Neutral Citation Number: [2023] EWHC 1234 (Ch)

Claim No. PT-2019-000932
Appeal No. CH-2022-000200

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 23rd May 2023

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

BRIGITA MORINA — **Claimant**

and

(1) CATHERINE MAIREAD MCALEAVEY — **Defendants**
(2) WILLIAM JEREMY GORDON
(ACTING AS JOINT ADMINISTRATORS PENDING SUIT OF THE ESTATE OF VLADIMIR ALEKSEYEVICH SCHERBAKOV, DECEASED)
(3) ELENA NIKOLAYEVNA SCHERBAKOVA
(4) OLGA VLADIMIROVNA SCHERBAKOVA
(5) ALEXANDER SCHERBAKOV
(6) AB
(A CHILD, ACTING BY HIS LITIGATION FRIEND, ELENA BUCHEN)
(7) BC
(A CHILD, ACTING BY HER LITIGATION FRIEND, ELENA BUCHEN)

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Hodge Malek KC and James Potts (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the Claimant
Emma Hargreaves (instructed by **Fieldfisher LLP**) for the Fourth and Fifth Defendants

Hearing dates: 26th and 27th April 2023

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on 23rd May 2023 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on (i) an application to strike out, (ii) an application for permission to amend, (iii) an application, so far as the same may be required, for permission to appeal against an order of Deputy Master Teverson made on 13th October 2022, and, subject to the grant of permission to appeal, (iv) the substantive appeal against that order.

2. All of these various matters were directed to come before the court at a single two day hearing. The hearing was listed before me. This is my judgment consequential on the hearing.

3. Not all the parties involved in the case appeared at this hearing. The parties who appeared were the Claimant, represented by Hodge Malek KC and James Potts, and the Fourth and Fifth Defendants, represented by Emma Hargreaves. I am most grateful to all counsel for their helpful written and oral submissions in relation to what is something of a tangle of issues on the statements of case.

4. In order properly to identify the matters which I have to decide in this judgment, it is necessary, as briefly as possible (i) to identify the parties to this dispute, (ii) to explain, as briefly as possible, what the dispute is about, (iii) to identify the particular claim in the dispute with which I am concerned and (iv) to set out the procedural history which has resulted in the applications and appeal which are before me.

5. For reasons which will become apparent later in this judgment, it is important to spell out that I am not, in this judgment, making any findings of fact in relation to factual matters which are not agreed between the parties. Nor, save to the extent that I may decide that it is appropriate to do so in this judgment, am I making any decisions on the substantive (as opposed to procedural) issues between the parties in this case.

The parties

6. Where I need to refer to the principal individuals in this case on an individual basis, I will use first names. It will be understood that I intend no discourtesy by this form of description.

7. The dispute in this case concerns the estate of the late Vladimir Alekseyevich Scherbakov (**"Vladimir"**), a Russian born businessman, who died in Belgium on 10th June 2017. It appears that Vladimir was a wealthy man, and left a substantial estate (**"the Estate"**), with assets in various jurisdictions.

8. Elena Nikolayevna Scherbakova (**"Elena"**) is the former wife of Vladimir. They were married in Russia on 19th July 1989. There is a dispute as to whether their marriage was dissolved in Russia in 1991 or, as Elena claims, in Belgium in 2015-2016. Vladimir and Elena had two children, Olga Vladimirovna Scherbakova and Alexander Scherbakov, who are both now adults (**"the Adult Children"**). Elena is currently in prison in Russia, having been convicted, in Russia, on what I understand to have been charges of attempted fraud and sentenced to six years of imprisonment.

9. Prior to his death Vladimir was also in a relationship with Brigita Morina (**"Brigita"**). Brigita's case is that the relationship commenced in November 2010, and continued until Vladimir's death. There is a dispute over the duration of the relationship. For present purposes it is sufficient to record that Vladimir and Brigita had two children together, a son born in 2014 and a daughter born in 2016 (**"the Minor Children"**). Brigita also has a son from a previous relationship, born in 2009. Brigita's case is that Vladimir treated her son from her previous relationship as his own son, and had wished formally to adopt him.

The actions

10. The dispute over the Estate has generated two actions. In the first action (**"the Probate Action"**) Brigita, in her own capacity and as litigation friend to her two sons, seeks an order for the grant of probate in solemn form of a will dated 28th October 2015 (**"the English Will"**) or a copy thereof. The English Will states that it affects all of the Estate, with the exception of property situated in Russia. The Defendants to the Probate Action are Elena, the Adult Children, Brigita's daughter with Vladimir (who was born after the date of the English Will), Chan Shee Chow (**"Mr Chan"**), a business associate of Vladimir and a co-executor with Brigita of the English Will, and William Gordon and Catherine McAleavey (**"the Joint Administrators"**), who have been appointed as administrators pending suit of the Estate in England, and also as interim administrators of the Estate in the British Virgin Islands (**"the BVI"**) and Singapore. The case number of the Probate Action is PT-2018-000247.

11. The second action (**"the KPHL Action"**) concerns a dispute over the ownership of shares in a company known as Key Platinum Holdings Limited (**"KPHL"**). KPHL is a BVI company incorporated in the BVI on 23rd October 2013. Brigita is the sole Claimant in the KPHL Action. By her Re-Amended Particulars of Claim, Brigita seeks a declaration that she is the absolute beneficial owner of the shares in KPHL (**"the KPHL Shares"**), either solely or, in the alternative, jointly with the Minor Children. The case number of the KPHL Action is PT-2019-000932.

12. The Defendants to the KPHL Action are the Joint Administrators, Elena, the Adult Children and the Minor Children. The active Defendants in the KPHL Action are the Adult Children, who deny that Brigita or the Minor Children had any interest in the KPHL Shares. The Adult Children are supported in this denial by Elena, but Elena has not recently taken an active part in the KPHL Action. As noted above, she continues to be imprisoned in Russia.

13. The Probate Action and the KPHL Action (together **"the Actions"**) are being case managed together and are listed for trial together in October 2023. In this judgment I am only concerned with the KPHL Action.

The essential issues in the KPHL Action

14. The statements of case in the KPHL Action are lengthy, and have been much amended. For the purposes of this judgment it is only necessary to give a very short summary of the essential issues between the active parties in the KPHL Action; that is to say Brigita on the one side, and the Adult Children on the other side.

15. Brigita's claim to a beneficial interest in the KPHL Shares essentially rests on the following transactions (**"the Transactions"**), by reason of which it is said that the beneficial interest in the KPHL Shares came to be vested in Brigita:
    (1) A declaration of trust dated 8th January 2015 (**"the 2015 Declaration**") by which the legal owner of the KPHL Shares, Mr Chan (the business associate of Vladimir mentioned above) declared that he held the KPHL Shares on trust for Brigita.
    (2) A declaration of trust dated 14th May 2015 **("the May 2015 Declaration**") by which a Ms Afendyk, to whom Mr Chan had transferred the legal title to the KPHL Shares on or about 16th February 2015, declared that she held the KPHL Shares on trust for Brigita. Ms Afendyk is described, on Brigita's case, as a trusted family housekeeper.
    (3) A transfer by Ms Afendyk, made on or about 17th September 2015, of legal title to the KPHL Shares to Brigita.
    (4) A deed of gift bearing the date 20th September 2015 (**"the Deed of Gift**"), but which is said to have been drafted in 2016 and signed by Vladimir on a date after 23rd January 2017.

16. The grounds on which the Adult Children deny this claim can be summarised as follows:
    (1) For various reasons of BVI and Swiss law, Vladimir's beneficial interest in the KPHL Shares was never the subject of a valid assignment or transfer to Brigita.
    (2) Alternatively, any such assignment or transfer which would otherwise have been effective should be inferred either to have been part of an arrangement pursuant to which Brigita was to hold the KPHL Shares as a nominee for Vladimir or to have been a sham.
    (3) Alternatively, and if Vladimir did transfer the beneficial interest in the KPHL Shares to Brigita in his lifetime, the transfer is susceptible to a claim under Section 423 of the Insolvency Act 1986 (**"Section 423"**), and should be set aside.

17. In the present case I am concerned with the case of the Adult Children based upon Section 423 (**"the Section 423 Claim"**).

The Section 423 Claim

18. The Section 423 Claim is pleaded in what is now the Re-Re-Amended Defence and Counterclaim of the Adult Children, at paragraphs 69-69D. The Section 423 Claim was introduced by re-re-amendments dated 8th July 2022. Permission to re-re-amend the Defence and Counterclaim, in order to introduce the Section 423 Claim and to make a couple of other amendments, was granted to the Adult Children by Deputy Master Teverson (**"the Deputy Master"**) by order made on 30th June 2022 (**"the June Order"**), for the reasons set out in a reserved judgment handed down on 30th June 2022 (**"the June Judgment"**).

19. The basic elements of the Section 423 Claim are pleaded in the following terms, in paragraph 69 of the Re-Re-Amended Defence and Counterclaim (italics have been added to all quotations in this judgment):

> *"69. If (which is denied for the reasons pleaded above) Vladimir did divest himself of beneficial ownership of the KPHL Shares prior to his death either (a) in January 2015 at the time of the 2015 Declaration; or (b) in May 2015 at the time of the May 2015 Declaration; or (c) in September 2015 when legal title to the KPHL Shares vested in Brigita; or (d) by virtue of the Deed of Gift (the date of signature of that document being not admitted), such transfer of*

*beneficial ownership is susceptible to a claim under s. 423 of the Insolvency Act 1986 ("**the 1986 Act**") in that:*

(a) it was made for no consideration; and

*(b) it was entered into by him for the purpose of: (a) putting assets beyond the reach of a person who was making, or may at some time make, a claim against him, or (b) otherwise prejudicing the interests of such persons in relation to the claim which they were making or may make ("**the statutory purpose**")."*

20. The original text, which I have quoted above, is in blue in the Re-Re-Amended Defence and Counterclaim. The same applies to other parts of paragraphs 69-69D which I quote below. The bold text and underlining in the above quotation are original.

21. Paragraph 69 then gives particulars of *"the statutory purpose"*. I will use the same expression in order to make reference to the purpose, within the meaning of Section 423(3), which must be proved if the court is to make an order under Section 423. Particulars of the alleged statutory purpose are given by reference to the dates of the Transactions; namely January 2015, May 2015, September 2015 and, in the case of the Deed of Gift, such date on which it was signed by Vladimir (which date is not admitted).

22. For present purposes the important point in relation to the pleading of the statutory purpose is that Vladimir is said to have held the statutory purpose at the times of the Transactions because he believed that claims were being made against him and his assets or might at some time be made against him and his assets by (i) Elena, and/or (ii) the Russian state and/or the Russian Ministry of Interiors. I will refer to the first of these categories of claims by the collective expression **"Elena's Claims"**. I will refer to the second of these categories of claims, comprising what I understand to have been criminal investigations/proceedings in Russia, as **"the Russian State Claims"**. In other words, *"the claim"* referred to in Section 423(3) comprised, in the present case, Elena's Claims and/or the Russian State Claims (together **"the Claims"**). I will use the expression **"the Relevant Dates"** to refer to the dates of the Transactions.

23. The Adult Children are identified as victims of the Transactions, within the meaning of Section 423(5), in the opening part of paragraph 69A, in the following terms:

> *"69A.The Adult Children are each victims of the transaction within the meaning of s.424 of the 1986 Act and thus entitled to make a claim for an order under s.423 in that each of them is a person who is, or is capable of being, prejudiced by the transaction by virtue of the diminution in the value of Vladimir's BVI Estate (and his estate more generally) caused by the transfer of the KPHL Shares out of Vladimir's ownership; this is because:"*

24. The relief sought by the Adult Children by the Section 423 Claim is pleaded in the following terms, in paragraph 69C:

> *"69C.In the premises, the Adult Children seek orders (in the alternative to their primary case) under ss. 423(3) and/or 425(1) of the 1986 Act:*
>
> (1) *setting aside the transfer of beneficial ownership of the KPHL Shares to Brigita;*
>
> (2) *requiring Brigita to transfer the KPHL Shares absolutely to the First and Second Defendants in their capacity as administrators of Vladimir's BVI Estate (alternatively to such other person or persons*

who shall at the relevant time be administering Vladimir's BVI Estate); and

(3) *requiring Brigita to reimburse Vladimir's BVI Estate for any sums which she has received by way of dividend on the KPHL Shares including interest at such rate and for such period as the Court thinks fit, with payment to be made to the First and Second Defendants in their capacity as administrators of Vladimir's BVI Estate (alternatively to such other person or persons who shall at the relevant time be administering Vladimir's BVI Estate)."*

25. An order to this effect is sought in the Prayer to the Re-Re-Amended Counterclaim.

The June Judgment and the June Order

26. The application for permission to make the re-re-amendments to the Defence and Counterclaim was made by the Adult Children by application notice dated 15th June 2022. This application (**"the June 2022 Amendment Application"**) came before the Deputy Master for argument on 21st and 22nd June 2022, together with two other case management applications (**"the June Hearing"**). As I have mentioned, the Deputy Master's decision on the various applications was handed down, in the form of the June Judgment, on 30th June 2022. In the remainder of this judgment references to the paragraphs of the June Judgment are given as [JJ/1], for paragraph 1 of the June Judgment, and so on.

27. According to [JJ/48], the June 2022 Amendment Application was resisted in part. The application to amend in order to introduce the Section 423 Claim was opposed *"solely on the grounds that the proposed amendments had not properly or sufficiently particularised the case."*.

28. At the hearing before the Deputy Master, in June 2022, one of the arguments which was advanced by leading counsel for Brigita was that in order to plead the Section 423 Claim adequately, it was necessary for the Adult Children to plead that the relevant claim or claims referred to in Section 423(3) were claims *"with substance"*, not claims of *"fantasy or fabrication"*. The quotations are from the submissions of leading counsel for Brigita, as recorded in the transcript of the second day of the June Hearing (22nd June 2022).

29. The Deputy Master dealt with this argument in the June Judgment. Given that the relevant part of the June Judgment is said by the Adult Children to have created an issue estoppel in relation to this argument, I will defer consideration of what the Deputy Master said to a later stage in this judgment. For present purposes it is sufficient to record that the Deputy Master granted permission to add the Section 423 Claim, in the terms of the draft Re-Re-Amended Defence and Counterclaim produced by the Adult Children. The Deputy Master concluded the relevant part of the June Judgment in the following terms, at [JJ/70]:

> *"70. Looking at the matter more broadly, I take the view that permission should be given to the Adult Children to introduce an alternative case under Section 423. I consider that the claim as pleaded with the one amendment I have indicated is sufficiently clear to enable the claimant to respond to it. In that response, any points can be taken relating to the merits of the plea under Section 423."*

30. So far as the June Order was concerned, paragraph 6 of the June Order granted the Adult Children permission to amend in the terms of the draft Re-Re-Amended Defence and Counterclaim, subject to one minor and (for present purposes) irrelevant deletion. Paragraph 8 of the June Order granted Brigita permission to make consequential amendments to what was then her Re-Amended Reply and Defence to Counterclaim in the KPHL Action.

The September Judgment and the October Order

31. The continuing case management disputes between the parties returned for a further hearing before the Deputy Master on 22nd July 2022. On this occasion the Deputy Master was called upon to decide, in the KPHL Action, whether additional issues for disclosure should be approved and whether permission should be granted for further expert evidence, as a consequence of the re-re-amendments for which the Deputy Master had granted permission by the June Order. The Deputy Master also had to deal with an additional issue concerning disclosure in the KPHL Action and the Probate Action, but this additional issue is not relevant for the purposes of this judgment.

32. The Deputy Master gave his decision on these issues by a judgment (**"the September Judgment"**) handed down on 14th September 2022. In the remainder of this judgment references to the paragraphs of the September Judgment are given as [SJ/1], for paragraph 1 of the September Judgment, and so on.

33. At [SJ/20-21] the Deputy Master identified the additional issues for disclosure in the following terms:

> *"20. The first issue sought to be added to the DRD is:-*
> *Issue 33:*
> *"When did Vladimir and Elena divorce? Was the 1991 Divorce Certificate valid and effective?"*
> *The second issue is:-*
> *Issue 34:*
> *"What was the nature of the alleged claim by the Russian state/Ministry of Interiors against Vladimir of which Vladimir was notified in November 2014? What were Vladimir's views on the merits of the claim?"*
>
> *21. Issue 33 is in the same form as Issue 1 in the DRD as it was before the court at the first case management conference held before me between 7 and 9 February 2022 (the CMC DRD"). One of the issues heard before was whether issues 1 to 4 of the CMC DRD should be issues for disclosure."*

34. The Deputy Master decided that Issue 34 should be permitted, but that Issue 33 should not be permitted. The Deputy Master expressed his conclusions on this question in the following terms, at [SJ/38-39]:

> *"38. It will be open to Brigita to plead in answer to the section 423 claim that Vladimir did not procure the transfer of the shares in KPHL to her to defeat such a claim. It is Vladimir's purpose at the time of the transfer of the shares that is relevant. I accept that Vladimir's view as to the merits of the claim could be relevant. A transferor may believe that a claim is devoid of actual merit but still regard it as a threat to his assets if for example the claimant is well-resourced. The issue for disclosure is what Vladimir believed at the time in relation to Elena's matrimonial property rights and whether the shares in KPHL were transferred to defeat those perceived rights.*

39. In my judgment, the introduction of an alternative claim under section 423 into the KPHL does not require the court to determine the validity of the Russian divorce. The Russian Divorce Certificate is dated some 24 years before the KPHL shares were transferred to Brigita. Brigita cannot deny that as a matter of fact Elena brought divorce proceedings against Vladimir in Belgium in 2015 and 2016."

35. So far as additional expert evidence was concerned, the Deputy Master dealt with this question at [SJ/43-44]. It is easiest simply to set out what the Deputy Master said:

"43. In addition, Brigita seeks permission for the Claimants and Elena and the Adult Children to have permission to adduce oral and written expert evidence in the field of

(a) Russian law to address:-

(i) Whether the 1991 Divorce Certificate is valid or invalid and/or has effect or no effect;

(ii) Whether the alleged marriage contract dated 14 December 2011 between Vladimir and Elena is valid or invalid and/or has effect or no effect;

(iii) What claim (if any) did the Russian state and/or the Russian Ministry of Interiors have to Vladimir's assets as part of their investigation into Vladimir's affairs; and

(iv) What was the nature and effect of the claim (if any) by the Russian state and/or the Russian Ministry of Interiors against Vladimir;

And (b) Belgian law to address:

Whether, if the 1991 Divorce Certificate was valid as a matter of Russian law, Elena had any claim to Vladimir's assets between 2015-2016 (or at all) under the marriage contract dated 14 December 2011 or under article 1287 of the Belgian Judicial Code.

44. For the reasons set out above and in the March Judgment, I do not consider it necessary for there to be expert evidence on any issue relating to the validity or effect of the 1991 Divorce Certificate. I consider that it is premature to decide whether to grant permission for expert evidence in relation to the Russian state claims or their nature and effect. That issue should be considered once Brigita has pleaded in response to the section 423 claim."

36. These decisions were embodied in an order of the Deputy Master made on 13th October 2022 (**"the October Order"**), following a further hearing that day. The relevant paragraphs of the October Order are 1, 4, 17 and 18, which provided as follows (the bold print is original):

"1. The following additional issue for disclosure in the KPHL Claim proposed by Brigita Morina is not approved:

"When did Vladimir and Elena divorce? Was the 1991 Divorce Certificate valid and effective?"

*"4. Without prejudice to the last recital of this Order, the parties to the KPHL Claim do not have permission to adduce expert evidence in the following fields (the "**Relevant Foreign Law Issues**"):*

4.1. Russian law to address:

4.1.1. Whether the 1991 Divorce Certificate is valid or invalid and/or has effect or no effect;

4.1.2. Whether the alleged marriage contract dated 14 December 2011 between Vladimir and Elena is valid or invalid and/or has effect or no effect;

4.2. Belgian law to address whether, if the 1991 Divorce Certificate was valid as a matter of Russian law, Elena had any claim to Vladimir's assets between 2015-2016 (or at all) under the alleged marriage contract dated 14 December 2011 or under article 1287 of the Belgian Judicial Code."

"17. Brigita Morina shall pay one third of the Adult Children's costs of and occasioned by the hearing on 22 July 2022, to be assessed on the standard basis, if not agreed."

"18. Brigita Morina shall pay £3,000 to the Adult Children on account of her liability under paragraph 17 of this Order by 27 October 2022."

37. One other matter which was left outstanding by the October Order was the question of whether permission for experts in Russian law on certain other issues should be granted. The Deputy Master dealt with this question (**"the Expert Evidence Question"**) in the following terms, at paragraphs 5 and 6 of the October Order (the bold print is original):

*"5. The question of whether permission should be granted for expert evidence from Russian law experts on the following issues (the "**Russian State Claim Issues**") shall be stood over to a further hearing:*

5.1. What claim (if any) did the Russian state and/or the Russian Ministry of Interiors have to Vladimir's assets as part of their investigation into Vladimir's affairs; and

5.2. What was the nature and effect of the claim (if any) by the Russian state and/or the Russian Ministry of Interiors against Vladimir.

6. The parties shall seek to discuss and agree whether the question of expert evidence on the Russian State Claim Issues shall be heard and determined before, at the same time as or after the Strike Out Application by 4pm on 20 October 2022. If no agreement is reached, Brigita Morina and the Adult Children shall seek a determination of this matter by way of a joint written request to Deputy Master Teverson by 4pm on 3 November 2022."

<u>The applications and the appeal</u>

38. Brigita served her Re-Re-Amended Reply and Defence to Counterclaim, in response to the Re-Re-Amended Defence and Counterclaim of the Adult Children on or about 21st September 2022. The Re-Re-Amended Reply and Defence to Counterclaim contained, at paragraphs 20A-20E, Brigita's response to the Section 423 Claim. This response was lengthy and denied, on a number of grounds, that the Adult Children were entitled to relief under Section 423.

39. By application notice dated 12th October 2022 (**"the Strike Out Application"**) the Adult Children applied to strike out the bulk of paragraphs 20A.9-20A.18 on the basis that they disclosed no reasonable grounds for defending the Section 423 Claim, and were an abuse of the process of the Court or were otherwise likely to obstruct the just disposal of the proceedings, pursuant to CPR 3.4(2)(a) and/or (b). The parts of the Re-Re-Amended Reply and Defence to Counterclaim which were under attack were identified by blue shading on a copy of the Re-Re-Amended Reply and Defence to Counterclaim which was attached to the application notice.

40. By appellant's notice dated 3rd November 2022 Brigita sought permission to appeal against paragraphs 1, 4, 17 and 18 of the October Order. I will use the expression **"the Appeal"** to refer generally to the application for permission to appeal and (subject to the grant of permission to appeal) the substantive appeal, unless it is necessary to distinguish between the permission application and the substantive appeal. I should also mention that the Adult Children have filed a respondent's notice in relation to the Appeal, dated 16th March 2023. In that respondent's notice there was also included an application to rely on further documents which had not been before the Deputy Master at the hearing before the Deputy Master on 22nd July 2022.

41. By an order made on 8th November 2022 the Deputy Master directed that the Strike Out Application should be heard and determined together with the Expert Evidence Question and the application for permission to appeal.

42. By an order made on 22nd February 2023 Fancourt J directed that the application for permission to appeal should be heard before a High Court Judge, with the appeal to follow (if permission was granted and if time permitted) at the same time as the Strike Out Application. It is not entirely clear to me how the order of 22nd February 2023 fits together with the earlier order of the Deputy Master of 8th November 2022, but this does not seem to me to matter. The relevant point is that the Strike Out Application, the Expert Evidence Question and the Appeal have all been directed to be heard at this hearing before me.

43. Much more recently, by application notice dated 18th April 2023, Brigita has made an application to make further amendments to her Re-Re-Amended Reply and Defence to Counterclaim (**"the April 2023 Amendment Application"**). The parties were agreed that I should deal with the April 2023 Amendment Application in this hearing. The application notice was accompanied by a draft Re-Re-Re-Amended Reply and Defence to Counterclaim which shows, in yellow, the re-re-re-amendments for which permission is sought by the April 2023 Amendment Application. The position of the Adult Children is that permission should not be granted for the bulk of these proposed amendments.

44. I should also mention that the application notice, by which the April 2023 Amendment Application was made, included an application, in relation to the Appeal, to rely on a witness statement (with accompanying exhibit) of Brigita's solicitor, Justin Michaelson, dated 25th November 2022. The application notice also included an application for directions consequential upon the grant of permission to re-re-re-amend.

45. At this hearing the parties were agreed that the Expert Evidence Question should be deferred, to be dealt with after my decision on the Strike Out Application, the Appeal and the April 2023 Amendment Application. The parties were also agreed that both limbs of the Appeal, namely the permission application and the substantive appeal, should be argued and determined together, subject of course to the point that the substantive appeal only arises for decision if permission is granted. The parties were also agreed that I should be able to consider, for all purposes, the documents which were the subject of the rival applications of the parties to rely on those documents in the Appeal.

46. The net result of all this is that the matters which I am deciding in this judgment are as follows:
    (1) the Strike Out Application,

(2) the Appeal,
(3) the April 2023 Amendment Application.

47. The issues raised by the Strike Out Application and the April 2023 Amendment Application (together **"the Applications"**) and the Appeal overlap. For this reason it is necessary to start by explaining what these issues are. It is also convenient, for the purposes of identifying these issues, to make reference to the draft Re-Re-Re-Amended Reply and Defence to Counterclaim which shows, in blue coloured (not blue shaded) text, the re-re-amendments which were made in response to the Re-Re-Amended Defence and Counterclaim of the Adult Children, and also shows, in yellow coloured text, the re-re-re-amendments for which permission is sought by the April 2023 Amendment Application. In the remainder of this judgment I will adopt the following rubric for making reference to the draft Re-Re-Re-Amended Reply and Defence to Counterclaim and its contents:
    (1) References to **"the Statement of Case"** mean the draft Re-Re-Re-Amended Reply and Defence to Counterclaim.
    (2) References to Paragraphs, without more and unless otherwise indicated, are references to the paragraphs of the Statement of Case.
    (3) Where it is necessary to distinguish between the blue text, which comprises part of the existing Re-Re-Amended Reply and Defence to Counterclaim, and the yellow text, which comprises the additional pleadings for which permission is sought by the April 2023 Amendment Application, I will make this clear by a reference to **"blue text"** or, as the case may be, **"yellow text"**. References to the yellow text include any parts of the existing Re-Re-Amended Reply and Defence to Counterclaim shown as struck through in the Statement of Case. It should also be noted that the blue text refers to text coloured blue, not to text shaded blue. I make this distinction because the application notice, by which the Strike Out Application was made, shows those parts of the Re-Re-Amended Reply and Defence to Counterclaim which are under attack in the Strike Out Application by blue shading.

The issues raised by the Applications and the Appeal

48. Paragraph 20A.9 is in the following terms (the yellow text is shown by bold print):

> *"20A.9. It is averred that in order to establish the Court's jurisdiction to set aside the transfer of the Shares under s.423, the Adult Children must establish that, on each of the relevant dates relied upon by the Adult Children, the Russian State and/or Elena had a claim or potential claim:*
>
> *20A.9.1. which stood a realistic prospect of success; and*
>
> *20A.9.2. which, if successful, stood a realistic prospect of being successfully enforced against the Shares.*
>
> *The~~se~~ matters **in paragraphs 20A.10 to 20A.18 below** will also be relied upon to support the Claimant's case that the inferences the Adult Children ask the Court to make as to Vladimir's purpose in vesting the beneficial ownership of the Shares in Brigita should not be made. **Throughout the period from 2014 to his death, Vladimir had access to legal advice when he needed it, so it should be inferred that he was subjectively aware that any claim or potential claim against him by the Russian State and/or Elena stood no realistic prospect of success and/or no realistic prospect of successfully being enforced against the Shares.**"*

49. As can be seen there are essentially two contentions in this paragraph:
    (1) First, it is contended that the court has no jurisdiction to set aside a transfer of the KPHL Shares pursuant to Section 423 unless it can be established, on the Relevant Dates (the dates of the Transactions), that the Claims had a realistic prospect of success and, if successful, had a realistic prospect of being successfully enforced against the KPHL Shares. Although this is not apparent from this part of Paragraph 20A.9, Paragraphs 20A.10 - 20A.18 then set out a series of matters relied upon in support of this contention.
    (2) Second, it is contended that the matters set out in Paragraphs 20A.10-20A.18 demonstrate that the inferences which the Adult Children ask the court to draw as to Vladimir's purpose in vesting beneficial ownership of the KPHL Shares in Brigita (assuming such vesting occurred) should not be drawn.

50. So far as the first of these contentions is concerned, the Adult Children contend that there is no requirement to demonstrate, for the purposes of seeking relief under Section 423, that the claim or claims referred to in Section 423(3) have a realistic prospect of success or indeed any prospect of success, either in terms of the outcome of the relevant claim or in terms of the enforcement of the relevant claim. On this basis the Adult Children seek the striking out of the first part of Paragraph 20A.9 and, consequentially, Paragraphs 20A.10-20A.18. In relation to Paragraphs 20A.10-20A.18 my understanding is that the Strike Out Application is not directed to the entirety of these Paragraphs, but only to those parts of these Paragraphs shown shaded blue on the copy of the Re-Re-Amended Reply and Defence to Counterclaim attached to the application notice by which the Strike Out Application has been made. It should be added that the blue shaded text comprises the bulk of Paragraphs 20A.10-20A.18, as they are currently pleaded. In the remainder of this judgment my references to Paragraphs 20A.10-20A.18 do not include the blue text which is not blue shaded. As I understand the position, this non-blue shaded text is not under attack in the Strike Out Application. So far as what is now the yellow text in Paragraphs 20A.10-20A.18 is concerned, I understand that the Adult Children contend that permission to amend should not be granted for the yellow text, on the same basis.

51. This particular issue was referred to in the submissions on behalf of Brigita as *"the No Claim Issue"*. I do not think that this is the correct description of this particular issue, as it implies that a claim will be sufficient to qualify as a claim under Section 423(3) if it has some kind of existence. Brigita's pleaded case, in Paragraph 20A.9, is that the relevant claim must have a realistic prospect of success, both in terms of outcome and enforcement. I will therefore refer to this issue as **"the Realistic Claim Issue"**.

52. So far as the second of the above contentions is concerned, the Adult Children object to the pleading of the second part of Paragraph 20A.9 (both the blue text and the yellow text) and to the consequential pleading of Paragraphs 20A.10-20A.18 on two bases, as follows:
    (1) First, it is said that these parts of the Statement of Case are not properly particularised, either in terms of what Vladimir is alleged to have known about the Claims and their merits on the Relevant Dates or in terms of what legal advice Vladimir is said to have received, and from whom, or in terms of what Vladimir is alleged to have known of the matters pleaded in Paragraphs 20A.10-20A.18 on the Relevant Dates. On this basis the Adult Children say these parts of the Statement

of Case should be struck out, so far as they contain blue text, or should not be the subject of a grant of permission to amend, so far as they contain yellow text.

(2) Second, it is said that a number of the matters pleaded in Paragraphs 20A.10-20A.18 postdate the Relevant Dates and, in some cases, Vladimir's death. As such, so it is contended, such matters cannot possibly be probative of Vladimir's intentions on the Relevant Dates. Accordingly, the relevant material should either be struck out or, as the case may be, should not be the subject of a grant of permission to amend.

53. I will use the collective expression **"the Particularisation Issue"** to refer to the issues outlined in my previous paragraph.

54. There is also a specific objection made by the Adult Children to Paragraph 20A.15, which forms part of the blue text, and is in the following terms:

> *"20A.15. Further or alternatively, it cannot have been the legislative intent of s.423 Insolvency Act 1986 to protect the interests of a foreign state pursuing a sovereign claim which is unenforceable in England as a matter of public policy. Any intention to avoid or prejudice such a claim is not a relevant intention for the purposes of s.423."*

55. The specific objection is that this Paragraph should be struck out, on the basis that there is no warrant in the statutory language for an exception of this kind within Section 423. The fact that a claim may be unenforceable in this jurisdiction, as a matter of public policy, does not mean, so it is said, that such a claim cannot qualify as a claim for the purposes of Section 423(3). This specific objection is made without prejudice to the overall objections to Paragraphs 20A.10-20A.18, by virtue of their relationship with Paragraph 20A.9. I will refer to the issue raised by this objection as **"the Policy Issue"**.

56. There is also what I understand to be a further specific objection made by the Adult Children to Paragraph 20A.16.4, which is in the following terms (the yellow text is shown in bold):

> *"20A.16.4. The falsity of the 2011 Marriage Contract is relied upon by the Russian Ministry of Internal Affairs, who* ~~***have***~~ *instituted a criminal investigation into Elena's fraud under Part 3 of Article 30 and Part 4 of Article 159 of the Criminal Code of the Russian Federation pursuant to which Elena was arrested and detained in Russia on 29 March 2021 and accused of attempting illegally to appropriate shares in Omega Holdings LLC by relying on the invalid 2011 Marriage Contract.* ***Elena was convicted of those charges by a Verdict of the Koptevsky District Court, Moscow, on 20 December 2022.*** *Further, Elena's claim in the Koptevsky District Court, Moscow, by which she sought to challenge Vladimir's transfers of shares in Omega Holding LLC to Ms Oksana Oreshina on the basis of the 2011 Marriage Contract, was dismissed on 14 February 2019 and Elena's appeal against such dismissal was refused by the Moscow City Court on 14 September 2019;"*

57. The specific objection is to permission being granted for the amendment comprised in the yellow text. This objection is also made without prejudice to the overall objections to Paragraphs 20A.10-20A.18, by virtue of their relationship with Paragraph 20A.9. The

specific objection is made on the basis that Elena's conviction in Russia, which is relied upon in the yellow text in this particular Paragraph, is a criminal conviction in a foreign court, which is inadmissible in this jurisdiction as evidence of any facts found in that conviction. Accordingly, it is contended that permission to amend should not be granted in respect of the yellow text in this Paragraph. I will refer to the issue raised by this objection as **"the Inadmissibility Issue"**.

58. Moving on from Paragraph 20A, Paragraph 20B.6 (which is all yellow text) is also the subject of specific objection. Paragraph 20B.6 reads as follows:

> *"20B.6 Further or alternatively, any right or interest held by the Adult Children that was prejudiced or capable of being prejudiced by the transfer arose only after any prospect of a "claim" under s.423(3) (if there ever was such a claim or potential claim, contrary to paragraphs 20A.9 to 20A.18 above) had irrevocably ended: (1) in April 2017, Vladimir was informed that the Russian investigation was going to be dropped (as confirmed by the termination decision on 22 June 2017); and (2) the Belgian divorce compromised any matrimonial claims which Elena may have had."*

59. The objection is that the case pleaded in Paragraph 20B.6 is unsustainable, both as a matter of law and as a matter of fact. As such, it is contended that permission to amend should not be granted for this Paragraph. I will refer to the issue raised by this objection as **"the No Prospect Issue"**.

60. The final objection relates to Paragraph 20E, which is in the following terms (the yellow text is shown in bold):

> *"20E. It is denied that the Adult Children are entitled to the relief sought in paragraph 69C or to any relief under s.423 to 425 of the Insolvency Act 1986.* ***The Court should refuse to grant the relief sought and/or any relief in its discretion because:***
>
> ***20E.1 Ms Morina received beneficial ownership of the Shares in good faith.***
>
> ***20E.2 The Court ought not to grant relief for the benefit of the Adult Children in circumstances where: (1) neither the Russian State nor Elena could have obtained a remedy under ss 423 to 425 in respect of the same transaction, for the reasons in paragraphs 20A.10 to 20A.18 above; and/or (2) the Russian investigation was abusive, politically motivated and any claims arising from it would have been unenforceable in England as a matter of public policy; and/or (3) Elena was aware that she had been divorced from Vladimir in 1991, such that any matrimonial claim brought by her would have been a fraudulent or dishonest claim.***
>
> ***20E.3 If the Russian State and/or Elena could ever have brought a "claim" within the meaning of s.423(3), the prospect of any such claim had irrevocably ended before Vladimir's death. Paragraph 20B.6 above is repeated.***
>
> ***20E.4 The Adult Children had no claims on Vladimir or the Shares during his lifetime and, before his death, had no***

more than at most a hope or expectation of legacies from him.

20E.5 The Adult Children (and Elena) have already been well-provided for, and Vladimir believed as such, by inter vivos gifts by Vladimir and under the Belgian divorce, Vladimir's Russian Will dated 15 October 2014, and Vladimir's last Will dated 28 October 2015."

61. The Adult Children accept that the court has a discretion, in terms of granting relief pursuant to Section 423. Their case is however that this discretion is not a general discretion, and is not wide enough to encompass, as relevant matters to be taken into account, any of the matters pleaded in Paragraphs 20E.2-20E.5. As such, it is contended that permission to amend should not be granted in respect of these Paragraphs. I will refer to the issue raised by this objection as **"the Discretion Issue"**.

62. There are also further specific objections to Paragraphs 20E.2 and 20E.3, on the basis of which it is also said that permission to amend should not be granted in respect of these Paragraphs. These further specific objections are as follows:
    (1) The Adult Children say that the matters pleaded in Paragraph 20E.2 are not capable of disqualifying the Claims from being claims for the purposes of Section 423(3). This objection seems to me to raise effectively the same issues as the Realistic Claim Issue and the Policy Issue.
    (2) The Adult Children say that the Paragraph 20E.3 is misconceived on the basis that it repeats what is said to be the unsustainable contention in Paragraph 20B.6. This is therefore effectively the same issue as the No Prospect Issue.

63. Finally, there is the Appeal. The Appeal is made on what is said to be a protective basis. The reason for this is that the Adult Children contend that, so far as the Realistic Claim Issue is concerned, this has already been decided against Brigita by what was decided by the Deputy Master in both the June Judgment and the September Judgment. As such, the Adult Children contend, further or alternatively to their argument in the Strike Out Application that Brigita's pleaded case on the Realistic Claim Issue is simply wrong in law, that Brigita is subject to an issue estoppel which prevents her, in any event, from pleading her case on the Realistic Claim Issue.

64. In an attempt to meet this argument Brigita has instituted the Appeal. The position is a somewhat odd one in relation to the Appeal, for two reasons. First, the issue estoppel is said to arise out of what was said in the June Judgment and, independently, in the September Judgment. There is however no application for permission to appeal against the June Order, and thus no appeal platform which would provide Brigita with the opportunity to challenge what was said by the Deputy Master in the June Judgment. Second, appeals are against orders, not judgments. So far however as the October Order is concerned, it was clear from Mr Malek's submissions that Brigita would, all other things being equal, be prepared to live with the actual case management decisions contained in paragraphs 1 and 4 of the October Order, and with the consequential costs decisions contained in paragraphs 17 and 18 of the October Order. All other things are not equal, because the purpose of the Appeal is to provide a platform by which Brigita can challenge those parts of the September Judgment which are said to give rise to an issue estoppel on the Realistic Claim Issue.

The jurisdiction

65. There was no dispute between the parties as to the correct approach to the Applications and the Appeal, but it is convenient briefly to set out the nature of the jurisdictions which I am exercising.

66. So far as the Strike Out Application is concerned, the Adult Children rely upon paragraphs (a) and/or (b) of CPR 3.4(2), which provides as follows:

> *"(2) The court may strike out a statement of case if it appears to the court—*
>
> *(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;*
>
> *(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;"*

67. Turning to the April 2023 Amendment Application, my attention was drawn to note 17.3.6 in Volume 1 of the White Book 2023. I need not set out the whole of this note. For present purposes, it is sufficient to cite the opening paragraph of this note:

> *"A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation: see Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33 at [18]."*

68. Finally, and in relation to the Appeal, the test for the grant of permission to appeal is contained in CPR 52.6(1):

> *"(1) Except where rule 52.7 applies, permission to appeal may be given only where—*
>
> *(a) the court considers that the appeal would have a real prospect of success; or*
>
> *(b) there is some other compelling reason for the appeal to be heard."*

69. So far as the substantive appeal is concerned, assuming the grant of permission to appeal, the question of whether it arises and, if so, on what terms, depends upon my decision in the Strike Out Application, so far as the Strike Out Application is directed to the Realistic Claim Issue.

70. I come now to my discussion and determination of the various issues which I have to determine on this hearing. It is convenient to take the Applications first, and together, working through each of the Issues which I have identified above. Before doing so, I should briefly make three preliminary points. First, the oral submissions in this hearing occupied the better part of two days, in addition to the written submissions of the parties. It has not been feasible in this judgment to make express reference to all of the submissions which were made to me. They have all been taken into account in the reaching of my decisions in this judgment, whether expressly mentioned or not. Second, and by way of related point, the joint bundle of authorities for this hearing ran to 45 statutes, cases and other legal materials, supplemented by further authorities which were referred to in the oral submissions. Again, it has not been feasible to make express reference to all of these authorities in this judgment. Again, they have all been taken into account in reaching my decisions in this judgment. Third, the bundle of documents for this hearing ran to close to 2,000 pages. Again, it has not been feasible to make express

reference to all of the documents to which I was referred in the submissions. Again, all these documents have been taken into account in reaching my decisions in this judgment.

The Realistic Claim Issue

71. The starting point is Section 423 itself, which provides as follows:

> *"(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if—*
>
> *(a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;*
>
> *(b) he enters into a transaction with the other in consideration of marriage or the formation of a civil partnership; or*
>
> *(c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.*
>
> *(2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for—*
>
> *(a) restoring the position to what it would have been if the transaction had not been entered into, and*
>
> *(b) protecting the interests of persons who are victims of the transaction.*
>
> *(3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose—*
>
> *(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or*
>
> *(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.*
>
> *(4) In this section "the court" means the High Court or—*
>
> *(a) if the person entering into the transaction is an individual, any other court which would have jurisdiction in relation to a bankruptcy petition relating to him;*
>
> *(b) if that person is a body capable of being wound up under Part IV or V of this Act, any other court having jurisdiction to wind it up.*
>
> *(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor" ."*

72. The word *"claim"* appears in subsection (3). It does not have a separate definition, either in Section 423 or elsewhere in the Insolvency Act 1986. A claim is a component element of the statutory purpose which is defined in subsection (3). The statutory purpose exists where a person enters into a transaction of the kind referred to in subsection (1) for the purpose of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or for the purpose of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

73. The question raised by the Realistic Claim Issue is whether it is right that the court only has jurisdiction under Section 423 to set aside a transaction where the party seeking to invoke Section 423 can demonstrate that the relevant claim or potential claim stood a

realistic prospect of success and, if successful, stood a realistic prospect of being successfully enforced against the asset which was the subject of the relevant transaction which is being challenged; see the first part of the Paragraph 20A.9 as quoted above.

74. I remind myself that this issue comes before me on an application to strike out, made pursuant to paragraphs (a) and (b) of CPR 3.4(2). It seems to me that the relevant paragraph in relation to this part of the Strike Out Application is paragraph (a). Accordingly, it must be demonstrated by the Adult Children that Brigita's case in the first part of Paragraph 20A.9, that is to say Brigita's case on the Realistic Claim Issue, is clearly wrong or, to use the language of paragraph (a), demonstrates no reasonable grounds for contending that the court does not have jurisdiction under Section 423 in the present case.

75. A case is not suitable for striking out if it raises issues which need to be investigated at trial. This principle can extend to a case where a new point of law arises for decision, and has to be decided on the basis of assumed rather than actual facts. As a general rule it is not appropriate to strike out a claim on the basis of assumed facts in a developing area of jurisprudence. Decisions as to novel points of law should be based on actual findings of fact; see the judgment of Coulson LJ in *Begum v Maran* [2021] EWCA Civ 326; specifically at [23].

76. In the present case I do not see that there is any difficulty with the court making a decision on the Realistic Claim Issue in advance of the findings of fact in this case. While there is no direct authority on the Realistic Claim Issue which has been cited to me, the point which is raised is one of law, which requires no investigation of the facts of the present case. Nor, as it seems to me, is it necessary to make any particular assumption as to the facts of the present case. Put simply, the question raised by the Realistic Claim Issue is whether the reference to *"claim"* in Section 423(3) means, and only means a claim with a realistic prospect of success, both in terms of outcome and enforcement.

77. I have reached the clear conclusion that Brigita's case on the Realistic Claim Issue is wrong, as a matter of law, and can and should be struck out at this stage. I do not think that the reference to *"a claim"* in Section 423(3) is confined to a claim with a realistic prospect of success or, for that matter, to a claim with any particular degree of prospects of success. All that is required is something which can be described as a claim or a potential claim. The merits of that claim are, in this context, irrelevant. A claim is not disqualified from Section 423(3) because it can be said to have had little or no merit or to have been misconceived. The absence of merit may be relevant to the question of whether the statutory purpose did in fact exist, but I do not think that the merits of the relevant claim or the potential claim constitute a qualifying condition, in terms of what can qualify as a claim for the purposes of Section 423(3). I have reached this conclusion for the following reasons.

78. First, there is nothing in Section 423, either in subsection (3) or elsewhere, to support the argument that the relevant claim must meet any particular standard of merits. All that is required is something which can be described as a claim. Indeed, it is clear from the language of paragraph (a) of subsection (3) that the relevant claim does not even need to exist. It can be a claim which the relevant person may, at some time, make; that is to say a potential claim. In her submissions Ms Hargreaves pointed me to authorities which make it clear that additional wording and additional requirements should not be read into

Section 423. As Leggatt LJ (as he then was) said in *JSC BTA Bank v Ablyazov* [2019] BCC 96, at [14]:

> *"14. The description of the requisite purpose as a "substantial" purpose was not necessary to the decision of the Court of Appeal in the Hashmi case and to my mind it risks causing confusion. The word "substantial" is not used in s.423 and I can see no necessity or warrant for reading this (or any other) adjective into the wording of the section. At best it introduces unnecessary complication and at worst introduces an additional requirement which makes the test stricter than Parliament intended. I agree with the point made in McPherson's Law of Company Liquidation (4th edn, Sweet & Maxwell, 2017), paras 11–116, that there is no need to put a potentially confusing gloss on the statutory language. It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within s.423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that."*

79. In this part of his judgment Leggatt LJ was considering the earlier decision of the Court of Appeal in *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981 [2002] BCC 943. As Leggatt LJ explained, at [15], that earlier decision was very much to the same effect:

> *"15. Arden LJ made this very point in the Hashmi case when she said (at [23]) that "there is no epithet in the section and thus no warrant for reading one in". When later in her judgment she referred (at [25]) to a "real substantial" purpose, it is apparent from the context that the reason for using those adjectives at that point was to underline the distinction between a purpose and a consequence of the relevant transaction. As Arden LJ emphasised, it is not enough to bring a transaction at an undervalue within s.423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties."*

80. Mr Malek argued that his case did not involve the addition of anything to Section 423, but was concerned only with the correct construction of the reference to claim in subsection (3). I do not accept this argument. It seems to me that Mr Malek's argument did involve the introduction of an additional requirement into subsection (3); namely the requirement that the relevant claim or potential claim can be demonstrated to have a realistic prospect of success, both in terms of outcome and enforcement. The authorities make it clear that additions, or glosses of this kind should not be read into Section 423.

81. Second, it seems clear to me that the focus of subsection (3) is upon the statutory purpose, that is to say the purpose which the person making the relevant transaction must have. The focus is not upon the merits of the claim or the potential claim, but upon the

subjective intention of the person making the transaction. What matters is what the transferor subjectively intended at the time of the relevant transaction. This has been made clear in a number of cases; see *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 [2007] 1 WLR 2404, at [86], *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112 [2019] 2 All ER 784, at [66], and *Akhmedova v Akhmedov* [2021] EWHC 545 (Fam) [2021] 4 WLR 88, at [80-83].

82. While it is true that what was said in these cases, in the extracts identified above, was not specifically concerned with the meaning of a claim in subsection (3), it is difficult to see why the relevant claim under subsection (3) has to be shown to have any particular degree of merit, when the focus of subsection (3) is on the subjective intention of the transferor.

83. Third, the construction of subsection (3) contended for by Mr Malek runs into problems with the existing case law. In particular, Mr Malek's construction seems to me to be inconsistent with the decisions of the court, at first instance and in the Court of Appeal, in *Hill v Spread Trustee Co Ltd*. The neutral citation for the first instance decision is [2005] EWHC 336 (Ch).

84. The facts of this case were rather complicated, but need to be understood in order to understand the relevance of this case to the Realistic Claim Issue. In March 1989 a Mr Nurkowski (**"N"**) established an accumulation and maintenance settlement into which he gifted a field (OS 160), adjacent to other land which had the benefit of planning permission. In August 1989 this field was sold for £740,000 to the owner of the adjacent development land. N obtained a valuation of the field as at March 1989 in the sum of £35,000 and submitted that valuation to the Revenue, for capital gains tax purposes in relation to the disposal of the field into the settlement. N had in fact previously received an offer of £700,000 from the owner of the adjacent development land, which he did not disclose to the Revenue. At the same time N also sold a separate field (OS 149), which he had retained in his own name, to the owner of the development land. Following these transactions, the trustees of the settlement made a number of loans to N, and N executed a number of charges of assets in favour of the trustees, by way of security for these loans. N also made an assignment to the trustees of the sums owed to him by his company, by way of loan account. A dispute arose between N and the Revenue in relation to the tax liability arising from the disposal of the field (OS 160) to the settlement in March 1989. In particular, the Revenue did not accept the value of £35,000 submitted by N in respect of this field, and took its own advice on value. Ultimately however the Revenue agreed to compromise all of N's outstanding tax liabilities in the sum of £160,000. This was however followed by a further assessment to tax, in relation to the field (OS 149) sold personally by N in August 1989. N could not pay the assessed amount, and was made bankrupt by the Revenue. At around the same time the trustees of the settlement demanded repayment of the loans they had made to N. The trustee in bankruptcy made a claim for relief under Section 423 against the trustees, seeking the setting aside of the transactions between N and the trustees. The claim for relief was made on the basis that the original settlement, the charges and the assignment were all transactions defrauding creditors; specifically the Revenue.

85. The important point which emerges from the above, much abbreviated summary of the facts of the case is that the position of the Revenue, in relation to N, was uncertain. The Revenue had entered into a compromise of N's outstanding tax liabilities, but the Revenue might seek to set aside that compromise. The Revenue was not a party to the

relevant proceedings, with the consequence that the court was not in a position to make any findings, binding upon the Revenue, as to the legal position of the Revenue in relation to the compromise.

86. It was argued before the judge at first instance that there was no victim in respect of the relevant transaction because the only possible candidate as victim, namely the Revenue, had not been prejudiced by the transaction because it took its own valuation advice and, with full knowledge of that valuation advice, settled its claim for tax against N. The judge did not accept this argument. As the judge at first instance (John Weeks QC sitting as a Judge of the High Court) explained (I do not have page numbers for the report of the first instance decision which I have seen, but the page numbers in the authorities bundle are 250-251):

> *"Miss Newman's other submission is that there was no victim of the transaction. Section 423(5) of the Insolvency Act provides:*
>
> > *"(5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it."*
>
> *The argument is that the Inland Revenue is the only possible candidate for the victim but was not prejudiced by the transaction because it took its own advice from the District Valuer and in full knowledge of his valuation settled its claim for tax against the debtor. This submission, in my judgment, may affect the order I should make under section 423(2) but does not, in my judgment, prevent a finding of prejudice under section 423(3). For the purposes of subsection (3), the matter has to be considered at the time the transaction is entered into: was the purpose to prejudice the interests of an actual or potential creditor? Such a person is referred to as a victim, whether or not he has been actually prejudiced. If he has not been actually prejudiced, it may be, however, that his interests do not need protecting under subsection (2). That is a matter for the form of relief, on which I will hear further submissions."*

87. This decision was upheld by the Court of Appeal. In her judgment in the Court of Appeal Arden LJ (as she then was) explained, at [71- 72], why the case was an unusual one.

> *"71 An unusual feature of this case is that the settlement alone could not prejudice the revenue. It was the failure to reveal the offer of £700,000 made in December 1988 (if made) for the purposes of valuing the land vested in the settlement that was capable of prejudicing the revenue. It would indeed succeed in prejudicing the revenue if it led to an incorrect valuation of the land and that valuation caused the revenue to agree a lower value for it than it would otherwise have done. On the other hand, if there had been no settlement there would have been no charge to tax and no valuation. Mr Nicolson_s valuation was incomplete for the revenue_s purposes since at it took no account of any prior o›er for OS 160. However, the position is further complicated by the fact that the revenue did not rely on Mr Nicolson's valuation but on internal advice as to the value of OS 160. The position is yet further complicated by the fact that the revenue proceeded to enter into a compromise with Mr Nurkowski and to relinquish its claim to assess tax arising out of the gift into settlement. However, the revenue certainly was a form of future creditor by reason of the settlement. Moreover, its position is that in the events which have happened there are still claims to tax and interest of about £270,000 arising out of the gift into settlement, and that the compromise does not prevent these claims from being advanced. The revenue also claims tax pursuant*

to section 739 of the Income and Corporation Taxes Act 1988 as a result of loans made by the trustees to Mr Nurkowski.

72 The judge did not decide whether the revenue was correct about being able to reopen the compromise. Indeed he could not do so in a way that would bind the revenue because the revenue was not a party to the application. He did not, however, dismiss the application on the basis that it had not been shown that the revenue was a victim who still had a claim at the date of the trial. He fashioned the relief in a way which he considered was appropriate to deal with the situation that the revenue might or might be shown later to be a victim in relation to the tax due as a result of the gift into settlement. Whether he gave appropriate relief is not in issue at this stage. The point to be made at this stage is that this is a most unusual case; in the usual situation the bankrupt has entered into a transaction which removes assets from the reach of a creditor or creditors and has a direct effect on their ability to recover their debts, and that creditor or those creditors remain unpaid at the date of the trial. Here, as I have said the settlement did not as such prejudice the revenue and indeed the revenue received a sum which at the time it accepted in full discharge of the tax due in respect of the gift into settlement."

88. Arden LJ then went to explain the scheme of Section 423, at some length, at [101]:

"101 The scheme of section 423 is unusual. Subsection (1) defines the circumstances in which section 423 applies: there must be a transaction at an undervalue as defined. Both gifts and transactions with a gratuitous element are covered. Subsection (2) defines the objects for which the court can grant relief and refers to "victims". Subsection (2) does not set out the circumstances in which the court may grant that relief. Those circumstances appear from subsection (3). Subsection (3) stipulates the purpose with which the transaction must have been entered into before relief can be granted. Subsection (4) identifies the court which can hear a claim under section 423. Subsection (5) defines a "victim" of a transaction defrauding creditors, and it is to be noted that the definition is not restricted to creditors with present or actual debts: whether a person is a victim turns on actual or potential prejudice suffered. The definition of "victim" is employed in relation to the criteria for relief in subsection (2). It is not used in subsection (3), which defines the necessary purpose. The person or persons who fulfil the conditions in section 423(3) may thus be a narrower class of persons than those who at the date of the transaction are victims for the purpose of section 423(5). For a person to be a "victim" there is no need to show that the person who effected the transaction intended to put assets beyond his reach or prejudice his interests. Put another way, a person may be a victim, and thus a person whose interests the court thinks fit to protect by making an order under section 423, but he may not have been the person within the purpose of the person entering into the transaction. That person may indeed have been unaware of the victim's existence. That answers the question: what connection must there be between the purpose and the prejudice? Section 423(2) in conjunction with the definition of victim in section 423(5) makes prejudice or potential prejudice a condition for obtaining relief. That prejudice does not have to be achieved by the purpose with which the transaction was entered into. Nor in my judgment does the purpose have to be one which by itself is capable of achieving prejudice. What subsection (3) requires is that the purpose should be one which is to prejudice "the interests" of a claimant or prospective claimant. The "interests" of a person are wider than his rights. The expression the "interests" of a member in section 459 of the Companies Acts 1985

(right of members of a company to apply for relief against unfair prejudice) have been similarly construed: see for example In re Sam Weller & Sons Ltd [1990] Ch 682, 690. Likewise in Peter Buchanan Ltd v McVey (Note) [1955] AC 516, 521, Kingsmill Moore J of the Supreme Court of Ireland spoke of having to consider the interests of creditors (which included in that case the tax authority in respect of a tax liability triggered by a sale of whiskey stocks), when a dividend is paid by a solvent company, even though those creditors have no right in law to stop a dividend being paid. I do not therefore consider that it is any answer to the application of section 423 in the present case that the settlement did not by itself prejudice the right of the revenue to make an assessment of tax on the disposal of OS 160 to the settlement when it was exported to Guernsey. In my judgment, therefore, where, as in this case, the applicant relies on section 423(3)(b), the crucial step is to identify the interests of the person which are said to be prejudiced."

89. Arden LJ added this, at [102]:

"102 The next question is whether a person can be said to have the necessary purpose if he is completely mistaken as to whether entry into the transaction can have the effect of prejudicing a person's interests. This question assumes a rather exceptional state of affairs where a person has the necessary purpose of putting assets beyond the reach of his creditors and wrongly thinks that if he enters into a transaction at an undervalue (e g gifts property to his wife) his creditor, B, will be prejudiced. If unbeknown to him his wife has agreed to pay the moneys transferred to her to B, the purpose that he had in mind will not be achieved. If the creditor takes the benefit of the transaction solely for himself and refuses to share it out with other creditors, they will be persons who (arguably at least) are prejudiced by the transaction and can constitute victims within section 425(5). Another situation that might occur is where the debtor enters into a transaction knowing that his entry into that transaction, together with the happening of some other event, will prejudice a creditor. I consider that the court does not have to consider the relative causal effect of the two matters. If the transaction is entered into with the requisite purpose, the fact that some other event needs to occur does not mean that the transaction cannot itself be within section 423(3). I consider that this is what the judge meant by his test of whether the transaction was an essential part of the purpose (in which connection he applied his analogy with petrol and matches for a fire). I therefore do not accept Miss Newman's submission that it is necessary to approach section 423 as if a test of causation were to be applied. The right approach in my judgment is to apply the statutory wording. It is enough if the transaction sought to be impugned was entered into with the requisite purpose. It is entry into the transaction, not the transaction itself, which has to have the necessary purpose."

90. Looking, in particular, at what was said by Arden LJ at [102], the statement of the law in [102] does not seem to me to be consistent with an argument that the relevant claim under subsection (3) must be one with a realistic prospect of success. To the contrary, and consistent with the analysis of Arden LJ, it would appear that the merits of the relevant claim are irrelevant. What matters is the subjective intention of the transferor.

91. In relation to *Hill* it seems to me that Ms Hargreaves was right, in her submissions, to stress the nature of the Revenue's position. As Arden LJ pointed out, at [71], the Revenue

was *"a form of future creditor"*. It is clear that Arden LJ, in common with the judge at first instance, had no difficulty in accepting the Revenue's claim as a claim falling within the terms of subsection (3), notwithstanding the contingent and uncertain nature of that claim. None of this is consistent with the argument that it had to be demonstrated that the claim had a realistic prospect of success.

92. Fourth, and by way of related reason, it is difficult to see how a requirement to show realistic prospects of success can be applied in practice to claims under Section 423. This is illustrated by two cases to which I was referred.

93. The first of these cases, *Midland Bank v Wyatt* [1997] 1 BCLC 242, was concerned with the question of whether a declaration of trust made by Mr Wyatt in favour of members of his family in respect of his beneficial interest in the family home could be relied upon in priority to a charging order obtained by the bank in respect of any beneficial interest which Mr Wyatt had in the family home. One of the issues which arose was whether the declaration of trust, disposing of the beneficial interest in the family home, could be set aside pursuant to Section 423.

94. As the judge (David Young QC sitting as a Deputy Judge of the High Court) explained, at page 253 of the report, the case was not one where Mr Wyatt had entered into the declaration of trust with any particular claim in mind:

> *"As of June 1987, Mr Wyatt was of sound financial standing, as I have already stated (see Facts para (9), above) and whilst he was still employed by Whitehead Fabrics he was contemplating his own business, albeit only in general terms. The question I have to decide is whether and how far the provisions of s 423 of the 1986 Act cover the voluntary disposition of assets to avoid future but unknown creditors. Setting up any new business, not yet formulated, as Mr Wyatt states was the case at the time of executing the trust deed, would no doubt to any experienced businessman involve potential risks of a personal nature such as personal guarantees, even though the intention may be to operate through the limited liability of a company. Certainly such long-term risks of a personal nature were being contemplated by Mr Wyatt, as he so states in his affidavit that that was one of the reasons for transferring his assets."*

95. The judge's conclusion on this issue, at page 254 of the report, was in the following terms:

> *"I consider that if the purpose of the transaction can be shown to put assets beyond the reach of future creditors, s 423 of the 1986 Act will apply whether or not the transferor was about to enter into a hazardous business or whether his business was as a sole practitioner or as a partner or as a participant in a limited liability company. It is a question of proof of intention or purpose underlying the transaction. Clearly, the more hazardous the business being contemplated is, the more readily the court will be satisfied of the intention of the settlor or transferor. On the facts of this case, that intention and purpose was stated by Mr Wyatt at the outset in his affidavit and not resiled from in his evidence, namely to protect his family from the long-term commercial risk should he set up his own company. In hindsight, whilst not in any sense conclusive, it appears that Mr Wyatt's fears in 1987 of commercial risk have been realised. Mr Wyatt's interest in Honer House has indeed been exposed to claims by his creditors, namely, the plaintiff bank and Mr Howick, his partner.*

Accordingly, I am also satisfied that the declaration of trust was entered into by Mr Wyatt for the purpose of putting his interest in Honer House out of the reach of any future creditors who might make a claim with respect thereto and, therefore, cannot be relied upon by Mr Wyatt in view of s 423 of the 1986 Act."

96. If, as this case establishes, a claim under Section 423(3) may include future unknown claims, it is impossible to see how this can be reconciled with a requirement to demonstrate that the relevant claim has a realistic prospect of success, both in terms of outcome and enforcement. The court would not be in a position to carry out any such analysis.

97. Birss J (as he then was) adopted much the same approach in *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), at [444]:

"I would have found that for each of the trusts Mr Pugachev's purpose in setting it up and each of the transfers of assets in (either himself or by his nominee Victor) satisfied the test in section 423. That is because even if the deeds do in fact divest Mr Pugachev of control, his intention always was to use the trusts as a pretence to mislead other people, by creating the appearance that the property did not belong to him when really it did. Even if his purpose failed in the sense that he actually did divest himself of control, he always intended to use the trusts to hide whatever control he had. The people he intended to hide his control from were persons who might make a claim against him in future."

98. Mr Malek made the point that what was said by Birss J in the context of Section 423 came at the end of a lengthy judgment, and was not necessary to his decision in the case, which in any event involved very different facts to the present case. While all this may be so, I do not think that this reduces the authority of what was said by Birss J, which seems to me to be consistent with what was said in *Wyatt* and, more generally, to be consistent with the analysis of the operation of Section 423 provided by Arden LJ in *Hill*. The immediate point is that Birss J recognised that a claim, within the meaning of subsection (3), could extend to future claims by unknown creditors. Again, it is impossible to see how this can be reconciled with a requirement to demonstrate that the relevant claim has a realistic prospect of success, both in terms of outcome and enforcement, before it can qualify as a claim for the purposes of subsection (3).

99. Fifth and finally, if one stands back and reviews the totality of the case law which was cited to me in relation to Section 423 (by which I mean the case law dealing specifically with Section 423), it is clear that the jurisdiction under Section 423 is a flexible one. So far as subsection (3) is concerned, it is clear that what matters is whether the statutory purpose, that is to say the required subjective intention of the transferor, exists. If it does, there is no requirement to show a causative link between that intention and the result of the relevant transaction. Equally, the victim may be a person who has only a contingent claim or a future claim. Such a person, and the nature of the claim of such person may even be unknown. The argument that a claim can only be a claim for the purposes of Section 423 if it can be shown to have a realistic prospect of success, both in terms of outcome and enforcement, seems to me to be inconsistent with the nature of the jurisdiction under Section 423, as established by the case law to which I have been referred.

100. Turning specifically to Mr Malek's arguments, Mr Malek was not able to point me to any authority in which the limits of the meaning of the word *"claim"* in subsection (3) had been the subject of specific consideration, save for one exception. In *Westbrook Dolphin Square Ltd v Friends Life Ltd (No. 2)* [2014] EWHC 2433 (Ch) [2015] 1 WLR 1713 Mann J did consider the meaning of this word in the context of a Section 423 claim. The claim under Section 423 was made as part of an attempt by the freehold owner of Dolphin Square to resist a collective enfranchisement claim which was being made pursuant to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993. The freeholder sought to rely on Section 423 in support of a claim that the series of leases of individual flats in the building, which had been granted for the purposes of facilitating the collective enfranchisement claim, should be set aside.

101. Mann J rejected the argument that Friends Life had any claim within the meaning of subsection (3). As he explained, at [415]:

> *"415 I accept Westbrook's case on this point. In order to be able to bring proceedings under (or to benefit from) section 423 a person has to have a "claim" which gives rise to interests which are prejudiced (paragraph (b)) or a claim which is prejudiced by assets being put beyond the reach of that person (paragraph (a)). Friends Life is not such a person. It cannot seriously be argued that assets are put beyond the reach of Friends Life by the transactions in this case, so the only relevant paragraph to consider is paragraph (b). Friends Life has no claim against Westbrook (or other the tenant for the time being under the immediate headlease); nor will it be making one in any relevant sense. It has a reversion on a lease, which is a proprietary interest. It is not a "claim". It is a present proprietary right, and in due course that right will become unencumbered by the lease when the lease comes to an end. None of that gives rise to a "claim" within the meaning of section 423. If the tenant holds over at the end of the lease then there will be a claim (in a broad sense) and a right to possession. But even if that were a relevant claim it would not be prejudiced by the transaction."*

102. This is not however a statement of law which either supports or even bears upon the argument that a claim must have a realistic prospect of success in order to qualify as a claim within the meaning of Section 423(3). The point made by Mann J was what seems to me to have been the obvious, and uncontroversial point that Friends Life did not have any kind of claim, but rather a reversion on a lease, which was a proprietary interest, and not a claim.

103. In support of his case Mr Malek referred me to what has been referred to as *"the venerable history"* of Section 423. In *Sequana* David Richards LJ (as he then was) described this history in the following terms, at [29]:

> *"Section 423 is a wide-ranging provision designed to protect actual and potential creditors where a debtor takes steps falling within the section for the purpose of putting assets beyond their reach or otherwise prejudicing their interests. Unlike other provisions of the Insolvency Act 1986, proceedings under it are not confined to formal insolvency proceedings but may be brought at any time by any actual or potential creditor who claims to have been prejudiced. It also differs from other provisions in being focused on the subjective purpose of the debtor. Although enacted in new form in the Insolvency Act, the cause of action has a venerable history, going back to the actio pauliana in Roman law (see The Institutes of Justinian IV.VI.6) and to the Statute of Elizabeth 1571 (13 Eliz 1, c. 5) in English*

law. It was re-enacted in section 172 of the Law of Property Act 1925 before being replaced by section 423."

104. Mr Malek drew my attention to the Statute of Elizabeth 1571, as a statutory predecessor of Section 423. The 1571 Statute refers to an *"intent to delay, hinder, or defraud creditors and others of their just and lawful actions"*. The reference to *"just and lawful actions"* so he submitted, imported a merits requirement. The statute could not be engaged by an intent to delay, hinder or defraud any kind of action, but only an action with sufficient merit to qualify as a just and lawful action. By parity of reasoning, so Mr Malek submitted, Section 423(3) did not encompass any kind of claim, but only valid claims. Mr Malek drew my attention to *Twyne's Case* (1601) 3 Coke 80, 76 ER 809, which was concerned with the 1571 Statute. Mr Malek's point was that it was clear from the language of this decision that the relevant claim had to be a valid claim.

105. It seems to me that there are obvious problems with placing reliance upon a previous statute and/or upon a case concerned with that previous statute. Section 423 is not in the same terms as the 1571 Statute. Section 423(3) refers only to *"a claim"*. It contains no reference to just and lawful actions, whatever the extent of that phrase. Equally, as I read *Twyne's Case*, it was concerned with the question of what conveyances would qualify as fraudulent under the 1571 Statute. I cannot see that there is anything in the decision which is relevant to the Realistic Claim Issue or to what qualifies as a claim for the purposes of Section 423.

106. The same considerations seem to me to apply to the other cases which I was shown by Mr Malek, both in relation to the 1571 Statute (*French v French* (1885) 6 De Gex, Macnaghten & Gordon 95, 43 ER 1166, *Barrack v M'Culloch* (1856) 3 Kay and Johnson 110, and *Re Johnson* (1881) 20 Ch D 389) and in relation to equivalent legislation in British Columbia (*Mawdsley v Meshen* 2012 BCCA 91).

107. By reference to *Re Johnson*, Mr Malek made the point that the legislative scheme behind the 1571 Statute and what is now Section 423 has always been to strike a balance between protecting those with legitimate claims or potential claims, and not interfering with a person dealing honestly with their property. It is not necessary for me to decide whether this statement of general principle is correct or not, because it seems to me to miss the essential point, which is that the question of whether a party is entitled to relief under Section 423 depends upon whether that person comes within the wording of Section 423. In terms of subsection (3), the test is a simple one. To repeat what Leggatt LJ said in *Ablyazov*, at [14]:

> *"It is sufficient simply to ask whether the transaction was entered into by the debtor for the prohibited purpose. If it was, then the transaction falls within s.423(3), even if it was also entered into for one or more other purposes. The test is no more complicated than that."*

108. Mr Malek contended that the reference to a claim in subsection (3) cannot extend to a situation where the relevant claim is in fact no claim, either because it has no merit and/or is misconceived in some way and/or has no actual existence. As however Ms Hargreaves pointed out in her submissions in reply at the hearing, which I paraphrase, this approach creates more problems than it solves. If this is the approach, where is the line to be drawn? If the claim has to have a certain kind of existence, what kind of existence must it have? Is there a summary judgment type test to be applied? Does a claim qualify if it

can be said to exist, but with only limited prospects of success? What happens with claims which may never materialise, as was the situation with the Revenue in *Hill*? What happens where the claim is anticipated, but not yet known, as in *Wyatt* and *Pugachev*? Considerations of this kind seem to me to militate against importing a test of realistic prospect of success into the reference to a claim in subsection (3).

109. I was also referred, on both sides, to definitions of a claim in legal dictionaries. I did not find this particularly helpful, beyond confirming my own instinctive reaction to this word as meaning the assertion of some kind of cause of action against a person. This however is not the question raised by the Realistic Claim Issue. Causes of action come in all shapes and sizes, from unanswerable causes of action all the way through to causes of action which are misconceived or suffer from some fatal legal flaw or obstacle. The question raised by the Realistic Claim Issue is whether Section 423(3) contains some kind of limit on the categories of cause of action which can qualify as claims for the purposes of subsection (3). For the reasons which I have given, I do not think that any such limit can be found in subsection (3).

110. In summary therefore, and drawing together all of the above discussion, I reach the conclusion that Brigita's case on the Realistic Claim Issue is wrong, as a matter of law, and can and should be struck out at this stage of the KPHL Action. In my view the position on the law is clear, does not require further investigation, and is sufficient to satisfy the test for striking out in CPR 3.4(2)(a). In terms of the order to be made consequential upon this conclusion, this means that the first part of Paragraph 20A.9 falls to be struck out, from *"It is averred"* down to and including *"against the Shares"* in the second line of Paragraph 20A.9.2. The word *"also"* in the next line of Paragraph 20A.9 should, it seems to me, also be struck out. In theory, this has the result that Paragraphs 20A.10-20A.18 must also be struck out, as Paragraphs consequential upon the first half of Paragraph 20A.9. These Paragraphs are however also relied upon in relation to the second part of Paragraph 20A.9. As such, it seems to me that their fate depends upon my decision on the Particularisation Issue and, in the case of Paragraphs 20A.15 and 20A.16.4, upon my decisions on, respectively, the Policy Issue and the Admissibility Issue.

111. The above conclusion renders it unnecessary to consider the additional argument of the Adult Children; namely that Brigita is prevented by an issue estoppel, in any event, from pursuing her case on the Realistic Claim Issue. For the sake of completeness I will consider the question of issue estoppel, but it is convenient to do so after I have dealt with the Appeal, which I will consider after the Applications. I therefore turn next to the Particularisation Issue.

<u>The Particularisation Issue</u>

112. I can take the Particularisation Issue much more shortly. It is important to identify how this part of Brigita's case operates. Essentially, the case operates as follows:
    (1) Paragraphs 20A.10-20A.18 set out a series of reasons why the Claims, viewed objectively, had no realistic prospect of success, either in terms of outcome or enforcement.
    (2) Between 2014 and his death, Vladimir had access to legal advice when he needed it. As such, it is reasonable to infer that Vladimir was aware the Claims had no realistic prospect of success, either in terms of outcome or enforcement.

(3) Given the above position, no inference should be drawn that Vladimir had the statutory purpose on any of the Relevant Dates, with the consequence that Section 423 cannot apply.

113. It is true that there is no specific pleading, either in the second part of Paragraph 20A.9 or in Paragraphs 20A.10-20A.18, that Vladimir knew of any of the matters pleaded in support of the contention that the Claims had no realistic prospect of success, on any of the Relevant Dates. This however seems to me to miss the point of this part of Brigita's case. I assume that specific knowledge is not pleaded because Brigita is not able to plead such specific knowledge. The allegation is that it can be inferred that Vladimir was aware of the alleged lack of merit in the Claims. The court is effectively asked to draw this inference from (i) the matters set out in Paragraphs 20A.10-20A.18, which are said to demonstrate the alleged lack of merit and (ii) the alleged fact that Vladimir had access to legal advice on the Relevant Dates.

114. Subject to one exception, to which I shall come, I cannot see that there is anything objectionable in pleading this case. Whether what is pleaded is sufficient to allow the court to draw an inference that Vladimir had the awareness pleaded in the second part of Paragraph 20A.9 is a question for trial. Whether what is pleaded is sufficient to rebut an inference, that the court might otherwise be prepared to draw, to the effect that Vladimir had the statutory purpose on the Relevant Dates is also a question for trial. Subject to the exception which I have mentioned, I cannot see that further particulars of knowledge are required in order to render the pleaded case acceptable.

115. The exception to this is that it became apparent, in the course of Mr Malek's oral submissions, that Brigita was able to provide further particulars of the allegation that Vladimir had access to legal advice between 2014 and his death on 10th June 2017. In his submissions Mr Malek referred me to Paragraph 20A.4.3, which pleads the following legal advice:

> *"20A.4.3. At all material times Vladimir believed that the (ultimately abandoned) Russian State investigation and later charges were spurious, fabricated, devoid of merit and abusive, as recorded in his solicitors' letters dated 6 December 2015 and 16 April 2016. He would accordingly not have been concerned to put the Shares beyond the reach of seizure by the Russian State as a result of this 2014 investigation or the 2015 charges."*

116. It seems to me that if and in so far as Brigita is relying upon specific occasions on which Vladimir is said to have received legal advice, in support of her case in Paragraph 20A.9 that Vladimir had access to legal advice when he needed it, Brigita should plead those occasions, with appropriate particularity. This is not achieved by those occasions, or some of them, being mentioned in submissions or, for that matter, by those occasions being referred to in correspondence. In my view the occasions need to be pleaded as part of the case pleaded in the second half of Paragraph 20A.9.

117. I therefore conclude, subject to one condition, (i) that there should be no strike out order in relation to the blue text in the second part of Paragraph 20A.9, and (ii) that permission to amend should be granted in respect of the yellow text in the second part of Paragraph 20A.9. The condition is that Brigita should produce a revised version of the second part of Paragraph 20A.9 which pleads, with appropriate particularity and so far as Brigita is

able to do so, those occasions (i) on which it is said that Vladimir received legal advice and (ii) by reason of which it is said that it can be inferred that Vladimir had access to legal advice when he needed it, between 2014 and the date of his death.

118. This leaves the objection that a number of the matters pleaded in Paragraphs 20A.10-20A.18 postdate the Relevant Dates and, in some cases, Vladimir's death, and, as such, cannot possibly be probative of Vladimir's intentions on the Relevant Dates. Accordingly, the relevant material should either be struck out or, as the case may be, should not be the subject of a grant of permission to amend.

119. While I can see some merit in this argument, I have come to the conclusion that it is not sensible to try to edit the content of Paragraphs 20A.10-20A.18 in the manner which would be required by this argument. Again, it seems to me to be important to keep in mind the function of Paragraphs 20A.10-20A.18 in relation to Brigita's case. These Paragraphs are not, at least in direct terms, pleading matters which are said to have been known to Vladimir. These Paragraphs are pleading matters which are said to demonstrate that the Claims had no merit. If this can be established at trial, and if it can also be established that Vladimir had access to legal advice when he needed it during the relevant period, the case is that no inference should be drawn that Vladimir had the statutory purpose on any of the Relevant Dates. Putting the matter the other way round, the case is that it can be inferred that Vladimir knew that the Claims had no merit during the relevant period, with the consequence that no inference should be drawn that Vladimir had the statutory purpose on any of the Relevant Dates.

120. Given that the object of Paragraphs 20A.10-20A.18 is to seek to establish that the Claims had no merit, I do not see that matters postdating the Relevant Dates or the death of Vladimir are necessarily ruled out. I accept the argument of Mr Malek that such matters may be capable of throwing light on how the Claims stood on the Relevant Dates, and how the Claims were perceived by those advising Vladimir, assuming that it is established that Vladimir was in receipt of legal advice in relation to the merits of the Claims on the Relevant Dates.

121. I should add that this does not seem to me to preclude the argument of the Adult Children that, if and to the extent that the absence of merit in the Claims is sought to be established by matters postdating the Relevant Dates, such matters have no evidential value because they throw no light on how the Claims would have been perceived by lawyers advising Vladimir on the Relevant Dates (assuming any such advice was given). This argument may have considerable force. It seems to me however that this argument, which engages factual questions, is one which should be considered at trial, as part of an overall consideration of the matters pleaded in Paragraphs 20A.10-20A.18, and the case based upon those Paragraphs.

122. I therefore conclude that Paragraphs 20A.10-20A.18 should stand, in the sense that the blue text therein should not be struck out and in the sense that permission to amend should be granted in respect of the yellow text. This conclusion is subject to two qualifications. First, this conclusion assumes that Brigita satisfies the condition upon which I am prepared to allow the second part of Paragraph 20A.9 to stand. Second, this conclusion is subject to the separate objections which the Adult Children have raised in relation to the blue text in Paragraph 20A.15 (the Policy Issue), and the yellow text in Paragraph 20A.16.4 (the Inadmissibility Issue), which I have yet to consider.

The Policy Issue

123. Paragraph 20A.15, comprising blue text, is in the following terms:

> *"20A.15. Further or alternatively, it cannot have been the legislative intent of s.423 Insolvency Act 1986 to protect the interests of a foreign state pursuing a sovereign claim which is unenforceable in England as a matter of public policy. Any intention to avoid or prejudice such a claim is not a relevant intention for the purposes of s.423."*

124. The argument of Mr Malek in this context was that English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; see Dicey, Morris & Collins, The Conflict of Laws (Sixteenth Edition), Volume 1 at pages 291-292. As such, the Russian State Claims could not have been enforced in this jurisdiction, and any intention to avoid or prejudice the Russian State Claims could not have been a relevant intention for the purposes of Section 423.

125. I accept, of course, the principle stated in Dicey, Morris & Collins, as further articulated in the authorities to which I was referred by Mr Malek in this context. What I do not accept however is that there is an exception to Section 423 in relation to foreign claims which cannot be enforced in this jurisdiction as a matter of public policy. Although the case is not quite stated in these terms in Paragraph 20A.15, it seems to me that this case is, in reality, the same case which is put by Brigita on the Realistic Claim Issue. It also seems to me that the case is unsustainable for the same reasons as I have set out in my discussion of the Realistic Claim Issue. It seems to me that if and to the extent that the principle referred to in Paragraph 20A.15 would have affected the Russian State Claims, it cannot be relied upon to say that the Russian State Claims were disqualified from constituting a claim within the meaning of Section 423(3). Nor can it be relied upon to argue that the statutory purpose could not exist in relation to the Russian State Claims. As I have said, my reasoning in this respect is the same as the reasoning which I have already set out in my consideration of the Realistic Claim Issue.

126. I therefore conclude that Brigita's case on the Policy Issue is wrong, as a matter of law, with the consequence that it can and should be struck out at this stage of the Actions, pursuant to CPR 3.4(2)(a).

127. It might be argued that Paragraph 20A.15 should not be struck out, because it functions as part of what is relied upon pursuant to the case pleaded in the second part of Paragraph 20A.9. I have decided that the case pleaded in the second part of Paragraph 20A.9 should stand. I do not think however that Paragraph 20A.15 can be saved by this route. The public policy point which is raised in Paragraph 20A.15 is not pleaded for the purpose simply of establishing an objective lack of merit in the Russian State Claims. It is expressly pleaded as a reason why Section 423 cannot apply to the Russian State Claims. As such it seems to me that the Paragraph falls to be struck out. One can contrast, in this context, Paragraph 20A.13, which does plead the public policy point as a reason for the objective lack of merit in the Russian State Claims. As such, it seems to me that Paragraph 20A.13 stands or falls with the second half of Paragraph 20A.9, while Paragraph 20A.15 does not.

The Inadmissibility Issue

128. The specific objection to the yellow text in Paragraph 20A.16.4 is that it pleads Elena's conviction in Russia, which is a criminal conviction in a foreign court. As such, the conviction is inadmissible in this jurisdiction as evidence of any facts found in that conviction; see *Hollington v Hewthorn* [1943] KB 587 at 594-595, which establishes the general principle that a criminal conviction does not provide admissible evidence of the facts found in that conviction. There is now an exception to this general principle, in the case of conviction of an offence by or before any court in the United Kingdom; see Section 11(1) of the Civil Evidence Act 1968. This exception does not however extend to courts outside the United Kingdom.

129. The operation of this principle does not appear to be in dispute between the parties but, in their letter dated 18th April 2023, Brigita's solicitors have made the following assertion:

> *"18. Our client does not rely on the Russian Verdict as evidence of Elena's guilt or of the facts found therein. It is, however, proof that Elena was convicted by the Russian court (s.7 of the Evidence Act 1851). It is therefore relevant evidence that Elena was in fact unable to set aside the Divorce Order in Russia and that her reliance on the 2011 Marriage Certificate in proceedings in Russia resulted in her conviction for attempted fraud."*

130. It seems to me that the objection of the Adult Children is well-founded. I have already decided that, subject to the Admissibility Issue and with the exception of Paragraph 20A.15, the matters in Paragraphs 20A.10-20A.18 can stand. I have made this decision on the basis that they set out matters which are said to demonstrate that the Claims had no merit. This is then the foundation for the case that it can be inferred that Vladimir had been advised of this by his lawyers, which in turn is said to have the consequence that the inference should not be drawn that Vladimir held the statutory purpose on any of the Relevant Dates. In the case of the yellow text in Paragraph 20A.16.4 it seems to me that reliance upon Elena's conviction in Russia cannot prove anything beyond the bare fact of the conviction. As such, this part of Paragraph 20A.16.4 cannot assist Brigita. It does not demonstrate anything in relation to the merits or otherwise of Elena's Claims.

131. I can see that the position would be different if it was pleaded that Vladimir knew of the conviction on all or any of the Relevant Dates, or if it was pleaded that the conviction was known to lawyers advising Vladimir, who could be assumed to have taken the conviction into account in their advice to Vladimir. The pleading of such knowledge or such advice might have a bearing on the question of whether Vladimir had the statutory purpose on the Relevant Dates. This however is not the pleaded case, nor could it be, given that the conviction did not take place until 20th December 2022, long after Vladimir's death.

132. So far as the letter from Brigita's solicitors is concerned, it seems to me that the argument on the Inadmissibility Issue which is set out in that letter does not provide a route around the principle in *Hollington*. It is clear from what is said in this part of the letter that Brigita is seeking to rely on the conviction as a conviction for attempted fraud. The point is made expressly that Elena's reliance on the 2011 Marriage Certificate *"resulted in her conviction for attempted fraud"*. This point only works if Elena was in fact guilty of

attempted fraud. If the Russian conviction is no evidence of any attempted fraud, the point falls away.

133. I therefore conclude that permission should not be granted for the amendment constituted by the yellow text in Paragraph 20A.16.4.

The No Prospect Issue

134. Ms Hargreaves launched a two pronged attack on Paragraph 20B.6. She contended that Paragraph 20B.6 was unsustainable as a matter of law, and as matter of fact. I will deal first with the argument that Paragraph 20B.6 is unsustainable as a matter of law.

135. Paragraph 20B pleads Brigita's case that the Adult Children were not victims of the Transactions, within the meaning of Section 423(5). The contention in Paragraph 20B.6, which is part of that case, is that a person cannot be a victim, within the meaning of Section 423(5), after there has ceased to be any person capable of making a claim, within the meaning of Section 423(3). Ms Hargreaves contended that this contention was wrong in law. She submitted that the contention sought to add a restriction or limitation to Section 423 which does not appear in the wording of the Section. My attention was directed to two authorities which were said by Ms Hargreaves to bear out her argument that the concept of a victim in Section 423(5) is a very wide one.

136. The first of these cases was *Gordian Holdings Ltd v Sofroniou* [2021] EWHC 235 (Comm). In his judgment in this case, after considering various authorities (including *Hill*), Butcher J set out, at [16], the following points in relation to Section 423:

> *"16. From these authorities can be derived the following points which have some bearing on the present application:*
>
> *(1) Sections 423-425 are drafted in wide terms, and apply to transactions defrauding creditors whether or not the person effecting the transaction has become insolvent.*
>
> *(2) The concept of a 'victim' is a deliberately wide one. It extends beyond creditors with present or actual debts. Whether a person is a 'victim' turns on actual or potential prejudice suffered.*
>
> *(3) The class of 'victims' is not limited to those who were within the compass of the debtor's purpose when entering into the impugned transaction; indeed the person entering into the transaction may have been unaware of the victim's existence.*
>
> *(4) It is not necessary to approach s. 423 as if a test of causation is to be applied. That is to say, it is not necessary to ask whether the entry into the impugned transaction itself caused the prejudice."*

137. The second of these cases was *Random House v Allason* [2008] EWHC 2854 (Ch). In his judgment in this case David Richards J (as he then was) explained, at [94], what was meant by the reference to a victim of the transaction in Section 423(5), in the following terms:

> *"94. The definition of "victim of the transaction" was considered by the Court of Appeal in Hill v Spread Trustee Co Ltd [2007] 1 WLR 2404 . The judgment of Arden LJ, with which Waller LJ and Sir Martin Nourse agreed except on a different point relating to limitation, makes clear, particularly in paragraphs 101 and 125, that a victim within s.423(5) need not be a person who the debtor has in mind, either specifically or as a member of a class, for*

the purpose of satisfying the purpose requirement of s.423(3). Equally, the judgment establishes that a victim need not be a creditor at the date of the transaction: a creditor arising in the future may be a victim. If victims are not restricted to either creditors of the debtor at the date of the transaction or to persons whose interests the debtor intends to prejudice, Random House is able to assert a claim as a victim."

138. Similar statements identifying the flexibility in the concept of a victim of the transaction, in Section 423(5), can also be found in the extracts from the judgments in *Wyatt* and *Pugachev* which I have quoted earlier in this judgment.

139. In response to this argument Mr Malek referred me to May on Fraudulent and Voluntary Dispositions of Property (3rd Edition, 1908), at page 42. The proposition which Mr Malek sought to take from this textbook was that a subsequent creditor could not maintain an action to set aside a conveyance, pursuant to the 1571 Statute, in circumstances where all the debts due at the date of the conveyance had been paid before the commencement of the action. After stating this question, the editor of May said as follows:

"It is conceived that, in the absence of any fraudulent contrivance on the part of the grantor to pay off the existing creditors by creating fresh ones, such action could not be maintained; because the equity of the subsequent creditor cannot be a higher one than that of a creditor at the date of the conveyance."

140. This statement is however qualified by what follows, which is to the effect that this would not be the position where a subsequent creditor was substituted for the existing creditor, pursuant to an arrangement whereby the existing creditor was paid off. Beyond this however I cannot see that what is said in May, which was published in 1908 and was concerned with the law in relation to the 1571 Statute, has any real relevance to the question of who can be a victim for the purposes of Section 423(5). The authorities to which I have referred above make it clear that the concept of the victim under Section 423(5) is a very wide one, and is perfectly capable of extending to a person who suffers actual prejudice only after the relevant claim has been dealt with. The same reasoning applies to the authorities to which I was directed by Mr Malek in this context, none of which were concerned with Section 423.

141. In my view, the authorities to which I have referred above clearly establish that the concept of a victim is wide enough to embrace the Adult Children in the present case, even if one assumes that the factual position is that any right or interest held by the Adult Children that was prejudiced or was capable of being prejudiced arose only after any prospect of a claim had irrevocably ended. In these circumstances, it seems to me that permission for the amendment constituted by Paragraph 20B.6 should not be granted. It seems to me that the amendment is not properly arguable, as a matter of law, even if the facts are assumed to be as alleged in this Paragraph.

142. This conclusion renders it unnecessary to consider the further argument of Ms Hargreaves, which was that Paragraph 20B.6 was also unsustainable as a matter of fact. I will however briefly state, for the sake of completeness, my view on this further argument.

143. I was addressed at length by Ms Hargreaves and Mr Malek explaining to me why, as a matter of fact, it was quite clear that the prospect of a claim had not irrevocably ended

(Ms Hargreaves) or had irrevocably ended (Mr Malek) at the times referred to in Paragraph 20B.6. The longer the argument continued, the more convinced I became these factual issues were unsuitable for resolution in the context of the April 2023 Amendment Application. It seems to me that, as a matter of fact, what is pleaded in Paragraph 20B.6 would have been sufficient to satisfy the test for the grant of permission to amend, if the contention in this Paragraph had been arguable as a matter of law. Given my decision that the contention is not arguable as a matter of law, the factual position is not relevant.

The Discretion Issue

144. It is clear that a discretion exists under Section 423. By subsection (2) the court *"may"*, if satisfied under subsection (3), *"make such order as it thinks fit"*. Accordingly, the discretion arises in relation to the remedy to be awarded, if the statutory purpose in Section 423(3) is shown to have existed. The Adult Children accept that this discretion is wide enough to encompass the issue of whether Brigita received beneficial ownership of the KPHL Shares (assuming such receipt occurred) in good faith. For this reason no strike out is sought in respect of the blue text in the first part of Paragraph 20E, and permission to amend is not resisted in respect of the yellow text in the first part of Paragraph 20E and in respect of Paragraph 20E.1. This therefore leaves Paragraphs 20E.2 – 20E.5.

145. It is clear that this discretion which exists under Section 423(2) is not a wide one. This was explained by Sales J (as he then was) in his judgment in *4Eng v Harper* [2009] EWHC 2633 (Ch) [2010] BCC 746, at [91] and [92] (underlining also added):

> *"91. Mr Burles also submitted that before making any order in line with the principles and conclusions set out above, the court should seek to take into account Mrs Simpson's own needs, financial requirements and quality of life, as an additional defence. Against this, Mr Freedman submitted that the relevant legal principles to be applied should not depend upon such a potentially wide-ranging and unstructured inquiry. As he pointed out, if these aspects of Mrs Simpson's position were to be taken into account, then so also should such aspects of Mr Shepherd's and Mr Tapping's lives be brought into the balance. But this all went well beyond what the court is required to focus upon in making property adjustments and orders under ss.423–425 and would potentially add significantly to the costs and length of s.423 proceedings.*
>
> *92. I agree with Mr Freedman. There is no additional defence of the general kind proposed by Mr Burles. <u>The inquiry under ss.423–425 focuses upon claims to property, with a comparatively narrow scope for limited, recognised principles of justice (such as the change of defence position) to be taken into account.</u> Parliament has not stipulated any legal standard by reference to which any such wider balancing exercise as is proposed by Mr Burles could be undertaken, and I think it clear that it did not intend that the application of these provisions should involve any such exercise. Accordingly, I conclude that no wider inquiry of the kind proposed by Mr Burles is necessary or appropriate."*

146. Mann J made much the same point in his judgment in *Stonham v Ramrattan* [2010] EWHC 1033 (Ch), at [41]:

> *"41. The court, in doing that which Mr Mather invites the court to uphold, is doing something which it must acknowledge to be very unusual. To that extent, therefore, I accept Mr Ascroft's submissions. I do not think that the discretion*

is exercised on the basis of some overall cauldron which is stirred and into which the court peers in order to discern some discretionary result. The starting point is always going to be that the court will, unless there is something very different about the case, going to be granting the relief which follows on a finding that the requirements of section 339 are otherwise fulfilled."

147. Turning specifically to Paragraphs 20E.2-20E.4 I cannot see that permission to amend should be granted in respect of any of these Paragraphs.

148. Starting with Paragraph 20E.2, this Paragraph asserts various reasons why the Claims had no merit. I have however already dealt with this part of Brigita's case in my decisions on the Realistic Claim Issue and the Policy Issue.

149. So far as the Realistic Claim Issue is concerned, I have decided that Brigita's case is wrong, as a matter of law, and should be struck out. I cannot see that it is open to Brigita to try to introduce what is effectively the same case by the back door of the court's discretion under Section 423(2). It seems to me that my decision on the Realistic Claim Issue rules this argument out at the discretion stage, just as much as at the earlier stage of considering whether the court can be satisfied of the existence of the statutory purpose. Beyond this, it does not seem to me that the discretion which exists under Section 423(2), as that discretion is explained in the authorities, is wide enough to encompass consideration of the merits of the relevant claim under subsection (3). It seems clear to me that the court is not concerned with a question of this kind at the discretion stage.

150. Turning to the Policy Issue, which seems to me to be raised by sub-paragraph (2) of Paragraph 20E.2, the position is the same. I have decided that Brigita's case on the Policy Issue is wrong, as a matter of law, and should be struck out. It seems to me, again, that this case cannot be introduced by back door of the discretion stage. Beyond this, I repeat the point that the discretion which exists under Section 423(2), as that discretion is explained in the authorities, does not seem to me to be wide enough to encompass consideration of the merits of the relevant claim under subsection (3). As I have said, it seems clear to me that the court is not concerned with a question of this kind at the discretion stage.

151. Turning to Paragraph 20E.3, this seems to me to be an attempt to introduce the contention in Paragraph 20B.6 at the discretion stage. I have refused to permit this amendment as it appears in Paragraph 20B.6; see my discussion of the No Prospect Issue. As such, I cannot see that the same amendment should be permitted by the back door of the discretion stage. My decision on the No Prospect Issue seems to me to rule out this amendment.

152. Independent of this point, and if I had been persuaded that the amendment in Paragraph 20B.6 should be permitted, I would still have refused to permit the amendment in Paragraph 20E.3. I agree with Ms Hargreaves that it is important to consider the stage at which the discretion comes to be exercised. In the present case the discretion will come to be exercised at the point (assuming the relevant findings and decisions by the court) when the court will already have decided that Vladimir had the statutory purpose in relation to all or some of the Transactions. This will necessarily entail a finding that Vladimir, in relation to the relevant Transaction or Transactions, was seeking to put

assets beyond the reach of a person making a claim against him or who might make a claim against him, or that Vladimir was seeking otherwise to prejudice the interests of such a person in relation to the relevant claim. On this hypothesis I find it difficult to see how the contention in Paragraph 20E.3 could actually work at the discretion stage. The court will already have identified (i) a transaction within the terms of Section 423(1), (ii) the existence of the statutory purpose on the part of Vladimir, and (iii) the existence of a victim, within the terms of Section 423(5). On this hypothesis, the court will have to consider what order to make for protecting the interests of that person or those persons identified as victims of the relevant Transaction or Transactions. I cannot see how such persons can then be disqualified as victims at the discretion stage.

153. Paragraph 20E.4 seems to me to be another attempt, by the back door of the discretion stage, to introduce an argument that the Adult Children cannot qualify as victims for the purposes of Section 423(5). I have refused to permit this argument in my decision on Paragraph 20B.6. As with Paragraph 20E.3, I do not think that this should be permitted.

154. In this context I think that it is useful to make reference to what was said by Nourse LJ, in *Chohan v Saggar* [1994] BCC 134, at 141C-E:

> *"The object of s. 423-425 being to remedy the avoidance of debts, the 'and' between para. (a) and (b) of s. 423(2) must be read conjunctively and not disjunctively. Any order made under that subsection must seek, so far as practicable, both to restore the position to what it would have been if the transaction had not been entered into and to protect the interests of the victims of it. It is not a power to restore the position generally, but in such a way as to protect the victims' interests; in other words, by restoring assets to the debtor to make them available for execution by the victims. So the first question the judge must ask himself is what assets have been lost to the debtor. His order should, so far as practicable, restore that loss. A similar approach was adopted by Scott J in Arbuthnot Leasing International Ltd v Havelet Leasing Ltd (No. 2) [1990] BCC 636 at p. 645A, where in reference to s. 423(2)(a) he said:*
>
> > *'There is an element of discretion involved here implicit in the use of the word "may". But in my judgment the courts must set their faces against transactions which are designed to prevent plaintiffs in proceedings, creditors with unimpeachable debts, from obtaining the remedies by way of execution that the law would normally allow them.'"*

155. It seems to me that two important points emerge from this part of the judgement of Nourse LJ. First it seems clear to me, from what was said by Nourse LJ, that it is not appropriate, at the discretion stage, to seek to bring in arguments to the effect that a person did not qualify as a victim for the purposes of Section 423. At the point when the discretion arises, this question will already have been considered, and answered in favour of the person seeking relief under Section 423. Second, this part of the judgment approves what was said by Scott J (as he then was) in *Arbuthnot Leasing* as to the narrow nature of the discretion in Section 423(2). This part of the judgment therefore provides further confirmation of the narrow, and limited nature of the discretion.

156. This leaves Paragraph 20E.5, which seeks to introduce into the discretion stage a consideration of the existing provision made for the Adult Children by Vladimir, both in his lifetime and by his wills. It is however clear that this kind of inquiry is not appropriate

to the exercise of the discretion under Section 423; see Sales J in *4Eng v Harper*, at [91-92], as quoted above. For ease of reference I repeat what Sales J said in [92]:

> *"The inquiry under ss.423–425 focuses upon claims to property, with a comparatively narrow scope for limited, recognised principles of justice (such as the change of defence position) to be taken into account. Parliament has not stipulated any legal standard by reference to which any such wider balancing exercise as is proposed by Mr Burles could be undertaken, and I think it clear that it did not intend that the application of these provisions should involve any such exercise. Accordingly, I conclude that no wider inquiry of the kind proposed by Mr Burles is necessary or appropriate."*

157. I therefore conclude that, in the present case, the kind of inquiry which Paragraph 20E.5 seeks to open up is neither necessary nor appropriate, and should not be permitted.

158. In summary, and drawing together all of my discussion in relation to the Discretion Issue, I reach the conclusion that permission should not be granted for the amendments in Paragraphs 20E.2 – 20E.5.

The Appeal

159. The situation with the Appeal is, as I have already noted, an odd one. In her appellant's notice Brigita seeks to set aside paragraphs 1 and 4 of the October Order, and the consequential costs orders in paragraphs 17 and 18 of the October Order. Given the consequential nature of paragraphs 17 and 18 of the October Order, it is appropriate to concentrate upon paragraphs 1 and 4 of the October Order.

160. I have already set out these paragraphs of the October Order. By paragraph 1 the Deputy Master refused to permit the addition of a further issue (Issue 33) as an additional disclosure issue. By paragraph 4 the Deputy Master refused to permit expert evidence on Russian and Belgian law in relation to Elena's Claims.

161. Although the Appeal encompasses both the application for permission to appeal and, depending upon my decision in relation to that application, the substantive appeal, I find it easiest simply to proceed straight to a consideration of the questions raised by the substantive appeal, while reserving my decision on the application for permission to appeal.

162. The starting point is the reasoning of the Deputy Master in the September Judgment. So far as Issue 33 was concerned, the Deputy Master's reasoning can be summarised as follows:
    (1) Issue 33 was in the same terms as a previous disclosure issue which had been included in the Disclosure Review Document in the Actions (**"the DRD"**), where it was identified as Issue 1.
    (2) By paragraph 1 of an order made in the Actions by the Deputy Master on 18th March 2022, Issue 1 was ordered to be removed from the DRD as a disclosure issue.
    (3) The argument of Brigita was that this removal could and should be re-considered, in the light of the introduction of the Section 423 Claim. At [SJ/32-34] the Deputy Master recorded the argument of leading counsel for Brigita, which was that for the purposes of Section 423(3)(a) and (b) there needed to be a claim, with a realistic prospect of success.

(4) At [SJ/36-37], the Deputy Master rejected this argument, in the following terms:

> *"36. I do not accept that in order for there to be a fair resolution of the KPHL claim including the section 423 claim there needs to be investigated or determined whether under Russian law Vladimir and Elena were divorced in 1991. Nor does it need to be determined whether if that were the position, the divorce proceedings or the 1991 Divorce Certificate would be recognised in Belgium.*
>
> *37. The wording of section 423(3) makes clear that what the court is concerned with is whether the impugned transaction was entered into by the transferor for the purpose of putting assets beyond the reach of persons who are making or may make claims or prejudicing their interests in that regard. It is the purpose of the transferor that matters not whether the claim if pursued to judgment would have been successful."*

(5) At [SJ/38] the Deputy Master did accept that Vladimir's views as to the merits of Elena's Claims would be relevant. As the Deputy Master said in this paragraph:

> *"38. It will be open to Brigita to plead in answer to the section 423 claim that Vladimir did not procure the transfer of the shares in KPHL to her to defeat such a claim. It is Vladimir's purpose at the time of the transfer of the shares that is relevant. I accept that Vladimir's view as to the merits of the claim could be relevant. A transferor may believe that a claim is devoid of actual merit but still regard it as a threat to his assets if for example the claimant is well-resourced. The issue for disclosure is what Vladimir believed at the time in relation to Elena's matrimonial property rights and whether the shares in KPHL were transferred to defeat those perceived rights."*

(6) What however the Deputy Master said in [SJ/38] was not sufficient to persuade him that Disclosure Issue 33 was required. As the Deputy Master explained, in [SJ/39-40]:

> *"39. In my judgment, the introduction of an alternative claim under section 423 into the KPHL does not require the court to determine the validity of the Russian divorce. The Russian Divorce Certificate is dated some 24 years before the KPHL shares were transferred to Brigita. Brigita cannot deny that as a matter of fact Elena brought divorce proceedings against Vladimir in Belgium in 2015 and 2016.*
>
> *40. In my view, Brigita is seeking to have a second bite of the cherry. The focus of the defence of sham and the alternative claim under sections 423 to 425 in the KPHL claim are the purpose for which the KPHL shares were transferred by Vladimir, or at his instigation, by the documents and transfers relied on by Brigita."*

163. Turning to the refusal of the Deputy Master to permit expert evidence on Russian and Belgian law in relation to Elena's Claims, the Deputy Master set out his reasons very briefly, in the following terms in the first part of [SJ/44]:

> *"44. For the reasons set out above and in the March Judgment, I do not consider it necessary for there to be expert evidence on any issue relating to the validity or effect of the 1991 Divorce Certificate. I consider that it is premature to decide whether to grant permission for expert evidence in relation to the Russian state claims or their nature and effect. That issue*

should be considered once Brigita has pleaded in response to the section 423 claim."

164. The reference to the March Judgment was a reference to a judgment handed down on 18th March 2022 (**"the March Judgment"**). In the relevant part of the March Judgment the Deputy Master set out his reasons for the removal of Issue 1 from the DRD. The Deputy Master concluded this part of his reasoning in the following terms, in paragraph 28 of the March Judgment:

> *"28. Issue 1 is framed in a way that would require disclosure to be given going back to 1990 and 1991. The issue is not whether the 1991 Divorce was valid but from the time of the marriage contract onwards what rights, if any, Vladimir thought that Elena had as to his assets. That is framed as Issue 3. In the KPHL claim, there is an issue as to whether Vladimir transferred legal title to the entire share capital of KPHL to Brigita on 17 September 2015 in order either to keep the shares out of reach of the Russian State or out of reach of Elena in the light of her alleged entitlements during the 2015 Belgian divorce. The issue relates to Vladimir's motivations at the time of the share transfer. It does not in my view require the validity of the Russian Divorce to be determined."*

165. At the end of the March Judgment the Deputy Master considered the question of whether expert evidence in Russian and Belgian law should be permitted in relation to the validity and effect of what was referred to as the 1991 Divorce Certificate. The Deputy Master concluded this part of the March Judgment in the following terms, at paragraphs 73-76.

> *"73. I do not consider expert evidence on the validity or effect of the 1991 Divorce Certificate will assist the Judge in determining any of the key issues. The 1991 Divorce Certificate is dated some 24 years prior to the English Will. It is dated some 24 years before the KPHL shares were transferred to Brigita.*
>
> *74. The validity of the 1991 Divorce Certificate is not relevant to the formal validity of the English Will.*
>
> *75. For those reasons, I consider that permission should be refused for expert evidence from Russian law experts on whether the 1991 Divorce Certificate is valid or invalid or has effect or no effect.*
>
> *76. As the issue is raised on the statements of case, I suggest that the order should recite that the court does not consider it necessary for the court at trial to determine whether or not the marriage of Vladimir and Elena was validly dissolved in Russia in 1990 or 1991 nor, if it was, whether the Russian divorce decree would be recognised in England or Belgium."*

166. So far as the challenge to the relevant decisions of the Deputy Master in the September Judgment is concerned, there are three grounds of appeal, as follows.

(1) The first ground of appeal is, essentially, that the Deputy Master went wrong, in law and fact, in rejecting Brigita's case on the Realistic Claim Issue. The case stood a realistic prospect of success, both in law and fact (**"Ground 1"**).

(2) The second ground of appeal is that Brigita's case that the Claims had no realistic prospect of success, as now pleaded in Paragraphs 20A.9-20A.14 and 20A.16-20A.18 of the Re-Re-Amended Reply and Defence to Counterclaim, was relevant to the question of whether Vladimir had the statutory purpose on the Relevant Dates. As such, it was not open to the Deputy Master to treat Brigita's case as

having no real prospect of success. It was relevant to the issue of whether the statutory purpose existed (**"Ground 2"**).

(3) The third ground of appeal is that, in deciding that Brigita's case that the Claims had no realistic prospect of success, the Deputy Master made a decision which was unjust and seriously procedurally irregular, because the Deputy Master had not seen what is now the pleading of this case, in Paragraphs 20A.9-20A.14 and 20A.16-20A.18 of the Re-Re-Amended Reply and Defence to Counterclaim (**"Ground 3"**).

167. I start with Ground 1. It is apparent that, in making his decision on the proposed Disclosure Issue 33 and on expert evidence of foreign law in relation to Elena's Claims, the Deputy Master did rely on his rejection of Brigita's case on the Realistic Claim Issue. This is, it seems to me, clear from [SJ/37], and from the incorporation of the reasoning in [SJ/37] into the Deputy Master's decision on the expert evidence question, at [SJ/44].

168. I have however decided that Brigita's case on the Realistic Claim Issue is wrong in law, and falls to be struck out. It seems to me to follow that this is the end of Ground 1. The Deputy Master did not go wrong in what he said in [SJ/37], or in incorporating this reasoning into his decision on the expert evidence question, at [SJ/44].

169. The problems with Ground 1 do not however seem to me to end there. It is clear from the relevant parts of the September Judgment that the Deputy Master considered that there were good case management reasons for refusing to permit either Issue 33 or the relevant expert evidence on foreign law. It seems to me that this emerges, in particular, from [SJ/36], and from [SJ/38-40], and from the incorporation of that reasoning into [SJ/44]. It seems to me that the Deputy Master was entitled to rely on those case management reasons independently of his views on the Realistic Claim Issue. It is well-established that an appeal court should be slow to interfere with case management decisions, and requires a good reason to do so. In the present case I can see no good reason for interfering with the case management judgment of the Deputy Master either in relation to Issue 33 or in relation to the question of whether the relevant expert evidence should be permitted. Indeed, it seems to me that this point was borne out by the candid acceptance of Mr Malek, in his submissions, that Brigita would have been prepared to live with the case management decisions embodied in paragraphs 1 and 4 of the October Order, but for her desire to prevent an issue estoppel arising in relation to the view expressed by the Deputy Master in the September Judgment on the Realistic Claim Issue.

170. Turning to Ground 2, I can see the point that the merits of the Claims were relevant to the question of whether Vladimir had the statutory purpose on the Relevant Dates. Subject only to my decisions on the Policy Issue and the Inadmissibility Issue and the condition identified in paragraph 116 above, I have decided that the case pleaded in the second half of Paragraph 20A.9 and in Paragraphs 20A.10 – 20A.18 should stand. On this basis it could be contended that the Deputy Master was wrong in the decisions which he made on Issue 33 and the expert evidence of foreign law. This however ignores the fact that the Deputy Master did not base these decisions solely on his view on the Realistic Claim Issue. The Deputy Master also relied upon the case management reasons to which I have referred in my previous paragraph. I have decided that the Deputy Master was entitled to rely on those case management reasons, independently of his views on the Realistic Claim Issue. As such, I cannot see that the argument in Ground 2, whatever

its merits, can justify setting aside the Deputy Master's decisions on Issue 33 and the expert evidence of foreign law.

171. This leaves Ground 3. Ground 3 seems to me to suffer from three distinct problems. First, the Deputy Master was not wrong to take the view that Brigita's case on the Realistic Claim Issue was wrong in law. The Deputy Master was correct in expressing that view. Second, the Deputy Master had good case management reasons for his decisions on Issue 33 and the expert evidence of foreign law, independently of his view on the Realistic Claim Issue. Third, I cannot see how any injustice or procedural irregularity occurred. The Deputy Master was being asked to give permission for an additional disclosure issue, in the form of Issue 33, and to grant permission for expert evidence of Russian and Belgian law in relation to Elena's Claims. In support of Brigita's case on these case management questions, her leading counsel deployed the argument that the Claims, in order to qualify as claims for the purposes of Section 423(3), had to have a realistic prospect of success; see [SJ/32], where this argument is recorded as having been put to the Deputy Master. In deciding these case management questions, the Deputy Master was therefore fully entitled to consider this particular argument. I cannot see any basis upon which the Deputy Master was required to await the pleading of this argument before dealing with the argument. So far as I can see, the Deputy Master was not asked to defer his decision on the case management questions until this particular argument had been pleaded in the Re-Re-Amended Reply and Defence to Counterclaim and, if any such request had been made, the Deputy Master would have been entirely within his rights to refuse the request.

172. I therefore conclude that there is nothing in Grounds 1-3 to justify setting aside the case management decisions made by the Deputy Master in paragraphs 1 and 4 of the October Order. It follows that there is equally nothing in Grounds 1-3 to justify setting aside paragraphs 17 and 18 of the October Order. It also follows that the substantive appeal would fall to be dismissed, if I was persuaded that it was appropriate to grant permission for the substantive appeal.

173. This leaves the question of whether permission to appeal should be granted for the appeal. It does not follow from the fact that the substantive appeal would fall to be dismissed that permission to appeal should not be granted. It might be said that the grounds of the appeal, or some of them had a real prospect of success. It might be said that there was some other compelling reason for the appeal to be heard.

174. I have come to the conclusion that permission to appeal should not be granted. So far as real prospect of success is concerned, it seems to me that the grounds of appeal cannot be described as having any real prospect of success. So far as the grounds of appeal raised the Realistic Claim Issue, I have decided that Brigita's case should be struck out as being wrong in law. I have not been persuaded that the position is an arguable one, which should go to trial. So far as the grounds of appeal challenged the case management reasons upon which the Deputy Master also relied, in making his decisions on Issue 33 and the expert evidence, I cannot see that the grounds of appeal raised any viable challenge to those reasons. So far as the grounds of appeal alleged injustice and serious procedural irregularity, it seems to me that the grounds of appeal were misconceived. Putting all of this together I cannot see that the appeal had any real prospect of success. Nor can I see any other compelling reason to justify the hearing of the appeal. The only purpose which was intended to be served by the appeal was an attempt to avoid the

argument that Brigita was prevented, by an issue estoppel, from maintaining her case on the Realistic Claim Issue. Even if however it is assumed that the appeal was, in theory, capable of serving this purpose, the reality is that Brigita did not have a viable case on the Realistic Claim Issue. As such, it seems to me that the appeal did not serve its intended purpose. It should be noted that I say this independent of the point that the appeal could not have served this purpose in any event if Brigita was also bound by an issue estoppel created by the June Judgment, in respect of which there was no application for permission to appeal against the June Order. I will come to this question in the next section of this judgment.

175. I therefore conclude that permission should not be granted for the appeal. If I had been minded to grant permission to appeal, the substantive appeal would have fallen to be dismissed, for the reasons which I have set out above.

176. These conclusions render it strictly unnecessary to consider the two additional arguments in the respondents' notice filed by the Adult Children in response to the appellant's notice. These arguments were as follows:
    (1) The Deputy Master ought to have concluded that his findings on the Realistic Claim Issue were res judicata, by reason of the June Judgment, thereby providing an additional reason for not approving Issue 33 and for refusing permission for the expert evidence on Russian and Belgian law in relation to Elena's Claims.
    (2) The application for permission to adduce expert evidence of foreign law fell to be dismissed by reason of what is said to have been a decision of the French-speaking Court of First Instance in Brussels that the 1991 Divorce Certificate could not be recognised and has no effect in Belgium. In these circumstances the expert evidence sought by Brigita was not reasonably required.

177. I do not propose to deal with the second of the above arguments, and I make no decision on that argument. The first argument raises the question of issue estoppel, on which I heard a great deal by way of submissions. In deference to those submissions I will consider the question of issue estoppel, both in relation to the Appeal and in relation to the Applications.

Issue estoppel

178. The principles which govern the ability of a party to relitigate an issue (res judicata if the Latin term is used) have been set out by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] AC 160. At [17] Lord Sumption summarised the position in the following terms:

> *"17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as*

extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197—198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

179. In the present case it is said by the Adult Children that the Deputy Master decided the Realistic Claim Issue against Brigita in the June Judgment, such that it could not be relitigated in the Actions. It seems to me therefore that this argument, if it is well-founded, engages the fourth category of res judicata identified by Lord Sumption (issue estoppel) and, possibly, the general procedural rule against abuse of process identified at the end of [17].

180. These principles are capable of applying to interim decisions in proceedings. In this context I was referred to to *Fidelitas Shipping Co Ltd v V/O Exportchler* [1966] QB 630. The case concerned a dispute over a claim for demurrage in relation to a shipment of grain. The claim of the shipowners for demurrage was referred to arbitration, in which two of the issues were whether a cesser clause in the relevant charterparty had the effect of excluding the claim for demurrage and, if so, whether the cesser clause had been the subject of a waiver. By an interim award the arbitrator decided that the claim was not excluded by the cesser clause. That decision was however overturned by Megaw J, who held that the claim was excluded by the cesser clause. The decision of Megaw J was upheld by the Court of Appeal. In the proceedings in respect of the interim award the point on waiver was not taken by the owners. When the case was remitted back to the arbitrator, following resolution of the issue which was the subject of the interim award, the owners sought to maintain their argument that the cesser clause had been the subject of a waiver. The Court of Appeal decided that the owners could not do this. They held that the effect of the decision of the court on the interim award of the arbitrator was to create an issue estoppel in relation to the issue of whether the cesser clause excluded the claim for demurrage.

181. At 640C Lord Denning MR expressed the relevant law in the following terms:

"The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law

that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see King C v. Hoare. 11 But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again."

182. At 642B-C Diplock LJ (as he then was) expressed the relevant law in the following terms:
"In the case of litigation the fact that a suit may involve a number of different issues is recognised by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence:"

183. More simply and more recently, in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2021] UKSC 31, Lord Reed PSC and Lord Hodge DPSC said this, at [76]:
"76. It is not disputed that the doctrine of abuse of process can apply to separate stages within one litigation as well as to separate legal proceedings."

184. Their Lordships also provided, at [71], the following useful summary of what Diplock LJ had decided in *Fidelitas*:
"71. In Fidelitas Shipping [1966] 1 QB 630, 642 Diplock LJ expressed the view that in an action in which certain questions of fact or law are tried and determined before others and an interlocutory judgment is given, the parties are bound by the determination of that issue in subsequent proceedings in the same action and their only remedy is to appeal the interlocutory judgment. He saw this as an example of issue estoppel."

185. In relation to case management decisions and other decisions on interim applications, there is a separate principle which may also be engaged, to the effect that a party cannot fight the same battle twice, in the absence of some material change of circumstance. This is illustrated by *Chanel Limited v Woolworth* [1981] 1 WLR 485. The question in that case was whether the second defendants to the action could be discharged from undertakings which they had given, as part of a consent order standing over a motion for interlocutory relief until trial. The second defendants argued that a subsequent decision of the Court of Appeal and recently obtained evidence meant that the plaintiffs had no prospect, at trial, of obtaining relief in the nature of what was provided for by their undertakings, with the consequence that the second defendants should be discharged from their undertakings. At first instance Foster J refused to release the second defendants from their undertakings. The matter came before the Court of Appeal on an application for leave to appeal against this decision. Leave to appeal was refused. In

giving judgment on the application for leave to appeal Buckley LJ, with whose judgment the other members of the Court of Appeal agreed, said this at 492H-493A:

> *"The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position. The Revlon point was open to the defendants in April 1979, notwithstanding that this court had not then decided that case. Some at least of the new evidence was readily available to them at that time."*

186. In the context of interim decisions, I was also referred to *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch), in which Nugee J had to consider the question of whether an issue estoppel had arisen, in the context of a dispute over whether the judge could revisit a decision which he had previously made as to the ability of the defendants in that case to draw on funds, for the purposes of legal representation, which were the subject of injunctions preventing their disposal. At [44]-[47] of his judgment Nugee J considered what was required to give rise to an issue estoppel, and also considered the key question of whether a decision made at an interlocutory stage could give rise to an issue estoppel. After citing Diplock LJ in *Fidelitas* (including the extracts which I have quoted above), Nugee J reached, at [47], the following conclusion on the case before him:

> *"47. These citations make it clear that what Diplock LJ meant by an interlocutory judgment was the trial and determination of one or more issues that arose as part of a cause of action. He was not dealing with the question of discretionary decisions made at an interlocutory stage of an action before any of the facts had been found. Nor was Coulson J in Seele Austria. In my judgment therefore the February 2019 ruling, not being the final determination of an issue in the sense used by Diplock LJ, did not give rise to an issue estoppel properly so-called."*

187. With this summary of the relevant legal principles in place, I turn to the June Judgment, and to the question of what it was that the Deputy Master actually decided in the relevant part of the June Judgment. There were three case management issues before the Deputy Master, which were determined by the June Judgment. One of these was the June 2022 Amendment Application; that is to say the application of the Adult Children to amend what was then their Re-Amended Defence and Counterclaim. The proposed amendments fell into two categories. The first category of amendments sought to introduce a further alternative case relating to Vladimir's intentions in respect of the KPHL Shares as at 17th September 2015, when the legal title was transferred to Brigita. This category of amendments was not opposed by Brigita; see [JJ/46]. The second category of amendments sought to introduce the Section 423 Claim. This was opposed. The ground upon which these amendments were opposed was identified in the following terms, at [JJ/48-49]:

> *"48. It is important that I record at this point that it was not argued on behalf of Brigita that the alternative claim under Section 423 had no real prospect of success. It was not for instance argued that the Adult Children were not persons falling within the victims of the transactions under or within Section 423(5). The application to re-re-amend to introduce Section 423 was*

opposed solely on the grounds that the proposed amendments had not properly or sufficiently particularised the case.

49. The lack of particularisation relied on by Brigita related to the Russian investigation. It was not argued that there was a lack of particularisation in relation to the claims or potential claims of Elena against Vladimir."

188. As I have noted earlier in this judgment, it is clear from the transcript of the argument before the Deputy Master, at the June Hearing, that leading counsel for Brigita advanced the argument, in support of the claim of lack of particularisation, that it was necessary for the Adult Children to plead that the relevant claim or claims in Section 423(3) were claims *"with substance"*, not claims of *"fantasy or fabrication"*; see the transcript of the second day of the June Hearing. I refer, in particular, to the transcript of the second day of the June Hearing, at pages 48-61, where both *Westbrook* and another case on Section 423 (*Pinewood Joinery v Starelm Properties Limited* [1994] BCC 569) were cited to the Deputy Master. Put more simply, leading counsel for Brigita, in resisting the introduction of the Section 423 Claim, put Brigita's case on the Realistic Claim Issue to the Deputy Master. The only qualification to this, as the Deputy Master recorded, was that this case was only put in relation to the Russian State Claims. The Deputy Master recorded the position in the following terms, at [JJ/51]:

"51. It was submitted on behalf of Brigita that a positive case needs to be pleaded by the Adult Children: First on the merits of the Russian claim or investigation; and second as to Vladimir's views on the merits of the Russian claim or investigation."

189. The Deputy Master rejected Brigita's case on the Realistic Claim Issue. His reasons for rejecting this case were set out in [JJ/52-62]. It is not necessary to quote the whole of this extract. The essential reasoning of the Deputy Master can be found in [JJ/52-53], which is in the following terms:

"52. The wording of Section 423(3) makes clear that the court is concerned with whether the person entering into the transaction did so with the purpose of putting assets beyond the reach of a person who is making or may at some time make a claim against him or of otherwise prejudicing the interest of such a person in relation to the claim which he is making or may make. The courts have held on a number of occasions that additional words should not be read into the subsection. For example, it has been held that it is not helpful to insert the word "substantial" before the word "purpose".

53. There is not in my view any requirement to plead the objective merits of the claim in the context of which the impugned transactions are said to have been made as a part of the cause of action. The focus of the subsection is on the subjective intentions of the person entering into the transaction, not on the objective merits of the claim against that person."

190. The conclusion in [JJ/62] was in the following terms:

"62. As I read the order those persons included Vladimir. This suggests that Vladimir's personal assets had been under threat of seizure. In any event, I do not consider that the Adult Children are required to plead a case relating to the objective merits of the claim. That would lead to the potential for there being a mini-trial as to their merits."

191. The Deputy Master concluded this part of the June Judgment with his actual decision on the part of the June 2022 Amendment Application which had been opposed by Brigita. The decision can be found in [JJ/70], where the Deputy Master said this:

> *"70. Looking at the matter more broadly, I take the view that permission should be given to the Adult Children to introduce an alternative case under Section 423. I consider that the claim as pleaded with the one amendment I have indicated is sufficiently clear to enable the claimant to respond to it. In that response, any points can be taken relating to the merits of the plea under Section 423."*

192. In a powerfully expressed set of submissions on issue estoppel Mr Malek stressed that what the Deputy Master actually decided, in the relevant part of the June Judgment, was that the Adult Children should have permission to plead the Section 423 Claim. Mr Malek submitted that this was a decision made by the Deputy Master in the exercise of his case management discretion, which could not possibly create any issue estoppel. Mr Malek pointed out that appeals are made against orders, not reasons. As such, it could not possibly be right that a litigant should be required to appeal a case management decision, which was made in the exercise of the court's case management discretion and which the litigant was prepared to accept, in order to challenge the reasoning behind that decision. Mr Malek emphasized the distinction drawn by Nugee J in *Kea*, at [47], between (i) the trial and determination of an issue at an interlocutory stage in the sense identified by Diplock LJ in *Fidelitas* and (ii) a discretionary decision made at an interlocutory stage of an action before any of the facts had been found. Mr Malek submitted that the decision of the Deputy Master in the June Judgment clearly fell into the latter category. Equally, the present case was not one where the pleading of Brigita's case on the Realistic Claim Issue breached the *Chanel* principle.

193. Mr Malek stressed that issue estoppel is a flexible doctrine. In this context Mr Potts drew my attention to what Lord Sumption said in *Virgin Atlantic*, at [21] and [22]. At [22] Lord Sumption noted the exception to the application of issue estoppel which was established in *Arnold v National Westminster Bank plc* [1991] 2 AC 93.

194. It seemed to me that there was considerable force in these submissions, not least because the Deputy Master, at [JJ/70], said that in the response to the Section 423 Claim *"any points can be taken relating to the merits of the plea under Section 423."*. This might have been thought to permit Brigita to renew her case on the Realistic Claim Issue in her pleaded response to the Section 423 Claim, which is what has in fact happened in the Re-Re-Amended Reply and Defence and Counterclaim.

195. There is however, as it seems to me, a problem with these submissions. That problem is that the Deputy Master did make a decision, in the June Judgment, on the Realistic Claim Issue, at [JJ/52-62]. By that decision the Deputy Master decided the Realistic Claim Issue against Brigita. It is true that the Deputy Master was deciding the Realistic Claim Issue in relation to the Russian State Claims, but the reasoning of the Deputy Master on the Realistic Claim Issue is equally applicable to Elena's Claims. In making his decision the Deputy Master was not required to go into the facts of the case. The Realistic Claim Issue raises a question of law, on the interpretation of Section 423, which does not require any investigation of the actual merits of the Claims. It is of course for this reason that I have been persuaded that Brigita's case on the Realistic Claim Issue is susceptible to a strike out order.

196. In making his decision on the June 2022 Amendment Application, it does not seem to me that the Deputy Master necessarily had to decide the Realistic Claim Issue. The Deputy Master might have taken the view that Brigita had raised an arguable point in this respect, which could be pleaded in response to the Section 423 Claim and determined at trial. The Deputy Master did not however take this course. Instead, the Deputy Master made a decision on the Realistic Claim Issue. If one returns to the distinction drawn by Nugee J in *Kea*, at [47], what was said by the Deputy Master does not seem to me easily to fit into the category of *"discretionary decisions made at an interlocutory stage of an action before any of the facts had been found"*. There were no facts which required to be found in order to determine whether Brigita's case on the Realistic Claim Issue was correct as a matter of law. Nor was the Deputy Master's decision on the Realistic Claim Issue one which engaged his discretion.

197. In the final analysis it seems to me that Ms Hargreaves was, effectively, right to describe the situation before the Deputy Master as being one of reverse strike out. By her reliance upon the Realistic Claim Issue, Brigita was effectively challenging the viability of the Section 423 Claim. The need to plead the objective merits of the Russian State Claims may have been advanced as a want of particularity in the amendments pleading the Section 423 Claim, but the reality seems to me to have been different. It is clear from transcript of the June Hearing, and it is clear from the June Judgment itself that it was being said, at least in relation to the Russian State Claims, that the Adult Children were required to plead and prove that the Russian State Claims were, to quote Brigita's leading counsel, claims of *"substance"*. Given the way in which this argument was put, it seems to me that the Deputy Master did not have much option but to decide the argument.

198. In these circumstances it seems to me that the Deputy Master's decision, in [JJ/52-62], was a decision on the Realistic Claim Issue, which (i) did create an issue estoppel in relation to the Realistic Claim Issue and, (ii) did prevent Brigita from renewing her case on the Realistic Claim Issue in her response to the Section 423 Claim. Brigita could have sought to prevent such an issue estoppel arising, by appealing against the decision of the Deputy Master, as embodied in the June Order, to grant permission for the pleading of the Section 423 Claim, on the ground that the Deputy Master made the wrong decision on the Realistic Claim Issue. Brigita did not however seek permission for any such appeal.

199. While I accept that there is some flexibility in the doctrine of issue estoppel, it is clear that this flexibility is limited. As Lord Sumption noted in *Virgin Atlantic*, at [22], *Arnold v National Westminster Bank plc* allows an exception to the doctrine of issue estoppel only in special circumstances where the application of the doctrine would cause injustice. In *Arnold* the House of Lords were able to conclude that there were such special circumstances. The original decision of Walton J on the construction of the rent review clause in issue in that case, which had created the issue estoppel, had not been followed in subsequent case law. In these materially altered circumstances the tenant was permitted to re-argue the same point which the tenant had originally lost before Walton J. In the present case, and notwithstanding the force of the submissions of Mr Malek and Mr Potts, I am not persuaded that the circumstances are such as to justify treating Brigita as not being bound by the issue estoppel created by the relevant part of the June Judgment.

200. I therefore conclude that the Adult Children are correct in the argument which they have raised in their respondent's notice; namely that Brigita is subject to an issue estoppel which prevents her from relying upon her case on the Realistic Claim Issue in the Appeal. If issue estoppel had been the only point raised by the Appeal, it seems to me that the grant of permission to appeal would have been justified, but on this hypothesis my decision on issue estoppel means that the substantive appeal would have been fallen to be dismissed.

201. On the basis of my decision on issue estoppel I also conclude, in relation to the Strike Out Application, that this issue estoppel provides an additional ground for striking out Brigita's case on the Realistic Claim Issue and the Policy Issue, as pleaded in the Re-Re-Amended Reply and Defence to Counterclaim. On this hypothesis it seems to me that the relevant paragraph in CPR 3.4(2), which would have been engaged, would have been paragraph (b), on the basis that Brigita's case on the Realistic Claim Issue and the Policy Issue would have been an abuse of the process of the court. On the same basis of my decision on issue estoppel, I also conclude, in relation to the April 2023 Amendment Application, that this issue estoppel provides an additional ground for refusing permission to amend, so far as the amendments engage Brigita's case on the Realistic Claim Issue and the Policy Issue.

Overall outcome

202. The overall outcome of the Applications and the Appeal is as follows.

203. The Strike Out Application succeeds in part. I will order the striking out of the following parts of the Re-Re-Amended Reply and Defence to Counterclaim:
    (1) The first part of Paragraph 20A.9 is struck out, from *"It is averred"* down to and including *"against the Shares"* in the second line of Paragraph 20A.9.2. The word *"also"* in the next line of Paragraph 20A.9 is also struck out.
    (2) Paragraph 20A.15 is struck out.

204. The blue text in the second part of Paragraph 20A.9, from *"The matters"* to the end of the Paragraph, will not be struck out, on the condition that Brigita produces a revised version of the second part of Paragraph 20A.9 which pleads, with appropriate particularity and so far as Brigita is able to do so, those occasions (i) on which it is said the Vladimir received legal advice and (ii) by reason of which it is said that it can be inferred that Vladimir had access to legal advice when he needed it, between 2014 and the date of his death.

205. The April 2023 Amendment Application succeeds in part. I will grant permission for the amendment of the Re-Re-Amended Reply and Defence to Counterclaim, as shown in the yellow text in the Statement of Case, subject to the following exceptions.
    (1) I refuse permission to amend in respect of the yellow text in Paragraph 20A.16.4.
    (2) I refuse permission to amend in respect of Paragraph 20B.6.
    (3) I refuse permission to amend in respect of Paragraphs 20E.2 – 20E.5.

206. I will grant permission to amend in respect of the yellow text in the second part of Paragraph 20A.9, on the condition that Brigita produces a revised version of the second part of Paragraph 20A.9 which pleads, with appropriate particularity and so far as Brigita is able to do so, those occasions (i) on which it is said the Vladimir received legal advice

and (ii) by reason of which it is said that it can be inferred that Vladimir had access to legal advice when he needed it, between 2014 and the date of his death.

207. In relation to the Appeal, I refuse permission to appeal.

208. Following the circulation of this judgment in draft form, for corrections, the parties have agreed the terms of an order to be made consequential upon this judgment, save for the question of costs, which will fall to be dealt with subsequent to the handing down of the judgment. In particular, Brigita has produced a revised version of the second part of Paragraph 20A.9 which, it is agreed between the parties, satisfies the condition for (i) avoiding a strike out and (ii) the grant of permission to amend, in relation to this part of the Statement of Case.

Postscript

209. When I circulated this judgment in draft form, I was invited by those acting for Brigita to revisit what is now paragraph 153 of this judgment, where I have dealt with Paragraph 20E.4. The point made on behalf of Brigita was that Paragraph 20E.4 does not rely on the argument at Paragraph 20B.6, but rather upon the argument at Paragraph 20B and Paragraphs 20B.1-20B.5. Paragraphs 20B and 20B.1-20B.5 are in blue text, but were not blue shaded in the copy of the Re-Re-Amended Reply and Defence to Counterclaim attached to the application notice by which the Strike Out Application was made. As such, these Paragraphs were not the subject of attack in the Strike Out Application. The argument in these Paragraphs is that the Adult Children are not victims, within the meaning of Section 423(5) and/or Section 424, for the various reasons set out in Paragraphs 20B.1-20B.5. As such, as I understand the argument raised as part of the corrections, it cannot be right that permission to amend in respect of Paragraph 20E.4 is refused, when the Paragraphs on which it is based will stand, and were not challenged in the Strike Out Application.

210. I do not accept this point. It seems to me to disregard the difference in function between Paragraph 20E.4 and Paragraphs 20B and 20B.1-20B.5. The argument in the latter set of Paragraphs is that the Adult Children are not victims, within the meaning of the legislation, with the consequence that the Section 423 Claim must fail. Paragraph 20E looks to a situation where it is assumed that the Adult Children have succeeded in bringing themselves within the terms of Section 423, so that the discretion of the court under Section 423(2) is engaged. In this assumed situation, the Adult Children will already have established their status as victims of the Transactions. Paragraph 20E.4, by its reliance upon Paragraphs 20B and 20B.1-20B.5, seeks to re-run, at the discretion stage, the argument that the Adult Children are not victims within the meaning of the legislation, for the reasons set out in Paragraphs 20B and 20B.1-20B.5. In my judgment this is not permissible, for the reasons which I have set out in the section of this judgment which deals with the Discretion Issue and, in particular, for the reasons which I have set out in what are now paragraphs 152, 154 and 155 of this judgment.

211. I have therefore declined the invitation to revisit what is now paragraph 153 of this judgment.