Neutral Citation No.: [2023] EWHC 109 (Ch)

Claim No: PT-2021-BHM-000136

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY TRUSTS AND PROBATE LIST (ChD)
IN THE METTER OF RAY JAMES McELROY (deceased)

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date: 20th January 2023

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a High Court Judge)

- -

Between:

PAUL JOHN McELROY

Claimant

- and –

LYNNE McELROY
(in her capacity as administrator of the estate of RAY JAMES McELROY and in her personal capacity)

Defendant

- -

Roger Mullis (instructed by Aaron & Partners LLP) for the **Claimant**
Adrian Briggs (instructed by BDB Pitmans LLP) for the **Defendant**

Hearing date: 4 October 2022

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JUDGMENT

Introduction

1. Paul John McElroy ("***Paul***") and Lynne McElroy ("***Lynne***") are respectively the brother and wife of Ray James McElroy ("***Ray***"), who sadly died suddenly on 18 February 2011 at the age of 50 and some 5 months after his marriage to Lynne.

2. On 1 August 2011, Lynne swore an oath for a grant of letters of administration stating that Ray died "domiciled in England and Wales intestate a married man….".

3. On 24 August 2011, letters of administration were granted to Lynne, and thereafter Ray's estate was administered with the final estate accounts being signed on 9 April 2012. (The stated total net assets were £490,495.88.)

4. On 4 October 2021, Paul issued the present claim to have the grant of letters of administration revoked on the grounds that:

    a. Paul is the sole beneficiary of Ray's estate under a will dated 27 September 2002 ("***the Will***");

    b. Unlike in England and Wales, under the law of Scotland a will is not revoked by a subsequent marriage;

    c. At the dates of both his marriage to Lynne and his death, Ray was domiciled in Scotland;

    d. Therefore, the validity of the Will is governed by the law of Scotland such that it was not revoked by Ray's marriage to Lynne and was valid at the date of Ray's death; and

    e. Lynne obtained the letters of administration by making false depositions that Ray died domiciled in England and Wales intestate.

5. By order dated 7 March 2022 and by consent, it was directed that there be a trial of the following preliminary issue:

    "Is the Claimant's claim barred by laches, acquiescence and/or issue estoppel?"

    This is my decision on that preliminary issue.

Background

6. Ray was born on 10 August 1961, and Paul was born on 11 June 1962. They were both born in Wales. Their parents separated in around 1964, and in 1966 their mother married their stepfather in Oswestry. Thereafter, Ray and Paul both took their stepfather's surname.

7. In about 1974, Ray went to live with his maternal grandmother in Shropshire before enlisting with the Royal Navy in 1976. In the 1980's Ray was posted to the Nuclear Submarine Station in Faslane on the River Clyde. During this posting, Ray met his first wife, Karen Napier Brown ("***Karen***"). They were married on 10 March 1990 and purchased in joint names a family home at 72 Broughton Street, Edinburgh ("***the Property***").

8. Ray was discharged from the Royal Navy in 1995 and thereafter worked the remainder of his life aboard ships operating in the oil and gas industry. As a result, Ray spent large periods of time away from home at sea.

9. After initially moving to Singapore, Ray and Karen then moved to Australia in 1999 where they bought a home whilst renting out the Property.

10. In 2002, Ray and Karen commenced divorce proceedings. As part of the financial settlement, Ray retained the Property. Whilst continuing to live in Australia, Ray executed the Will, which:

    a. Appointed Keith Edward McCorriston ("***Keith***") as his executor and trustee;

    b. Gave the whole of his "estate both real and personal" to Paul; and

    c. In the event that Paul did not survive Ray, gave the whole of his estate to Paul's children in equal shares.

11. In 2003, Ray moved back to Scotland where he met Lynne.

12. In 2005, Ray moved into the Property.

13. In August 2009, Ray and Lynne were engaged to be married, and at that time Lynne, together with her two children, moved to live permanently at the Property.

14. On 5 September 2010, Ray and Lynne were married.

15. In 2011, Ray instructed Morton Fraser Solicitors ("***MFS***") to draft a new will, which:

    a. Appointed Paul and Lynne as his executors and trustees;

    b. Gave bequests of some personal items and cash;

    c. Gave the whole of his residuary estate to Lynne; and

    d. In the event that Lynne did not survive him, gave the whole of his residuary estate to Lynne's children in equal shares.

16. Before Ray was able to execute the new will, he died suddenly and unexpectedly on 18 February 2011 whilst working at sea off the coast of South Africa.

17. On 25 February 2011, Lynne instructed MFS in relation to Ray's estate.

18. At the time of his death, Ray was a member of his employer's life assurance scheme ("***the Scheme***"). On 13 June 2011, MFS wrote to the trustees of the Scheme ("***the Trustees***") challenging their decision to pay the full amount of the death in service benefit ("***DSB***") to Paul in accordance with Ray's expression of wishes dated 15 February 2006. The basis of that challenge was that, in exercising their discretion, the Trustees had failed to take into account the following relevant considerations:

a. On 24 February 2007, Ray nominated Lynne and Paul to receive 50% each of the dependents' pension payable on death under Ray's occupational pension scheme;

b. In September 2010, Ray married Lynne; and

c. In January 2011, shortly before his death, Ray instructed solicitors to draft a will bequeathing the whole of his residuary estate to Lynne.

19. By way of separate letters (albeit in similar terms) dated 29 July 2011 and 16 August 2011, solicitors for the Trustees wrote respectively to MFS and Paul confirming (with reasons) the Trustees' decision to pay 50% of the DSB to each of Lynne and Paul, but conditional upon them each signing a Receipt, Release and Indemnity. Lynne and Paul each then received the sum of £172,167.80.

20. On 1 August 2011, Lynne swore the oath for a grant of letters of administration by which she said that Ray died domiciled in England and Wales intestate.

21. On the 24 August 2011, letters of administration were granted to Lynne.

22. On 18 March 2012, Lynne, in her capacity as administrator of the estate, transferred the Property to herself as beneficiary of the estate.

23. On 9 April 2012, Lynne signed the final estate accounts, which recorded the value of the Property as £320,000.

24. In February 2015, Lynne purchased her current home using the Property as part exchange with the developer.

25. On 6 July 2018, Paul's solicitors, Aaron & Partners Solicitors ("***APS***"), sent a 4 page letter of claim to Lynne, which concluded as follows:

> "We are instructed by our client to make an application in the English Court for the Grant of Letters of Administration made to you to be revoked which will enable our client to apply for Confirmation in the Scottish Sherriff Court of the Will and thereafter administer Ray's estate in accordance with the terms of the Will. This will require the return of assets that you have incorrectly received from Ray's estate to Paul as the beneficiary entitled to those assets."

26. After several chasing letters by APS, Gillespie Macandrew LLP ("***GM***") responded on behalf of Lynne by letter dated 17 August 2018. That letter failed to engage with the substantive arguments raised by APS and simply dismissed the claim as follows:

> "We have now had the opportunity to consider the terms of your letter, review the papers relative to the estate and the legal advice received by our client at the time. We do not see any grounds for overturning the Grant of Probate."

27. On 19 July 2019, APS wrote to the Newcastle District Probate Registry requesting that the Registrar exercise the power under the Non-Contentious Probate Rules to revoke the grant on the grounds that it was obtained by knowingly false statements made by Lynne. On 2 August 2019, Paul swore a supporting affidavit.

28. On 21 October 2019, the Probate Officer at Newcastle District Probate Registry responded to confirm that:

> "As previously mentioned, the Registrar can only revoke the grant if the current grantee consents to the revocation; but as this appears to be the subject of contention it can only be dealt with as a revocation action in the Chancery Division."

29. In August 2020, Paul sent a further 4 page letter before claim to Lynne, which was drafted with the assistance of Counsel.

30. By letter dated 17 September 2020, GM responded:

> "We have no further comment to make on this matter and simply re-iterate our position from August 2018 that we do not see any grounds for overturning the Grant of Letters of Administration."

31. On 26 November 2020, Paul issued a claim form, which was personally served out of time on Lynne on 4 June 2021.

32. On 4 October 2021, Paul issued a further claim form, which was validly served upon Lynne, who filed a Defence dated 20 January 2022 and which stated by way of introduction:

> "……..
>
> 2. In summary the Defendant's position is that:
>
> a. The Claimant's claim is barred by *laches*/or acquiescence or issue estoppel. The Claimant expressly represented he would not seek any inheritance from the Deceased and has taken financial advantage in the receipt of large death benefits on the basis that the Defendant was the sole heir upon intestacy. The Defendant has relied upon those actions such that it would be inequitable now for the Claimant to resile from them.
>
> b. Without prejudice to that preliminary issue, the Deceased died intestate. The Deceased was domiciled in England and Wales at the date of his marriage to the Defendant and at his death. Accordingly, the will dated 27 September 2002…was revoked by the Deceased's marriage to the Defendant."

33. In his Reply dated 17 February 2022, Paul responded:

> "……..
>
> **Alleged Laches/Issue Estoppel**
>
> 2. ….. it is specifically denied that the Claimant at any time told the Defendant that he wanted no inheritance from the Deceased's estate or that he wanted all of the Deceased's estate to pass to the Defendant.
>
> 3. …….it is specifically denied that the Claimant spoke to Kathleen McAloon on the telephone, whether on 4 March 2011 or at all, and it is specifically denied that he told Ms McAloon at any time that he wanted his share of everything to go to the Defendant…..

4. …….the Defendant's solicitors did not in their letter to the Saipem Trustees dated 13 June 2011 state that the Defendant stood to inherit the Deceased's estate, nor did the Saipem Trustees, in their reasons for their decision to divide the trust fund equally between the Claimant and the Defendant, refer to the fact that the Defendant stood to inherit the Deceased's estate…….

…….

10. …….it is denied that the Claimant has acquiesced to the grant of letters of administration or delayed in bringing this claim such that it would be inequitable in the circumstances for the Claimant now to be permitted to do so……

……."

Jurisdiction

Leapfrogging

Laches

34. The classic statement of the principle of laches was given by Lord Selbourne LC in ***Lindsay Petroleum Co v Hurd*** (1874) L. R. 5 P.C. 221 [at 239,240] as follows:

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

35. It is not in dispute that for the purposes of determining this preliminary issue, acquiescence and/or estoppel do not add anything to laches, which is an equitable doctrine under which delay can bar a claim to equitable relief.

Submissions on behalf of Lynne

36. Whilst generally laches can only bar equitable relief, laches is a defence to a probate claim in certain narrow circumstances. In ***Mohan v Broughton*** [1899] P. 211 an order was made for the remaining balance of the estate to be distributed among the persons who were found, in earlier proceedings in which the claimant had participated, to be the next of kin. Thereafter, the claimant issued fresh proceedings claiming, as next of kin of the deceased, administration to his estate. In dismissing the claim, Gorell Barnes J held [at P. 220]:

> "the [claimant] has practically acquiesced in the [earlier] proceedings, and has been guilty of such laches as to disentitle her…to maintain a [claim] against those who have received the estate to compel them to refund. Therefore, as the only object of the present [claim] to revoke the letters of administration and obtain a grant in her own favour is to assist her in an attempt to recover the funds which have been distributed, it follows that this Court ought not to assist the [claimant], who has been guilty of laches…"

37. In the present case, as in ***Mohan***, the estate has been distributed. The court must have clearly in mind the ultimate purpose for which Paul has brought these proceedings, namely, to recover from Lynne the estate assets she has received. If that subsequent recovery claim would be barred by laches, the court can properly dismiss the present claim as serving no useful purpose.

Submissions on behalf of Paul

38. Paul is seeking revocation of the grant of letters of administration, which is not equitable relief.

39. In ***Fisher v Brooker*** [2009] 1 WLR Lord Neuberger held that:

> "[79] …….. laches …. can [only] bar equitable relief, and a declaration as to the existence of a long-term property right, recognised as such by statute, is not equitable relief…."

40. For present purposes, the court must proceed on the basis that the substantive claim (namely that Ray was domiciled in Scotland such that the Will was not revoked by his subsequent marriage to Lynne) is a good claim in which case (i) the letters of administration granted to Lynne will be set aside as of right and (ii) Paul can apply as executor for a grant of confirmation in Scotland. Any claim by Paul for recovery of Ray's estate would then be in Scotland where it would be for Lynne to argue any defence based upon delay.

41. In ***re Flynn Deceased*** [1982] 1 WLR 310, Slade J said [at p. 318]:

> "My general conclusion from the authorities cited to me, in particular ***In re Coghlan, decd.*** [1948] 2 All E.R. 68, is that they tend to support the view that the court will never strike out an action to revoke a grant of probate or letters of administration on the mere ground of delay in instituting it, unless it is satisfied that the claim is otherwise frivolous, vexatious or for other reasons is an abuse of the court process."

In the present claim, Lynne has not applied to strike out the claim as being frivolous, vexatious or otherwise an abuse of process. They are not the terms in which the preliminary issue has been drafted.

42. ***Mohan*** is not authority for the proposition now contended for by Lynne. In ***Re Coghlan deceased*** [1948] 2 All Er 68, Tucker LJ held [at p. 71] as follows:

> "Counsel for the defendants……based his whole case on the ground that on a summons to dismiss a probate action as frivolous and vexatious under its inherent jurisdiction the court will investigate the facts, and, if satisfied that laches would bar any subsequent proceedings for which purpose the action had been brought,

will dismiss the action *in limine* as frivolous and vexatious. His authority for this proposition was **Mohan** …….

……..

…….. [but] the case is no authority for the circumstances in which an action should be dismissed *in limine* as frivolous and vexatious and an abuse of the process of the court."

43. In any event, ***Mohan*** is distinguishable on the facts, since in the present case there have been no earlier proceedings and the administration of Ray's estate was completed without the knowledge and/or involvement of Paul. Further, the claimant in ***Mohan*** was not seeking, as here, to establish the validity of an alleged will.

Analysis and conclusion

44. Whilst, in ***Fisher*** Lord Neuberger held that laches can only bar equitable relief he then observed that "It is arguable" that a declaration as to the existence of a long term-term property right, which is not equitable relief, "should be refused on the ground of laches if it was sought solely for the purpose of seeking an injunction or other purely equitable relief. However, …… that argument does not apply in this case." In the present case, Paul seeks revocation of the letters of administration solely for the purpose of then claiming recovery of the estate assets from Lynne, which recovery would be equitable relief against which Lynne would be entitled to raise a defence of laches.

45. It is submitted on behalf of Paul that, as held in ***Coghlan*** by the Court of Appeal, ***Mohan*** is not authority for the proposition advanced on behalf of Lynne that the court may dismiss a probate claim, if satisfied that laches would bar any subsequent proceedings for which purpose the probate claim had been brought.

46. In ***Coghlan***, the claimant issued proceedings in 1943 to revoke letters of administration granted in 1892 and 1908, and to establish an alleged will of the deceased dated 23 December 1891. The defendants made an application under the inherent jurisdiction of the court to dismiss the action as frivolous and vexatious. Willmer J [at [1948] 1 All ER 367] dismissed the proceedings. In doing so he held that:

"It seems to me that a [claimant], who lies by for 23 years after the will which he claims to propound has come to light, when the estate has long since been distributed amongst a number of beneficiaries, is clearly guilty of laches……. I am satisfied that such laches on the part of the [claimant] would render quite hopeless any attempt on his part, as this date, to follow the assets. That being so, if this action is allowed to proceed, even assuming that the [claimant] succeeds in proving the alleged will, no good can possibly result, and the [claimant] will be left in no better position. The action being quite pointless, therefore, it is in my judgment an abuse of the process of the court, and should be dismissed now….."

47. In allowing the appeal in ***Coghlan***, Tucker LJ recited the following from the judgment of Gorell Barnes J in ***Mohan***:

"On June 7, 1898, the writ in the present action was issued. On June 30, 1898, a summons was taken out by the late baronet to show cause why the action should not be dismissed on the ground—first, that the issue had already been adjudicated

upon in the Chancery Division; and, secondly, that the action was vexatious. That summons came on for hearing before me, and was adjourned into court, and at the hearing in court it was ordered, by consent, that all questions in the action between the parties, other than the question of the relationship of the plaintiff and the late baronet to Henry Thomas Coghlan, the deceased, should be tried at the next sittings before me, upon the materials already supplied to the court and any further evidence. The case subsequently came on for hearing on these questions other than the relationship of the plaintiff and the late baronet to the deceased, on Feb. 24 last, when two questions were raised for the defence as a bar to the plaintiff's claim in this action. They were—first, that the plaintiff's claim was *res judicata*; and, secondly, that the plaintiff had been guilty of such laches as debarred her from prosecuting her claim."

Therefore, Tucker LJ sought to distinguish ***Mohan*** on the grounds that in ***Mohan***:

"…… although a summons to dismiss the action on the ground of *res judicata* and that the action was vexatious had been taken out, the actual order was made on certain questions which by consent had been dealt with by the court on the hearing of the summons. …… The decision was, therefore, one which was arrived at after trial by consent of certain issues…."

48. In allowing the appeal in ***Coghlan***, Evershed LJ held that:

"And on the main proposition advanced by the defendants *(viz*., that the court may, in the exercise of its inherent jurisdiction, dismiss an action *in limine* where it is shown that though the action itself may succeed no useful or fruitful result can thereby be achieved by the plaintiff) I find myself, for my part, in agreement with Willmer J. For, in approaching the question whether the action is frivolous or vexatious, the court is entitled to ask of the plaintiff, what is his object? If it is apparent that the plaintiff can achieve no real or material advantage for himself or for anyone else from his success, then I think that the court may fairly hold his proceeding to be, in truth, vexatious. I think further that the court is properly entitled to take account of the fact that to any proprietary claim which the plaintiff may make either the relevant statutes of limitation or laches would be a conclusive defence, if, in all the circumstances, it is plain that such pleas will be raised though the time for raising them has not yet, strictly, arrived…..

……..

As, however, I have indicated at the beginning of this judgment, one fact has emerged from the evidence filed since the hearing before this court began which seems to me fatal to the defendants' application. For it appears that there is a piece of ground containing a family tomb which at the date of the death of Sir Henry Delves Louis Broughton still remained vested in him as administrator of Mr Coghlan. It is remarkable that no mention appears to have been made of the property in the administration proceedings started in the year 1893, and it may be that some explanation will hereafter be forth-coming, but, as the evidence stands, it is, in my judgment, impossible to deny that that piece of property still remains outstanding as part of Mr Coghlan's estate, to which none save Mr Coghlan's personal representative can make title. Nor does it seem to me that the comparative smallness of the value of the property—it is said in the evidence to be worth £157 10s 0d, compared with a total estate of over £600,000—can affect the result. It cannot be said that the value is so wholly negligible as to invoke any application of the principle of "*de minimis*." I, therefore, have felt compelled to

conclude that, whatever be the answers to the several questions indicated above, the evidence in regard to the family tomb is of itself decisive of the appeal."

49. In allowing the appeal in ***Coghlan***, Hodson J held that:

> "…… it is, in my view, not established by authority that the mere existence of laches such as would bar a claim in subsequent proceedings would justify the court in taking the drastic step of dismissing the action *in limine*. A close examination of the authorities principally relied on by the defendants, *viz*, *Mohan v Broughton* and *Willis v Earl Beauchamp*, leads me to the same conclusion as Tucker LJ on this aspect of the matter. Laches, like the Statute of Limitations, must normally be pleaded in order to defeat a claim, and there are grave difficulties in determining on affidavit evidence whether the facts proved against the plaintiff establish laches against him. In spite of the lapse of time and the admitted inactivity of the plaintiff and his predecessor, I express no opinion as to the prospects of a defence of laches succeeding in this or subsequent proceedings by the plaintiff.
>
> Again, the defendants have undertaken to establish on this application that the plaintiff could recover nothing, not only from themselves but also from any other person as identifiable with, or otherwise referable to, assets originally forming part of H T Coghlan's estate. On this part of the case a curious fact emerged in the evidence, namely, that a somewhat valuable family tomb exists which forms to this day part of the unadministered estate of H T Coghlan. There was no evidence of any other unadministered assets except possibly some pedigree books, but for my part I see great difficulty in applying the *de minimis* principle, even to the tomb alone, so as to justify the dismissal of the action *in limine*. ……."

50. In my view the critical factors identified by the Court of Appeal in allowing the appeal in ***Coghlan*** and distinguishing ***Mohan*** were:

    a. The absence of pleadings/a trial of the issue of laches; and

    b. The existence of unadministered assets of the estate (the family tomb).

51. Neither of those distinguishing features exist in the present case, since:

    a. It is not disputed that the whole of the assets of Ray's estate have long ago been distributed. There are no remaining unadministered assets of Ray's estate;

    b. Lynne's Defence, over the course of some 4 pages out of a total of 7 pages, sets out in detail why she alleges that Paul's claim is barred by laches. Paul's Reply, over the course of some 4 pages out of a total of 6 pages, responds in detail to that specific allegation, but without raising any jurisdictional issue;

    c. By order dated 7 March 2022, and made with the consent of the parties, DJ Phillips directed that that there be a trial of the preliminary issue of laches. The order further directed that the parties exchange witness statements of fact and provide specific disclosure in relation to that preliminary issue. The parties have complied with those directions;

d. There has been a trial of the preliminary issue before me and during which I have heard oral evidence from the parties. This was not a hearing of an application to strike out the claim as an abuse of process; and

e. It was only in Paul's written submissions for the trial of the preliminary issue that it was raised for the first time that the Court effectively has no jurisdiction to determine that preliminary issue.

52. It was further submitted on behalf of Paul that ***Mohan*** can be distinguished, since in that case, unlike in the present case, the claimant was not seeking to establish an alleged will. It was further submitted that the authorities tend to support the view that the court will never strike out an action to revoke a grant of probate or letters of administration on the mere ground of delay in instituting it.

53. The Civil Procedure Rules ("***CPR***") introduced in 1998 a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost. CPR r.1.1(2) provides that:

> "Dealing with a case justly and at proportionate cost includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly;
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
> (f) enforcing compliance with rules, practice directions and orders."

54. CPR r.1.4(1) provides that the "court must further the overriding objective by actively managing cases."

55. CPR 1.4(2) provides that active case management includes "identifying the issues at an early stage" and "deciding the order in which the issues are to be resolved".

56. CPR r.1.3 requires the parties "to help the court to further the overriding objective."

57. I repeat that the parties in the present case consented to a case management order that laches be tried as a preliminary issue.

58. In ***Wahab v Khan*** [2011] EWHC 908 (Ch) Briggs J (as he then was) held that;

> "[23] Miss Barbara Rich for the Appellant……. sought to persuade me that claims for the revocation of probate occupy a special status in relation to which delay in their institution should not easily justify their being struck out. She relied upon ***Re Flynn Deceased***….
>
> ……

> [24] While it is true that Slade J went on to hold that there was no prior authority supporting the case that delay in institution might warrant the striking out of a probate claim, he made no comment, one way or the other, on the soundness of counsel's submission. In my judgment, in particular after the introduction of the Civil Procedure Rules, there can be no such special rule applicable to probate cases, derived from any supposed sanctity of a grant of probate."

59. In my judgment, the wishes expressed by a testator in their will are not so sacrosanct that the court is required automatically to embark upon an investigation upon the validity of the grant of letters of administration simply as a matter of principle and without giving due consideration to the wider context and the practical necessity of doing so. In furthering the overriding objective under the CPR, judges are necessarily required to be more proactive and interventionist. The particular need for proportionality involves a cost/benefit analysis where the expense of pursuing an action is weighed up against the advantage to be derived from the action, if successful.

60. In conclusion, (and subject to the question of the interplay with Scottish law dealt with next):

    a. The assets of Ray's estate were distributed some considerable time ago;

    b. The sole purpose for seeking revocation of the grant of letters of administration to Lynne is to then enable Paul to seek to recover from Lynne the assets she received from Ray's estate;

    c. Any recovery claim against Lynne would be equitable relief against which Lynne would be entitled to raise the defence of laches;

    d. The defence of laches has been fully pleaded and responded to in the parties' statements of case;

    e. If the recovery claim against Lynne is bound to fail on the ground of laches, it would be wholly contrary to the overriding objective of saving expense and avoiding delay to permit the probate claim to continue in circumstances where it would serve no useful purpose;

    f. Therefore, it is entirely understandable that, in exercising its case management powers to further the overriding objective, the court ordered, with the consent of the parties, that the issue of laches be tried as a preliminary issue;

    g. The court has now read and heard evidence/argument to enable it to determine the preliminary issue of laches; and

    h. In the event that I determine that the laches defence is made out, I would be entitled and indeed bound to dismiss a probate claim that has thereby been rendered utterly academic. To otherwise allow the probate claim to proceed would simply expose the parties to significant expense for no discernible benefit.

<u>The interplay with Scottish law</u>

61. If the probate claim is successful then the recovery claim against Lynne will proceed in Scotland. It was briefly submitted in closing oral submissions that I should make my decision simply on the basis that the doctrine of laches is the same under Scottish law as it is under English law. However, during the course of preparing the judgment, this point caused me increasing concern, since, unlike in England, there was never a separate court of equity in Scotland. I therefore invited counsel for the parties to file further written submissions on the point.

Submissions on behalf of Lynne

62. Paul has elected not to plead any foreign law, either in his Particulars of Claim or Reply, as governing the claims which might follow the revocation of the letters of administration, to recover estate assets. Therefore, applying the default rule as per ***Brownlie v FS Cairo (Nile Plaza) LLC*** [2021] UKSC 45, the Court must apply English law when considering whether any subsequent claim would be barred.

63. If the court is satisfied (on the balance of probabilities) that such a claim would be so barred, then Paul's present claim to revoke the grant can serve no useful purpose and should be dismissed.

64. If Paul goes on to persuade this court that Ray had a Scottish domicile at the date of his marriage, and so the English grant should be revoked, then any distributions or conveyances made in good faith remain valid – ss.27, 37 Administration of Estates Act 1925 (England and Wales); s.1 Confirmation and Probate Amendment Act 1859, s.24 Succession (Scotland) Act 2016 (Scotland). Any subsequent proceedings would have be taken in two stages:

    a. First, Paul must apply for confirmation in Scotland. The Scottish court would determine domicile in accordance with Scottish law and would not be bound by the English court's English-law conclusion as to domicile. It could therefore quite properly reach a contrary conclusion to this court, considerations of comity notwithstanding (see e.g. ***Re Martin*** [1900] P 211);

    b. Second, Paul (in his capacity as executor) would have to bring proceedings in Scotland to recover assets from Lynne. It would be open to Lynne to raise any defences available to her under Scottish law. These are likely to include limitation/prescription and personal bar (equivalent to estoppel). Again, the Scottish court would not be bound by this court's conclusion as to laches, because it would be considering a different claim between different parties (the claim being brought by the executor) applying a different substantive and procedural law. It would, subject to its own rules of admissibility, have regard to the evidence filed in these proceedings (insofar as filed in the Scottish court) and any judgment or findings of fact made by this court.

65. All three of these stages – English domicile determination, Scottish confirmation proceedings, Scottish recovery proceedings – will be both expensive and lengthy, taking place 12 years after Ray's death. All of this could have been avoided had Paul brought his claim when he had the requisite knowledge to do so, and when he chose to conceal his intentions from Lynne. This is precisely why it is unconscionable for Paul now to bring this claim.

Submissions on behalf of Paul

66. If the claim is dismissed at the preliminary issue stage, the consequence will be that the Scottish courts will never be seized of the matter, because if the English grant is not revoked, then the Scottish courts will have to recognise the grant as being of full force and effect (Administration of Estates Act 1971 s, 3(1)) and will not be able to go behind the grant to consider Paul's claim.

67. By contrast, if Lynne fails on the preliminary issue and the claim is permitted to proceed, (and assuming again for present purposes that Paul is right on the substantive issue and accordingly that the grant of letters of administration is revoked), Paul will then be able to proceed with his claim in Scotland. In those circumstances it is accepted that it would be open to Lynne to raise any defences based on delay available to her in principle under Scottish law, and the Scottish court would not be bound by this court's conclusion on laches

68. There is thus an asymmetry between the consequences of the two possible outcomes of the preliminary issue hearing. If the claim is dismissed, Paul loses his opportunity to pursue his claim in the Scottish courts, and the Scottish courts are deprived of the jurisdiction to decide whether a claim, justiciable in Scotland, to recover the estate from Lynne should or should not be barred by delay. If on the other hand the claim is permitted to proceed, and Paul succeeds in having the grant set aside, Lynne will still have another bite at the cherry on the question of delay in the proceedings to recover the estate, and the Scottish courts will not be bound by any decision made by this court on laches.

69. For these reasons this court should not dismiss the present claim unless it is satisfied that subsequent proceedings by Paul in Scotland to recover the estate would be bound to be met with a successful defence based on delay: in other words this court would have to be satisfied that no court in Scotland could properly reach any conclusion other than that the claim should be dismissed on the ground of delay.

Analysis and conclusion

70. The Chancery Guide (applicable at the time of the case management order directing the trial of the preliminary issue) provided that:

> "21.27 Costs can sometimes be saved by identifying decisive issues, or potentially decisive issues, and ordering that they be tried first. The decision of one issue, although not itself decisive of the whole case, may enable the parties to settle the remainder of the dispute. In such cases a preliminary issue may be appropriate.
>
> 21.28 At the allocation stage, at any case management conference and again at any PTR, consideration will be given to the possibility of the trial of preliminary issues the resolution of which is likely to shorten proceedings. The court may suggest the trial of a preliminary issue, but it will rarely make an order without the concurrence of at least one of the parties."

71. It is submitted on behalf of Paul that I should not dismiss the probate claim unless I can be satisfied that no court in Scotland could properly reach any conclusion other than that the subsequent recovery claim should be dismissed on the ground of delay. The difficulty I have with that submission is that I am unable properly to undertake any such evaluation, since even now I do not know with any degree of precision what, if any, defences based on delay would be available to Lynne under Scottish

law on any subsequent recovery claim. That then begs the question what was the purpose of the parties ever agreeing to a trial to determine the preliminary issue of whether or not "the Claimant's claim [is] barred by laches"? If Paul's submission is correct, determination of whether any subsequent recovery claim would be barred by laches applying English law was never a potentially decisive issue.

72. In ***Brownlie*** Lord Leggatt (dissenting on the tort gateway issue but with whom Lord Reed P, Lord Lloyd-Jones, Lord Briggs and Lord Burrows agreed on the foreign law issue) held that;

> "[112] For my part, I think it preferable in the interests of clarity not to treat the terms 'presumption' and 'default rule' as interchangeable and to recognise that there are two different rules which are conceptually quite distinct. So too are their respective rationales. The presumption of similarity is a rule of evidence concerned with what the content of foreign law should be taken to be. By contrast, the 'default rule' (as I shall use that term) is not concerned with establishing the content of foreign law but treats English law as applicable in its own right where foreign law is not pleaded.
>
> ……
>
> [114] I think this justification for applying English domestic law by default is valid so far as it goes. Article 1(3) of each of the Rome I and Rome II Regulations provides that (with immaterial exceptions) the Regulation 'shall not apply to evidence and procedure'. The rule that (with limited exceptions) the court is not obliged to decide a case in accordance with a rule of law on which neither party chooses to rely is a rule of English civil procedure. The Rome I and Rome II Regulations therefore do not seek to oust it. (If, which I doubt, the Court of Appeal in ***Belhaj v Straw MP (United Nations Special Rapporteur on Torture intervening)*** [2014] EWCA Civ 1394, [2017] AC 964, [2016] 1 All ER 121 (para [155]), intended to suggest otherwise, I agree with the reasons given by Andrew Baker J in **Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA (formerly Dean International Trading SA)** [2018] EWHC 2759 (Comm), [2019] 1 WLR 82 (para [21]), for regarding the suggestion as mistaken.) In accordance with this procedural rule, the English court is not obliged to apply the choice of law rules contained in the Rome I and Rome II Regulations if neither party chooses to assert in its statement of case that foreign law is applicable. That is so even if the case is one to which a foreign system of law would clearly have to be applied if either party chose to rely on that fact. It may also be said that in such a situation the parties are tacitly agreeing that English law should be applied to decide the case. There is no public policy which prevents this. Indeed, the freedom to agree after the event to submit a contractual or non-contractual obligation to a law of the parties' choice different from the law previously or otherwise applicable is expressly affirmed by, respectively, art 3(2) of the Rome I Regulation and art 14(1)(a) of the Rome II Regulation.
>
> [115] Not uncommonly, actions are brought in the English courts in which the parties are content for the court to apply English law, even though it is apparent that foreign law would be applicable if either party chose to rely on it. A notable example is ***Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd*** [1976] 2 All ER 552, [1976] 1 WLR 676, the leading case on the effect of a clause in a contract for the sale of goods which provides for the seller to retain title to the goods until payment is made. The contract terms in issue in that case were written in the Dutch language and expressly governed by Dutch law, but neither party

pleaded Dutch law and the court accordingly applied English law to the contracts. Such an approach makes good practical sense where there is or is likely to be insufficient difference between the foreign law in question and English law to justify the inconvenience and cost of asserting and proving a difference."

73. This is the trial of a preliminary issue, which was raised and responded to in the parties' statements of case. Any principle of foreign law upon which a party's case is based ought to have been clearly identified and the basis of its application explained in their statement of case. Paul's Reply responds in detail to Lynne's pleased defence of laches. However, nowhere in that Reply is there any reference to Scottish law, whether in generic terms or at all, so far as it may relate to the issue of laches/delay. The clear implication, therefore, is that Paul was content to proceed on the basis that there is likely to be insufficient difference between English and Scottish law to justify asserting and proving a difference. Indeed, in closing oral submissions it was conceded, albeit in passing, that I ought to decide the preliminary issue on the basis that the doctrine of laches is the same under Scottish law as it is under English law.

74. Having now been referred to the decision in ***Brownlie***, I am persuaded that I am bound by higher authority to determine the preliminary issue by applying English law by default and notwithstanding that Scottish law would be applicable to any subsequent recovery claim.

Approach to the evidence

75. In ***Booth v Booth*** [2010] EWCA Civ 27, Rimer LJ held [at 71]:

> "The issue whether the claim was barred by laches required a value judgment by the judge after weighing the relevant considerations."

76. Therefore, I must first decide any disputed facts, which, if proved, need to be weighed in the balance as relevant considerations in making the required value judgment identified in ***Booth***. The party who asserts a disputed fact must prove that, more likely than not, it is true.

77. Paul and Lynne were the primary witnesses of fact in this case and the only witnesses who gave oral evidence. In their evidence they were seeking to recall events and conversations that took place many years ago, which necessarily gives rise to particular problems. Quite understandably, it is often difficult for witnesses to remember accurately what happened or what was said so long ago. That particular problem is amplified in this case, since Paul and Lynne confirmed in their oral evidence that in the immediate aftermath of Ray's death they were variously in shock/distress/emotional turmoil.

78. In addition, in ***Gestmin SGPS SA v Credit Suisse (UK) Limited*** [2013] EWHC 3560 (Comm), Leggatt J, as he then was, made the following observations about the interference with human memory introduced by the court process itself:

> *"*[19.] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence

for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20.] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

79. I consider that there is a substantial risk of interference with the memories of Paul and Lynne in the present case. Neither can be regarded as detached or objective observers. They each have a significant financial interest in the outcome of this litigation and as such are subject to powerful motivating forces/biases.

80. In the circumstances, and even though I found Paul and Lynne to be honest witnesses doing their best to assist the Court, I have approached the reliability of their witness evidence with a substantial degree of caution.

81. In making my findings of disputed facts, I have placed particular reliance upon (i) the undisputed facts (ii) the documents in the case, and (iii) the overall probabilities.

Disputed facts

The written evidence

82. In her written evidence, Lynne stated that:

"[13] I distinctly remember speaking with Paul on the phone in the week after [Ray] died. I had told Paul about the Australian will in the days following [Ray's] death and I think that I also told him that [Ray] and I had instructed solicitors to prepare new wills very shortly before [Ray] died and that we did not have time to sign them before [Ray] was called back to sea.

[14] Paul told me that he did not want anything from [Ray's] estate and that he wanted everything to go to me and the children. This was a relief to me, given I was living in [Ray's] house. At that stage I did not know what the status of the Australian will was following our marriage, although I recall [Ray] discussing its destruction when we met our solicitor to discuss new wills in the month before he died. Certainly if Paul had said anything to me in that conversation to the effect that he was expecting to receive the whole of [Ray's] estate (including my home) I would have remembered that.

……

[20] …….. At some point between [22 March 2011] and 28 April 2011, [MFS] told me over a telephone call that the Australian will was not valid and [MFS] thereafter proceeded to consider the question of [Ray]'s domicile…….

[21] Around this period, Paul discovered that his wife was having an affair and was leaving him. Paul called me several times in an agitated state. Paul's wife was the main breadwinner…. and it appeared that he was worried about money and where he would live. During one of these calls, Paul asked if "we could just say that the Australian will was valid and sort things out between us". I told Paul that my lawyers had investigated the will, had told me that it was not valid and that what he was suggesting was not possible. I then said to Paul that I had thought that he did not want anything from the estate to which he replied, "I've changed my mind" and hung up the call. I called [MFS] to advise.. of Paul's change of heart straight after the call…….

[22] After that, Paul took no action and I did not hear from him again……

…….

[34] The first direct contact that I received regarding the challenge by Paul to [Ray]'s estate was when I received a letter from Aaron & Partners in July 2018. Prior to this the executor named in the [Will], Keith McCorriston, had been in touch with me intermittently from February 2015 onwards to say that he was receiving emails from Paul/Michael Brownrigg and that he had also had a visit from a private investigator instructed by Paul.

[35] Paul never asked me for a copy of the [Will]. If he had done, I would have given it to him along with the letter from the Australian Solicitors confirming that that they held the original document but it was invalidated by marriage. I had told Paul that I had a copy of the [Will] in the days immediately following [Ray's] death but he never asked for a copy of it.

……..."

83. In his written evidence, Paul stated that:

"[19] I did not tell Lynne that I wanted no inheritance from Ray's estate or that I wanted Ray's estate to pass to her….. I travelled up to Scotland to attend Ray's funeral on 10th March. Prior to that I had conversations with Lynne with regards to the funeral arrangements and also about my birth certificate…… Lynne explained to me that she needed my birth certificate to determine whether James, my biological father, may have had a claim on the estate under Scottish law. Neither of us knew at that time that my father was deceased…… The next time I remember speaking with Lynne was when I attended Ray's funeral.

[21]…… After the wake just the family….. walked back to Ray's flat…… myself and Lynne were walking together. Lynne started talking about Ray's estate and said to me that I should disclaim any inheritance from Ray's estate and that it should all go to her. I was in such a state of grief and shock that she could be mentioning any such thing, I gave her no reply. The conversation then moved on.

[22] When we got back to [the Property] the topic of the will was brought up again when Lynne and I were stood in the hall or kitchen….. I told Lynne of the conversation Ray had with me about his will. I told her that he had left me things and also that he had said that he kept a copy of the will in his desk. I also explained I had no other idea about its terms and that I had never seen a copy. Lynne told me that she had found an Australian will but dismissed it as a "Mickey Mouse" will. I am now aware that Lynne had already had sight of the Will previously, as she told her solicitors… about it during their first meeting…….

[23] Lynne did not provide me with sight of the Will or share the details of its terms…. It took me over five years from Ray's death, to obtain a copy of the Will.

[24] On 15 April 2011, I found out that my wife had been having and affair. On 18 April, she left our family home with my children……..As the months passed, I sunk deeper and deeper into depression and could not cope with all the stress going on in my life during that time.

……..

[27] By mid-2012, I was in a slightly better place and tried to set the wheels in motion for formally divorcing my wife……

[28] Thankfully Michael [Brownrigg] was there to help me….. As my divorce proceeded, the subject of Ray's estate naturally came up, as I did not know what I might be entitled to from Ray's estate.

[29] ……Michael suggested I instruct a Scottish solicitor as ……. it seemed likely that [Ray] was domiciled in Scotland when he died. I initially called Campbell Smith, based in Edinburgh, on 15 January 2013, I told them what I knew at the time: that Ray had told me that he had executed a will and that I wanted to know what was in it. Lynne by this point had completely shut me down and I had no idea how to find out what was going on…...

……..

[32] My solicitor, Julia wrote to me on 26 February 2013 to confirm that no application had been made for probate in Scotland……I thought it may be worth contacting the solicitors who dealt with Ray's divorce in Australia….. Paterson & Dowding. Julia….confirmed that she had written to Paterson & Dowding.

[33] Paterson & Dowding responded on 24 September 2013 seeking confirmation that Ray had died and that I had authority to access information on his behalf….

[34] Julia advised me to obtain Ray's death certificate by contacting the South African Embassy in London….. I wrote a letter…but received no reply. Michael contacted the undertakers who had arranged Ray's funeral to request a copy of the death certificate but they did not have one.

[35] Julia then wrote to me on 23 January 2014. I was informed that [the Property] had been transferred into Lynne's name in March 212. I was also provided with the Grant…. issued in Lynne's favour….. This was the first time I knew that Lynne had taken all of Ray's assets and ignored the "Mickey Mouse"

will she referred to. This was also the first time I knew Morton Fraser had acted in the administration of Ray's estate……..On the sworn oath for administration it states Ray was domiciled in England and Wales and died intestate.

[36] As Ray had made his home in Scotland, Michael suggested that we spend a couple of days in Scotland in order to get clarification of Ray's domicile, which we believed was Scotland……

[37] .. Julia informed me ……that…… I should obtain advice from a firm of solicitors in England.

[38] …. On 1 May 2014, [Julia] sent me the death certificate, which she had obtained from [Ray's former employer]…….

[39] Following Julia's advice I instructed Keene and Kelly solicitors…. to advise me regarding the Grant and also help try to find Ray's will.

[40] On 3 June 2014, Keene and Kelly wrote to Paterson & Dowding providing them with the death certificate as requested……..

……..

[43] On 28 July 2014, Campbell Smith responded to [Keene and Kelly] to confirm the advice they [had previously] provided in relation to Scottish law. ...Their letter [stated that "it is the position in Scotland that a marriage which takes place after the making of a Will does not necessarily revoke the Will. We are aware that the position is different in England and Wales."]

[44] On 11 August 2014, Paterson & Dowding provided the details of the executor of Ray's will to whom they had provided the original will; Mr Keith Edward McCorriston ("Keith"), along with his address, email and telephone numbers. I was told to direct all enquiries to him…….

[45] It was at this point that I knew Ray had definitely executed a will in Australia, but I still did not know its terms.

……..

[53] ……. It appeared to me as if Keith was ignoring all contact attempts……..

……..
[55] On 31 July 2015, Michael contacted Finders International ("Finders"), a firm of tracing agents to see if they could help me track down Keith…….

……..

[57] Finders responded on 11 December 2015, to confirm that they had tracked down Keith…..

[58] …… [Keith] indicated to Finders that the estate passed to me, not [Ray's] wife. This was the first time I had heard that I was due to inherit Ray's estate, albeit, I still did not have sight of his will. Finders told Keith that if he did not produce the will in his possession there could be potential ramifications for

continued non-action…… Keith told finders that he wanted to instruct a firm of solicitors to assist him…..

…….

[64] In June 2016, I personally received a letter…… from Alison & Associates, based in Perth, who acted for Keith. After all of my efforts, spanning over five years since Ray's death, I finally received Ray's original will along with Keith's deed of renunciation……..

[65] This is when I finally knew for sure that Ray had intended to leave his estate to me….. It now made complete sense to me why Lynne did not want to share the Will with me on the date of Ray's funeral and why she was so quick to dismiss it, as well as apply for a grant of letters of administration, issued to her around six months after his death, on the basis of his alleged domicile in England and Wales and therefore intestacy, at a time she knew full well that I was struggling to function owing to my mental health.

……

[95] I do not think my claim should be barred. I have done everything that I can to pursue the matter in a sensible manner. Lynne refused to provide me with a copy of Ray's will on the date of his funeral, despite clearly having it in her possession. I would not have told Lynne that I wanted her to have everything, especially as I had not even seen in black and white, Ray's testamentary wishes. It took me over five years to obtain the will, during which I was blocked at practically every turn. Only once I had secured the Will did I know that Ray had indeed made a will, which he had not subsequently revoked, and that the will left his entire estate to me……..

……"

Did Paul initially tell Lynne that he wanted nothing from Ray's estate?

84. I find on balance that Paul did initially tell Lynne that he wanted nothing from Ray's estate and that he wanted her to have everything. I make that finding for the following primary reasons.

85. Firstly, the weight of the contemporary documents supports such a finding:

    a. MFS' file note dated 25 February 2011 records -

        "……..Lynne said that Paul has said that he doesn't want anything and wants everything to go to her. Lynne acknowledged that this will need to be confirmed by Paul further down the line."

    b. MFS' file note dated 4 March 2011 records the following -

        "Call to Jade re birth certificate for Paul and details re James MacKenzie.

        Spoke with Paul McElroy. Paul confirmed that he would provide us with a copy of his birth certificate. He explained that James MacKenzie was he and [Ray's] biological father but that he

abandoned them when they were children and their step-father William McElroy (deceased) was like their real father.

I asked if he was still alive. Paul confirmed he was but that he had no contact details for him. I also noted that James MacKenzie is noted as being alive on [Ray] and Lynne's marriage certificate. Paul confirmed that he wanted his share of everything to go to Lynn[e] and that she would deal with anything on his behalf."

86. In his written evidence, Paul stated that:

> "[20] In the period following Ray's death I have no knowledge of who Lynne had instructed as solicitors in relation to Ray's estate. I certainly had no knowledge of this on 4 March 2011. The first time I became aware of [MFS'] involvement was when…… solicitors I instructed in January 2013.. obtained the copy of the Grant to Ray's estate which was posted to me on 23 January 2014…… I did not speak to [MFS] on 4 March 2011. I was due to work on 4 March 2011 but was unable to go in due to sickness. If I had spoken with [MFS] I would have made a note of that conversation in my diary but no such note appears….."

87. However, in a witness statement dated 24 March 2022, Kathleen Martin, solicitor, stated that, whilst employed by MFS, she acted for Lynne in connection with the administration of the estate of Ray. She confirms that the file notes dated 25 February 2011 and 4 March 2011 "accurately record my recollection of the matters detailed therein at the time they were prepared." In addition, the other information recorded in the file note dated 4 March 2011 as having been provided by Paul about his and Ray's biological father and stepfather is entirely accurate.

88. Secondly, in my judgment, it is inherently likely that:

    a. Immediately following Ray's death, Paul would have wanted everything to go to Lynne in circumstances where Ray (i) had married Lynne only some 5 months before his death and (ii) had been unable to sign the new will in favour of Lynne prepared on instructions only 1 month before his death; and

    b. Paul changed his mind after (i) finding out his wife had been having an affair and (ii) her leaving the family home with their children. Those events no doubt heavily impacted not only upon his emotional state, but also his financial stability.

<u>Reasonable delay in pursuing the Probate claim?</u>

89. It is rightly conceded on behalf of Paul that the delay in bringing the probate claim has been significant, but it is submitted that the delay as a whole is not unreasonable in all the circumstances:

    a. Paul explains that he was suffering from depression following his wife's desertion 2 months after the death of Ray, and that he was only in a position to explore the question of his entitlement to Ray's estate from about January 2013. Thereafter, he and his solicitors used all reasonable endeavours to obtain the Will, which they succeeded in doing only in June 2016; and

    b. In their letter dated 28 April 2011, MFS advised Lynne that it was at least arguable that Ray was domiciled in Scotland, and also indicated that, as Paul

had indicated an intention to make a claim on the estate, it would be necessary to contact him. In fact no such contact took place. Given that, under the law of Scotland, a will is not revoked by marriage, if she had wished to ensure that there was no risk of Paul later claiming that the Will was valid and seeking revocation of the grant of letters of administration on intestacy, the proper and safest course would have been to adopt a formal "cards on the table" approach, namely at the very least instructing MFS to inform Paul of the existence and the whereabouts of the Will and of the fact that he was the sole beneficiary under it.

Reasonable endeavours to obtain the Will?

90. Paul sought primarily to explain the delay on the basis that, although he was aware of the existence of the Will, he did not know the extent, if any, of his entitlement under the Will. Further, Lynne refused to provide him with a copy of the Will despite having it in her possession. As a result he was forced to spend some 5 years seeking to obtain the Will from other sources. When he finally obtained the Will in June 2016 he finally knew that Ray had intended to leave his estate to Paul.

91. On balance, and for the following primary reasons, I find that Paul did not ask Lynne for a copy of the Will:

    a. Paul's evidence on this point was characterised by contradictions. At the end of his written evidence Paul claimed that Lynne had refused to provide him with a copy of the Will on the date of the funeral. In his oral evidence he accepted that he had never requested a copy of the Will from Lynne. He did, however, say for the first time that he had asked Lynne at the wake held in the Property to see the copy of the Will in her possession. He was unable to explain why this potentially important information was not contained within his written evidence, which sets out in some detail the alleged conversation that took place including Paul telling Lynne that Ray had told him that he kept a copy of the Will in his desk, although Paul had never seen it.

    b. On 13 September 2013, Campbell Smith LLP wrote to Lynne in the following terms -

        "We act for Paul McElroy, brother of the late Ray James McElroy who we understand was your late husband and who died on 18th February 2011.

        We have been consulted by Paul McElroy in connection with the Estate of the deceased. We understand the deceased was married as at the date of his death, had no children and died intestate.
        Our client has advised us that he has requested details from you on several occasions about the estate of his late brother but these have not been forthcoming. As the late Mr McElroy died intestate, depending on the size of his Estate his brother, Paul, may be a beneficiary. We should be obliged if you would please contact us as soon as possible to confirm the assets of the deceased and the liabilities of his estate to enable us to advise our client….

        ……."

It was Lynne's evidence that she did not receive this letter. However, if Lynne had previously refused to provide Paul with a copy of the Will or indeed sight of the Will then why did his solicitors not request a copy from Lynne. Indeed, the letter is even more extraordinary in that it makes no mention of the Will, but expressly states that Ray "died intestate". In the covering letter to Paul of the same date, his solicitor confirms that "Of course if there is a valid Will in Australia which he never revoked the position will be different and I will advise you as soon as I have additional information."

c. In his oral evidence, Paul confirmed that at the time of Ray's death, not only was he aware of the existence of the Will, but he was also aware that he was the sole beneficiary under the Will. Paul said that, following Ray's divorce from his first wife, he visited Ray in Australia. At that time, both their parents were dead and Paul was Ray's only living close blood relative. Ray told Paul that he had made the Will in Paul's favour as he wanted Paul to inherit his whole estate. I note that shortly thereafter, on 15 February 2006, Ray signed a nomination form confirming that he wished Paul to be the sole beneficiary of the DSB payable under the Scheme. On 16 August 2011, some 6 months after Ray's death, the solicitors for the Trustees wrote to Paul and confirmed both the existence and contents of the nomination form, which contents were entirely consistent with what Ray had told Paul about wanting Paul to inherit everything following Ray's divorce.

d. It is likely that Paul deliberately and for tactical reasons chose not to request a copy of the Will from Lynne –

    i. It was Paul's evidence that initially he was unable to cope because he was suffering with depression as a result of dealing with both Ray's death and his wife's affair. I accept that it must have been a very difficult time for Paul, as it was for Lynne, but nevertheless he was able to instruct a solicitor, Robert Mann, to advise upon the letter from the Trustees' solicitors dated 16 August 2011. In his letter dated 15 September 2011, Mr Mann advised Paul that "As we discussed when we met it may be that there is a separate pension held under a discretionary trust. May I suggest that initially you make contact with the solicitors who have been instructed to deal with his estate. If you do not have any success in obtaining information from them please feel free to come back to me and I can write to them directly although I would need their full address.";

    ii. Further, on his own written evidence, by mid-2012 Paul "tried to set the wheels in motion for formally divorcing [his] wife" by instructing another firm of solicitors, Crampton, Pym and Lewis, although ultimately he did not consider that they had the requisite expertise to deal with a likely acrimonious divorce. Therefore, he instructed yet another firm of solicitors, Keene and Kelly, to deal with his divorce;

    iii. Again on Paul's own written evidence, "as my divorce proceeded, the subject of Ray's estate naturally came up". Nevertheless, in his oral evidence, Paul confirmed that he did not disclose, either to his wife or her divorce solicitors, the Will and any potential entitlement

to Ray's estate. Rather, he instructed a separate firm of solicitors, Campbell Smith, in connection with Ray's estate;

iv. Campbell Smith's file note dated 25 January 2013 records

> "Atte with Mr McElroy……
>
> ……. His understanding was that [Ray] made a Will in Australia……
>
> ……..
>
> In January 2011 a month before his death [Ray] had instructed a Solicitor to prepare a Will leaving the whole of his Estate to his wife but the Will was never signed. Accordingly he does not know where he stands regarding his brother's Estate. He does not know whether the Estate is intestate or whether the Australian Will has any validity. When he has asked his sister-in-law she had indicated that it is an invalid Will because he was married at the time. He was not sure whether this was correct…… Once he had established what assets his brother was likely to have he can decide what he wishes to do. We should also establish from the Solicitors in Australia whether there is a valid Will. His understanding, however, from his sister-in-law is that his brother had left an Estate of about £1 million.
>
> Time engaged 1 hour"

v. Paul re-instructed Keene and Kelly, who on 24 July 2014 wrote to Campbell Smith

> "We understand that you have been acting on behalf of Mr. Paul McElroy in relation to his brother's estate and that you had correspondence with Messrs. Paterson and Dowding of Perth Western Australia.
>
> We have been instructed by Mr. McElroy only in the context of any help that we may be able to provide to him in relation to English and Welsh law on probate issues. We understand from our mutual client that you may have advised him that as long as his brother had Scottish domicile a marriage which takes place after the making of a Will would not necessarily revoke the Will (in England and Wales such a marriage would revoke the Will unless the Will had been made specifically in contemplation of that marriage)
>
> We are anxious to endeavour to stop the Australian solicitors from taking steps which may forewarn the Widow of enquiries that are presently being made but feel that we cannot do so until we can satisfy them of the differences in the Law which appear to apply.
>
> ……."

When this letter was put to Paul in cross examination, he confirmed in his oral evidence that he did not want Lynne to know about the enquiries that he was making about the validity of the Will. Somewhat incongruously, Paul sought to justify this tactic on the basis that he thought that Lynne was keeping him in the dark; and

vi. In his letter to Keith dated 26 February 2015, Paul stated

> "…….
>
> Ray told me there was a copy of this will in his desk at the flat in Scotland
>
> I'm quite sure that Lynne would have destroyed this will in order to put full claim on all Ray estate
>
> Once again I ask you please can you send me Ray will in order that my brothers wishes can be carried out."

Lynne's alleged impropriety

92. It is alleged that Lynne was not open and transparent in her dealings with the administration of Ray's estate by (i) ignoring/concealing the Will and (ii) knowingly and falsely swearing on oath that Ray died domiciled in England and Wales intestate. On balance, and for the following reasons, I do not consider that Lynne was guilty of improper conduct in the administration of the estate.

93. Firstly, it is not disputed that shortly after Ray's death Lynne told Paul that she had a copy of the Will.

94. Secondly, Lynne instructed a firm of solicitors to advise her upon administering Ray's estate. MFS' file note dated 25 February 2011 records:

> "DK meeting with Lynne…at home….
>
> …….
>
> DK raised the point of [Ray's] Australian Will and Lynne passed us a copy of this. Lynne explained that this Will was to deal with [Ray's] Australian property following his divorce from his first wife. She also confirmed that he had no assets left in Australia.
>
> DK considered Will and noted that it does not say it deals with Australian assets only. However, the Will was made in 2002 and so need to consider whether it has now been revoked by marriage. As made 8 years before marriage need to confirm position of whether it could be deemed in contemplation of marriage."

It is clear from this file note that, rather than seeking to conceal/ignore the Will, Lynne immediately brought it to MFS' attention.

95. Thirdly, on 28 February 2011, MFS wrote to Lynne to confirm that they would *inter alia* "investigate the position regarding Ray's Australian Will just to confirm

the position". By letter dated 28 March 2011, Paterson and Dowding Barristers & Solicitors, based in Perth, Australia, wrote to MFS as follows:

> "……
>
> We confirm that we continue to hold the original Will signed 27 September 2002.
>
> We note that the Will was not made in contemplation of Mr McElroy's divorce or subsequent remarriage and accordingly we advise that the will would no longer be valid.
>
> Please note that this advice is limited to the law in our jurisdiction….."

96. It was Lynne's evidence that in March/April 2011, MFS called her to confirm that the Will was not valid and MFS would now be considering the question of Ray's domicile. Indeed, Paul confirmed in his oral evidence that Lynne had specifically told him that the Will was not valid. However, there is nothing in MFS' file of papers confirming that such advice was given to Lynne regarding the validity of the Will. I accept that is a striking omission, but, by letter dated 28 April 2011, MFS advised Lynne as follows:

> "……
>
> As our investigations into Ray's estate are largely complete, I have been able to calculate the estimated value of Ray's estate as at his date of death to be approximately £517,000….
>
> At this point, it is now time to consider the question of Ray's domicile and from this decide whether to obtain Confirmation or Probate.
>
> I explained that on contacting the Probate Helpline we were advised that the matter of domicile is a matter for the executor to decide as HMRC will only investigate the matter where Inheritance Tax is due.
>
> In the circumstances, Ray's domicile of origin is Wales. It is difficult to remove a domicile of origin and even living in another country for an extended period of time does [not] necessarily remove a domicile of origin.
>
> It is our view, that having considered Ray's varied living arrangements throughout his lifetime and treating England and Wales as one jurisdiction, that it is most likely Ray did not remove his domicile of origin and was thus domiciled in England and Wales. This would mean that we would need to follow the procedures in England and Wales and obtain Probate to Ray's estate.
>
> However, it may be possible to argue that Ray was domiciled in Scotland as he bought a home here in 1990 and as you have previously been of the clear view that he considered Scotland to be his home. What slightly weakens this case is that although he owned a property in Scotland, he also lived in Australia and Singapore during this time. Further it is not enough that an individual considers their domicile to be the country where they resided for prolonged periods of time. The person's ultimate long term intentions need also be considered, and you will be best placed to know what these were.

Ultimately it is for you as the executor or Ray's estate to decide his domicile following consideration of all the information you have before you. This is an important decision and you need to feel confident in your decision as there is the possibility of challenge from Ray's brother and father as potential beneficiaries.

Rights to Ray's Estate

As we previously discussed, the rights to Ray's estate will depend on his domicile and I have outlined the rights for each jurisdiction below:

Scotland

Your rights as spouse

- House of value up to £300,000
- Furniture and plenishings up to £24,000
- £75,000 from the residue of the estate
- Half of remaining moveable estate (in this case half of the residue as only heritable property is your house)

In practical terms the house, as valued at £350,000, would be transferred to you and the £50,000 shortfall would be taken from the residuary payment of £75,000 due to you. You would also receive the contents of the house…..Thereafter you would receive cash for the £15,000 and half of the moveable estate.

Paul's rights

- Paul would be entitled to receive a quarter of the remaining moveable estate.

James MacKenzie's rights:

- Ray's father would be entitled to receive the other quarter of Ray's remaining moveable estate.

England

Your rights as spouse:

- All personal chattels (would likely include all house contents and car)
- Cash legacy of £450,000
- Half of the remaining residue

In practical terms the house would be transferred to you as would all the contents and car. Thereafter you would receive cash for the remaining

James MacKenzie's rights

- Ray's father would then be entitled to receive the other quarter of Ray's remaining moveable estate.

Ray's Brother

As Ray's brother is now indicating that he intends to make a claim on Ray's estate, I should be grateful if you could provide me with his contact details. Please note that we would have needed to contact him in any event as a potential beneficiary, whether he decided to proceed with his claim or not.

…….”

97. The MFS letter advised Lynne that the decision upon Ray’s domicile was important, but only because the rules on intestacy under Scottish law and English law were different. The letter then in some detail sets out what those practical differences would be in the context of Ray’s estate. The clear implication from the contents of that letter is that MFS, having investigated the Will, had by then concluded that it was not valid. There is no reference anywhere in the letter to the decision on Ray’s domicile impacting upon the validity of the Will itself.

98. Fourthly, the letter advises upon the difficulties of replacing a domicile of origin with a domicile of choice. It further advises that, although Lynne expressed the clear view that Ray considered Scotland to be his home, it is most likely that Ray retained his domicile in England and Wales, rather than replacing it with Scotland, and in light of the fact that Ray also spent time living in Australia and Singapore.

99. Fifthly, a striking feature of MFS’ letter is the reference to Paul “now indicating that he intends to make a claim on Ray’s estate”. Having initially told MFS that Paul did not want anything from Ray’s estate, Lynne then told MFS about Paul’s change of mind, which in my judgment is entirely consistent with Lynne being open and transparent in her dealings with the administration of the estate.

100. Sixthly, MFS’ letter does make reference to the need to contact Paul as a potential beneficiary on intestacy. Whilst there is nothing in MFS’ file of papers to confirm that they did so, it was Lynne’s evidence that she had assumed that MFS would have contacted Paul as they already had his contact details. I do not consider that was an unreasonable assumption for Lynne to have made when:

    a. She had specifically instructed MFS to assist in the administration of Ray’s estate;

    b. MFS had previously made contact with Paul; and

    c. The breakdown in the relationship between Paul and Lynne following Paul’s change of mind about receiving anything from Ray’s estate.

Relevant Considerations

<u>Length and reasons for the delay</u>

101. Paul issued these proceedings over 10 years after Ray’s death.

102. Paul knew at the time of Ray’s death:

    a. of the existence of the Will,

    b. that he was the sole beneficiary under the Will; and

    c. that there was a copy of the Will kept at the Property.

103. By the time of Ray’s funeral, Paul knew that Lynne had a copy of the Will in her possession.

104. Having initially told Lynne that he did not want anything from Ray's estate, Paul then changed his mind as a result of his wife leaving him a couple of months after Ray's death. At that time, Paul also (i) knew that it was Lynne's position that the Will was not valid and (ii) believed that the estate was worth about £1 million.

105. In August 2011, Paul felt well enough to instruct a solicitor, Robert Mann, to advise upon his entitlement to the DSB payable under the Scheme. As part of that advice, the solicitor offered, on behalf of Paul, to make contact with the solicitors dealing with the administration of Ray's estate.

106. In mid-2012, Paul instructed solicitors (initially Crampton, Pym and Lewis and then Keene and Kelly) in relation to divorcing his wife. Notwithstanding that as the divorce proceeded and "the subject of Ray's estate naturally came up", Paul failed to disclose any potential entitlement under the Will to his wife or her solicitors. Rather, in January 2013, he chose to instruct separate Scottish solicitors, Campbell Smith, to investigate the validity of the Will on the basis that Ray was domiciled in Scotland when he died such that the Will was not automatically revoked on marriage.

107. As part of those investigations and over the course of the next 3 years, Paul and his solicitors sought to obtain a copy of the Will from variously Paterson & Dowding, the Newcastle District Probate Registry and Keith. Paul did not request a copy of the Will from Lynne or her solicitors. Had he done so, I find that they would have provided a copy of the Will as requested thereby avoiding the need for Paul to embark upon a protracted and convoluted exercise to obtain it by other means. However, Paul deliberately sought to conceal those ongoing investigations from Lynne. Indeed, on 13 September 2013 and on instructions, Campbell Smith, wrote to Lynne requesting details of the size of Ray's estate, but on the express understanding that Ray had died intestate.

108. Finally, on 13 June 2016, Paul was sent the original Will and the deed of renunciation executed by Keith. By letter dated 23 August 2016, Campbell Smith advised Keene & Kelly, who had been re-instructed by Paul to advise upon the Will:

> "Thank you for your letter of 6 July 2016 and for the copy of the Will granted by the deceased while in Australia. Insofar as we are aware the deceased did not grant a subsequent Will nor did he take steps to revoke the Will which he had granted in Australia. Further we understand that the deceased lived and worked in Scotland and therefore his domicile which is a matter of fact was Scottish and that Scots law should therefore apply to the administration of his Estate. We are aware that Probate has been obtained in England indicating that the deceased had domicile in England and Wales which Paul McElroy disputes.
>
> In terms of Scots law the Will granted by Ray McElroy in Australia remains a valid Will. His subsequent marriage to Lynne… does not *per se* invalidate the Will it merely grants Lynne Legal rights in his Estate but otherwise leaves Paul McElroy as the sole residuary beneficiary.
>
> Any challenge to the Probate which has now been granted in the English Courts will need to be undertaken in England by English Solicitors. It is certainly the case that the Law in Scotland as we understand differs in relation to the Law of England regarding re-marriage invalidating an earlier

> Will. Crucially, the Legal Rights of the spouse in a Scottish Estate would affect only the Moveable Estate i.e. money and investments but not heritable property. In Scotland if the deceased left a Will his wife would only have Legal Rights to the Moveable estate. If he had died intestate his wife would have the prior rights of the spouse which for deaths after February 2012 have included a right to a property in which the surviving spouse lived up to the value of £473,000…… We understand the main asset in dispute here is in fact the heritable [Property] which would fall in terms of the Will to Paul… and not to Lynne…"

109. However, even then it took another 2 years before Paul, through yet another firm of retained solicitors, APS, sent a letter of claim to Lynne, whose solicitors by letter dated 17 August 2018 denied the claim, albeit in relatively short terms. Nevertheless, it was then a further 3 years before this claim was issued.

110. The delay as a whole in Paul prosecuting the claim was both gross and inexcusable.

Conduct of Lynne

111. I do not find that Lynne has caused or materially contributed to the delay by Paul in prosecuting the claim.

Cogency of the evidence

112. A helpful summary of the relevant principles of the law of domicile law is to be found in the judgment of Arden LJ in ***Henwood v Barlow Clowes International Ltd*** [2008] EWCA Civ 577:

> "8. The following principles of law, which are derived from Dicey, Morris and Collins on The Conflict of Laws (2006) are not in issue:
>
> (i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).
>
> (ii) No person can be without a domicile (Dicey, page 126).
>
> (iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).
>
> (iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).
>
> (v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).
>
> (vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).
>
> (vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be

considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to143).

(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).

(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).

(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153)."

113. It is a question of fact as to whether Ray had formed the intention of making his sole or principal permanent home in Scotland, and of continuing to reside there indefinitely. Lynne gave evidence that by the time that Paul sent the letter of claim key evidence going to the issue of Ray's domicile was no longer available including Ray's:

a. personal emails; and

b. tax records.

114. It is further submitted that, if, as the court has now determined, Lynne and Paul are unable to give reliable evidence at the trial of this preliminary issue as a result of the passage of time, how will it be possible hereafter to have a fair trial on the issue of Ray's domicile?

115. Whilst I accept that there is some force in the submissions made on behalf of Lynne as to the cogency of the available evidence in determining Ray's domicile, ultimately for the purpose of determining this preliminary issue, it is assumed that the Probate claim is a good claim. In other words, it is assumed that Ray was domiciled in Scotland when he married Lynne such that the Will was not revoked by their marriage. In the circumstances, I do not consider that the cogency of the evidence in relation to the Probate claim is a relevant consideration in relation to determining a defence of laches to any subsequent recovery claim or, if it is a relevant consideration, I do not attach much weight to it.

Prejudice to Lynne

116. Assuming that Ray was domiciled in Scotland and the Will was valid, Lynne has suffered significant financial prejudice as a result of the delay in Paul prosecuting his claim:

a. Under applicable Scottish law, Lynne would only have been entitled to ½ the "moveable estate". The Property, which formed the bulk of Ray's estate, would not be part of the "moveable estate";

b. Under English law, where a will fails to make reasonable financial provision for the surviving spouse and/or dependent children of the deceased, they can bring a claim under the Inheritance (Provision for Family and Dependants)

Act 1975 ("***the 1975 Act***"). Under the 1975 Act, the court has wide discretionary powers to order that reasonable financial provision be made out of the estate and having regard to all the relevant circumstances including the needs of the surviving spouse/dependent children. However, there are no equivalent Scottish law powers. Therefore, Lynne and her children would have had no claims in relation to the Property and they would have lost the home that they were living in at the time of Ray's death; and

c. Had Paul acted promptly and put Lynne on notice of his claim that the Will was valid, then this is a matter she could have brought to the attention of the Trustees. I have no doubt that the potential loss of the family home coupled with Ray's unexecuted will would have been highly relevant considerations and indeed magnetic factors when weighed in the balance in the exercise of the Trustees' discretion when distributing the DSB payable under the Scheme such that there is every likelihood that the Trustees would have awarded the whole of the DSB to Lynne, who would then have had the funds immediately available to buy the Property from Ray's estate.

117. The estate has long ago been distributed and Lynne has sought to rebuild her life around the inheritance she received following the devastating loss of Ray including by renovating and selling the Property before purchasing a replacement home. Further, Lynne now faces the prospect of having to relive painful memories and reopen emotional scars through protracted litigation.

<u>Paul's divorce</u>

118. Under the Matrimonial Causes 1973 Act, the Court has wide discretionary powers to make financial orders between the parties on the granting of a divorce. In deciding how to exercise those powers, the Court is required to have regard to all the circumstances including the "financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future".

119. Paul and his former wife were in the context of their financial remedy proceedings under an ongoing duty to provide full, frank and clear financial disclosure, since otherwise the court would be unable lawfully to exercise its powers under the Matrimonial Causes Act 1973 to achieve a fair result. In **Lykiardopulo v Lykiardopulo** [2011] 1 FLR 1427, CA Thorpe LJ stated:

"[36] However ancillary relief proceedings are marked by features absent in other civil proceedings:

i) The proceedings are quasi-inquisitorial. The judge must be satisfied that he has, or at least that he has sought, all the information he needs to discharge the duty imposed on him to find the fairest solution.

ii) The parties owe the court a duty, a duty of full, frank and clear disclosure. The duty is absolute."

120. It is not disputed that in the course of his divorce proceedings, Paul failed to disclose any entitlement under the Will. In the event that the Probate claim succeeds and Paul is thereby entitled to recover substantial monies from Lynne then that will necessarily undermine the fairness of the result of Paul's divorce proceedings. This

Court should be slow to assist Paul in taking advantage of his failure to provide full, frank and clear disclosure in the parallel divorce proceedings.

Prejudice to Paul

121. If the probate claim is dismissed, Paul will be deprived of the opportunity of pursuing his claim to recover Ray's estate from Lynne. However, that lost opportunity must be viewed in the context that:

a. Paul had from the outset sufficient knowledge of the facts constituting his claim. In particular, he knew that Lynne had a copy of the Will, which he could have requested from her, but he chose not to do so. There is no good reason why Paul could and should not have brought the claim very much earlier;

b. Paul has already received some £172,000 by way of a 50% share of the DSB payable under the Scheme. Had the Probate claim been brought promptly, this would have been a highly relevant consideration for the Trustees such that it is likely in my judgment that Lynne would have been awarded the whole of the DSB in light of (i) Paul receiving the Property and (ii) the resulting housing needs of Lynne and her children; and

c. In the event of Paul successfully recovering the assets received by Lynne from Ray's estate, there is a realistic prospect of Paul's former wife applying to set aside the final order made in the financial remedies proceedings on their divorce. The Family Procedure Rules, Practice Direction 9A provides that "…. The grounds on which a financial remedy order may be set aside….. include…. material non-disclosure…". Consequently, Paul would potentially be exposed to further costly and acrimonious satellite litigation involving his former wife.

Conclusion

122. The sole purpose of the present claim is to revoke the letters of administration and thereby enable Paul to obtain a grant of confirmation in his own favour and seek to recover from Lynne the estate assets she received many years ago.

123. Lynne has raised a defence of laches to any such recovery claim.

124. On balance, and having read/heard the parties' evidence at this trial of the preliminary issue of laches, I find that any subsequent recovery claim is bound to fail. It would now be unconscionable for Paul to recover from Lynne the estate assets she has received and having regard in particular to:

a. The very significant delay on the part of Paul in prosecuting the claim;

b. The absence of any good reason for the delay. Paul sought to explain that delay primarily on the basis that Lynne refused from the outset to provide him with a copy of the Will, which forced him to spend some 5 years seeking to obtain the Will from other sources. I have found that (i) Paul deliberately chose not to request a copy of the Will from Lynne, and (ii) had Paul requested a copy of the Will, Lynne would have provided it;

c. The conduct of Paul in deliberately concealing the claim from both (i) Lynne, who completed the administration of Ray's estate acting in accordance with the professional advice that she received including that the Will was not valid, which particular piece of advice was communicated to Paul early on and (ii) his former wife during the course of the parallel divorce proceedings in breach of his ongoing duty of full and frank disclosure; and

d. The substantially greater prejudice that would be suffered by Lynne in allowing the claim to proceed;

125. Having decided the preliminary issue in favour of Lynne and having regard to the fact that Ray's estate has been fully distributed, it would serve no useful purpose and would be wholly contrary to the overriding objective of dealing with cases justly and at proportionate cost to allow the present claim to continue.

126. The claim is dismissed.