying because he is not in a position to pay?
(3) Would it be unjust and unfair to the Defendants to undertake the cost of defending these proceedings without Sharas meeting the unpaid costs orders?

Stage 1a

40. The position shown in the latest estate accounts is that Sharas owes the estate £102,368.41. In his first witness statement made on behalf of the defendants Mr Forrester says:

> "54. According to the most recent set of estate accounts for the English estate approved by the Executors (but not by the Claimant), as at 14 December 2021 the Claimant's share of the English estate was calculated to be £300,390.59. However, when his liability to the estate for Inheritance Tax plus interest on the failed potentially exempt transfers to him (£281,994.04), and the Court-ordered costs mentioned above (total £115,959.22, without the inclusion of interest) is deducted from his share, his total liability to the estate as at 14 December 2021 was £397,953.26. When set off against his share of the estate, the Claimant owed £97,562.67 to the English estate as at 14 December 2021. If interest on the total of the Court-ordered costs was included, his liability to the estate would increase to £145,128.95 at that date. Since the last accounts, the estate has paid further administration costs (some of which have been brought about by the Claimant's correspondence and actions), so reducing his share of the English estate and thereby increasing his net liability to the estate. The current estimate of the Claimant's share of the English estate is £295,584.85. Deducting the Inheritance Tax plus interest, and

the Court-ordered costs (without interest) would leave the Claimant indebted to the estate in the sum of £102,368.41."

41. He provided a correction to this paragraph in his second statement:

> "For clarity, paragraph 54 of my First Witness statement should say the Claimant's liability to the estate for Inheritance Tax plus interest on the failed potentially exempt transfers to him and the Inheritance Tax plus interest on the estate (£281,994.04)…".

42. These figures can be taken to be accurate subject to answers being provided to the two subsidiary questions. The deficit is at least £102,368.41 plus judgment interest on the costs that Sharas has been ordered to pay.

Immovable/Movable

43. The question the court is required to answer concerns whether the sale of the English properties affects their status under English law as immovable property. Put another way, is the only point at which the status of the property is determined the date of death? It is not in doubt that (a) a leasehold interest in land is treated as an immovable asset and (b) the fact that land vests in the personal representatives upon a trust for sale does not transform immovable property into movable property. This was so even before section 3 of the Trusts of Land and Appointment of Trustees Act 1996 abolished the doctrine of conversion.[1]

44 The most convenient approach is to consider first whether the English leasehold land held by Mr Changizi at his death is properly characterised as being immovable and then to consider whether its character could change for the purposes of succession upon its sale.

45. It is useful to start with a series of basic propositions about how immovable property is treated for the purposes of the English law of succession.

(1) Under section 1(1) of the Administration of Estates Act 1925 ("the 1925 Act") real estate, which for these purposes can be treated as synonymous with immovable property, vests in the deceased's personal representatives:

"(1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, and notwithstanding any testamentary disposition thereof, devolve from time to time on the personal representative of the deceased, in like manner as before the commencement of this Act chattels real devolved on the personal representative from time to time of a deceased person."

(2) Under section 33(1) and (7) of the 1925 Act the real estate is held on trust for sale.

"(1) On the death of a person intestate as to any real or personal estate, that estate shall be held in trust by his personal representatives with the power to sell it.

...

(7) Where the deceased leaves a will, this section has effect subject to the provisions contained in the will."

(3) Mr Changizi's will expressly provides that his estate is to be held on a trust for sale and therefore does not conflict with section 33(7) of the 1925 Act.

[1] See *Re Berchtold* [1923] 1 Ch 192.

(4) Under section 36 of the 1925 Act the personal representatives have power to transfer the legal estate they hold by virtue of section 1(1) of the Act.

(5) Under section 39 of the 1925 Act the personal representatives are given wide powers to manage real estate including all the powers that are set out in section 1 of Trusts of Land and Appointment of Trustees Act 1996.

46. Thus, it makes no difference for the purposes of English law what is to happen to the immovable property under an intestacy or under the terms of a will. It vests in the personal representatives who are given power to administer the estate. It matters not for the purposes of vesting what is to happen to the immovable property subsequently; whether it is to be transferred to a beneficiary pursuant to a specific bequest or it falls into residue and sold does not affect the position. The land vests in the personal representatives for them to deal with in accordance with the terms of the will (or the intestacy provisions) subject to conflict rules leading to a different outcome.

47. In order to establish whether English law will apply it is necessary to establish the applicable principles of English conflict of laws. The executors have obtained an opinion from Charlotte John of Gatehouse Chambers on that issue and the opinion has been put in evidence. I accept her conclusions which are set out at paragraph 8:

> "In my opinion, the proposition advanced by Sharas is misconceived and is incorrect. Whilst the proceeds of sale may indeed be regarded as movable assets if there were any continuing conflict of laws issue to resolve, there is no such issue. Applying the relevant conflict of law principles, the material validity of the Will falls to be assessed as at the date of death by reference to English law as the lex situs in so far as it disposes of the English immovable assets. The Will is perfectly valid in so far as the English immovable assets are concerned. There is no further conflict of law issue to be resolved in respect of the administration of the English immovables and their sale and the distribution of the proceeds is purely a matter of the application of English domestic law to be carried out in accordance with the terms of the Will. This conclusion is supported by *Re Berchtold* [1923] 1 Ch. 192, which is broadly on point given that the specific question that the court resolved in that case was concerned with entitlement to the proceeds of sale (although the assets had not been sold as at the date of the judgment) and is further supported by the case law from other common law jurisdictions noted below."

48. She notes later in her opinion at [25] that:

> "The notion that beneficiaries deemed to be entitled to English immovable assets as a matter of the law of the lex situs could be divested of their interest in favour of forced heirs entitled to movables under the law of the domicile following a sale is a remarkable one that has far reaching implications for estate administration. One would expect the practitioner texts and commentary on conflict of laws in the succession context to highlight the issue and the risks and consequences of a sale over distribution in specie, if Sharas were correct on this point. The point would arise in many estates and would have the effect of redirecting the assets in every estate where a sale of the immovables is required to discharge liabilities. I have reviewed the relevant extracts of Theobald on Wills; Williams, Mortimer and Sunnucks on

> Executors, Administrators and Probate; and Dicey on Conflict of Laws. I am unable to find any commentary supporting Sharas' proposition."

49. English law applies a scissionist approach. Instead of applying a single body of law to the entire estate, different law may be applied to different aspects of the estate. Broadly, the succession to immovable property will be governed by the lex situs and succession to movable property is generally governed by the deceased's domicile.

50. For the purposes of conflict of laws, the applicable rules distinguish movable and immovable property rather than realty and personalty. As the editors of Dicey, Morris & Collins 16th ed. explain in chapter 23:

> "23-006 The distinction between movables and immovables is not co-extensive with the distinction between realty and personalty. In the first place, as will appear below, personalty includes some important interests in immovables; and, in the second place, the distinction between movables and immovables would appear to be a distinction between different kinds of things, whereas the distinction between realty and personalty would appear to be a distinction between different kinds of interests in things. The two distinctions are therefore ''distinctions in different planes.'"

51. The relevant starting point with regard to the immovable property is the material (or essential validity) of the will. A will may be duly executed by a testator who has capacity but the will may be wholly or partly inoperative because it contravenes the law of another jurisdiction. An example of this principle in operation is where the laws of the deceased's domicile apply forced heirship rules which may override the terms of the deceased's will.

52. *Dicey, Morris & Collins* 16th ed. provides the following rules which are relevant:

> "Rule 140 - All rights over, or in relation to, an immovable (land) are (subject to the Exception hereinafter mentioned) governed by the law of the country where the immovable is situate (lex situs).[2]
>
> Rule 169 – 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, including its choice of law rules.
>
> Rule 170 – 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), including its choice of law rules."

53. In the comment section that follows Rule 140 the editors of Dicey, Morris & Collins observe at 24-069:

> "As a general rule, all questions that arise concerning rights over immovables (land) are governed by the law of the place where the immovable is situate (lex situs). The general principle is beyond dispute, and applies to rights of every description. It is based upon obvious considerations of convenience and expediency. Any other rule would be ineffective, because in the last resort land can only be dealt with in a manner which the lex situs allows."

[2] The exception is not material.

54. Further on at 24-081 in relation to material or essential validity they go on to say:

> "Although the cases all concern wills, there can be no doubt that the material or essential validity of a disposition of land is governed by the lex situs.
>
> …".

55. Rule 170, unlike Rule 169, does not specify that the material or essential validity of a will that contains a gift of immovables is assessed at the date of death, no doubt because it is so obvious it did not need to be stated. There is a discussion in Dicey, Morris & Collins at paragraph 23-009 where they say the "decisive moment" for establishing whether an asset is movable or immovable is the date of death and there is no reason to suppose that a different "decisive moment" should be taken for deciding the associated question of material or essential validity of the will. It is not in doubt that at the date of Mr Changizi's death he was domiciled in Spain and the land forming part of his estate was situated in England. Applying rules 140 and 170, to the extent that the will includes immovables, English law, including English conflict rules, will apply. Thus Mr Changizi's executors were entitled to treat the land as part of the residuary estate under the will to be disposed of in accordance with the wishes expressed by Mr Changizi in his will because the laws of the lex situs apply. The critical moment for assessing the position is the date of death.

56. The issue raised by Sharas is whether the position changes upon sale of the land when immovable property is turned into movable property. At first sight this is a very surprising proposition as Charlotte John has noted. The fact that none of the leading textbooks even discuss the possibility of the applicable law changing with a change in the nature of the asset after the date of death is significant. It is treated as axiomatic that the date for establishing material validity is the date of death.

57. The decisive moment is evidently the moment when the property will vest in the Personal Representatives if English law applies. Certainty is an important principle of law. The position is taken at the date of death both as to domicile and as to what law applies to immovable property. From that point onward the rules about conflict of laws have no bearing because they have operated to apply English law to immovable property sited in England and the application of English law will not change.

58. If the applicable law is ambulatory and depends upon what steps the personal representatives either take, or do not take, the administration of the estate will potentially be very difficult. In this case the executors would be bound to administer the estate in accordance with English law from the outset but would then be required to apply Spanish law from the moment they sold immovable property. If, as here, they sold two properties at different times they would have to apply English law to the property that is not yet sold and Spanish law to the proceeds of sale of the other property. They might be faced with a request from all the beneficiaries of residue for one or both properties to be transferred in specie, in which event English law would apply to one or both properties and Spanish law would have no application. Executors administering such an estate would be in an impossible position.

59. Sharas relies upon *Re Piercy* [1895] 1 Ch 83 and *Philipson-Stow v IRC* [1961] AC 727 as providing support for his contention that once immovable property becomes movable by being turned in to cash the applicable law also changes. In other words, there is not on his case a single decisive moment which is used to determine the essential or material validity of

the provisions in the will so far as they deal with land held in England. It is necessary to consider these two cases fully although in my judgment neither case helps him.

60. *Re Piercy* concerns a will dated 5 December 1883 under which Benjamin Piercy, who was a British national, left his entire estate to trustees to hold on trust after payment of expenses inter alia for his children for their lives with remainders for their issue. His estate included a substantial tract of land in Sardinia. The court received expert evidence about the laws of Italy which had two material strands. First, under Article 9 of the Italian Civil Code the substance and effect of testamentary dispositions was regulated by the national law of the testator. Secondly, under other provisions of the Italian Civil Code the trusts created by the will were substantially invalid. Consequently, the tenants for life took their share absolutely. However, part of the land had been sold by the trustees.

61. There were two issues before North J. First, did the trustees have power to sell the Sardinian land and, secondly, did the provisions of the will directing the trustees to hold the proceeds of sale of the land upon the trusts of the will fall foul of Italian law? The decision seems to have been an essentially pragmatic one and is not easy to follow.[3] North J applied Italian law and determined that under Italian law the trustees had power to sell the land. He then went on the decide that there was nothing in Italian law that prevented the proceeds of sale being held under the trusts of the will. At pages 744-745 he said:

> "Then the next question is, as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land: it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the Italian law still applies to the land in the hands of the then owner or owners; <u>but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will</u> by a disposition which is valid according to Italian law."

62. It seems to me that the decision can be understood when regard is had to the words I have highlighted. The judge appears to be saying that the sale of the land was not part of the administration of the estate but rather part of the operation of the trusts created by the will. Italian law governed the essential validity of the will so far as it comprised land in Sardinia and gave power to sell the land. After the sale, the trustees were administering the trusts in accordance with English law. However, this rationalisation of the decision does not explain why the judge felt it was relevant to remark that the application of the proceeds of sale under the trusts was not inconsistent with Italian law. In any event, *Re Piercy* is not a case, as Sharas submits, of the applicable law governing the essential validity of the will as it relates to immovable property changing with the sale of the Sardinian land.

63. Ms John makes the telling point that a decision such as *Re Piercy,* concerning the proceeds of sale of foreign land, would support the view that the proceeds of sale of English land are all the more likely to be administered under the terms of a will trust where the will is materially valid in respect of the land. I can find nothing in *Re Piercy* that supports Sharas' case.

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[3] In *Philipson-Stow v IRC* Lord Radcliffe giving the dissenting speech described the decision as "curious".

64. *Philipson-Stow v IRC* concerned whether or not United Kingdom estate duty applied to land in South Africa. The decision in essence concerned the proper construction of section 28(2) of the Finance Act 1949 under which:

> *"... deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England or Scotland and ...(c) that the property so situate is by the law of the country in which it is situate, immovable property."*

65. The testator died in 1908 domiciled and resident in England. His residuary estate included land in South Africa. His will created successive life interests for his wife and his sons. His wife died in 1930 and his son, Sir Elliot, died in 1954 (after the passing of the relevant Finance Act). At the date of Sir Elliot's death, the relevant land in South Africa had not been sold. The critical question their Lordships had to consider was whether estate duty triggered by the death of Sir Elliot in 1954 could not be levied on the land in South Africa because the estate left under his father's will was deemed not to be included.

66. Taking the decision as it is set out in the headnote, the House of Lords (with Lord Ratcliffe dissenting) held that:

(1) Succession to movables is regulated by the law of the domicile of the deceased and succession to immovables is regulated by the lex situs.
(2) The proper law for the purposes of section 28(2) was that of South Africa, both on the death of the testator and on the death of his tenant for life, Sir Elliot, and the land was entitled to exemption from estate duty.

67. However, there are references in the speeches of their Lordships to what the position might have been had the South African land been sold by the trustees by the time of Sir Frederic's death. Viscount Simonds who gave the leading speech, having concluded that the testator's "disposition" of the South African land for the purposes of section 28(2) was regulated by South African law, went on to say at pages 742-743:

> *"Does this conclusion lead to the further conclusion that in respect of a single disposition the relevant law is not ascertained once and for all when the instrument becomes effective? I think that almost inevitably it does. We have seen that there may be two relevant laws at the date of the instrument taking effect. This very case supplies an illustration. For it is as certain that at the death of the testator South African law applied to his South African as English law to his Sussex property. If the relevant law was determined once and for all, that would be the end of this case; for then South African law would continue to apply to the South African property. But, difficult as the question is and anomalous as are the results that may follow any answer to it, I have come to the conclusion that the proper law may change with a change in the subject-matter. Applying that to the present case, I should not exclude the possibility that, if and when the South African property is sold and the proceeds are gathered in, the proper law regulating the disposition will be English law. It is not necessary for the purpose of this case to decide that question.*
>
> *Until, however, the subject-matter has changed its nature and, having been an immovable, it has become a movable, I see no justification for saying that the relevant*

law has ceased to be South African. What is it that passed on the death of the deceased? Inasmuch as the Crown is claiming duty upon the land in South Africa, it is not admissible to contend that anything passed except that land or that duty, if exigible at all, is exigible upon anything except its value. By English law it may be regarded as converted into personalty: it remains by South African law immovable property as in fact it is. Therefore, though, as I have said, a future sale of the land may result in a change of the relevant law, I am of opinion that, until that event, the law remains that of South Africa."

68. Sharas also relies upon passing observations in other speeches, including that of Lord Reid at page 749:

> *"Although there is a trust for sale it is not disputed that the property which passed was the land in South Africa, and that this must still be dealt with as an immovable within the meaning of the section so long as the land remains unsold."*

69. There are several points that can be made about the decision in *Philipson-Stow v IRC*:

(1) The decision concerns the construction of a section in the Finance Act 1949.
(2) Viscount Simonds' remarks about the possibility of the proper law changing upon sale of the South African property are obiter.
(3) If such a change were to be possible, it could only have consequences for a charge to tax arising on the death of the testator's son, some 46 years after the testator's death. The administration of his estate would have been completed many years previously, leaving the trustees with the role of administering the trusts.
(4) The underlying facts are very different to those in this case. In *Philipson-Stow* the will created trusts with successive interests that would give rise to different dates when a liability to pay tax might arise. The issue to which Viscount Simond's mind was addressed in his obiter remarks was that a liability might arise upon the death of each life tenant; and although the disposition in question for the purposes of section 28(2) was the disposition in the will that created the trusts, it would not be surprising to look, for the purposes of estate duty, at whether an exemption applied to the nature of the assets held by the trust at the date of the relevant death. Similar considerations do not arise in relation to Mr Changizi's estate. The executors' role is limited to gathering in the assets, paying liabilities and distributing the estate in accordance with the will.

70. I conclude that the English land vested in the executors upon Mr Changizi's death as immovable property. The sale of the properties did not change the status of the properties for the purposes of the administration of the estate. The fact that immovable property subsequently, in fact, became movable property in the form of cash upon sale does not lead to the application of Spanish law because the decisive moment is the date of death and for these purposes there is one and only one decisive moment.

Stage 1b

71. This stage is rather simpler to deal with than stage 1a. On 9 June 2009 Mr Changizi made a cash transfer of £300,000 from an English bank account to an English bank account held by Sharas. The executors have treated the payment as a Potentially Exempt Transfer pursuant to section 199(1)(b) of the Inheritance Tax Act 1984 upon which Sharas is primarily liable to pay Inheritance Tax. He failed to pay the tax which created a secondary liability on the part of

the executors pursuant to section 199(2) and section 204(8) of the 1984 Act. When the executors were in a position to do so they paid the tax for which Sharas had primary liability together with accrued interest.

72. Sharas has changed his position about the transfer made by his father. Over a number of years he consistently referred to the transfer as a gift from his father. Examples of this taken from his emails are dated 20 January, 18 February, in March and on 22 November 2011, 3 September 2013 and on 12 May 2016.

73. At one stage he maintained he was not liable to pay Inheritance Tax because his father was domiciled in Spain. However, that argument does not assist him because the transfer was made from an account in England to him in England and is therefore not excluded from Inheritance Tax.

74. More recently, in January 2018, he has said that the transfer was not a gift from his father but rather was payment by his father of a debt due to him relating to another property, 160 Wricklemarsh Road. This version of events emerged after Sharas had taken advice about how to avoid a liability to Inheritance Tax. The only particulars he has given on this alleged debt are contained in his third witness statement where he said Mr Changizi made the payment as a settlement payment:

> *"… to avoid a claim against him during his lifetime, and on his demise against his estate, the Claimant agreed with the Settlor to a payment of £300,000."*

75. No further particulars have been given. In any event, this version of events is inconsistent with Sharas' threats to bring a claim against the executors in 2014 and 2015 arising from his father's failure to pay him in respect of Wricklemarsh Road.

76. Sharas' evidence has not been tested at a trial. It is, however, unnecessary to make any findings about Sharas' various assertions because the executors paid the tax and interest on the basis of Sharas' repeated assertions that the payment by his father was a gift to him. They were obliged to do so on the basis of the information they had at the time and no criticism can be made of them for doing so. For the purposes of this application, it is right to treat the payment of tax and interest by the executors as properly made. It follows that Sharas is liable to the estate for the sum it has paid to HMRC namely Inheritance Tax of £129,476.40 and interest of £9,499.15.

Stage 2 – stifling

77. As I have indicated, it is incumbent upon Sharas to establish facts from which the court can conclude that if an order is made staying this claim it will be stifled. He has provided very little information and he has not provided further particulars in response to a request made on 10 November 2023. During the course of his submissions, he provided further details about his addresses in Spain and about his bank accounts but it would not be right to have regard to such information.

78. His evidence about stifling is found in his witness statement dated 20 October 2023. He asserts he had in the past and still has an inability to pay the costs. However, his evidence in support of that assertion amounts to the following:

(1) He says he did not make a choice not to pay the costs orders. He says he was not in a position to pay.
(2) He exhibits redacted bank statements that do not disclose the descriptions of the payments in and out of the account. He was asked by the executors' solicitors to produce unredacted statements but did not do so.
(3) He says he cannot produce a schedule of assets and liabilities as he does not have any assets or liabilities other than those relating to his father's estate.
(4) He says he is unable to secure financing for litigation costs.
(5) He says he could be in a position to pay the outstanding costs order when the Spanish court distributes his share of the estate.

79. It is clear that Sharas has not provided a complete picture of his finances. He has not said, for example, what happened to the £300,000 he received from his father, he has not provided unredacted bank statements, he has not explained how he funds day to day living expenses and he has not explained in evidence where he lives and what interests in property he has. He has not explained how he was able to offer buy 105 Barkston Gardens for over £1 million in 2019. Most importantly he has not provided any detail about his share of the Spanish estate, when a distribution may be made (and any distributions already made) and his ability to raise funds from family or other third parties.

80. Sharas has never made an offer to pay the costs he has been ordered to pay or otherwise engaged with the orders. The court is aware of both the substantial gift he received from his father and that he will benefit from the Spanish estate. His bank statements show a regular flow of funds through his accounts albeit that he does not at any time have a balance that runs into many thousands of Euros. In the circumstances I conclude that he has decided not to pay or make any attempt to pay the previous costs orders. Sharas has accordingly failed to discharge the burden on him and I am unable to conclude on a balance of probabilities that this claim will be stifled if it is stayed pending payment of the previous costs orders.

Stage 3

81. Is it unjust and unfair for the executors to be required to meet the cost of defending these proceedings without Sharas paying the previous costs orders? Is it an abuse of the court's process to bring this claim without paying those costs?

82. There are a number of factors to be taken into account.

(1) Although it is not essential for the court to find that the conduct of previous proceedings was abusive, I am in no doubt that his conduct in relation to the will which led to the probate claim and his conduct of the probate claim was abusive. He put forward a series of grounds for asserting that the will was invalid but when these grounds were challenged and he was ordered to provide particulars he was unable to do so. The grounds of challenge to the will cannot have been made in good faith. Furthermore, although it would have been open to him to concede the claim he persisted leading to his defence being struck out.
(2) His attempt to bring a derivative claim was clearly hopeless and was struck out at an early stage.

(3) The unpaid costs are substantial and have in the case of the costs of the probate claim and the application to be joined to the County Court claim been outstanding for a lengthy period.
(4) This claim is made against the executors who undertake their role in accordance with their duties. Mrs Changizi is a beneficiary but as a defendant to this claim she is a party as one of the executors. They have been attempting to complete the administration of the estate for some time but have been unable to fully administer the estate as a consequence of claims brought by Sharas.
(5) Mrs Changizi as a beneficiary is directly affected by the unpaid costs.
(6) Without forming a concluded view about the merits of this claim, it is clear that Sharas is seeking some information that he has already received. It does not appear likely that this claim is brought out of a genuine need for the information Sharas is seeking. He is determined to bring a claim in devastavit regardless of the outcome of the claim. If he genuinely needed the information to formulate a claim he would have accepted the offer made by the executors to supply him with the information he seeks in the claim (at his cost). Instead, he has simply not replied to the offer, even after it was repeated.
(7) I consider, in light of Sharas' approach to litigation, it is unlikely that this claim can be resolved swiftly and at modest cost. It would not be right to assume in his favour that the offer will now be accepted with the consequence that the claim will have only a limited further life.

83. There are ample grounds to conclude that Sharas' failure to pay the costs of the previous claims is an abuse and that it would be unjust and unfair for this claim to proceed without those costs being paid.

Sharas' Application

84. Sharas' application is bound to fail because I have found that there is nothing in the estate to be distributed to him.

Conclusion

85. I will make an order staying this claim until the outstanding costs have been paid in full. As I indicated at the hearing, I will not at this stage add an unless order striking out the claim if the costs have not been paid by a fixed date. However, I will order that if the costs have not been paid in full within 3 months from the date when this judgment is handed down, the executors may apply for a peremptory unless order. It will be open to the court to deal with that application in writing, without a hearing, unless that appears to be unjust in light of circumstances of which the executors are aware at the time.

86. Sharas' application will be dismissed.