Neutral Citation Number: [2022] EWHC 649 (Ch)

Case Nos: PT-2021-BRS-000016 and PT-2021-BRS-000007

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25 March 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

PT-2021-BRS-000016

Between :

HELEN ELIZABETH BATT	**Claimant**
- and –	
HUGH CHARLES BOSWELL	**Defendant**

And between :

HUGH CHARLES BOSWELL	**Part 20 Claimant**
- and -	
PHILIP RAYMOND BATT	**Part 20 Defendant**

PT-2021-BRS-000007

And between :

HUGH CHARLES BOSWELL	**Claimant**
- and -	
HELEN ELIZABETH BATT	**Defendant**

- -

Alex Troup (instructed by **Harris and Harris**) for the **Claimant**
Steven Ball (instructed by **Pardoes LLP**) for the **Defendant**

The Part 20 Defendant in person

Hearing dates: 25-26 January 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim under CPR Part 7 for breach of trust brought by the claimant against the defendant, her brother, by claim form issued on 16 February 2021. The claim arises out of a will trust created by their late father, Charles Boswell, who died as long ago as 23 February 1991. But the issue of the claim followed hard on the heels of a claim under CPR Part 8 issued on 21 January 2021 by the defendant against the claimant to remove her as a personal representative of the estate of their mother, Phyllis Boswell. That claim has since been resolved, apart from the question of costs. I will have to return to that question later. But for now I am concerned with the breach of trust claim. On 29 March 2021 the defendant made a Part 20 claim in the Part 7 claim against the claimant's husband, Philip Batt.

The family

2. Before I go further, I will briefly describe the family circumstances. For the sake of convenience, but without intending any disrespect, I shall use the first names of the relevant parties. Charles Boswell and his wife Phyllis had two children. The elder is the claimant, Helen. She was born some nine years before her brother, Hugh, the defendant. Helen married Philip Batt (the Part 20 defendant) and they have two sons, one of whom is called Harry, who changed his name to Hemmings-Batt upon his marriage in 2014. Hugh was married first to Elizabeth, and they had a daughter together. After their divorce, Hugh married Jackie. When Charles died in 1991, his will appointed his widow Phyllis and his son Hugh as co-executors and trustees.

3. Phyllis subsequently formed a relationship with an old family friend called Les Kite. He died in 2009. Phyllis died on 20 September 2019. By her will she appointed Helen and Hugh as co-executors. As I have said, there was a claim brought to remove Helen as a co-executor of her mother's will, but on 20 July 2021 District Judge Taylor sitting in the High Court in Bristol removed both Helen and Hugh, and appointed Michelle Rose, an independent solicitor, to act as personal representative of Phyllis's estate in their place.

The properties

4. A number of properties come into the story in this case. I set out brief details of them here. First of all, there is the family home of Charles, Phyllis and their children in the 1970s. This was known as Hillside, Venns Gate. It was sold on 12 September 1991 by Phyllis and Hugh. Since Charles and Phyllis were joint tenants of the legal estate, Phyllis took the whole legal estate by survivorship on Charles's death. However, Hugh was appointed a co-trustee for the purpose of giving a good receipt to the purchasers for the capital monies. (I interpose here to say that Hugh *also* had a house called Hillside, on Shipham Hill, but this was an entirely different house.) Secondly, there is a property called 1 Hill Lea Gardens (which I will refer to as "HLG"). This was originally a bungalow, bought in 1992 in the joint names of Phyllis and Helen, and in which Phyllis lived. It was later the subject of a deed of gift in favour of Helen

and Philip dated 22 February 2009. Thirdly, there is a house called The Rowans. This was bought in 1997 jointly by Phyllis and Les Kite, but as beneficial tenants in common. After Les Kite's death, it was sold in 2010 by Phyllis. Lastly there is a house called Montrose Villas, which was owned by Helen and Philip. It was let at a rent until Phyllis moved to live there.

Family litigation

5. This is litigation between a sister and brother, about the affairs of a trust created by the will of their father, and of which their mother and brother were trustees. It is the result of a huge rift in the family, originally between Helen and her mother during her lifetime, and now (after her death) between Helen and her brother, with the added complication that Helen's own son Harry is giving evidence for his uncle, the defendant, and against his own parents.

6. It is the worst kind of trust and inheritance litigation. Nothing that I decide is going to bring about a reconciliation between the parties in this case. Whatever I decide, each side is going to go on thinking that it was right, and the other wrong. And the costs of both sides will swallow up a good deal of the benefit that was intended to be conferred. Nevertheless, I must decide it by the same rules that apply to all such litigation. At least then the parties will be able to get on with their lives.

This claim

7. The claim form says that this is a "breach of trust claim in which the Claimant seeks the restoration of the Trust Fund together with compound interest and an order that she is paid such sum as is due to her out of the Trust Fund". The particulars of claim plead (amongst other things) (i) Charles's will, creating a life interest trust for Phyllis with a gift over in remainder (after paying legacies to grandchildren and giving Hugh some land at Bilcombe, Cheddar) for Helen and Hugh in equal shares absolutely, (ii) Charles's death on 23 February 1991, (iii) probate being granted to Phyllis and Hugh on 23 July 1991, (iv) a failure to invest the trust fund, and (v) a wrongful transfer of the trust fund to Phyllis "who spent it as if it were her own personal money". Allegations (i)-(iii) are admitted, but the remainder are denied.

How civil judges find facts

8. Both claimant and defendant in this unfortunate family dispute were professionally represented by solicitors and barristers. The Part 20 defendant, however, was not. The professionals involved will already know what I am going to say, but, for the benefit of the claimant and defendant, most of whose experience of civil litigation must be little or nothing, and also for that of the Part 20 defendant, I set out here some important aspects of the procedure which has to be followed. I hope that it will enable the lay clients to understand a little better how civil judges reach their conclusions, and indeed how I have reached mine in this case.

9. Where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving it. In general, the person who

asserts something bears the burden of proving it. In this case it is the claimant who asserts that there was a breach of trust by the defendant. The significance of who bears the burden of proof in civil litigation is this. If the person who bears the burden of proof of a particular matter satisfies the court, after considering the evidence that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen. The position is binary. There is no room for "maybe".

10. Next there is the question of the *standard* of proof. Civil judges do not find facts on the basis of what is *scientifically certain*, nor even of what is *beyond reasonable doubt*. Instead, they find facts on the basis of what is *more likely than not* to have happened, the so-called "balance of probabilities". And it is the judge, and no-one else, who makes that (objective) evaluative decision. Self-evidently, the parties may have a quite different, subjective, appreciation of what the evidence shows. But it is the judge's independent and objective view that counts.

11. Thirdly, it is also well known that memories are fallible, especially going back a number of years, and once a false memory has been unwittingly absorbed, it may be almost impossible for the witness to divest himself or herself of it. Certainly, in commercial cases where there are contemporaneous documents available, these accordingly acquire a greater significance, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. Even in such cases, however, oral evidence and cross-examination are still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of parties and witnesses: *cf Armagas Ltd v Mundgas SA* [1985] 1 Lloyd's Rep 1, 57, per Robert Goff LJ.

12. On the other hand, where witnesses are personally and emotionally involved in events in family life, and death, those witnesses may have more cause to remember events, even going back many years, than any employee of a large corporation may have in relation to a past commercial transaction: *cf Kogan v Martin* [2019] EWCA Civ 1645, [89]. Whereas (say) a solicitor may deal with many wills and trusts in a career, family members may be involved in only one or two such events in their lifetime, and they assume more significance for them. Here there are relatively few documents, and some of those are ambivalent: *cf NatWest Markets plc v Bilta* [2021] EWCA Civ 680, [51].

The witnesses

13. The following witnesses gave evidence before me: (i) the claimant Helen, (ii) her husband Philip, the Part 20 defendant, (iii) the defendant Hugh, (iv) the defendant's wife Jackie, and (v) Harry, one of the two sons of the claimant and the Part 20 defendant, but also the business partner of the defendant in their company together. I will set out here my brief impressions of each witness.

14. Helen was clear and forthright in giving her evidence. She was also inflexible. If something was not done "by the book", it was not done properly, whatever the substance. She was also convinced that she was right, and therefore the

facts must be such as demonstrate this. I think that on certain points she has convinced herself that the facts were so. In my judgment, she was mistaken on several important matters, because she was unable to accept an innocent explanation. Worse than this, I am satisfied that in some cases she was telling me things that she knew were simply not true, and that she thought that the end justified the means.

15. My view is confirmed by the evidence of her son Harry, who says in his witness statement (not shaken in cross-examination):

> "48. My mother thinks she has been wronged all her life and she wants to get even. My Mum is so sure of her rightness that any lie she tells or any wrong she commits is morally right. This is jihad for her: holy war. … "

16. In giving his evidence, Philip was less inflexible than Helen, but still very rule-based. He shied away from awkward questions, and either did not answer or answered a different question. I am mostly satisfied that he did not tell me a direct untruth, although on one or two occasions I am afraid that he told me things that I am sure he did not believe to be true, though he may have *hoped* they were.

17. On the other side, Hugh was a quiet and polite witness, who came across as nonconfrontational. But he was clear in what he said, and he stood his ground. He did not take any extreme or silly points. It is clear that he and his mother Phyllis had a much closer relationship than Helen and Phyllis did. I was satisfied that he was telling me the truth throughout. On the whole, when his evidence and that of Helen or Philip are in conflict, I prefer the evidence of Hugh.

18. Hugh's wife Jackie was clear and straightforward witness. I have no reason to doubt her honesty, and accept her evidence as truthful. Where her evidence and that of Helen or Philip are in conflict, I prefer the evidence of Jackie.

19. Lastly, Harry was a clear and intelligent witness who gave transparently honest evidence. He was measured, and did not try to give evidence where he had none to give. I bear in mind also how hard it must be for him to give evidence against the interests of his own parents. Where his evidence and that of Helen or Philip are in conflict, I prefer the evidence of Harry.

Facts found

20. On the evidence before me, I find the following facts. Charles and Phyllis had two children, Helen and Hugh. They had hoped for a son, but Helen was born first. Nine years later, Hugh was born. Helen resented the fact that her parents had wanted a son and that her brother once born was seen as the blue-eyed boy, who could do no wrong. Charles was a market gardener, and in particular he grew strawberries for Marks & Spencer. Eventually, Hugh joined him in that business.

21. In addition, Charles and Phyllis's property, known as Hillside, Venns Gate, had four cottages, which were let for holidays until about 1987, and then on

long term lettings, the last of which came to an end shortly before the property was sold, after Charles's death (see below). This property had been conveyed to Charles and Phyllis as beneficial joint tenants on 1 May 1954. However, on 28 February 1973 Charles and Phyllis declared that as from that date the property should be held on trust themselves as tenants in common in equal shares.

22. Evidence was given at trial about what sort of person Phyllis was. There were also some documents in the bundle in her handwriting. In addition, I was invited to and did listen to an audio recording of about 20 minutes' duration made covertly by Philip in 2011 of a conversation between Phyllis and Philip. All of this has enabled me to build up a picture of Phyllis.

23. Helen said in her witness statement that "appearances were paramount to my mother" and that she "always spent money on her hair", bought a mink coat at John Lewis in the early 1970s, and "liked new cars, particularly their identifying number plates". In cross-examination she said that her mother was a spendthrift. She also said she was "vain" and "had very silly ideas". Harry said in his witness statement that his parents when in private said that Phyllis "was vain and stupid".

24. By contrast, Philip said in *his* witness statement that Phyllis was "an intelligent and independent person" and "a clear thinker". When Harry's comments (that they said she was "vain and stupid") were put to him, he said Harry was making it up. Nevertheless, he accepted that Phyllis was a vain person, but "vain in a non-derogatory sense". I prefer Harry's evidence.

25. My assessment is that Phyllis was an intelligent woman who knew her own mind, and preferred her son to her daughter (as Helen realised). She liked to look her best and enjoy life, but she wrote an educated hand and spoke an educated language. She understood the gist of legal transactions, though not necessarily the detail.

26. Helen and Philip are both retired civil servants. However, when he was younger, Philip studied law at A level, and was once offered a job as a trainee solicitor. He had a tragic encounter with the legal system after his parents and other members of his family were killed in an aeroplane accident in 1973.

27. He seems nevertheless to have retained an interest in legal matters, assisting Charles and Phyllis (and indeed other relatives) with any paperwork they had to deal with, such as planning applications, rates tribunals and so on. As will be seen, Philip was involved with the affairs of Charles's will trust at a number of points, and drafted some legal documents.

28. Harry's evidence was that "money is important to my mother". This was not challenged, and I accept it. Indeed, Harry's evidence was that a frequent topic of his parents at the dinner table was potential inheritance from well-off elderly relatives, such as Kathleen, Phyllis's sister, who was married to Reuben. They were well off and childless.

29. This evidence was not challenged in cross-examination of Harry, though when it was put to Helen she said first of all that there were no such discussions, but that they were "open" with their children about financial matters. She was pressed and asked again whether there were discussions about inheritance at the table. This time she said she was not denying it. I find that there were such discussions before the children about inheritance from other relatives.

30. In 1987 Charles and Phyllis made wills in similar form, prepared by solicitors. One of the witnesses of Charles's will was a solicitor called Ken Pigot, who was an acquaintance and a fellow bridge player, and who drafted the will. In 1988, Phyllis received money under the will of her father, Thomas Sandford (who had died in 1959, leaving a life interest trust for his widow) and under the will of her mother (who had died in 1987). The amounts received were £24,171.59 and £20,135.19 respectively, a total of some £44,306.78. On 9 April 1988, using money left to her by a relative, Phyllis bought a piece of agricultural land at Cheddar Woods, amounting to about 3 acres for £9,600.

31. Charles and Phyllis paid for Helen, Philip and their children to go on holiday twice, once down to the south of France and once to Disneyland.

The death of Charles

32. Charles died on 23 February 1991, aged 66 years. He had been ill, but his death was unexpected. Hugh's first marriage also broke down during the spring of 1991. Charles's will appointed Phyllis and Hugh as executors, and they obtained probate on 23 July 1991. They extracted the probate personally, all the necessary forms having been prepared on their behalf by Philip, who said that it would be a waste of money to employ a solicitor. The net value of the estate was sworn at £146,526.

33. Since the declaration of 28 February 1973, Hillside had been owned beneficially by Charles and Phyllis as tenants in common in equal shares. Accordingly, a one-half share in that property fell into his estate. He also owned some land at Bilcombe and some shares in British Gas plc. Charles and Phyllis also had joint accounts in banks and building societies (into which Phyllis's inheritances were paid), and were joint tenants of the land at Cheddar Woods. But all these assets would have vested in Phyllis alone by right of survivorship, and would not have fallen into Charles's estate.

34. Charles's will appointed Phyllis and Hugh to be executors and trustees. It gave his estate to his trustees upon trust for Phyllis for her life, and upon her death (i) as to 3 pieces of freehold agricultural land collectively known as Bilcombe Shipham Hill Cheddar, together with farming equipment, for Hugh absolutely, and (ii) as to the remainder for Hugh and Helen in equal shares absolutely. Clause 3 of the will provided:

> "ANY monies calling for investment under this my Will may be invested by my Trustees as they in their absolute discretion shall think fit as if they were entitled thereto beneficially."

There were no provisions in the will dealing with advancement.

The sale of Hillside

35. The most significant asset of Charles's estate was his half share in Hillside. The whole property was sold and conveyed by Phyllis (as surviving legal owner) and Hugh (appointed as a second trustee of the trust of land) on 12 September 1991 to David Thomson and Catherine Thompson. One half of the net proceeds of sale accordingly belonged to Charles's estate. The purchasers were represented by solicitors. Phyllis and Hugh however acted in person, with Philip drafting any necessary documents and preparing any forms.

36. The balance of the purchase price was paid into Phyllis's bank account, and she split it between building society accounts. She did not segregate trust money from her own monies, and nor was Hugh a joint account holder or otherwise noted as having any interest.

37. The price shown in the conveyance as having been paid by the purchasers was £275,000. However, in a formal written statement made by Phyllis on 15 December 2011, with the assistance of solicitors, Phyllis referred to this sale in the following terms: "which we sold, shortly after his death, for, I believe, £330,000."

38. Helen considers that that statement of the sale price is true in the sense that what was being sold was not only residential property, but also the four holiday let cottages and the market garden business. She says that the price was apportioned as to £275,000 for the residential property and a further £55,000 for the rest. However, Helen was not involved in the sale at all, and there is no documentary evidence that I have seen to support this view. So, this is entirely an inference by her. She says that it must have been done this way to minimise stamp duty.

39. On the other hand, Hugh's evidence is that the reference to a price of £330,000 is a mistake by Phyllis, and that there was a single sale of the entire property and business interest at a single price of £275,000. According to him, Phyllis had confused this sale with the sale just completed by Hugh of his own house, at the price of £330,000.

40. In assessing the relative likelihood of these two scenarios, I bear in mind that Hugh was directly involved in the transaction, and Helen was not, that there is no other documentary or other evidence to show that there was a separate sale of the business, and that Phyllis was making her 2011 statement some 20 years after the event being described, and without reference to any relevant documents. I also consider that Helen would be more likely than Hugh to note the opportunity to reduce stamp duty by selling the businesses separately. Having seen both Hugh and Helen in the witness box, in my judgment Hugh's evidence is to be preferred. Accordingly, I find that the total sum realised on the sale of Charles's half share was £137,500 gross.

41. As I have said, there would have been some costs of the sale. Helen estimated these at between £5000 and £15,000. Her closing submissions accepted the figure of £10,000, which is also the figure which Phyllis used in her written witness statement made in December 2011. I will therefore proceed on the

basis that the net proceeds of sale of Charles's half share were £132,500. Charles's estate also contained some shares in British Gas plc, which Philip arranged to be put into the names of Phyllis and Hugh. They were later sold for £3,127.32. Phyllis paid three pecuniary legacies of £1000 each, one to each grandchild then living.

The £50,000 paid to Hugh

42. Because Hillside was being sold, Phyllis had to move out. She went to live with Hugh in his house. As mentioned above, Hugh's marriage had broken down in the spring of 1991, and his wife Elizabeth had moved out of their home. Hugh wished to retain that home, not only because he ran the market garden business from there, but also because he now had his mother Phyllis living there with him. He therefore needed to buy out Elizabeth's interest. This was agreed between them at £50,000.

43. Thereafter, Phyllis agreed to lend Hugh that sum out of the proceeds of sale of Hillside. Solicitors drew up a second legal charge over Hugh's own property to secure that loan, and it was executed on 20 September 1992. Neither the document nor the invoice rendered to Phyllis by the solicitors refers to any trust or to either of them being trustees.

44. In this claim, Helen's written witness statement both accepts that the £50,000 was *a loan*, and also says that Phyllis told her that she was making *a cash gift* to Hugh. Her counsel cross-examined Hugh on the basis that it was a gift dressed up as a loan, which Hugh denied. Helen's case is that the payment was personal, from Phyllis's own money, and not from trust money. She infers this from the fact that the documents do not refer to the trust at all, and that if it had been from the trust it would have been a loan from Phyllis and Hugh to Hugh.

45. Hugh accepts that, when the payment was made, it was a loan, but says that he and his mother did not discuss where exactly it was coming from. I find that it was indeed a loan when made, but that neither Hugh nor Phyllis consciously decided whether the loan was being made with trust money or out of Phyllis's free estate. For reasons that will become apparent later, it is not actually necessary for me to decide which it was. I also find that Hugh fully intended to repay this sum when he sold a property and had the funds to do so.

The purchase of 1 Hill Lea Gardens

46. Although Phyllis was living with Hugh temporarily, in the longer term she wanted her own place. It would be a kind of downsizing from Hillside. She found a bungalow at 1 Hill Lea Gardens (HLG) which she liked, though it would need work doing to it before she could move in. In December 1991, at about the same time as she found HLG, Phyllis paid for herself, Helen, Philip, their two sons Hugh and his five-year old daughter to have a family holiday at Center Parcs. The holiday was just after Christmas.

47. Hugh gave evidence of a clear recollection of an incident at Center Parcs when everyone was sitting together, playing cards, and discussing the intended

purchase of HLG by Phyllis. Phyllis referred to the fact that she would be able to buy the property outright from the sale proceeds of Hillside and said that she was fortunate that she could use the money left by Charles, and so keep her own savings intact. Hugh's evidence was that Helen and Philip agreed that she was fortunate. There were discussions about how much work would need to be done to the bungalow.

48. Hugh was challenged about this evidence, on the basis that it related to a conversation 30 years before. He explained that there were several reasons why the conversations had stuck in his memory, including his father's death, the fact of a family holiday of this kind, and the fact that he was able to take his young daughter (whom normally he only saw for one day a week).

49. By contrast, Helen's written evidence does not refer to this holiday at all. In cross-examination, however, she accepted the holiday had taken place, but said that Phyllis had not made the statements attributed to her by Hugh. She said that if Phyllis had made a proper case for buying it for the trust, she (Helen) "could have been persuaded". She explained there would have been a need to persuade her, because part of the capital in the trust fund was hers.

50. This is an understandable misconception on the part of a lay person as to the powers of a trust beneficiary with an interest in remainder, but it is still incorrect. In law it was for the trustees and not the beneficiaries to decide how to invest the trust funds. Moreover, the house purchase would have been exactly the sort of safe investment that Helen would have approved of.

51. Again, I am satisfied that Hugh's recollections are correct, that the conversation took place, and that Phyllis said what Hugh attributes to her. It follows that Helen was aware that Phyllis intended to use trust funds to buy HLG, and did not object. On the contrary, she agreed it was fortunate that the trust funds were available to be used.

Helen asks for £50,000

52. On return from the holiday, Phyllis told Hugh that, after Helen found out about the loan, she complained to her mother that it was not fair that he was receiving £50,000, and that she should have £50,000 too. Phyllis refused to give her any money at that stage. So Helen asked to be added to the title of the new property as a beneficial joint tenant. This may have been the product of a suggestion made by Ken Pigot, as a simple means of giving Helen a direct property interest which would be secure but would take effect in practice only on Phyllis's death, when Helen would obtain full ownership by survivorship. Or it may have been Philip's idea.

53. But it does not matter who suggested it. It is consistent with Helen being aware that the trust funds were to be used to purchase HLG. Given that trust funds were to be used, Helen wanted to be sure she would get her share when her mother died. Phyllis told Hugh that she had decided to agree to this in order to satisfy Helen. The fact that HLG cost more than the £50,000 lent to Hugh (and later forgiven) is said to be explained by the fact that the acquisition did not immediately benefit Helen. In principle she would have to

wait until Phyllis died to have a free asset she could use, let or sell. The higher value was seen as compensation for waiting.

The conveyance of Hillside

54. HLG was eventually purchased for £74,500 on 24 January 1992. The conveyance was drafted by Philip himself, in order to save on solicitors' fees. The property was stated to be conveyed to Phyllis and Helen "in fee simple as joint tenants in law and equity". Phyllis subsequently spent some £25,000 in renovations and improvements. There is no documentary evidence available, but Hugh's evidence (which I accept) was that about half of this was building work, £5,000 was spent on the kitchen and £3,000 on bedroom furniture. In addition, a local painter painted the property throughout, and there was some further double glazing fitted and new carpets and furniture obtained from John Lewis.

55. The question that I have to decide is whether HLG and the renovations were paid for out of trust monies or out of Phyllis's own money. There is no document to construe. Therefore, this is at least partly a question of fact, in particular, of intention. (I will come to legal aspects later on.) In my judgment, the conversation at Center Parcs which I have found took place makes the parties' intentions quite clear. Moreover, the inclusion of Helen as a beneficial joint tenant, who would take the whole property on Phyllis's death, cannot rationally be explained as Phyllis voluntarily making a gift out of her own money to Helen, especially when Hugh's evidence (which I accept) was that their mother had refused to make a gift to Helen equal to the £50,000 loan to Hugh.

56. But it can be explained as a kind of advance to Helen of her interest under the trust. I say 'kind of' because it did not put free assets immediately in the hands of Helen. She had either to wait for her mother to die, or sever the joint tenancy and apply for an order for sale (which it seems unlikely to me that the court would have granted, as long as Phyllis was able and wanted to live there).

57. Helen's objection to this conclusion was the formalistic one that it was never mentioned or discussed that the trust money would be used, and there was no deed or declaration recording it. But I have found that it was discussed at Center Parcs. I will come to the absence of documentation later. She also said in her witness statement that Phyllis was clear with her that the purchase of HLG was with her own and not trust money. But this is inconsistent with the Center Parcs discussion, when (as I have found) she said she would use Charles's trust money. Nor is it credible that Phyllis would change her mind and use her own money to make a gift to Helen, when she had just refused to do just that. Accordingly, I do not accept Helen's evidence. I am satisfied that Phyllis intended to use the trust monies to purchase HLG, and that Helen and Hugh were aware of and content with that.

58. I find further that, thereafter, when Helen complained to Phyllis that she also should have £50,000, Phyllis modified her plans, so that (as she saw it) a half share of HLG would belong to Helen from the outset, and she would obtain

the rest when Phyllis died. In her witness statement of December 2011, Phyllis said that she intended to give a one half share of HLG to Helen immediately. It was also Philip's own oral evidence at trial, which, given that it is corroborated by Phyllis's statement, I accept. Nevertheless, Philip still drafted the conveyance as a joint tenancy in equity rather than a tenancy in common. I have no doubt that he knew the difference.

Phyllis's letter of 29 December 1993

59. On 5 December 1993 Hugh and Jackie had a son. On 29 December 1993, Phyllis signed a handwritten letter addressed to Hugh as follows:

> "Dear Hugh,
>
> The £50,000 that you borrowed from me to settle your account with Elizabeth, and to buy 'Hillside'. I now officially give it to you as part of your future inheritance.
>
> With Love Mum.
>
> Signed Phyllis Boswell "

Although the letter itself is handwritten, it is written on printed headed notepaper, bearing the address "Blue Firs, 1 Hill Lee Gardens, Cheddar, Somerset BS27 3JH".

60. Helen says that this represents a gift by Phyllis out of her own funds, as an advance on the inheritance which Hugh could expect to receive on his mother's death. Hugh says however that this represents an advance out of the capital *in his father's trust*, in which his mother had a life interest, and which he would obtain in possession only on the death of his mother. He says that the words "future inheritance" could not refer to what his mother might leave him, because nobody knew whether she would have any money left at her death or not, whereas his share of his father's estate was not available for his mother to spend as her own, but would come to him only on her death. He further says that it does not matter whether the loan was from the trust or from Phyllis's free estate. Whatever its source, the loan was satisfied by the advance of £50,000 from the trust.

61. I will have to deal with legal aspects of this transaction later. For now, I am concerned with the question of what actually happened at the time. Helen's evidence in her witness statement is that:

> "21. I was unhappy when Mother told me she was making a cash gift of £50,000 to the defendant. It is a substantial sum of money and I thought it was unfair. Mother said it was her money and she could do as she pleased. I strongly emphasised that Mother could only give away her own money. I said that she needed to ensure it was not paid from Father's estate and Mother agreed. I suggested to Mother that she should give £50,000 to me as well to treat her children equally. …

> 22. Mother said she was not willing to give me £50,000. She said that she was going to buy a property (Hill Lee Gardens) and would add my name to the title so that we would hold it as joint tenants. This was Mother's attempt to try and equalise the £50,000 gift to the Defendant. … "

62. Helen says that this shows that Phyllis did not intend to use the trust money. But, even if this were true, it would not refer to the right event. The conveyance of HLG to Phyllis and Helen took place in January 1992 (as Helen herself notes in paragraph 20 of her witness statement). It follows the legal charge securing the loan of £50,000 to Hugh of 30 September 1991 by a few months. The letter from Phyllis to Hugh forgiving the debt of £50,000 is dated 29 December 1993.

63. So, it is clear that, when Helen says that her mother agreed that she could give away only her own money and not that of her late husband's estate, that was at a time when the loan of £50,000 had been paid to Hugh just a few months before, and nearly *two years* before the forgiving of the loan in December 1993. Accordingly, I do not think that Helen is telling the truth about the conversation with her mother. But, even if she were, I find that she would have simply been mistaken.

64. Hugh's evidence in his witness statement is:

> "17. … In December 1993 during one of my regular visits to Hill Lea Gardens I was discussing with her my intention to sell my property and Mum wrote a letter to me confirming that she did not want me to repay the loan she had made in 1991 she told me that would 'even things up' by turning the loan I had received into an advance from my inheritance in the same way that Helen had received an advance of half of Hill Lea Gardens, i.e. from my Father's share of the Hillside Venn's Gate sale proceeds."

Hugh was cross-examined by counsel on this, but his account was not shaken, and I accept it. I also note that his position is against his own interests, because, if it were a gift out of Phyllis's free estate, he would still have his half share to come from his father's estate.

65. In considering what really happened, I bear in mind a number of matters. First of all, Helen was not involved in any way in the transactions between Phyllis and Hugh, whereas Hugh was. So he will have a better understanding of the primary facts and their context. Secondly, Hugh was closer to his mother than Helen was. He is therefore more likely to have understood her thinking. Thirdly, the wording of Phyllis's handwritten letter, and in particular the words "part of your future inheritance" fit better in the context with an advance from the existing trust set up by Charles's will than with an advance from any inheritance from his mother, given that she might spend everything she had and leave nothing to him. Fourthly, having (as I have held) paid for HLG out of the trust monies, and seeking to equalise the position between Helen and Hugh, it is more consistent to use trust monies to make the gift to Hugh than her own.

66. Accordingly, I find that the gift to Hugh was intended to be an advance from the trust fund to him. Helen says that the parties' subjective intentions are irrelevant. I will come back to this.

Land at Cheddar Woods

67. Phyllis personally owned a piece of land at Cheddar Woods, that she had bought with money that came to her as a family inheritance (see [21] above). In 1999, she sold it for £20,000. She gave the proceeds to Hugh, as Hugh had used this land in his business and invested a substantial amount there, increasing its value. Helen having found out about the sale asked for a share of the proceeds. Phyllis and Hugh agreed that Hugh should get £15,000 and Helen £5,000. This has nothing to do with the trusts of Charles's will, but it is illustrative of the tensions in the family.

Dealings with HLG

68. During the time that Phyllis lived at HLG she formed a relationship with Les Kite, a family friend who had also been widowed. He moved in to live with her at HLG. In 1997 they decided to purchase a larger property together, called The Rowans, and moved there. HLG was rented out, and the rental income was paid to Phyllis. This is consistent with Phyllis's life interest in Charles's will trust. In 2000, HLG was put up for sale, but did not sell. In 2003, having had two hip replacements and struggling with mobility, Helen and her husband Philip moved into HLG because as a bungalow it was easier for her than a house with stairs. They did not pay any rent, although they paid the expenses, and looked after the property.

69. However, Helen and Philip found the bungalow to be too cold in the winter and too hot in summer. They proposed to demolish it and build a new four-bedroom house in its place. Their original application for planning permission in 2002 was refused, as was an appeal (in 2003), but a subsequent application was made in 2006, which I understand was granted in 2007. Thereafter, the bungalow was demolished and the house constructed, at a cost of about £300,000, paid by Helen and Philip.

70. I am satisfied that they would not have done this if Helen had not been a beneficial co-owner of HLG and expected to become full owner on Phyllis's death. During the period of demolition and construction, they lived in another property, called Montrose Villas, which they had acquired on mortgage for that purpose. After the new house was completed, they moved into it and rented out Montrose Villas in order to produce an income to service the mortgage.

71. In February 2009 Phyllis and Helen executed a deed of gift of HLG to Helen and Philip as tenants in common equal shares. The deed had been prepared by Philip, and Phyllis had no independent legal advice. On the same day that Phyllis signed the deed, she told Hugh about the gift and explained that this made things even between him and Helen, so far as their father's estate was concerned.

72. The deed of gift does not refer to Charles's estate or describe any of the parties to the deed by reference to their roles in relation to that estate. It does not refer to the transfer as an exercise of any power of advancement or otherwise of appointment. Hugh was not a party. Indeed, he did not know about it until Phyllis told him, after the event. But his evidence (which I accept) was that, having discussed the matter between them, Phyllis and Hugh had decided to leave matters as they were, and no challenge was made to the gift during Phyllis's lifetime.

Montrose Villas

73. In August 2009 Les Kite died from prostate cancer. Thereafter, Phyllis sold The Rowans, as it was too large for her by herself. The new house at HLG contained a "granny annexe", but Phyllis did not wish to live there. Instead, in late 2009 she moved into the other property belonging to Helen and Philip, namely Montrose Villas. Helen and Philip asked Phyllis to pay rent to cover the lost rental income, but she refused, telling Hugh that she thought that Helen was being greedy. In fact, Helen and Philip subsequently explained to Hugh that they were struggling financially, having overspent on the building works. They asked Hugh to help them out by paying rent on their mother's behalf. He did so, but did not tell their mother, having been asked by Helen not to do this.

74. Phyllis invested her share of the proceeds of The Rowans (£162,000) with an investment company in Bristol. She told Hugh subsequently on a number of occasions that she was pleased with how her savings were performing. In July 2011 Phyllis found out that Hugh had been paying rent on her behalf in relation to Montrose Villas, and confronted him. She was angry with him for paying, and told him to stop immediately, which he did. Phyllis met Helen at their bridge club and confronted her too, as a result of which they had an argument, and ceased to be on speaking terms.

75. Philip visited Phyllis at Montrose Villas, and secretly recorded their conversation. In that conversation Philip told Phyllis (amongst other things) that she had to apologise to Helen, "completely and unreservedly". He also said that Phyllis could not tell Hugh how to spend his money and could not stop Hugh from making "Helen a gift". Phyllis did not apologise. In August 2011 Helen wrote to Hugh suggesting that Montrose Villas should be sold to their father's will trust. Hugh did not respond to this letter. Nor did he show it to Phyllis.

Phyllis's written statement

76. Phyllis was concerned that Helen was trying to get more of the family money than Hugh, and decided that she would make a detailed statement of everything that had happened, with the help of solicitors. This statement was signed on 15 December 2011 in the presence of a solicitor, Mr Reynolds of Bartlett, Gooding and Weelen. It says that Phyllis was "making this statement in an attempt to clarify the various transactions that have taken place since the death" of her husband Charles on 23 February 1991.

77. The invoice rendered by Mr Reynolds for the assistance given refers to his "Being informed that the various gifts have been given to each of your children without attention being paid to whether these were out of your free estate or as an advancement under the Will of their Father". This is a curious statement, because the witness statement itself makes clear what Phyllis thought she had done. I think therefore that this refers, not so much to a failure of *decision-making* on the part of Phyllis, but rather to a failure *to record at the time* what had been decided.

78. Amongst other things it says the following:

> "5. I have spoken to my Solicitor and I am advised that money belonging to my Husband's estate should have been invested in the joint names of Hugh and myself and proper documentation prepared as and when monies were advanced. As I have said previously, Philip dealt with the application for Probate and none of this seemed to be important. However, it was always my intention that monies that I advanced to the children should come, in the first instance, out of their Father's estate. It made no sense for me to give the money out of my free estate and to keep back money that they were going to get anyway under their Father's will. Helen has received 1 Hill Lea Gardens which was worth £120,000 when bought in 1991/2. She and Philip lived there rent free for eight years. I estimate that they benefitted to the extent of £38,000 from that (95 months occupation of £400 per month notional rent) Hugh has had about £50,000. …
>
> […]
>
> In summary therefore, for the reasons and in the circumstances set out above my children have received the following: –
>
> Helen
>
> | | |
> |---|---|
> | 1 Hill Lea Gardens | £120,000.00 |
> | Rent allowance | £ 38,000.00 |
> | Part proceeds of sale – Mother's land | £ 5,000.00 |
> | **Total** | **£163,000.00** |
>
> Hugh
>
> | | |
> |---|---|
> | Cash gift | £ 50,000.00 |
> | Land at Bilcombe | £ 44,800.00 |
> | Part proceeds of sale – Mother's land | £ 15,000.00 |
> | **Total** | **£109,000.00**" |

79. I am satisfied that this represented a genuine attempt (even though mistaken in certain particulars) by Phyllis to record what she understood to have happened, so that after her death there would be clear evidence of her views on the subject. It was not, as Helen characterised it, an attempt to rewrite history. Instead, I consider that Phyllis was trying to deal with what she evidently regarded as her daughter's difficult behaviour without having to confront her during her lifetime.

80. In these circumstances, it is not surprising that the Phyllis did not wish to go on living at Montrose Villas. Instead, Hugh made arrangements to sell his own house and buy a larger one, which he did in March 2012. He then had works carried out to include accommodation for his mother, and she moved in there in December 2012. But she was still not on speaking terms with Helen. Then in 2014 Helen was diagnosed with cancer, and underwent treatment. Phyllis sought to remake contact with Helen, and a relationship of some kind between them was re-established.

The payment of £130,000 to Hugh and Harry

81. In late 2015 Hugh asked his mother for some help in paying a deposit on factory premises for a new business which Hugh and his nephew Harry (who were already in business together and apparently doing well) wished to launch. The bulk of the purchase price was to be raised by bank mortgage. Phyllis was happy to lend £130,000 to Hugh and Harry. However, the bank was unwilling for Phyllis to lend this money, particularly on any secured basis, since it would compromise the bank's security. Instead, Hugh and Harry were advised to call the loan a gift. This would mean that the bank would see the directors putting in their own money and not borrowed money, and there would be no competition for security.

82. Phyllis accordingly wrote a letter to her investment managers as follows:

> "I confirm that I wish to transfer the sum of £130,000 … from my portfolio as a gift to my son … and nephew … Please organise a payment as soon as possible to the following account … "

The sum of £130,000 was paid to the account of the new company on 19 November 2015. The purchase of the new premises completed on 3 December 2015.

83. Hugh and Harry paid interest on the £130,000 between 2015 and 2019 at the rate of £3250 per annum, a total of £13,000. In 2019 they were in a position to repay the loan. There were discussions between the various parties. Phyllis told Hugh that she did not need the money back. Philip told Phyllis that she should not take the money back, presumably to assist in inheritance tax planning. As a result, Phyllis decided that she would treat the £130,000 as an advance from her own estate to Hugh and Helen, so that the half of the loan for which Harry was liable would be owed instead to Helen.

84. There were then discussions between Helen and Harry as to whether she wanted the money back or whether she wanted it divided equally between her

two sons Harry and Fred. For present purposes it is not necessary for me to resolve this issue in any more granular detail. It is only necessary for me to find, as I do on the evidence, that initially the payment of £130,000 was indeed a loan to Hugh and Harry, and subsequently treated by Phyllis as funds from her estate which could be distributed to her two children, Hugh and Helen.

Law

Constitution of the trust

85. The first question is whether the trust intended to be created by the will of Charles Boswell was ever properly constituted. The original constitution of a trust generally requires either that the owner of assets declares a trust of them or that the owner transfers them to someone who accepts a trust of them: *Milroy v Lord* ((1862) 4 De G F & J 264. Where a trust is to be established by will, on the death of the deceased the assets vest automatically in the executors nominated by the will (even before probate is granted) to be held on the terms of the will: *Woolley v Clark* (1822) 5 B & Ald 522. Immediately on the death, the executors will hold the estate to administer it in accordance with law (Administration of Estates Act 1925, s 25(a)), and after administration to transfer assets, including assets intended to be held on trust, to the persons entitled (with power to postpone for the first year: 1925 Act, s 44).

86. In the case of beneficial devisees or legatees, they are the persons entitled. In the case of assets intended to be held on trust, it is the intended trustees. In most cases (as indeed here) the executors and the intended trustees are the same persons. The executors will assent or transfer the intended trust assets to themselves as trustees at an appropriate point in the administration. Alternatively, if the administration is completed then the executors will hold the trust assets as the trustees: *Re Ponder* [1921] 2 Ch 59; *Re Cockburn* [1957] Ch 438.

87. There is also authority for saying that where specific assets are given (as opposed to the residue of the estate) the executors hold those assets on trust for the intended beneficiaries, although subject to their being liable to be taken in order to pay debts: *IRC v Hawley* [1928] I KB 578. For present purposes, this does not matter.

88. In the interim period between the death and completion of the administration (or earlier transfer of assets), those ultimately entitled to assets passing under the will, whether beneficially or as trustees, have at least the right as against the executors to ensure good and full administration of the estate: *Commissioner for Stamp Duties v Livingston* [1965] AC 694. Strictly speaking, in the case of intended trustees, that right will be held by them as such trustees on trust for the intended beneficiaries of the trust (*cf Fletcher v Fletcher* (1844) 4 Hare 167). So, there actually is a trust from the outset.

89. If however the executors transfer the intended trust assets to the wrong persons, then in principle those persons will become at least constructive trustees of the assets for the benefit of the intended beneficiaries. What this

means is that a will trust is constituted for all practical purposes from the moment of death, although the interposed administration of the estate usually means that there is a delay before the trust becomes operational.

Duty to segregate trust funds?

90. One of the duties pleaded as falling on the defendant as trustee was "a duty to set aside and keep the Trust Fund in a separate bank account held in the joint names of Phyllis and the Defendant as trustees of the Trust pending its investment" (see the particulars of claim, paragraph 8(a)). At the trial, I asked the claimant what authority there was for that proposition of law. Mr Troup for the claimant referred me to *Lewin on Trusts*, 20th ed, at 34-040, and *Duggan v. Governor, HM Prison, Full Sutton* [2004] 1 WLR 1010, [37] (Chadwick LJ) and [42] (Peter Gibson LJ).

91. *Lewin* is forthright and unambiguous:

> "It is a clear breach of trust to mix trust money or trust goods with other money or goods … "

The same passage appears in the 19th ed (2015, para 34-40), 18th ed (2008, para 34-34) and 17th ed (2000), para 34-21). But no similar passage occurs in the 15th ed (1950) or earlier. Instead, these earlier editions say

> "If the trustee pay the money to his own credit and not to the separate account of the trust estate … the trustee will be personally liable for the consequences" (224 in the 15th ed).

92. The 16th edition of 1964 (the first by John Mowbray QC), takes an intermediate position:

> "The general principle of the earlier cases was that a trustee should place trust money only for temporary purposes in some responsible banking house, under his own control, but to the separate account of the trust."

This form of words hardens the principle stated in the earlier editions, by removing the qualification that the trustee would be responsible for the consequences, *ie* if there was any loss to the trust fund. As here stated, it looks like an absolute rule, even though not as baldly stated as in the 17th and later editions. Yet the authorities cited are the same ones as are cited in the 15th and earlier editions for the proposition found there.

93. But, curiously enough, they are not among the authorities cited by *Lewin* (17th to 20th eds) for the *current* proposition. In the 18th to 20th eds those authorities include *Duggan*, cited to me by Mr Troup. I will come back to that case. The other authorities cited by *Lewin* (also in the 17th ed, which preceded *Duggan*) are: *South Australia Insurance Co v Randell* (1869) LR 3 PC 101; *Re Nevill, ex p White* (1871) LR 6 Ch App 397; *Re Gross, ex p Kingston* (1871) LR 6 Ch App 632; *Henry v Hammond* [1913] 2 KB 515 at 521; *Re Tilley's Will Trusts* [1967] Ch 1179; *Re Bond Worth Ltd* [1980] Ch 228; *Re Andrabell Ltd* [1984] 3 All ER 407; and *Foskett v McKeown* [2001] 1 AC 102, HL. None of those

decided before 1964 is cited by the 16th edition in this context. I shall (briefly) consider them all.

94. So far as I can see, none of these authorities contains a clear statement that mixing is *itself* a breach of trust, except *Duggan* (which I dare say is why Mr Troup cited it to me specifically). The first of them, *Randell*, was not a trust case at all, but a case of sale or bailment of wheat by farmers into a bulk store owned by millers. The Privy Council relied on the well-known banking case of *Foley v Hill* (1848) 2 HLC 28 to find on the facts that there was a sale, and so property passed, and the millers had an insurable interest and could recover on their insurance policy when the stock was destroyed by fire.

95. *Re Nevill, ex p White* was similarly not a trust case, but one where cotton manufacturers supplied goods and a price list to Nevill. He often altered or treated the goods (*eg* pressing, bleaching, or dyeing them) and sold them on to purchasers at prices and on terms he alone determined, only accounting to the manufacturers, after a fixed period, for the prices set out in their price list. Although Nevill carried on the business of selling on the goods on his own account, he received all the monies from his purchasers and paid the manufacturers through a firm in which he was a partner (by agreement with his partners), so that his firm was acting in effect as his bankers.

96. When the firm executed a deed of arrangement with its creditors, the manufacturers sought to prove for Nevill's credit balance with the firm, on the basis that these monies belonged to them. The Court of Appeal in Chancery held that Nevill was not an agent of the manufacturers, but acting on his own account, so the monies he received were his own. The judges said that there was no evidence to show that, by treating or altering the goods, he was committing any breach of duty.

97. *Re Gross, ex p Kingston* was a case about a solicitor who was appointed a county treasurer under statute, and paid county monies into an account at one bank, whilst keeping his personal account at another. But he paid over monies from the county account to his personal account, in order to deal with payments he made from the police rates. In 1869 he opened a separate account at his own bank, headed "Police Account", and thereafter used that account for the police rate monies. In 1870 the solicitor absconded, leaving the police rate account in credit and his personal account overdrawn. The personal bank sought to set off the credit balance on the police account against the overdraft on the personal account, but failed. The police account was clearly a trust account.

98. James LJ said (at 639) that the solicitor opened the police account,

> "being then minded … to do what it was his plain and obvious duty as an honest man to do, to keep the public stock of the county not mixed up with his own, and to avoid the liability to which trustees are subject who deal improperly with trust funds … "

But this simply makes clear that in opening the account he sought to avoid liability for misapplication of trust funds, and that not mixing the funds was

the way to do that. It refers to the "duty as an honest man", rather than to any duty as a trustee. This is a slender basis for any *trustee* duty not to mix at all. In *Lewin*, 15th ed (1950) and earlier, back to the 6th ed (the last in which Thomas Lewin himself played a part), this case was cited as authority for the different proposition that a trustee should deposit the trust money in such a manner that the beneficiaries might follow it into the bankers' hands. In fact, that was what had happened, and the point was therefore not in issue.

99. *Henry v Hammond* was another commercial sale case which was argued to involve a trust. The plaintiff loss adjuster instructed the defendant shipping agent in 1883 to sell a cargo that had been salved from a wreck, and pay all claims and expenses out of the proceeds. After the sale, the sum of £96 was left in the defendant's hands, but he did not account to the plaintiff for it. In 1912 the plaintiff discovered the existence of the balance and sued to recover it. The defendant pleaded limitation. The plaintiff answered that the defendant held the sum of £96 as a trustee for him.

100. The claim failed in the county court, as did the plaintiff's appeal to the King's Bench Division of the High Court. Channell J, with whom Bray J agreed, said (at 521):

> "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor."

101. It is to be noted, first, that the judge does not refer solely to mixing or not. He refers both to mixing or not *and* either handing over in specie or dealing with it as the holder pleases. In other words, for a trustee the real wrong is that he or she does not hand over the property in specie. This would be a *misapplication* of the property. But, secondly, the statement proceeds on the basis that there is an obligation to keep separate, and an obligation to hand over in specie, and concludes that there is in such a case a trust. Yet the reverse is not stated to be true. It may be that a trustee is obliged to hand over the trust assets in specie to an absolutely entitled beneficiary, but it does not follow from this that he must not mix it with his own property in the meantime. It will be *unwise* for him to do so, but that is different.

102. Unlike the earlier cases discussed, *Re Tilley's Will Trusts* was the case of an express trust. Mrs Tilley was given a life interest under the trusts of her late husband's will. She was also a trustee. In the latter capacity she thoroughly confused funds she held as trustee with her own personal monies. She also had very large bank overdraft facilities. She bought and sold properties over the years, and made significant profits, so that when she died in 1959 she left some £94,000.

103. The testator's daughter Mabel (who was in fact Mrs Tilley's *stepdaughter*) was one of the two remaindermen under the will trusts, but she had predeceased her stepmother. Her estate claimed a half share in the capital profits made by Mrs Tilley, to the extent that Mrs Tilley's estate could not show that the profits were made from her personal monies. The claim to profits failed on the facts.

104. It is correct that the judge held (at 1183) that, if a trustee mixed trust assets with his own, the onus was on the trustee to distinguish the separate assets, and, to the extent that could not be done, the conclusion was that those assets belonged to the trust. But that, of course, is an old rule of evidence applicable to dealings by trustees (see *eg Lupton v White* (1808) 15 Ves 432). It is not saying that the mixing is *itself* a breach of trust. On the contrary, it leads to the vindication of the trust, by ascertaining what assets the trust covers. It simply shows once more how unwise it is for a trustee to mix personal and trust assets.

105. In the present case, however, Mrs Tilley's estate was able to show that the amount of trust monies paid into Mrs Tilley's personal bank account was £2,237. Moreover, the evidence showed that Mrs Tilley did not rely on any of the trust monies to make her purchases. So, the claim succeeded in relation to one half of the sum of £2,237, but failed as to any share of the profits made.

106. *Re Bond Worth Ltd* was another commercial sale case. A carpet manufacturer (Bond Worth) bought man-made fibres from a seller (Monsanto) and made them into carpets, which they sold. The fibres were sold on terms including a retention of title clause. The manufacturer went into receivership. The judge held that, despite the clause, property in the fibres passed to the manufacturer on delivery, and it was free to use them to make carpets and sell them on.

107. The legal effect of the clause however was to create a security interest for the seller defeasible upon payment of the price. This equity of redemption was inconsistent with a bare trustee-beneficiary relationship. The clause therefore created a floating charge on the fibres or their proceeds of sale or of the sale of products made with them. But this charge was unregistered, and therefore void under section 95 of the Companies Act 1948 as against the creditors of the manufacturer.

108. The judge did however discuss the question of the ability of the manufacturer to use the fibres in making carpets, in two different contexts. First of all, he accepted that there was no obligation on the manufacturer to keep the seller's unpaid-for fibres separate from other materials. He said (at 257A):

> "Without committing any breach of the alleged trust, it could mix the raw fibre with its other goods, sell it on such terms as to price and otherwise as it pleased, spin it into yarn and use it for all the purposes of its carpet manufacture."

The judge held that this was no objection to a trust in principle on the grounds that there was uncertainty of subject matter, because the relevant clause substituted the product of the fibres for the original fibres themselves.

109. But he was further referred to the cases of *Foley v Hill*, *South Australia Insurance Co v Randell*, *Re Nevill*, and *Henry v Hammond*, to which I have referred above. It was argued that these cases showed that there could not be a bare trust for the seller. The judge agreed. He said (at 261B):

> "these four last-mentioned authorities seem to me clear authority for the proposition that, where an alleged trustee has the right to mix tangible assets or moneys with his own other assets or moneys and to deal with them as he pleases, this is incompatible with the existence of a *presently* subsisting fiduciary relationship in regard to such particular assets or moneys."

110. Subsequently, he said (at 265H-266A):

> "The implicit authority and freedom of Bond Worth to employ the relevant raw materials, products and other moneys as it pleased and for its own purposes during the subsistence of the operation of the retention of title clause were in my judgment quite incompatible with the existence of a relationship of Bond Worth as trustee and Monsanto as beneficiary solely and absolutely entitled to such assets, which is the relationship asserted."

111. But the important point made by the judge was not that the manufacturer could mix up the fibres, rather than keep them entirely segregated. It was that it could *deal with the fibres as its own*, make new products with them and sell those products on its own account. So, in my view the judge here was not deciding that there was a duty as such on trustees to keep assets segregated.

112. *Re Andrabell Ltd* was yet another case of a sale of goods on terms including a retention of title clause. Unlike *Bond Worth*, however, the goods sold (travel bags) were not worked on by the purchaser (Andrabell), but simply resold by it to retail customers. The purchaser went into liquidation owing the seller (Airborne Accessories) the price of delivered bags which had been sold on. The seller's claim against the liquidator failed. Peter Gibson J noted (at 411g) that

> "it is common ground that the purchaser was entirely free to sell the goods for whatever price, at whatever time and in whatever manner it chose without reference to the seller."

113. The judge went on to say (at 415f) that:

> "it was accepted by counsel for Airborne that there was no obligation on Andrabell to keep separate from its own moneys the moneys it received from the sales which it made of the bags supplied by Airborne. Counsel persisted in this concession even after I had referred him to the principle stated by Channell J in *Henry v Hammond* [1913] 2 KB 515 at 521 … " (which I have already set out above, at [100]).

He also repeated (at 415j), with evident approval, the comment made by Slade J in *Re Bond Worth* (at 261B) after examining *Foley v Hill*, *South Australia*

Insurance Co v Randell, *Re Nevill* and *Henry v Hammond*. In my judgment this case takes the matter of the duty to segregate no further forward than *Re Bond Worth*.

114. *Foskett v McKeown* was a case where investors in a development of a building estate in Portugal paid monies over to a Mr Deasy on terms (as Lord Browne-Wilkinson said in his speech, at 107), that

> "each purchaser to pay the purchase price to Mr Deasy, to be held by him upon the trusts of a trust deed ('the purchasers trust deed') under which the purchasers' money was to be held in a separate bank account until either the plot of land was transferred to him or a period of two years had expired, whichever first happened. If after two years the plot had not been transferred to the purchaser the money was to be repaid with interest. Some 220 prospective purchasers entered into transactions to acquire plots on the building estate and paid some £2,645,000 to Mr Deasy to be held by him on the terms of the purchasers trust deed. However, the land in Portugal was never developed. When the time came for the money to be refunded to the purchasers it was found that it had been dissipated and that £20,440 of those funds had been used to pay the fourth and fifth premiums due under the policy."

115. Somehow, which is not entirely clear from the report (but the detail does not in fact matter), some of the monies had been diverted into a bank account of a Mr Timothy Murphy, who had used some of it to pay premiums on a life assurance policy on his own life settled on trusts for his wife and children. Subsequently he committed suicide, and the life assurer paid out about £1m under the policy to the trustees of that policy. The purchasers claimed an interest in the proceeds of the insurance policy, on the basis that their funds had paid 40% of the premiums for it.

116. The majority of their Lordships (Lords Browne-Wilkinson, Hoffmann and Millett) held that the claim succeeded. The first and third said expressly (at 110 and 127 respectively) that the trustees of the funds had acted in breach of trust by mixing them in a bank account with personal funds. But, of course, the terms of the original trust, as set out by Lord Browne-Wilkinson, made clear that the funds contributed should remain in a segregated account until applied in the purchase of the land or returned to the contributor. So it would have been *a breach of the express trust* to move them to an account together with Mr Murphy's funds. The only two authorised states of the trust fund were the segregated bank account and the purchase of the land. *That* is why it was wrongful for Mr Murphy to mix the funds. There was no *general* obligation not to do so.

117. My conclusion on this necessarily rapid survey of the authorities cited by *Lewin* for the proposition that trustees *must* segregate the trust assets from personal assets is that, so far, there is no clear authority for it. I therefore return to *Duggan*. That was a case where a serving prisoner sought to argue that prisoners' cash, which by prison regulations had to be paid into an account under the control of the governor, was held by the governor on trust for the prisoners concerned. The claim failed, both at first instance and on

appeal, on the basis that the relationship created by the relevant regulation was one of debtor-creditor only.

118. Chadwick LJ gave four reasons for reaching this conclusion. Part of the fourth reasons was this:

> "37. … The difficulty which the appellant's submissions do not address is that if the rule maker had intended to impose a trust obligation in respect of prisoners' funds generally – an obligation to be met by keeping those funds in a single mixed account – it would have been easy for him to say so. And, because that would be a departure from the more usual obligation imposed on a trustee – to keep the trust monies separate not only from his own monies but also from the monies of others for whom he is trustee – the rule maker might have been expected to say so."

Peter Gibson LJ (who agreed also with the reasons given by Chadwick LJ) added some further reasons of his own, including that:

> "42. … in the absence of express authorisation to the contrary a trustee would normally have to keep trust monies separate not only from his own monies but also from other monies which the trustee holds for other beneficiaries. … "

Keene LJ agreed with both judgments.

119. No authority was cited by either Chadwick LJ or Peter Gibson LJ for the propositions stated by them, not even para 34.21 of *Lewin*, 17th ed (2000). Of course, there is a well-known saying "that the more self-evident a proposition is, the harder it is to find authority for it" (*National Employers' Mutual General Insurance Association v Jones* [1990] 1 AC 24, 45, per May LJ).

120. There can be no doubt that mixing trust and personal money, or trust and other trust money, increases the risks both of an unauthorised investment and of a misapplication of trust money, both of which are certainly breaches of trust. But mixing is not of itself either an unauthorised investment or a misapplication, because the mixed fund may be in the form of an authorised investment, and the trust funds remain intact, and continue to be available for distribution to those entitled. So, despite what is said in the case, it is not clear to me why a mere mixing should *itself* be a breach of trust.

121. Although the existence of a trust means that the assets are not at the free disposal of the trustee, the authorities show that the trustee is presumed to act honestly in withdrawing assets from a mixed fund. In *Pennell v Deffell* (1853 4 De G M & G 372, for example, Knight Bruce LJ (at 555) and Turner LJ (at 559) discuss mixing of trust and personal monies in a chest or bank account, with a view to demonstrating that the trust assets continue to be trust assets and that any withdrawal from the mixed fund is assumed to be from the personal assets, and not the trust assets. Yet neither judge says anywhere that the mixing is itself a breach of trust. It is the subsequent misapplication of trust assets which is the wrong. Again, in *Re Hallett's Estate* (1880) 13 Ch D

696, 727-28, Sir George Jessel MR says the same thing, and again does not suggest that the mere mixing would be a breach of trust.

122. It may fairly be said, of course, that these eminent judges were not then concerned specifically to decide whether mixing was or was not a breach of trust. That was not the precise question before them. But it is striking that, although they *were* concerned with the question whether the withdrawal of sums from a mixed fund was or was not to be treated as a breach of trust, it did not occur to any of them to observe that of course there had *already* been "a clear breach of trust" in mixing the funds in the first place. Nor did successive editions of *Lewin* suggest that there was, until the 17th edition in 2000. It is also striking that there is no clear authority available for the proposition that there is a duty to segregate assets, before the decision in *Duggan* in 2003. It may be that the rules on authorised investments and on misapplications were so much tougher in earlier times that any "rule" requiring segregation was hidden behind them, and so not clearly seen.

123. But at the end of the day it does not matter what the reason is. The Court of Appeal's decision is clear, and the proposition that a trustee *normally* (or *usually*) has a duty to segregate trust assets is part of one of the several *rationes decidendi* of that decision. The Court of Appeal and the courts below are bound by it. In any event, as Mr Troup rightly observed, the claimant pleaded the duty to segregate, and the defendant by his defence *admitted* it. So, ultimately, there is no need to explore the question further. On the other hand, the fact that there was a breach of trust in not segregating the estate or trust assets from personal funds does not answer the question whether any remedy may or should be given. In many, perhaps most, cases a failure to segregate by itself causes neither loss to the trust fund nor gain to the trustee.

Legal powers and formalities

124. Although Hugh claims that advances were made to Helen and himself out of their father's estate, he also accepts that nothing was done formally or in writing to record such advances being made, or even to ensure that the estate funds were invested and safeguarded in accordance with the law. In her written statement of December 2011 Phyllis says much the same thing.

125. So far as concerns the investment of the estate funds, I have already set out clause 3 of Charles's will, which provided that the trustees could invest in their absolute discretion as if they were beneficial owners. Investing estate funds into building society accounts, and purchasing real estate are well within the range of investments permitted by this clause. In addition, depositing funds in bank accounts pending investment was expressly permitted by the Trustee Act 1925, s 11(1) (repealed by the Trustee Act 2000).

126. I have found that Phyllis paid the proceeds of sale of Hillside into her bank account and then into building society accounts, and that when she paid the purchase price for HLG she intended to use and did use Charles's estate's monies. I have also found that Hugh both knew of and agreed with these actions. It follows that, although Hugh was wrong not to insist on being a joint owner of the estate funds with Phyllis, Phyllis nevertheless held the estate

funds and anything that those funds were invested in as a trustee of the will trust.

127. So far as concerns advancement, there is a statutory power applicable so far as not modified or excluded by the terms of the trust, arising under section 32 of the Trustee Act 1925. It is not necessary to set out all the terms of this section, but it is necessary to note three things. The first is that at the time of Charles's death there was a limit (in section 32(1)(a)) on the power of advancement to one half of the putative capital share of the appointee. This was commonly modified by the terms of the trust, but there was no such modification in Charles's will. (The limit was in fact removed by legislation in 2014).

128. The second is that, with one exception, it is not necessary for any particular formality to exercise the power, and it can therefore be exercised without any writing. The third thing (the exception to the second) is that, by section 32(1)(c),

> "no such payment [, transfer] or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money [or other property paid, transferred] or applied unless such person is in existence and of full age and consents in writing to such payment [, transfer] or application."

129. Phyllis was of course a person within the scope of that provision, as a "person entitled to any prior life or other interest". However, in circumstances where Phyllis was herself the trustee as well as the life tenant, the lack of a signed consent to an advance out of the estate funds could not have been relied upon by Phyllis after having deliberately made such an advance. So, I need not consider this point further.

130. What I do need to consider is whether, and if so how far, the statutory power was exercised. In *Re Lawrence's Will Trusts* [1972] Ch 418, 430A-C, Megarry J said:

> "a power of appointment, whether special, general or hybrid, is exercised if, and only if, the purported exercise, first, complies with any requirements of the power, and second, sufficiently indicates an intention to exercise it. … If the instrument shows an intention not to exercise the power, then it is inconceivable that it should be exercised; if, on the other hand, it shows an intention to exercise the power, I can see no reason why that intention should not suffice. If the instrument displays no intention one way or the other, then I would hold that prima facie the power has not been exercised. The donor of the power has confided to the donee power to make an appointment, and, statute apart, I do not think that to hold that the donee has exercised the power unawares is likely to accord with the intention of either the donor or the donee."

131. As to what sufficiently shows the intention of the party concerned to exercise the power, it is clear from *Re Ackerley* [1913] 1 Ch 510, 515, that where it is alleged that a power has been exercised by a written instrument, "either a reference to the power or a reference to the property subject to the power

constitutes in general sufficient indication for the purpose". However, a reference to the property subject to the power will not suffice in a case where the putative appointor has property of his own answering the same description: see *Re Waldron's Settlement* [1940] 3 All ER 442.

132. Yet, despite the statement of Megarry J cited above, there can be cases where a power is exercised *impliedly* rather than expressly. This occurs where the power must be exercised in order for a *further* transaction to take place validly, at least in the absence of an indication that there was no intention to exercise the power: *Davies v Richard & Wallington Industries Ltd* [1990] 1 WLR 1511 (where an employer had a power to remove trustees of a pension scheme, and impliedly exercised it when a definitive trust deed was executed by the employer and only two of the three trustees, the third having indicated his intention to retire).

133. In the present case there are two particular acts claimed to amount to advances. The first is the forgiving by Phyllis in December 1993 of the loan of £50,000 made to Hugh in September 1992. The second is the purchase of HLG in the joint names of Phyllis and Helen in January 1992, or at least the transfer of it by them to Helen and Philip in February 2009.

134. In the former case, the act of forgiving the debt was reduced to writing, in a short letter written by Phyllis to Hugh, the terms of which have already been set out. I have found that Phyllis intended that the loan should be repaid by the advance of £50,000 to Hugh out of the funds which he would obtain under his father's will on the death of his mother. She did indeed hold sufficient funds as trustee for such payment to be made if there was power to do it. However, there is no reference in the letter to the statutory power of advancement. Indeed, there is no evidence that Phyllis was even aware that there was such a power, and I find that she was not.

135. The same is true in relation to both the original purchase of HLG and the subsequent transfer of that property to the joint names of Helen and Philip. Again, Phyllis purchased HLG with trust funds, and therefore she and Helen (to whom it was conveyed) would without more have held it as trustees of Charles's will trust. But as I have already said, the property was conveyed to Phyllis and Helen "in fee simple as joint tenants in law and equity". I have found that both Phyllis and Helen in January 1992 intended that Helen should have an immediate beneficial interest but not be able to make use of it until Phyllis's death. Similarly, I have found that Phyllis and Helen intended in February 2009 that Helen and Philip should become the absolute beneficial owners of HLG.

136. However, neither the conveyance of January 1992 nor that of February 2009 (both drawn by Philip) makes any reference to the statutory power of advancement or indicates any intention to exercise it. Again, I find that Phyllis did not know of the power at the time that she executed these conveyances.

137. So far as I can see, this is not a case where there can be any implied exercise of the statutory power of advancement because the validity of a later

transaction depends upon it. Accordingly, I hold that the statutory power of advancement was not exercised in the present case.

Saunders v Vautier

138. However, that does not conclude the matter, because there is also the rule known as the rule in *Saunders v Vautier* (1841) Cr & Ph 240 to be considered. This rule holds that it is competent for the beneficiary who is of full age and capacity and is solely absolutely entitled to assets held on trust to call upon the trustee for the transfer of the trust assets to him or her, or as he or she directs, and so bring the trust to an end. It also applies in cases where two or more such beneficiaries of full age and capacity between them absolutely entitled to the assets held on trust, and both or all such beneficiaries (as the case may be) make the same demand of the trustee: *Barton v Briscoe* (1822) Jac 603.

139. Indeed, in the case of two or more persons together absolutely entitled as co-owners, English law has gone further than this. The rule applies to *each of them separately*, provided that the property is of such a nature that each share can be severed without harm to the remainder: *Stephenson v Barclays Bank Trust Co Ltd* [1975] 1 WLR 882, 889-90. There are no legal formalities (such as writing) needed in order to operate the rule. All that matters is that the relevant parties agree on what is to happen, and then implement their agreement, by whatever means necessary (such as a conveyance, a cash payment, a share transfer, a physical transfer or whatever is appropriate to the facts of the case).

140. In the present case, the life interest trust created by Charles's will had only three beneficiaries: Phyllis, Helen and Hugh. Helen and Hugh had vested interests in the capital of the fund of one half each. So long as Phyllis was alive, neither Helen nor Hugh could require their share of the capital to be paid over to them, *unless Phyllis agreed*. But, once Phyllis agreed to such a payment, the rule in *Saunders v Vautier* meant that all those who were interested in the relevant share of the trust fund (as to Helen's share, Phyllis and Helen, and as to Hugh's share, Phyllis and Hugh) combined to require the payment of the relevant share as they directed. Provided the relevant share could be severed without difficulty, then there was no need for the consent of the third beneficiary. Here the fund was in cash, and there was no difficulty in severance.

141. Hence, when Phyllis used trust money to purchase HLG and procure its conveyance to herself and Helen as beneficial joint tenants, both of them intending Helen thereby to obtain an immediate beneficial interest in the property, they were to that extent operating the rule in *Saunders v Vautier*. To the extent of the transfer of value out of the trust and to Helen, the trust of Helen's share was being terminated. To the extent that Phyllis remained a co-owner of HLG, she was still a trustee, holding the remaining trust interest on trust for herself for life, with remainder to Helen absolutely.

142. It is an interesting question, not explored at the trial, whether in fact there could be a beneficial joint tenancy at all after the conveyance, given that there was an interest given beneficially to Helen and an interest retained on trust. If

one of two beneficial joint tenants *charged* her interest, a severance would result: *Williams v Hensman* (1861) 1 J & H 546, 558. It may be that the same would obtain if one beneficial joint tenant *declared a sub-trust* of her interest for another, as "an act by any one of the persons interested operating upon his own share": *Williams v Hensman* (1861) 1 J & H 546, 557. Of course, it does not follow that the same must apply to an original conveyance where one co-ownership interest is held on trust and one is owned beneficially. But none of this was argued and it is not necessary to decide it now.

143. When in 2009 Phyllis and Helen transferred the property to Helen and Philip absolutely, it was a further operation of the rule, with the consent of all concerned (namely Phyllis and Helen) and conveying the property as they had agreed. In fact, Hugh knew of and agreed with the first transaction, with the trust and Helen acquiring HLG as co-owners. But it would not have mattered if he did not know or did not agree (as appears to have been the case in relation to the further transfer in 2009). It was something that Phyllis and Helen could do between them. Although Hugh was a trustee under the will, the relevant trust property was never vested in him: he had all of the liability of a trustee, but little or none of the actual power. Fortunately for him, the property went to the correct beneficiary.

144. So far as concerns the forgiving of the debt of £50,000 in December 1993, I have found that Phyllis intended this to be an early payment from Charles's will trust to Hugh on account of his future entitlement. It does not matter whether this is analysed as a further (bilateral) operation of the rule in *Saunders v Vautier*, or as a "unilateral" gift by Phyllis to Hugh of her life interest in the £50,000, thus absolutely entitling Hugh to this sum immediately. Either way, Hugh agreed to this, by thereafter treating the debt as repaid by way of an advance of his trust entitlement.

145. My conclusion accordingly is that both HLG itself and the sum of £50,000 were properly transferred ultimately to the beneficiaries of the will trust.

Misapplication and loss

146. With the above conclusions in mind, it is now possible to consider and decide whether the trust monies were misapplied, or any loss was otherwise caused to the trust fund. The mixing of funds and the absence of trust accounts makes it more difficult to see what has happened. The burden is on the trustees to account for what they have done. But Phyllis's written statement of 15 December 2011 sets out what she says happened, and I have heard Hugh give evidence of what he says happened. I have also looked at the small amount of documentation available.

147. I have set out the facts which I have found. Charles's estate was sworn at £146,526 for probate, and his half share in Hillside after sale came to £137,500 gross, but £132,500 net. The proceeds of the British Gas shares more or less equalled the pecuniary legacies for the grandchildren. HLG was bought for £74,500, and Phyllis spent an additional £25,000 on renovation work. In her written statement she says HLG was worth £120,000 when bought, but even adding the cost of the works to the purchase price that is wrong.

However, as it appears to me, this does not matter. Phyllis spent approximately £100,000 of trust monies on the acquisition and renovation of HLG, and conferred a beneficial co-ownership interest on Helen at her request. Some years later, she gave up her life interest in the remainder to Helen and Philip (again at Helen's request, and by a deed drafted by Philip).

148. If we then take into account the £50,000 advance to Hugh out of the trust monies to repay the debt he owed his mother, that means that a total of approximately £150,000 of trust monies has been paid out by Phyllis, either to or for the benefit of the two capital beneficiaries, Helen and Hugh. That £150,000 approximates to the probate value of £146,526 of Charles's estate, though it is more than the £132,500 net proceeds of Charles's half share in Hillside. But, either way, in receiving HLG in two tranches Helen has already had more than her half share of Charles's estate. In fact, the renovations to HLG were *also* paid out of Charles's estate, and so Helen has had the benefit of about two thirds of the trust fund. In my judgment, she has failed to prove any misapplication of trust funds or any loss to the trust. If anyone has lost out, it is Hugh. He has certainly not profited by his trusteeship.

Duty to invest for capital growth

149. Charles died in February 1991. Phyllis invested in HLG in January 1992, before the so-called "executor's year" was up (see the Administration of Estates Act 1925, s 44; *Gaskin v Chorus Law Ltd* [2019] EWHC 616 (Ch)). Phyllis placed trust money in building society accounts and then bought HLG with part of it. An investment in real estate is the paradigm example of investment for growth in the longer term. This is Helen's claim and I am concerned only with the trustees' duty towards *her*. However, so far as Helen is concerned, she has had the benefit of this investment (unlike Hugh). In my judgment, there has been no breach of duty in this regard.

Defences

Acquiescence

150. In these circumstances, the question of acquiescence in any breach of trust does not arise. But I have found that Helen knew that Phyllis intended to use trust monies to purchase HLG. In my view, Helen certainly acquiesced in that.

Trustee Act 1925, s 61

151. In the circumstances, too, the question of relief for Hugh under section 61 of the Trustee Act 1925 does not arise. This is always an acutely fact sensitive question, However, in my judgment, Hugh acted honestly. As to whether he acted reasonably, I bear in mind that he knew what his mother was doing, and he did not see any need to interfere. He also knew that his sister as the only other interested beneficiary also knew what his mother was doing, and his sister's husband was drafting all the necessary legal documents. Many lay people would have done the same. However, I cannot say that this was reasonable in law. He was an executor and a trustee, and he should not have left everything in his mother's hands. Moreover, I cannot say that he ought

fairly to be excused for omitting to obtain the directions of the court. Therefore, if it mattered, there would be no question of relief being granted under section 61.

Undue influence

152. The question of undue influence was raised in relation to both the original purchase of HLG in the names of Phyllis and Helen in 1992, and the transfer of that property to Helen and Philip in 2009. So far as concerns the first of these, I am satisfied that, whatever its merits (as to which I need say nothing), any such claim for undue influence must now be barred by laches, on account of the length of time that since elapsed since 1992, and the reliance which has been placed by Helen on her beneficial co-ownership of the property, in particular in developing the land at significant cost in the period from 2007.

153. So far as concerns the second transaction, some 12 years have since elapsed, and it is clear on the evidence that Phyllis's witness statement of December 2011 that it was intended to be a beneficial transfer to Helen and Philip and that she did not impugn it in any way. Moreover, I have held that, having discussed the matter, Phyllis and Hugh had decided to leave matters as they were. That decision has affirmed the transaction. In any event, since I have held that the original purchase by Phyllis and Helen as joint tenants cannot now be impeached, there would be no substantive point in impeaching the second transaction on its own. This is because, Phyllis having died, the whole beneficial interest now survives to Helen anyway.

Contribution proceedings

154. Although Philip gave evidence before me at the hearing, he was not formally represented, and neither did he address me himself as Part 20 Defendant. However, he indicated through Helen's counsel, Mr Troup, that he was content to adopt Mr Troup's submissions. In the event, of course, given the result of the main claim, it is not necessary to deal with the contribution proceedings against Philip. They arose only if the transfer of HLG was found to be a personal gift by Phyllis rather than an advance out of trust funds. But in any case they are based on a claim of undue influence which I have held above cannot be sustained in the circumstances, because of laches and affirmation.

Costs of the Part 8 proceedings

155. As I said above, Hugh issued a claim under CPR Part 8 on 21 January 2021 against Helen to remove her as a personal representative of Phyllis's estate. That claim has since been resolved, in the sense that the parties agreed to an order removing both of them as personal representatives, and appointing an independent solicitor to act in the administration. But the order of 20 July 2021, settling the Part 8 claim, said that the costs of that claim were "reserved to the judge who hears the trial of [the Part 7] claim". The order does not state on its face that it was by consent, but that is what I understand it to have been. I received submissions on the costs issue.

Jurisdiction: the problem stated

156. Having considered this question during the preparation of this judgment, I was concerned about the jurisdiction of the judge in one claim to make a costs order in another. I found a decision of the Court of Appeal, in a case called *Zanussi v Anglo Venezuelan Real Estate and Agricultural Development Ltd*, reported only in *The Times* for 18 April 1996. This had not been referred to at the trial, and I accordingly invited counsel to let me have any written submissions that they wish to put before me on the question of jurisdiction.

157. Counsel for both sides did make submissions, but jointly, to the effect that notwithstanding the decision of the Court of Appeal in *Zanussi*, I did have jurisdiction to deal with the question of the costs of the Part 8 claim. I will come back to the submissions in a moment. I should also record that Michelle Rose, the administrator of Phyllis's estate, confirmed that she did not wish to make any submissions on this point.

158. In *Zanussi*, the defendant BVI company held the shares in an English incorporated but offshore resident company, EHL. (This was possible at the time.) The defendant held those shares on trust for the plaintiff, a rich Italian businessman. EHL was used as a vehicle for holding the plaintiff's assets outside Italy. The defendant was controlled by an Italian lawyer, Professor Miele. Under the Finance Act 1988, EHL would become UK resident for tax purposes on 14 March 1993. To avoid UK tax consequences, it was therefore necessary to move assets out of EHL into another tax efficient vehicle.

159. However, the defendant declined to cooperate in this, and the plaintiff issued an originating summons in December 1992 seeking an order transferring the shares of EHL into his own name or to his order. Ultimately, the proceedings were compromised in early 1993, before the crucial date. The consent order provided that the settlement was "without prejudice to the rights of the parties arising out of the trustee/beneficiary relationship including the questions of who should pay the costs of this application and the reimbursement of the trustee expenses".

160. The parties could not agree on the various costs and expenses referred to, and the plaintiff started further originating summons proceedings in March 1993, including for an order that the defendant pay the claimant's costs of the 1992 proceedings. The matter came before a chancery master who (so far as concerns the 1992 proceedings) ordered the defendant to pay the plaintiff's costs of those proceedings. Both sides appealed from the master's order. I am concerned here only with the question of jurisdiction of the master in the 1993 proceedings to deal with the costs of the 1992 proceedings.

161. On this question, Aldous LJ (with whom Nourse LJ and Sir John Balcombe agreed) said:

> " … in this case the question is whether the Master had the jurisdiction to make the award which he did, namely an award of costs of the l992 proceedings in the l993 proceedings. If he had jurisdiction that can only have come from s 5l of the Supreme Court Act l98l. The relevant parts of that section are in these terms:

> '51 (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in -
>
> (a) the civil division of the Court of Appeal;
>
> (b) the High court, and
>
> (c) any county court
>
> shall be in the discretion of the court'."

162. Aldous LJ then discussed the decision in *Allen v Distillers Co Ltd* [1974] QB 384, to which the court had been referred, and concluded:

> "That is very different to this case where a costs order is sought in different proceedings to those where they were incurred. It might be that the plaintiff could either in the l992 proceedings or by an action for some misdemeanour such as breach of trust have recovered costs of the l992 proceedings. That is not the issue before us. The agreement, if there was one, could not confer jurisdiction upon a court in the l993 proceedings in respect of costs of the l992 proceedings. The court's jurisdiction is defined by s 5l and that does not enable it to award costs other than the costs incurred in the proceedings before it and those incidental to those proceedings. As it was not suggested that the l992 proceedings were incidental to the l993 proceedings, it is apparent that the Master did not have jurisdiction to order that AVREAD should pay any of the costs of the l992 proceedings."

Jurisdiction: the parties' submissions

163. The joint submission of counsel accepted that *Zanussi* was authority for the proposition that the court did not have power to make a costs order in respect of the costs of proceedings other than those with which the court was engaged, unless those costs could be regarded as 'incidental' to those proceedings. That submission also accepted that it was not easy to see how the costs of the Part 8 claim would be regarded as 'incidental' to the Part 7 claim with which up to now I have been dealing. Finally, the submission also accepted that the parties could not by agreement confer upon the court a jurisdiction which did not otherwise exist.

164. Counsel submit that there is however an important point of distinction between the *Zanussi* case and the present one. This is the fact that the order settling the Part 8 claim "reserved" the costs of that claim to the judge hearing the trial of the Part 7 claim. They say that the district judge making that order could have made an order in respect of the costs, so he could also direct that another judge in the court seised of the claim could do so. He could simply have said that the Part 8 claim (or any application for costs in that claim) be listed before such and such another judge in the Bristol District Registry of the High Court, Chancery Division, such as another district judge, or a circuit judge with High Court, Chancery Division, authorisation (such as I am). That judge would have had power to make the costs order in the Part 8 claim.

Alternatively, they say that the district judge could have ordered that the remaining part of the Part 8 claim (that is, the costs issue) be consolidated with the Part 7 claim, and then the judge dealing with the latter could have dealt with the costs of the former.

165. Either way, counsel submit that it is a question of the interpretation of the words used by the district judge as to whether this is to be construed in either of those senses, or in a way which means that the trial judge of the Part 7 claim has no jurisdiction to deal with the costs question of the Part 8 claim. They refer me to the well-known decisions of the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and of the Court of Appeal in *Mediterranean Salvage and Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531.

166. In the former case the court held that if the contract was capable of two possible constructions the court was entitled to prefer the construction which was consistent with business common sense and reject the other (see at [21]). In the latter case the court in effect said that, in a case where the express words are otherwise unworkable, additional wording might be implied to make it work (see at [18]).

Jurisdiction: decision

167. In my judgment, at least where (as here) the order is an order by consent, giving effect to an agreement between the parties, it is appropriate to interpret such an order on ordinary contract principles, for the order is simply an "agreement [which] it expresses in a more formal way than usual" (*Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, 280, per Lindley LJ). It could not be right to interpret the parties' agreement in one way if they leave it as an agreement between the parties without asking the court to make an order embodying it, but to interpret it in another way if they choose to ask the court to incorporate it in a consent order.

168. The question therefore is whether it is possible to interpret this part of the order in the Part 8 claim in either of the two ways suggested by counsel. I do not think it can reasonably be interpreted as an order for consolidation of the costs aspects of the earlier claim with the whole of the second claim. The language used does not reflect or suggest any such intention, and I can see no plausible argument from the surrounding circumstances (in which the order as an agreement should be construed) to suggest that anyone was even thinking of consolidation, or intended consolidation.

169. But, in my judgment, it is at least possible to read the words in the Part 8 order as a listing direction. The word "reserved" is typically used where a decision on costs is not being made there and then, but will be made at a later date, still in the same proceedings, once the court has more or better information. And it is plain that the parties did not intend to give up the point there and then. They wanted it decided, but they also wanted the (assumed) benefit of the decision in the Part 7 claim to inform the decision. Their desires are not conclusive. After all, their agreement cannot confer jurisdiction on the court. But nor is

there is anything to show that the parties were abandoning the jurisdiction which the court already had in the Part 8 claim.

170. On the whole, I conclude that treating the order as in effect a listing direction for the Part 8 costs is to prefer a construction which is consistent with business common sense, rather than one that is not. I will therefore go on to deal with the costs question, albeit not in the present claim, but in the earlier one.

The applicable costs rules

171. There are some special costs rules for estate disputes to which I will come, but, under the general law, costs are in the discretion of the court (CPR rule 44.2(1)). However, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including the conduct of all the parties and to any admissible offer to settle the case (not under CPR part 36) which is drawn to the court's attention: CPR rule 44.2(4).

172. One matter that is not immediately clear to me is how far I can take into account what happened subsequently in the Part 7 claim in deciding a costs question arising in the earlier Part 8 claim. I think that this was probably the point of reserving the costs to the judge trying the Part 7 claim, but CPR rule 44.2(4), (5) expressly refers to conduct *before* the relevant proceedings, yet does not mention conduct afterwards. For myself, I do not see how the rule can sensibly be expected to cover conduct *following* the proceedings. *Ex hypothesi*, this cannot normally be known at the time that the costs decision is made. So, I think that is not included in "all the circumstances" and that I must leave out of account anything that happened after 20 July 2021.

173. Helen asks me to order Hugh to pay the costs of the Part 8 claim personally. She says it was inappropriate for him to try to have her removed as executor whilst himself remaining an executor. She says that she proposed (in her witness statement in that claim dated 15 February 2021) what she calls the "obvious solution" that both of them should be replaced by an independent solicitor, which was in fact the order that the court ultimately made.

174. Helen also submits that Hugh should be deprived of any indemnity out of their mother's estate, on the basis that (i) he failed to obtain directions from the court, (ii) he acted in substance for his own interests, and (iii) he acted unreasonably in bringing the claim and in his conduct of it. In this connection, Helen refers to CPR rule 46.3 and Practice Direction 46, paragraph 1, and to my own decision in *Jones v Longley* [2015] EWHC 3362 (Ch). These encapsulate the special rules that I referred to above.

175. CPR rule 46.3 provides:

> "(1) This rule applies where –

> (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
>
> (b) rule 44.5 does not apply.
>
> (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.
>
> (3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis."

(Rule 44.5 concerns costs payable under a contract, and is not relevant to this case.)

176. Practice Direction 46, paragraph 1 provides:

> **"1.1** A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') –
>
> (a) obtained directions from the court before bringing or defending the proceedings;
>
> (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and
>
> (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.
>
> **1.2** The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally."

(For clarity's sake, I add that conduct which causes a personal representative to lose his or her indemnity is generally referred to in the books and cases as "misconduct", for short.)

177. The case of *Jones v Longley* [2015] EWHC 3362 (Ch) was one where a father died leaving three children, the eldest of whom was appointed executor ("the family executor") along with a solicitor ("the solicitor executor"). The executors were however unable to work together. Eventually, the solicitor executor made an application for the removal of the other. The family executor resisted the application. His siblings expressly stated that they wished him to continue as executor, and were prepared to accept the risks involved. It was clear to me that the executors could not work together.

178. In all circumstances, therefore, I decided to remove the solicitor executor, on the basis that the three siblings (all adult) were the only beneficiaries and they expressly agreed that the family executor should continue. I also decided that the solicitor executor had been right to recognise the difficulties and to make

the application for the removal of the other executor. He was concerned that the other beneficiaries might be at risk if the family executor continued to act on his own. So, I made the order on the basis simply of what was in the best interests of the beneficiaries of the estate in the circumstances as they were at the time.

179. I later had to deal with the costs. The judgment referred to under reference [2015] EWHC 3362 (Ch) is concerned simply with this question. After reading submissions, I made an order that the family executor should pay the solicitor executor's costs of the claim, on the standard basis if not agreed. I held that the solicitor executor had not committed "misconduct" so as to deprive himself of his indemnity from the estate. To the extent therefore that those costs were not recovered from the family executor personally, they would be recoverable from the estate on the indemnity basis.

This case

180. In the present case Hugh said, in his witness statement supporting the claim, that Helen should be removed because she was in a state of "irreconcilable conflict". This was because Helen had been appointed (along with Hugh) to be an executor of the will of their mother Phyllis. Yet in her capacity as a beneficiary of their father Charles's will, she had, through solicitors, written a letter before claim to Hugh's solicitors, threatening to make a claim against both Hugh and the estate of Phyllis, for breach of trust in relation to the trusts of Charles's will, of which Hugh and Phyllis had been trustees. It seems to me that, so long as Helen was threatening to make a claim against Phyllis's estate for her own benefit as a beneficiary of Charles's will, she could not properly act as a personal representative of Phyllis's estate. Accordingly, the claim to remove her was entirely justified.

181. Yet, instead of seeing the difficulty and agreeing to be removed, Helen resisted the claim. She filed an acknowledgement of service, indicating an intention to contest the claim. It is correct that, in her evidence filed thereafter, she indicated that she would be willing to retire as executor and trustee, provided that (i) Hugh did the same and (ii) they were replaced by a neutral and independent solicitor who was experienced in the administration of estates. But in fact her preferred solution was that the Part 8 claim should simply be stayed pending the determination of her separate breach of trust claim (the Part 7 claim). This was "because the resolution of that separate claim will resolve the conflict of interest which forms the basis of my brother's application in these proceedings".

182. She alternatively invited the court to consolidate the two claims, so that they could be determined at the same time. But she never made any such application for consolidation, and in fact it was Hugh's solicitors who wrote to the court suggesting that the two matters should be listed for directions at the same time. In the event, however, the parties managed to agree to put an end to this claim by both being replaced by an independent solicitor executor.

183. In my judgment, it is appropriate in the circumstances for the court to make an order in respect of the costs of this claim. So the general rule would normally

apply. But the general rule depends on who can be regarded as the successful and who the unsuccessful party. This is not a money claim, and so one cannot answer the question by asking "who writes the cheque?" As in *Jones v Longley*, however, the claimant who issued the application (Hugh) to remove the other (Helen) as executor had the right idea, and was seeking to implement it. It was plainly impossible for Helen to continue as executor of their mother's estate so long as she was threatening to bring breach of trust proceedings against that estate. If Helen resisted the Part 8 claim, then she did so at her own risk.

184. She did not want to give up being executor, and so sought to stay the claim until her own breach of trust proceedings were concluded. As we have seen, however, it has taken until now to conclude those proceedings, during which time (if the Part 8 claim had been stayed) any administration of Phyllis's estate would have been impossible. The order removing both parties as executors has vindicated the approach taken by Hugh in seeking to remove Helen.

185. In my judgment, Hugh is clearly the successful party. Is there any good reason not to apply the general rule, that the unsuccessful party pay the costs of the successful party? I can see none. Accordingly, I will order Helen to pay Hugh's costs of the Part 8 claim on the standard basis, to be subject to detailed assessment if not agreed.

186. I turn then to the question whether Hugh is entitled to an indemnity out of their mother's estate. The rule derives from the Trustee Act 2000, s 31, but in this context is contained in CPR rule 46.3 and paragraph 1 of the Practice Direction (both of which I set out above). Hugh brought the claim in his capacity as personal representative of their mother's estate, and the rule is therefore engaged. Hugh is entitled to be paid the properly incurred costs of the proceedings, insofar as they are not recovered from or paid by any other person, out of that estate. The question therefore to be answered is whether the litigation costs were properly incurred.

187. Helen says that they were not. She points out that Hugh did not obtain the directions of the court before bringing the claim. That is correct, although it is not conclusive. It is also the case that, where the estate (as here) is a modest one, it is more understandable that a personal representative may be advised not to spend extra money on an application to the court because in the opinion of the lawyers the case is a clear one. I have no idea whether that is the case here or not. But I bear in mind that it may be. There can be no doubt about Helen's conflicted position, for example.

188. Helen also says that Hugh acted in substance for a benefit other than that of the estate. I do not agree. It is true that he is also a beneficiary of the estate, but he was bringing the claim in order to advance the administration of the estate, without which it would go nowhere. There is nothing in this objection.

189. Finally, Helen says that Hugh acted unreasonably in bringing the claim and in his conduct of it. Again, I do not agree. It was his duty (as indeed it was Helen's) to get on with the administration of the estate. But that could not happen so long as Helen was threatening to make a claim against the estate.

Not only was it not unreasonable for him to bring the claim, it might indeed have been a breach of his duty not at least to do something to unblock the administration. Nor do I consider that his conduct of the claim was unreasonable. For example, it was his solicitors, not Helen's, who suggested that the two cases should be managed together.

190. Drawing the threads together, in my judgment, Hugh has not committed misconduct such as to lose the benefit of his indemnity. I will therefore order that Hugh is entitled to be paid the costs of the proceedings, insofar as they are not recovered from or paid by any other person, out of Phyllis's estate.

Conclusion

191. I dismiss both the Part 7 claim and the Part 20 claim. In the Part 8 claim, I make a costs order in favour of Hugh as set out in the preceding paragraph. I am grateful to all the lawyers involved for their assistance. I should be grateful to receive a draft minute of order in each case to give effect to this judgment.